WaveLength

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Editorial: Japanese Sentiment, Today & Tomorrow

New Law of Arbitration Promulgated – what's needed next?

The Bill to amend the Law of Arbitration 1890 was passed in the Upper House late July and promulgated on 1 August. It is expected that the New Law will come into force from 1 March 2004. As the Law adopted most of the generally accepted principles of the UNCITRAL Model Law, and hence became sufficiently "transparent" to users especially from overseas, the reform on the Japanese arbitration system may have cleared the first (procedural) hurdle. However, the next one is imminent and the third is also around the corner, both of which seem to be more substantial.

What are in fact under hot debate now in the Japanese legal community are: (1) whether if the New Law may at all boost utilization of international arbitrations, professional arbitrators will be viable in Japan; (2) whether if the answer to the first question is "yes", Japanese arbitrators will be able to compete and handle cases efficiently and effectively.

As to the first issue, an apparent stumbling block is Article 72 of the Lawyers' Law, which prohibits non-lawyers from practicing law for remuneration and as profession. There are many non-lawyer specialists in Japan and abroad who are potentially suitable as arbitrators for resolution of particular disputes. However, are they lawfully entitled to act as professional arbitrators if they wish to when the number of arbitrations instituted here reaches commercially intriguing levels? If Japanese lawyers, jealous of their territory, object to professionalization of non-lawyer arbitrators, benefits of arbitration at least of resolving disputes from a perspective of business sense may well be lost. To my knowledge, Nichibenren, or the Japan Federation of Bar Associations, is currently divided on this issue. Further, in exchange for a special provision of law to circumvent Art 72, a governmental committee is said considering a verification system to secure fair and proper procedures of non-lawyer arbitrators. This must be a poor approach. Party autonomy in the selection of arbitrators/arbitral institutions should in principle prevail.

The first question inevitably leads us to the second one because even if non-lawyer arbitrators are permitted to practice professionally, one cannot make a good arbitrator by leaps and bounds. Due to a very limited number of international arbitrations so far incepted in Japan, most Japanese arbitrators, lawyers and non-lawyers alike, tend to lack practice and theory. The second issue thus gives rise to the necessity of education of

arbitrators. The newly formed Japan Arbitrators Association (founded on 16 October) and also CIArb Japan Sub-committee should play positive roles in this category.

Professor Takao Tateishi – *General Editor*

TOMAC ARBITRATIONS*

Stevedore Damage or Charterers' Breach of Contract?

Vessel's tank top was damaged when steel coils of 19 tons each loaded and stowed on board with forklift weighing 28 tons - Whether the damage caused by stevedores' mishandling or attributable to breach of contract of Charterers - Whether the claim already barred pursuant to Civil Law of which prescription period is 3 years or not yet by virtue of Commercial Law which allows 5 years

Claimants: Shipowners (Japan)
Respondents: Timecharterers (Japan)
Tokyo, December 26, 2001

On the NYPE form as amended, the vessel was chartered by Respondents, and then sub-chartered by an operator to load a cargo of steel products. When the cargo was loaded on free-in terms by the stevedores a steel mill (shipper/voyage charterer) appointed, the vessel's tank top was damaged, and Claimants invoiced Respondents for USD 96,670.75, as the charter hire for the period of the repair which had been withheld by Respondents for the alleged off-hire, and for USD 484,720 as the repair charge. Respondents refused to pay and the amount remains outstanding.

Discussion and decision

Respondents plead against the claim made by Claimants saying that:

1. Sub-charterers had been well informed of her structure and equipment, and in due course of this charter party, they had performed successfully 20 shipments of steel products before this shipment in dispute. Therefore, Sub-charterers were well aware of the strength of the tank top.
2. The damage was caused because the foreman of the stevedores ignored the instruction of Captain who could foresee the result. Hence it was stevedore damage. C/P Clause 42 reads: *'Charterers are not responsible for stevedore damage ... unless notified in writing by Master ... within 24 hours.'* Charterers were not notified.
3. Captain should have rejected the foreman's plan of the stowage. Hence Captain was negligent too.

* These awards were translated and summarized by Masaaki Kohsaka.

4. The foreman and/or Captain neglected his or their duties. Captain surrendered to intimidation of the foreman. At any rate, the prescription period for the tort liability is 3 years pursuant to Civil Law, and the claim is already barred.

Pursuant to the C/P preamble, *Charterers have liberty to sublet the vessel but they remain responsible for the fulfillment of this C/P*, even though the operation is under Sublet-charterers.

According to the testimony given by a manager of Sub-charterers and the Captain's report which is not in conflict with the testimony, it seems that the facts were as follows:

a) For this shipment, Sub-charterers decided the total quantity of steel products to be loaded according to the calculation of 7 tons per centare as the tank top strength.
b) The vessel was originally scheduled to load the cargo at Fukuyama, but it changed to Kimitsu just one day before ETA Kimitsu. The total quantity was not changed, but the particulars of cargo, such as the weight of each unit, might have been somehow changed. If the vessel had loaded at Fukuyama, 19-ton coils might not have been included in the shipments.
c) No super-cargo or port-captain was sent by Sub-charterers.
d) Upon arrival at Kimitsu, the foreman of the stevedores told Captain that the vessel was to load 5,500 tons of steel hot coils of which average weight was 19 tons per piece. Captain requested the foreman to increase the quantity of the dunnage and to place iron plates upon tank top where a forklift was to run. Foreman ignored it. Captain compromised and proposed to place iron plates as far as possible and requested coils to be rolled in order to stow beyond the plates.
e) On the next day, Captain saw the forklift of 28 tons (instead of 15 tons as told) running with a coil of 19 tons, making 12 tons per centare while the maximum allowable weight was 7 tons. Captain, considering the relationship among Owners, Charterers and Shippers, did not stop the operation although he was very worried.
f) On the 2nd day, the tank top was cracked, and after emergency repairs, the 28-ton forklift was not used again, and by means of a shore-crane and the smaller forklifts, the loading operation was continued.

C/P Cl.8 reads: *'... Captain shall be under the orders and directions of Charterers as regards employment and agency;...'*
C/P Cl.56 reads: *'Charterers to be responsible for loss or damage to the vessel ... by goods being loaded contrary to the terms of C/P ...'*
C/P Cl.63 reads: *'Charterers to guarantee to undertake all necessary protective measures to Master's satisfaction before loading. Furthermore, cargo to be loaded according to*

IMCO or equivalent safety regulations,…'

Sub-charterers are one of the leading companies in the field of the carriage of steel products. The manager of the company testified that the cargo in dispute was not the 'unusual cargo' as a large number of steel coils including those of 20 tons had often been shipped and exported from Mill ports in Japan. Is it not 'unusual' for Captain, Owners and Vessel built for the short sea trade, too? Carriers of the steel of this kind normally decide the quantity of a shipment after they study the tank top strength, frame position, weight of forklift, number of its tyres and relevant rules and regulations, and fix the place of stowage, number of tiers, thickness and size of dunnage, and obtain Captain's consent sufficiently before the shipment. C/P Cl.63 stipulates to this effect. For Captain, who had not been informed of this shipment beforehand and was surprised on noticing a 28-ton forklift running with cargo, it was the 'unusual cargo'. In conclusion, the damage of the tank top was caused by the 'negligence through familiarity' of Sub-charterers, who neglected even minimum consideration and attention required by C/P Cl.63. And therefore, Respondents are held responsible as per C/P Cl.56.

Once Respondents are held responsible for their breach of Charter Party contract, the prescription period of 5 years pursuant to Commercial Law is to be applicable to the claim that Claimants have on Respondents.

Although Respondents are responsible for the damage itself, there remains some question about the actions taken by Claimants and Captain before and after the accident.

a) Claimants insist that they were informed over the phone from Captain of the pressing danger, and soon asked Respondents to deal adequately with the situation. Claimants' contention, though Respondents deny it, reveals that their contact to Respondents in this regard was once and for all. Since then, they had done nothing to protect Captain and themselves for 4 years until they brought this before the arbitration. After the accident, they did not call surveyors on board, and no evidence was produced for the damage.
b) Captain did not try to contact Respondents to make a protest. After the accident, he did not prepare any kind of papers to protest or to reserve a claim for damages. If he had stood firm for the safety of Vessel and the crew, the result would have been quite different.
c) The tank top together with many other items were repaired at a Korean shipyard together, and therefore it is impossible, without Survey Report and/or other evidence, to define time and expenses spent merely upon the tank top.

As regards the damage and the repair, there is no evidence other than the Captain's report reading: *'Crack 8 places; not so big ones'* and before the accident *'…because tank-top in all holds are superannuated and frail…'*. Accordingly, the arbitrators cannot define time and expenses spent purely upon the tank top. Furthermore, thinking of the actions taken or not taken by Claimants and Captain as stated above, their claim is of no force.

Nevertheless, Respondents should compensate Claimants somehow for the damage because its cause is, without a doubt, their breach of contract.

Award

Respondents shall pay to Claimants the amount of US$10,000 plus interest at 6% per annum.

Shifting Berth due to Bad Weather –Whether to save Life and Property or to have Vessel's Repair carried on?

When cargo operation in No.2 Hold finished but tank top repair in No.1 Hold still unfinished, Storm Warning issued by Port Authority and vessel shifted to another pier, where repair continued – About twenty hours after repair completed, vessel back to original berth, where loading operation resumed in No.1 Hold – Whether all time lost thereby off-hire – Whether owners entitled to be indemnified for loss of time – What prescription period applicable

Small Claims Arbitration (SCAP) between:
Claimants: Shipowners (Japan)
Respondents: Timecharterers (Japan)
Tokyo, May 24, 2002

On the NYPE form as amended, the vessel was delivered to Respondents off Cape Nojimasaki 2 days before ETA Kushiro, the loading port. On her way there the vessel encountered rough seas, and some of the tween deck pontoon hatch covers fell down on the tank top though they were stowed and lashed at the fore section on the tween deck in No.1 Hold according to 'the Hatch Cover Stowing Arrangement' prepared by the builders.

The tank top and 3 pontoons were found damaged upon her arrival. At 09:10 on the 1st day, loading operation was commenced on No.2 Hold, while in No.1 Hold the tank top repair started with shore labours and the pontoons were landed and brought to a shore factory for repair. At 15:30, No.2 Hold was full and finished loading. These 06h 20m until 15:30 were agreed by both parties to count one half as off-hire on a 'net loss of time concept' which is a pro-rata deduction of off-hire for the breakdown time of one out of two holds which was unavailable to load cargo. Meanwhile the weather worsened, and a storm warning had been issued by the port authority at 15:00. The vessel left the pier at 15:50 toward another pier which was located in the inner harbour and more protective against storms and there the repair was resumed at 08:00 and completed at 11:30 on the 2nd day. The pontoons, of which repair was completed at 17:00 on the 1st day, were shipped aboard at 13:30 on the 2nd day. The vessel was back to the original pier at 07:50 on the 3rd day and resumed loading. Claimants accepted the payment for USD 519 as one half of the charter hire as stated above and, on the ground that the shifting was for saving life and property, claimed Respondents for USD 6,050 as the charter hire from 15:30 on the 1st day to 07:50 on the 3rd day which had been withheld by Respondents for the alleged off-hire, for USD 555 as bunker charges consumed in this period and for USD 2,305 as tugboat fees which had been deducted from charter hire remittance as Owners' account. Respondents refused to pay and the amount remains outstanding.

Discussion and decision

Respondents plead against the claim made by Claimants saying that:

1. If the hold condition were good enough, the vessel could have completed loading at the original pier without shifting. The vessel shifted because of lack of her cargo worthiness. Therefore, the purpose of the shifting was primarily for repair and incidentally for refuge.
2. It is needless to say that time used for the repair is Owners' time and thus off hire. Time after the repair finished until the cargo operation resumed, it is also off- hire by virtue of C/P Cl.45 which reads: *"In the event of loss of time ... the hire shall be suspended ...until Vessel becomes again efficient in the same position…and all expenses including bunkers consumed during such period of suspension shall be for Owners' account."*
3. The claim is already barred pursuant to Article 765 of Commercial Law which reads: *"The claim of a shipowner against the charterer, consignor or consignee shall be extinguished by prescription upon the lapse of one year."*

The claim filed with this panel is based on the time charterparty. From the related articles

in the Law, it is obvious that the 'charterer' in Article 765 means the 'voyage charterer' and not the 'timecharterer'. And because no other articles, laws or ordinances provide a shorter period for prescription specifically upon the time charterparty, the prescription period of 5 years is to be applicable to the claim that Claimants have on Respondents pursuant to Article 522 of Commercial Law which reads: *"Except as otherwise provided for in this Code, a claim which has arisen out of commercial transaction shall be extinguished by prescription if it is not exercised within five years. …"*.

Respondents' insistence that the shifting was for the purpose of continuation of the repair seems reasonable, and the Time Sheet, which was type-written by port agents and signed by Captain, clearly shows that *the vessel shifted …due to No.1 Hold Repair"*. However, Claimants' statement that *Captain noticed all other vessels alongside the piers nearby shifting toward off port* is worthy of attention. The arbitration being SCAP, the arbitrator (sole) decided not to summon any witness, and instead, he mailed a questionnaire addressing to the port agents, who were, to his knowledge, the affiliated firm of Respondents. They ignored the question whether the statement was correct, but in their answer to other questions, they wrote that *Captain had opined that the shifting was desirable to ward off possible damage to cargo stowed on board.* Still there remains a question: who did arrange the pier, instead of buoy or off port where tank top repair was not possible? Claimants were neither consulted beforehand nor informed afterwards. There is no evidence showing Captain's request for so doing. No other evidence denies the fact that the shifting was to save cargo. In conclusion, the shifting was primarily for refuge from the bad weather.

Once the above conclusion is drawn, time and expenses used for the shifting shall be at Respondents' account. However*, the right to off-hire, otherwise existing, is not lost by nonuser (The Yaye Maru, 274F.195(4th Cir.), cert.denied 257 U.S. 638(1921)).* That is to say, the vessel should have been kept seaworthy so that Charterers could use her and since Charterers could not have used her, they were entitled to off-hire. It is not important whether Charterers would actually have used her, and in fact they could, while she was in repair, do nothing other than to wait due to the bad weather. Therefore, time from 15:30 on the 1st day when cargo operation was suspended to 11:30 on the 2nd day when tank top repair was completed, the vessel was off-hire for 20 hours, and immediately after 11:30, she was back on hire. C/P Cl.45 (Put-back Clause) shall not be applied to this case. The pontoons were brought back 2 hours after the tank top repair was over, but it would not have interfered loading activities because those would have been installed after cargo was stowed upon tank top, and Respondents remain bound to pay hire. As regards tugboat, it was hired by the vessel to shift for refuge. Hence the tugboat fee is

Respondents' account.

Award

Respondents are directed to pay Claimants the sum of USD 5,116 which is calculated as follows:
USD 8,391 amount claimed − (USD 3,600 daily hire + USD 330 bunker/day) ×
20/24 hours = USD 5,116

Crimes on Ships and the Criminal Jurisdiction of Calling Port Countries - Legal Implications of the *Tajima* Case in Japan

*Akiyoshi Ikeyama**

The **Tajima** *case and subsequent amendment to Japanese Penal Code*

In April 2002, a murder, which became grounds for an important amendment to the Japanese Penal Code, one expanding its criminal jurisdiction, was committed on board the Panamanian tanker *Tajima* owned and operated by Japanese interests. Two Filipino crewmen allegedly killed a Japanese officer on board as she was sailing at night on the high seas off Taiwan, bound for a discharging port in Japan. The crime became known to the master of the ship through the confession of another crewman who witnessed the scene. The master immediately informed the Japanese Coast Guard (JCG) and sought their assistance.

It was soon realised, however, that the JCG could not fully cope with the crime, for the Penal Code provided its criminal jurisdiction only over crimes committed in Japan or those committed by Japanese nationals in principle. It did not cover crimes committed against Japanese nationals by foreign nationals (Filipino) outside Japanese territory (a Panamanian ship on the high seas), save in exceptional cases inapplicable to this case. The JCG, therefore, could not arrest the two crewmen at first. The *Tajima* master had no option but to detain them aboard ship under his own authority (and at his risks and costs) for a month, until eventual arrest by the JCG for extradition at the request of the government of her flag-state Panama, which did have the jurisdiction, yet only after lengthy diplomatic talks between the two governments. The ship had never been detained officially, but was, as a matter of fact, obliged to waste a long time anchored off the discharging port, at great economic loss. Otherwise, the master would have had to risk continuing the voyage with two men who had just killed a senior officer, then set them free in their home country, the Philippines, which also lacked proper jurisdiction.

After this incident, strong and continuous campaigns by relevant parties moved the Japanese government to pass a necessary amendment to the Penal Code in July 2003. It was amended to extend jurisdiction to crimes committed against Japanese nationals by foreign nationals outside Japanese territory in respect of several serious offences,

* Attorney-at-Law, Abe & Sakata, Tokyo

including murder. If a similar incident happens in the future, the JCG will at least be authorised to arrest the suspect for trial in Japan. If the governments of other relevant parties, suspect or flag, claim jurisdiction and request arrest and extradition, such claim will continue to be respected. But Japan need not wait for such claim.

The remaining real issue – the position of "pure" calling port country

But this amendment has not solved all issues. Suppose, the victim in the *Tajima* case were non- Japanese; an officer of country A was killed by a passenger of country B on board a cruise ship with flag of country C while sailing on the high seas before entry into Japanese waters. Obviously, the same irresolvable situation would arise even after this amendment.

For parties interested in ship operations (especially those who work on board!), it would always be of vital importance that the suspect be disembarked from the ship as soon as possible at the next calling port in Japan to ensure that the master could surrender that person to the authorities of such a port, authorities who could exercise its own criminal jurisdiction or otherwise discuss what to do about the suspect with the governments of the relevant parties - suspect, victim or flag.

Yet can we simply say that Japan shall then further extend its jurisdiction to cover these cases too? They are serious-but-ordinary crimes committed by foreign nationals against other foreign nationals outside Japan, the sole connection with Japan being that suspects subsequently enter Japan. Japanese authorities *may* respond to diplomatic requests by the governments of suspect, victim or flag to arrest and extradite suspects for them, but it is perhaps not necessarily indispensable or appropriate for a merely "pure" calling port country to ensure its own criminal jurisdiction to cover those cases, at least from a legal (criminal or international) point of view.
More importantly, the issue is not solely a matter of Japanese law, but of the laws of all calling port countries. This time, Japan's Penal Code amendment is clearly an effort to improve the situation of one calling port country being by chance the victim's country too, but no further.

A "Tokyo Convention" type regime and its limits

In regard to this, the Japanese Government proposed before the IMO last year to consider a new international convention providing with masters the authority to disembark, or imposing on calling port countries the obligation to take delivery of, such suspects upon a

ship's entry into port. The idea stems from the 1963 Tokyo Convention on aviation crimes that grants aircraft commanders similar authority. If this scheme is successfully introduced, the vital concerns of ships interests will fairly be satisfied. Support for this initiative from various ships interests is greatly expected.

One must know, however, that this idea also has its own limits. They derive from the fact that the taking delivery by the authorities of a calling port country can only be of a temporary nature, one awaiting the exercise of criminal jurisdiction by the calling port country on its own, or awaiting extradition requests by other relevant governments having jurisdiction. First limit is that the Tokyo Convention, having regard to this nature, allows only a short period of detention. It provides that detention "may *only* be continued for such time as is necessary to enable any criminal or extradition proceedings to be instituted." Japanese statutes construe this as 72 hours.

Secondly, if a calling port country lacks jurisdiction, and if any other government cannot or does not finally claim jurisdiction or request extradition (or if the extradition process is not feasible for any reason – some countries require a treaty in advance), the suspect logically should be set free, sooner or later. When the similar scheme is established for ships, therefore, a longer detention period should be granted, subject to judicial review if necessary. In relation to the second point, the scheme must be designed to ensure that ships interests shall not be required by immigration authorities to receive the suspect again (!) for repatriation somewhere abroad at their risks and costs, even in a most unfortunate case.

Conclusion

Let us return to the *Tajima* case: (a) no country had geographical jurisdiction (the high seas); (b) the victim's country (Japan) lacked criminal jurisdiction, as did (c) the suspect's country (Philippines) and (d) the calling port country (again Japan), while (e) the flag state (Panama), which did have jurisdiction, needed a month to institute an actual extradition process. Yet we were not most unfortunate. Had the ship been flying the flag of an FOC country that cannot or does not exercise jurisdiction, or had an extradition process been unfeasible, the *Tajima* master would have been compelled to carry the two suspects to their home country to set them free!

The amendment to the Japanese Penal Code improved factor (b), but not (d), as one calling port country. An international scheme like the Tokyo Convention would relieve ships interests in first instance, but it would ultimately not work to bring justice in the

worst scenario.

For ships interests, factor (e), a ship's registry, is the most controllable, if we dare say, among the above factors. It follows that the best solution in theory is for shipping companies to choose a flag whose government is willing to immediately exercise its criminal jurisdiction to request arrest and extradition of calling port countries (and already has the necessary inter- governmental arrangements for such with all possible calling port countries), unless and until they can 100% avoid occurrence of crimes on ships - none of which is easy.

■

The Starsin
- Or the Beginning of the Demise of the Demise Clause

*Kazuo Satori**

The demise clause in a bill of lading states that the issuer of the bill of lading is acting as an agent only and therefore is not liable for any cargo claim. The carrier is often excused from his liability by such a clause, coupled with a one-year time limitation.

I had been keenly awaiting the House of Lords judgment in *The Starsin* which was decided in March of 2003. This ruling came after a majority decision by the Court of Appeals which admitted the validity of the demise clause in the bill of lading, reversing the first instance decision. There were strong and reasonable opinions[1] voiced against the Court of Appeal decision and it was predicted that the House of Lords might overturn it. Japan may be the only civil law country where the highest court[2] has admitted the validity of the demise clause such that a bill of lading issuer can effectively rely on the demise clause to establish the defense that the bill of lading issuer is not a contractual party. One of the strong reasons supporting the validity of the demise clause in Japan is that England is a leading maritime law country and that they have admitted it. I have strongly argued against the validity of the demise clause because it is entirely incompatible with the Japanese legal system[3]. I would like to concisely explain the House of Lords decision in *The Starsin* and once more discuss the demise clause in Japan.

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[1] Steven Gee Q.C., Lloyd's Maritime and Commercial Law Quarterly 2001, p. 214; The Law Quarterly Review Vol.117, pp. 358-366.

[2] The Supreme Court admitted the validity of the demise clause in The Jasmine, March 27, 1998. However, in The Camfair, the Tokyo District Court, September 30, 1997, took the plural carrier theory, admitting both a bill of lading issuer and a registered shipowner as the contractual carriers. This plural contractual carrier theory actually invalidates the purpose of the demise clause which is designed to exempt the bill of lading issuer's contractual liability.

[3] I have written three articles on the demise clause: "The Demise Clause in Japan", Lloyd's Maritime and Commercial Law Quarterly, November 1998, "The Camfair", the JSE Bulletin No.36 in March 1998 and "The Supreme Court Ruling in The Jasmine, translation and comment", the JSE Bulletin No.37 in September 1998".

1. Facts

The Starsin, a 27,000-ton bulk carrier, was demise chartered by Oreandae Shipping Ltd., her registered owner was Agrosin Private Ltd. (hereinafter Oreandae and Agrosin are collectively referred to as "Y"). In October 1995, Continental Pacific Shipping Ltd ("CPS") time-chartered the Starsin from Agrosin. In November 1995, the Starsin loaded consignments of plywood and timber from three ports in Malaysia: Kuching, Belawan and Port Klang, for discharge at Antwerp and Avonmouth, in the United Kingdom. The cargo was improperly stowed and some of the cargo was out-turned damaged by water. CPS had become insolvent by the time of the litigation.

The cargo claimants ("X") were the consignees to whom the bills of lading had been endorsed. The bills of lading were on the CPS form and were signed by agents on behalf of CPS as carrier. The bills of lading contained an identity of carrier clause (clause 33[4]) and a demise clause (clause 35[5]). X commenced litigation against Y in breach of contract due to the presence of the demise clause in the bills of lading, and failing that, in tort. Y alleged that the contractual carrier is not Y but CPS.

2. Who is the contractual carrier in *The Starsin*?

Colman, J. in the first instance and Rix L. J. in the Court of Appeal decision, concluded that the bills of lading are the charterer's bills and the contractual carrier is not Y. The majority decision by the Court of Appeal concluded that the contractual carrier is Y by admitting the demise clause. The House of Lords finally and unanimously concluded that the contractual carrier is not Y but CPS.

In reaching this conclusion, the House of Lords placed much reliance on the business aspects of bills of lading. Lord Bingham took the view that "business sense will be given to business documents."[6] He described that the court "must seek effect to the contract as intended, so as not to frustrate the reasonable expectations of businessmen."[7] Lord Styen

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4 Clause 33. IDENTITY OF CARRIER
"The contract evidenced by this Bill of Lading is between the merchant and owner of the vessel …and …the shipowner only shall be liable for any damage …arising out of the contract of carriage."

5 Clause 35. DEMISE CLAUSE
"If the ocean vessel is not owned or chartered by demise to the company or line by whom this Bill of Lading is issued (as may be the case notwithstanding that which appears to the contrary) this Bill of Lading shall take effect only as a contract of carriage with the owner …as principal made through the agency of the said company or line who act solely as agent and shall be under no personal liability whatsoever."

6 At [10]. (This reference refers to "paragraph 10" of the House of Lords Judgment)

7 At [12].

referred to Colman's and Rix's approach as a "mercantile view" and criticized the majority of the Court of Appeal by concluding that their approach "gave preponderant effect to the boilerplate clauses on the back of the bill" and "it would have an adverse effect on international trade if the latter approach prevails."[8] All Lords agreed to adopt this business approach and placed more importance on the face of a bill of lading than the small printed wording on the reverse side, because this approach is in line with bank business practices.[9] Business efficacy in international trade was taken into account by all Lords under this interpretation of the bills of lading.

3. My comments on *The Starsin*

As we can easily access Prof. Tetley's[10] latest comments criticizing the demise clause, here I reserve my general comments on the demise clause. I focus on points different from English law, based on my experience as a practicing lawyer.

(1) Cargo claimants sometimes obtain benefits from the demise clause

I note that *The Starsin* case is different from the usual course of cargo claims, at least from my own experience in Japan. CPS became bankrupt. In *The Aliakmon*[11] , it has been established that a tort action for damages is admitted only when the cargo claimant owns or possesses the cargo at a time when the cargo was damaged by carrier's tort action, willful misconduct or negligence. This rule strictly limits use of a tort action in the English Courts and there is no similar rule in Japan. Therefore, in *The Starsin* the consignee was compelled to pursue the shipowner or the demise charterer for breach of contract by relying on the demise clause.

In usual cargo cases, I pursue the contractual carrier by identifying him with the prominent head note on the face of the bills of lading. If there is a demise clause in the bills of lading, I always feel disgusted by anticipating the carrier's demise clause defense which often causes me to do much burdensome work in attempting to persuade the Judge as to how unreasonable the clause is. Therefore, from time to time, I am compelled to add a registered shipowner as defendants in tort and/or in breach of contract by relying on the demise clause, as a cumulative defendant in the complaint. I am of the opinion that there is no reason to refute the owner's or demise charterer's contractual liability based on the demise clause in addition to the bill of lading issuer's contractual liability, because the

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8 At [46].

9 At [16]. Article 23(a) of the ICC Uniform Customs and Practice for Documentary Credits.

10 Canadian Professor William Tetley's home page, http://Tetley.law.mcgill.ca

11 [1986]AC 785, at [88].

owner or the demise charterer granted the issuance of the bill of lading bearing the demise clause.

In *The Starsin*, the House of Lords refuted plural contractual carriers in the bill of lading because the wording was not so, with the result that the consignees almost could not collect damages in tort due to the *Aliakmon* rule. This result seems unreasonable and I prefer L. J. Rix's suggestion of a plural carrier approach.[12]

I refer to *The Berkshire*[13], an English Queen's Bench decision, frequently cited as the judgment admitting the validity of the demise clause. In *The Berkshire*, the consignee attempted to sue the shipowner alone and did not sue the bill of lading issuer who was the time charterer. The shipowner took the position that the demise clause was unenforceable and therefore the time charterer should have been held liable as the bill of lading was issued on the time charterer's form. The court held that the receivers of the cargo could sue the shipowners as the shipowners were liable due to the presence of the demise clause and that the time charterer acted according to the terms of the time charter by signing the bills of lading on the shipowner's behalf. I note that the bill of lading issuer was not pursued by the cargo claimant and this case is not appropriate as a reference as the bill of lading issuer was excused from his own liability[14].

(2) How can we know who is the demise charterer?

I have no means to determine whether the vessel is demise chartered or not. A demise charter is a private contract and no third party has the right to access it. In Japanese civil procedure, we have no action in rem against a ship herself and the Court demands the defendant's name and address for the defendant's identification, more particularly, for the service of the complaint to the defendant. I am not allowed to submit the complaint

[12] At [74, 75] of the Court of Appeal Judgment in *The Starsin.*

[13] [1974] 1 Lloyd's Rep. 185.

[14] In *The Berkshire*, the key wording in the decision was: "the contract contained in or evidenced by the bill of lading purports to be a contract between shippers and the shipowners and not one between the shippers and the charterers." Unfortunately the words "and not one between the shippers and charterers" were used. This wording was unnecessary because the charterer was not sued, therefore whether a contract existed between the charterer and the shipper was not a question before the court and this wording is *obiter* and therefore is not binding as precedent. While I agree with the court's holding that a shipowner should not be able to challenge the validity of their own or their agent's demise clause in order to avoid liability, it is unfortunate that the Judge here chose to say that the bill of lading was not a contract between the shippers and charterers because *The Berkshire* has been wrongly cited as establishing that a bill of lading does not obligate the time charterer contractually. The problem caused by the use of this excess wording is discussed more extensively in William Tetley, Marine Cargo Claims 251-2 (3d ed. 1988)

designating the defendant as "the owner or the demise charterer of the Starsin" to the Court. Therefore I must locate who possesses the vessel at the material time, the registered owner or a demise charterer. Even in the UK, cargo claimants sometimes misidentify the existence of a demise charter, like *The Puerto Acevedo*.[15]

(3) For the master

If, as in *The Starsin* case, the bills of lading were to be signed by the master, the charterer, the charterer's agent or sub-charterer's agent on behalf of the master, I wonder who is the contractual carrier under a "for the master" bill of lading. I obtained an English solicitor's instant opinion that the demise clause would be effective under a "for the master" bill of lading. I am of the opinion that even in a "for the master" bill of lading, because cargo claimants have no means to identify whether the vessel was demise chartered or not, and cargo claimants do not know whether the master is representing the shipowner or the demise charterer under the bill of lading, they cannot identify the contractual carrier pursuant to the demise clause. In addition, bankers at first view the prominent head note on the face of bills of lading and easily identify the liner company, and I wonder if they consider that the shipowner or the demise charterer is a contractual carrier and also how they identify the master representing the shipowner or the demise charterer. Under the business approach, it is my opinion that the prominent head note at the top of the bill of lading prevails over the small boilerplate wording of "for the master."

Sometimes lawyers have a tendency to be much too theoretical when analyzing bills of lading as a contract and as such their ideas have strayed far from actual shipping practice and common sense of ordinary business people in the trade. Under *The Starsin*, the House of Lords gives us good guidance and warning in reading a contract, such that common sense of business people should prevail over lawyer's over-fussy analysis.

(4) Tokyo Jurisdiction clause in the bills of lading and U S Court's decision

Since the U S Supreme Court's decision in *The Sky Reefer*[16] , it has been established that U S Courts accept jurisdiction clauses in bills of lading including arbitration, so long as

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[15] [1978] LLR 38. The cargo claimant commenced suit against the shipowner but the vessel was found to be on demise charter at the time the cause of action occurred after the one-year time-bar has elapsed. The cargo claimant lost in litigation against the demise charterer in the High Court but managed to win at the Court of Appeal. Thereafter, the cargo interests demanded the wording "The vessel was not demise-chartered at the material time," in the letter of guarantee from the shipowner's P&I Club.

[16] 1995 AMC 1816.

the judgment or award does not unreasonably prejudice the U S cargo interests. It has also well been established in the U S Courts that the demise clause shall be null and void.[17] The U S Courts' refusal to enforce the demise clause prevails over their acceptance of the foreign jurisdiction clause in the bill of lading. In *The Spring Wave*, the Eastern District Court of Louisiana refused to apply a bill of lading clause calling for Japanese law and jurisdiction, because of the real risk that a Japanese Court might enforce a demise clause, which provision was characterized as "unlawful" under the US COGSA[18] .

In *The Rubin Kobe*, which is a cargo claim case where logs on deck were lost during a voyage from Washington to Japan, the Western District Court of Washington, March 25, 2003, accepted the Japanese carrier's (Mitsui O S K lines) allegations that the bill of lading expressly incorporates US COGSA and that that prohibits the enforcement of the demise clause, although the bill of lading had a demise clause and Japanese law and the Tokyo District Court jurisdiction clause. Therefore the Western District Court of Washington expected that the Tokyo District Court would apply the US COGSA to this case pursuant to the paramount clause, if this case is to be heard in the Tokyo District Court[19] .

I do not understand the present purpose of the demise clause[20] in a bill of lading other than to unfairly exempt the carrier's liability due to it being coupled with a one-year time limitation. Therefore, I hope that honest carriers would no longer adopt the demise clause. According to the Lord Roskill's own words, "It is quite unnecessary and has been unnecessary ever since 1958."

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[17] Prof. Tetley's Cargo Claims (to be published in 2007), Chapter 10.

[18] 2000 AMC 1717. A similar decision was that in *The Gertrude Oldendorff*, where the Southern District Court of New York refused an exclusive London jurisdiction clause in the bill of lading.

[19] The relevant provision states: "If the carriage covered by this Bill of Lading includes Carriage to or from a port or place in the United States of America, this Bill of Lading shall be subject to the United States Carriage of Goods by Sea Act 1936(US COGSA), the terms of which are incorporated herein and shall govern throughout the entire time during which the goods are in the actual custody of the carrier."

[20] The demise clause had a reasonable purpose when it was originally drafted. According to Lord Roskill of England, one of the original drafters, who explained at pp. 403-406 of Volume 106 of the Law Quarterly Review in 1990, the demise clause was developed during World War II at a time when it became necessary for the British government to requisition vessels to be under government control. At that time there was an English law, which continued in effect until 1958, that provided that only a shipowner or a demise charterer could limit their liability for losses. As the British government gained control of the vessels through a time charter, it became necessary for the government to have the same limitations from liability as the actual owners or demise charterers.

Subrogation under Chinese Law*

*Sanming Chen***

The law of subrogation is one of most important and complex doctrines in the law of marine insurance. Controversy and complexity over this doctrine have long been discussed in courts and among academic scholars. The problems exist in the law of subrogation, *inter alia*, the legal basis of subrogation rights; the mechanics of taking over the rights and remedies of the person who has been paid; the distribution of recovery when the payment has not satisfied all the loss of the assured; the legal issue when the payment is not made under legal obligation by the insurer or by a third party; limitations and loss of subrogation rights; the defence available to the third party. Common law has created some rather unjust and harsh results over this doctrine, such as *Yorkshire Insurance Co., Ltd v. Nisbet Shipping Co., Ltd*[1] as to the surplus of recoveries as the result of currency fluctuation; *Napier v. Hunter*[2] as to the top down recovery rule; *Simpson v. Thomson*[3] as to rights against vessel in the same ownership. In contrast with English law, China's laws insufficiently cover this area prior to the promulgation of the Maritime Code and the Insurance Law. The law of subrogation has not been widely interpreted due to limited exposure of the Chinese maritime courts to the disputes over this doctrine. This article attempts to tackle the legal problems in application of the doctrine of subrogation under Chinese law in comparison with English law.

a. Concept of subrogation under Chinese law

English law has some conflict of authority as to whether subrogation is a doctrine stemming from the operation of equity or whether it rests upon an implied term in every contract of insurance permitting the insurer to exercise the assured's right. As far as the law of marine insurance is concerned, the law of subrogation is now codified both in the Chinese Maritime Code and the Insurance Law. Before the codification in the statutes, it has been customarily perceived as an international practice or by way of contractual

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1 [1961] 1 Lloyd's Rep. 479.

2 [1993] AC 713 (HL).

3 (1877) 3 App. Cas. 279, HL.

subrogation in a device of subrogation receipt or as an express term in the contract. It may be much more correct to say that the subrogation right is based upon an implied term in the contract of insurance under Chinese law.

The insurer's subrogation right under Chinese law tends to be somewhat confused as statutory assignment of the assured's right against the third party to the insurer. Before the enactment of the Maritime Code and the Insurance Law, the right of subrogation was first codified in the Economic Contract Law, which contemplates that the right of the assured against the third party must be assigned to the insurer after the indemnity from the insurer.[4] Similar codification could be seen in the Regulations Concerning Property Insurance of PRC in 1983[5] which was promulgated based upon the Economic Contract Law. The confusion similarly remains in the Maritime Code, Article 252 of which states that:

"Where the loss of or damage to the subject matter insured within the insurance coverage is caused by a third person, the right of the insured to demand compensation from the third person shall be subrogated to the insurer from the indemnity is paid..."

Though wording of "subrogation" is used in the English translation version, the exact meaning under Chinese law written in Chinese denotes "assignment" in lieu of "subrogation".

It seems less confusing under the Insurance Law, the definition seems more close to English counterparts.

"When the occurrence of the insured event results from the loss or damage to the subject matter of the insurance caused by a third party, the insurer may be subrogated into the insured's right of indemnity against the third party up to the amount of indemnity from the date when the amount of indemnity is made…"[6]

The legal right of the insurer after payment contemplated by the Insurance Law is distinguishable from that of the Maritime Code. Under the Insurance Law, it is much more like the concept of subrogation. However, under the Maritime Code, the right tends to be a statutory right of assignment. Chinese law is originally derived from the civil law

[4] Article 25 of the Economic Contract Law.
[5] Section 19 of the Regulations.
[6] Article 44 of the Insurance Law.

system and many of the statutes have been influenced by the Roman civil law system. Under the Roman law, the word subrogation does not approach the meaning of that word in English law. In Roman law, the term subrogation was a well-known term of constitutional law, denoting the replacement of one official by another, or replacing one official action with another action. There is no subrogation by law under Roman law unless the actions are actually transferred.[7] Thus, the right of subrogation tends to operate as an implied assignment under the civil law system.

It is submitted that the law of subrogation under Chinese law is not a statutory assignment or an implied assignment. Assignment and subrogation are two distinct legal doctrines. By virtue of a valid legal assignment, the insurer is entitled to sue in his own name and to acquire all the proceeds of recoveries even though it exceeds his payment, where the subrogation right only confers upon the insurer an amount no more than his payment. Under English law, the right against the third party tortfeasors always vests in the assured whether there is a full indemnity or not and the insurer can only step into the assured's shoes to exercise the subrogation right. However, under Chinese law, the insurer has conferred upon him a direct right against the third party for which he has paid, while "the right of indemnity by subrogation exercised by the insurer shall in no way affect the assured's right of indemnity against the third party for the unindemnified amount".[8] To construe the subrogation right as statutory assignment will inevitably deprive the assured of the right against the third party for his uninsured loss and therefore be contrary to the codification in the Insurance Law.

Further, the wording under the Maritime Code and the Insurance Law tends to be ambiguous. By virtue of both the Maritime Code and the Insurance Law, the insurer is entitled to be subrogated to the assured's right against those who cause the loss to the subject matter insured, other than rights and remedies of the assured which may come into his hands to diminish the losses incurred. It seems the insurer is only subrogated to those rights and remedies of the assured which losses are caused by a third party by tort or breach of contract but not including those contractual rights and statutory rights of the assured, this is discussed below. In the meantime, the insurer shall not be entitled to those gifts which come into the assured's hands no matter whether same diminish the loss or not. As far as marine insurance is concerned, it will encompass a payment under TOVALOP. Therefore, under Chinese law, in the event of cases like *Castellain v.*

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[7] M. L Marasinghe, *A Historical Instruction to the Doctrine of Subrogation: The Early History of the Doctrine I,* Valparaiso University Law Review Volume 10, 1976.

[8] Article 44 of the Insurance Law.

Preston;[9] *Sterns v. Village,*[10] the insurer shall have no right of subrogation after the indemnity whenever there is a contractual right of the assured or any voluntary payment from a third party.

Moreover, it seems clear that the right of subrogation under Chinese law arises from the indemnity of the insurer. Thus, before making any payment to the assured under the policy, insurers have no right to take any action to protect their potential rights, which they may acquire after the payment. Under English law, it has been the subject of much debate whether the right of subrogation arises from the time of the inception of contract. There is *obiter dictum* that the insurer has a contingent right of subrogation when the policy is initiated.[11]

b. Direct right of action by the insurer

The law of subrogation in China has been codified as one of substantive law and there has long been controversy over in whose name the right of subrogation is to be exercised in the proceedings. In practice, the courts and practitioners tend to favour the direct right of action by the insurer. The rationale has never been well interpreted by courts. As has been discussed, before the codification of law of subrogation, the courts had interpreted the right of subrogation as rule of international practice. A subrogation form is necessary in a subrogation action by the insurer and therefore the right of subrogation has long been recognised by the courts. In the meantime, the lawyers have rarely argued about the procedural matter of subrogation actions in court. It tends to be contemplated that the right of an insurer after full indemnity to a device of transferring the chose in action from the assured to the insurer under civil law and thus inevitably confers upon the insurer a direct right of action. The direct right of action can also been seen in most of the civil law systems.[12] It is therefore submitted that the Chinese approach to exercise the subrogation rights has somewhat been influenced by the civil law system. Moreover, the direct right of action is suggested to be in line with the civil procedure law in which Article 108 of the Civil Procedure Law of the People's Republic of China states, *inter alia*, that all lawsuits must be brought in the name of the party who has a direct interest in the claim. In the meantime, the intention of the legislators also favoured a direct right of action by the insurer. This could be inferred from the Insurance Law where it states, *inter alia*, that the assured ceases to have the right to claim against the third party after he has obtained a

[9] (1883) 11 QBD 380.
[10] (1950) 10 Com. Cas. 89.
[11] See *Boag v. Standard* [1937] 2KB 113.
[12] Under Japanese Law and French Law.

full indemnity.[13] The right of direct action by the insurer has now been codified into *the Special Procedure Law of Maritime Proceedings*. However, in the writer's view, it would suffice to confer upon the insurer a direct right of action without referring to *the Special Procedure law of Maritime Proceedings.*

Contrary to the approach under Chinese law, direct right of action was rejected under English law unless there is a valid legal assignment. Under English law, the doctrine of privity prevents the insurer using his own name in the subrogation action. The insurer is only allowed to "stand in the shoes" of the assured and therefore has no right of his own against the wrongdoer. This was made clear in the House of Lords in *Simpson v. Thomson*[14] where Lord Cairns said: *"but this right of action for damages they must assert, not in their own name but in the name of the person insured*."[15] It is submitted that insurer's indemnity under the policy does not discharge the third party's obligation to the assured and the right still vests in the assured. The insurer's subrogation is suggested to be a simple subrogation right.[16] Under the doctrine of privity of contract, the insurer is not supposed to be a party to the relationship between the assured and the third party wrongdoer. Therefore, the insurer could not avail himself of the assured's right against the third party in his own name. The English approach is completely different from the Chinese counterparts. Chinese courts recognise the direct right of action by the insurer as the effect of the reasons discussed above, however, it does not deprive the assured's right to pursue uninsured loss. "*The right of indemnity by subrogation exercised by the insurer...shall be in no way affect the insured's right of indemnity against the third party for the unindemnified amount."*[17]

The law of subrogation is thus itself confusing under Chinese law, while, on one hand, it contemplates the subrogation right as a statutory assignment of chose of action, on the other hand, the insurer's subrogation right does not extinguish the assured's right for his uninsured loss. It is suggested that the right of subrogation under Chinese law is not a statutory assignment device. In the case of partial payment of the assured's loss, the insurer acquires no cause of action for the uninsured loss unless by way of valid legal assignment of the assured's claim. The principle of direct right of action by the insurer is more closely related to the Civil Procedure Law of People's Republic of China which requires that any lawsuit must be brought in the name of party who has the direct interest

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[13] Article 45 of the Insurance Law.

[14] (1877) 3 App. Cas. 279.

[15] Ibid, at p. 284.

[16] Charles Mitchell, *The Law of Subrogation*, LMCLQ 1994, at p. 487.

[17] Article 44 of the Insurance Law.

in the case. This looks similar to the "rule of real party in interest" under American law.[18] However, no courts have ever interpreted the "rule of real party in interest" pursuant to the Civil Procedure Law of People's Republic of China.

The direct right of action by the insurer has caused some procedural difficulties, in particular, in the case of arrest of ship in China. While the arresting party is usually the assured, the insurer will find himself not entitled to be able to be substituted in the proceedings of which have been instituted by the assured after indemnity effected by the insurer. It is still far from clear whether the insurer can replace the assured in the proceedings. If the answer is negative, then the insurer shall commence a separate legal action and the vessel will be released unconditionally as the assured has ceased to be a lawful claimant in the case when the insurer has fully indemnified him. The difficulty has yet to be interpreted in the courts. However, in the writer's opinion, the insurer could join in the proceedings raised by the assured as the insurer is entitled to be subrogated to the assured's right against the third party wrongdoers, including all the preservative steps the assured has taken.

c. The extent of subrogation right

Unlike the common law position where the insurer is entitled to all those rights and remedies of the assured which come into his hands in diminution of the loss, the extent of subrogation right seems very narrow under Chinese law. Under Article 252 of the Maritime Code, the insurer's subrogation rights are to the extent of the right of the insured to demand compensation from the third party where the loss of or damage to the subject matter insured within the insurance coverage is caused by that third party.

Similarly, by virtue of article 44 of the Insurance Law, the insurer may be subrogated to the assured's right of indemnity against the third party when the occurrence of the insured event results from the loss of or damage to the subject matter of the insurance caused by that third party. Both laws emphasise the subrogation rights the assured possesses against the third party who causes the loss or damage to the subject matter insured.

Therefore, it seems that under Chinese law, the insurer's subrogation right is simply

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[18] Federal Rule of Civil Procedure Article 17(a) which reads "*Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another or a party authorized by statue may sue in his own name without joining with him the party for whose benefit the action is brought…*"

related to torts and breach of the contract by the third party. First of all, the extent of the subrogation rights are those in respect of the "loss or damage" of the assured. Gifts paid to the assured have nothing to do with the loss or damage of the assured caused by the third party and therefore the insurer is not entitled to any gift whether it comes into the assured's hands for the diminution of the loss or not. The position under common law is that the insurer has the subrogation right insofar as the gift is intended to diminish the loss of the assured. Secondly, the loss or damage should be "caused by" the third party. It does not include those contingent contractual rights of the assured and those statutory rights of the assured. In the case of *Castellain v. Preston*, the insurer has no rights to recoup sale price the assured possesses where in the meantime he has obtained the indemnity from the insurer after the house was burned down. Furthermore, it is not clear what the "third party" consists of. In the context of marine insurance, the third party may not include those co-assureds and sister ships. Thus, if one ship collides with her sister-ship, the insurer of one vessel would have no subrogation right after paying the loss. However, the sister-ship clauses of ITC Clauses (hull)[19] would confer on the insurer the same right against the other sister-ship as if the ship belongs to the other shipowner.

Chinese law has limited the right of subrogation against the family member and employees of the assured in the absence of fraud. *"The insurer has no right of indemnity by subrogation against any family member or staff member of the insured unless the occurrence of the insured event ...has resulted from the willful misconduct of such a third party."* [20] However, limit against the co-assureds has not been explicitly codified. If one of the co-assured is not within the definition of the "third party", then the insurer's right of pursuing the assured or sister-ship will inevitably be barred in the absence of fraud under the joint or composite policy. In practice, the subrogation action against the co-assured rarely arises. Chinese courts tend to restrict the insurer's right of pursuing the co-assured and sister-ship.[21] The court stresses that the subrogation rights can only be enforced against the third party wrongdoers.[22] Similarly, under a void policy, it would be clear that the insurer is not entitled to the subrogation right.

The prerequisite for acquiring a subrogation right under Chinese law is the actual payment of the insured loss. This is clearly stipulated in Article 252 of the Maritime Code as "*...from the time the indemnity is paid*" and in Article 44 of the Insurance Law, "*...from the date when the amount of indemnity is made*". However, it seems less clear under

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[19] Clause 9 of ITC Hull 95.

[20] Article 46 of the Insurance Law.

[21] It is submitted that the co-assured is not within the definition of third party.

[22] *Annotation of the Insurance Law of PRC*, ed. Yiao Wu Bian, Law Publishing Limited, 1996 at p. 99.

English law whether the right of subrogation arises from the payment of the loss or from the inception of the policy in which the authority of *The Boag* [23] case confers a contingent right at the time when the insurance contract is initiated. Under Chinese Law, there is no confusion in this aspect. The vagueness remains as to whether the insured must be fully indemnified under the policy or a full indemnity of the actual loss even though the shortfall is the deductible, in particular, where the indemnity does not meet the actual loss of the assured. The difficulties similarly give rise to controversy under English Law.

Chinese Law confers upon the insurer the partial right over the subject-matter insured in the case of under-insurance but fully indemnify under the policy *"...in the case of under-insurance, the insurer shall acquire the right to the subject-matter insured in the proportion that the insured amount bears to the insured value*".[24] It could be inferred that the insurer should be entitled to be partially subrogated to the assured's rights and remedies against the third party wrongdoers in the case of partial payment of the assured's loss especially in the case of under-insurance. In that case, the insurer has the subrogation rights against the third party up to their actual payment to the insured, and the insured meanwhile remains the cause of action over the uninsured losses. Indeed, the Insurance law has the similar codification of not to deprive of the right for the uninsured loss. *"The right of indemnity by subrogation exercised by the insurer in accordance with the first paragraph shall in no way affect the insured's right of indemnity against the third party for the unindemnified amount.*"[25] The effect of partial subrogation right will give rise to difficulties as to the split of cause of action. Chinese law confers a direct right of action for the insurer. In the meantime, the assured retains part of the cause of action for the uninsured loss against the third party. It may probably lead to two different decisions in a single cause of action. Some scholars in China have suggested to consolidate both actions or by way of joinder in the existing proceedings. In the writer's opinion, either of these ways will protect the insurer and the assured's rights and pursuant to the principle of indemnity. Either the insurer or the insured retains the cause of action against the third party wrongdoers and there may be a joiner if one action has proceeded, or consolidation of both actions. Thus, the insurer and the insured have rights over the recovery proceeds pro rata to their respective loss and similarly bear ratably the legal costs in the proceedings.

Likewise, it remains unclear as to whether the assured still has the cause of action against the third party over the shortfall of deductible. Under English law, it seems that a full

[23] [1937] 2KB 113.

[24] Article 256 of the Maritime Code of PRC.

[25] Article 44 of the Insurance Law.

indemnity under the policy even where there is a deductible clause will be sufficient to confer upon the insurer *dominus litis* over the subrogation action. The insurer shall have the first claim over the recoveries up to his payment and the remainder be held on trust for the insured. Under Chinese law, a suitable case has yet to reach the courts. In the writer's view, the insured will have a similar right as if he is his own insurer for the deductible or excess and therefore, he is entitled to recover against the third party for the deductible by way of joinder or consolidation of the insurer's subrogation action.

In any event, the insurer can only be "subrogated to the assured's right of indemnity against the third party up to the amount of indemnity", therefore, *"...where the compensation obtained by the insurer from the third person exceeds the amount of indemnity paid by the insurer, the part in excess shall be returned to the insured.*"[26] In practice, the insurer only asserts an amount of his payment and will not give rise to a recovery exceeding his payment. Therefore, in the view of writer, supported by the case of *Yorkshire Insurance Co., Ltd v. Nisbet Shipping Co., Ltd*[27] *,* where there is a windfall due the currency fluctuation, *the* insurer shall have the windfall on the grounds that the insurer has a direct right of action for what it has paid under the policy and the payment reflects the amount the insurer asserts and no more. If the payment from third party exceeds what the insurer asserts in the subrogation action, then the insurer should refund that part in excess to the assured.

Where there is an *ex gratia* payment from the insurer, it is not clear whether the insurer shall have a subrogation right. The common law position has been clear that the insurer shall have a subrogation right as long as the payment is honestly made by the insurer.[28] Likewise, under Chinese law, it is likely to confer upon the insurer the subrogation right unless the loss is explicitly or implicitly within the exclusion clauses. The approach will be in line with the Article 252 of the Maritime Code which confers upon the insurer right of subrogation against the third party "where the loss of or damage to the subject matter insured *within the insurance coverage* is caused by a third person." By contrast, if the insurer has paid to the insured by mistake, then he can only pursue against the assured.

d. Duty of the assured to preserve the subrogation rights

Given that the right of claims against the third party vests in the assured whether there is an indemnity or not, the insurer's rights to be subrogated to the assured's rights against

[26] Article 254 of the Maritime Code.

[27] [1962] 2QB 330.

[28] King v. Victoria, (1896) AC 250.

the third party wrongdoer may be prejudiced by the assured either before the indemnity or after the indemnity. Under Chinese law, both the Maritime Code and the Insurance Law are expressed so as not to prejudice the insurer's subrogation right.

The legal effect of prejudice of subrogation rights may be clarified by the intention of the assured under Article 253 of the Maritime Code:

"Where the insured waives his right of claim against the third person without the consent of the insurer or the insurer is unable to exercise the right of recourse due to the fault of the insured, the insurer may make a corresponding reduction from the amount of indemnity."

By virtue of the article, it seems that the Code simply defines the legal effect of waiving subrogation right by the assured before the indemnity from the insurer. It is unclear as to the legal effect for prejudicing the insurer's subrogation right after the indemnity. Similarly, the vagueness in the Article remains on whether a clause exempting the subrogation right made before the indemnity but after the inception of the policy will bind the insurer. The defect has been partly remedied by the Insurance Law.

"If the insured waives the right of indemnity against the third party after the occurrence of the insured event and before the insurer making the indemnity, the insurer shall bear no obligation for indemnity. If the insured, without the insurer's consent, waives the right of indemnity against the third party after the insurer makes indemnity, the waiver of the insured shall be regarded as invalid. The insurer may deduct a corresponding sum from the amount of indemnity if it is not able to exercise the right of indemnity by subrogation due to the fault of the insured."[29]

Where subrogation right is waived by the assured, there is a conflict between the Maritime Code and the Insurance Law. Before the indemnity from the insurer, the waiver of the subrogation right by the insured gives rise to a corresponding reduction in the amount of the indemnity under the Maritime Code, while under the Insurance Law the insurer bears no liability for indemnity after the occurrence of the loss but before the indemnity from the insurer. By contrast, after the indemnity from the insurer, the waiver of subrogation right by the insured shall be regarded as invalid under the Insurance Law whilst the Maritime Code remains silent under such circumstance. It is still ambiguous whether waiver of subrogation right by the assured extends to any compromise agreement

[29] Article 45 of the Insurance Law.

made between the assured and the third party.[30] Chinese law tends to restrict the assured to making any claim against the third party after he has obtained a full indemnity from the insurer. Therefore, under Chinese law, any release by the assured after a full indemnity may be held invalid. It is suggested that article 45 of the Insurance Law should by no means embrace the compromise by the assured for uninsured loss with the third party where the insurers only partially indemnify the assured's actual loss in which case it will not deprive the assured of claims for the uninsured loss. It remains unclear whether any compromise by the assured for the whole losses including the insured loss will be held invalid under this Article. Under English law, any release by the assured will ultimately bind the insurer; however, the assured will be liable for damage to the insurer unless it is honestly made by the assured. Whether the Chinese courts will accept that the compromise will bind the insurer as the authority in *Commercial v. Lister*[31] is far from clear. It is the opinion of the writer that codification of article 45 in the Insurance Law is confined only to cases where the assured has been fully indemnified under the policy; while in case of partial indemnity, compromise by the assured for the whole loss including the insured loss and the uninsured loss will inevitably bind the insurer no matter whether it is honestly made or not, unless the third party acknowledges the existing subrogation right before the compromise is made. However, the codification itself has imposed a huge duty upon the third party to check whether the assured has been fully indemnified by the insurer only in which case the third party is immune from further action by the insurer for the same loss by way of subrogation right even after the third party has already indemnified the assured for the whole loss. This seems harsh and unjust to the third party. However, the insurer is entitled to sue for damage against the assured for prejudicing his subrogation rights if it is not made in good faith. Where compromise is made by the assured for the uninsured loss, it will not bind the insurer in any event.

Before the assured has been fully indemnified, both the Maritime Code and the Insurance Law have similar legal effect in which confer upon the insurer the right to a corresponding reduction from the amount of the indemnity where the subrogation right is prejudiced by the assured. However, it is unclear whether the duty of the assured not to prejudice the subrogation right will include the duty to protect the time limit and arrest the vessel to obtain security. In practice, there has usually been a clause inserted in the policy to impose upon the assured the duty to preserve the rights against the carriers, bailees or other third parties.[32] It will suffice to hold the assured in breach of the duty by virtue of such clause where the time limit against the carrier has not been well preserved.

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[30] In writer's view, it should be included in all the compromise agreement made by the assured.

[31] (1874) L. R. 9 Ch App. 483.

[32] ICC (A) 1/1/82, Cl. 16.2.

But the clause will not impose upon the assured a duty to arrest the vessel as far as marine insurance is concerned.

Article 45 of the Insurance Law is construed as the duty of the assured after the occurrence of a peril insured against. However, the Article remains silent as to whether any act depriving the subrogation right by the insured before the occurrence of a peril insured against will be binding on the insurer. It is similarly unclear under the Maritime Code. The insurer is entitled to a corresponding reduction from the amount of the indemnity under such circumstance; however, it may not affect the validity of any release by the assured before the occurrence of loss. Therefore, under Chinese law, a benefit of insurance clause in the bill of lading will probably be held enforceable. However, the insurer may deny the liability by pleading the duty of non-disclosure of the assured if there is a non-disclosure when the insurance is initiated, alternatively, he can make a corresponding reduction from the amount of indemnity. Similarly, it may be held valid if any agreement contracts out of the insurer's subrogation right after the policy is initiated but before the occurrence of a peril insured.

Furthermore, silence under Chinese law remains on whether the insurer has a right of recovery against the assured if the assured further obtains an indemnity from the third party after he has been fully indemnified by the insurer. The right of subrogation under Chinese law seems to be in respect of the assured's claims against the third person. Unlike the position under common law, the insurer will avail himself of equity to recoup from the assured any surplus he has retained from the third party. The purpose of the subrogation right is to prevent the assured from obtaining double compensation. Therefore, if the assured has been paid more than his losses, the surplus must be held on trust for the insurer and the insurer has a cause of action to recoup from the assured any surplus. Likewise, under Chinese law on the ground of unjust enrichment, the insurer is entitled to recoup any surplus from the assured if he is over-compensated for his loss. As far as marine insurance law is concerned, it could be construed from article 256 of the Maritime Code that, in the case of under-insurance, the insurer is entitled to be partially subrogated to the assured's right against the third party wrongdoers in the proportion his payment bears to the total losses as if the assured is his own insurer for his uninsured loss. Thus, it may be possible for the insurer to recoup from the assured in proportion to his payment if the assured has compromised the whole loss with the third party.

e. Conclusion

In conclusion, Chinese law is problematic in this area. It is vague, ambiguous and very

conflicting. Lack of judicial interpretation leaves a grey area. It is suggested that a comprehensive interpretation by the Supreme People's Court is necessary to fill the gap and the courts are encouraged to remedy the defects as discussed which affect the doctrine of subrogation.

DISPUTE RESOLUTION

*Chris J Hilton**

I read with interest Philip Yang's article ***("The Arbitration Agreement Appointment - Latest Developments")*** in the last issue of WaveLength. It is not my intention to comment on by far the major part of Mr Yang's article, but the piece that caught my eye, as it happened, fell on the first page. This relates to the BIMCO Standard Dispute Resolution Clause. Mr Yang has expressed a concern as to its effectiveness in one specific area, namely the application of section 60 of the English Arbitration Act 1996. I beg to disagree.

By way of background, I should explain that I sat on the BIMCO sub-committee that prepared this Clause, and it may help readers, therefore, to understand the thinking behind it. The starting point is that mediation is a relatively new concept in the shipping industry. It is widely accepted in a number of comparable sectors (of which the construction industry is one example). BIMCO took the view that it was a concept that should be encouraged in the shipping industry and consequently the committee set to work.

Mediation

Even more so than arbitration, mediation is a consensual process. It is, however, one where even reluctant participants can be surprised at how effective a good mediator can be in teasing out common ground, and identifying ways forward to resolution. The range of skills employed by a mediator is considerable, and may not be appreciated by those unfamiliar with the process.

The committee took the view that the best way to promote the use of mediation in the shipping industry would be to make the mediation provision an integral part of BIMCO's Standard Law and Arbitration Clause. Consequently, working closely with the LMAA in London and the SMA in New York, the framework of a blended arbitration and mediation clause was developed.

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Could, however, any degree of pressure be put on parties to give mediation a try? Various ideas were explored, but the one on which the committee settled was drawn from the approach taken by the Courts in England, who have embraced mediation wholeheartedly. Not only do the Courts, in appropriate cases, require the parties to mediate before proceeding through the Court process, but they go further, and are prepared to penalise a party if it refuses to mediate without reasonable cause.

In both ***Dunnett v Railtrack plc (in railway administration) [2002] 2 All ER 850,*** and ***Royal Bank of Canada Trust Corporation Limited v Secretary of State for Defence [2003] All ER (D) 171 (May)***, parties have been penalised in costs for their reluctance to mediate. This has also been the case in a number of other recent decisions.

The problem that the committee recognised was that an arbitration Tribunal may not consider that it's discretion over the award of costs under s. 61 of the Arbitration Act 1996 included the ability to take into account the refusal of a party to mediate (in other words the Tribunal might feel unable to adopt the same approach as has been taken by the English Courts over the last two or three years).

Consequently, the clause was structured around an arrangement whereby either party can call on the other to mediate, but if the other refuses, the arbitration Tribunal can be appraised of the fact, and can take that into account when allocating the costs of the arbitration as between the parties.

In this way, the outcomes in the ***Dunnett v Railtrack plc (in railway administration) [2002] 2 All ER 850,*** and ***Royal Bank of Canada Trust Corporation Limited v Secretary of State for Defence [2003] All ER (D) 171 (May)*** cases could be replicated if they were heard in arbitration.

So much for the background.

Section 60 of the Arbitration Act 1996

In his article, Mr Yang says that this provision in the Clause could be contrary to English public policy.

The section reads :-

"***An agreement which has the effect that a party has to pay the whole or part of the***

costs of the arbitration in any event is only valid if made after the dispute in question has arisen".

That section is derived from s.18 (3) of the Arbitration Act 1950, which in turn re-enacts s.12 of the Arbitration Act 1934. It is an old provision.

I understand that it was intended to counteract clauses which were common at one time in, for instance, insurance contracts. In effect, those clauses fettered the Tribunal's discretion.

The provision in the BIMCO Dispute Resolution Clause, however, does not in any way fetter the discretion of the Tribunal - on the contrary, it broadens it. The power is expressed in permissive wording - "***may be taken into account"*** (not ***"will").***

Interestingly, Section 61 (2) of the Arbitration Act 1996 provides that :- ***"Unless the parties otherwise agree, the Tribunal shall award costs on the general principle that costs should follow the event except where it appears to the Tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs".***

This reflects the practice of the High Court, that the successful party should normally receive his costs, a practice which arbitrators have long been obliged to follow.

As envisaged by s.61 (2), however, the Tribunal can decide that this approach would not be appropriate. One of the factors that has been recognised in the past as justifying a departure from this general rule is one party's obstructive conduct which has increased the costs of the other party.

Furthermore, in ***Messers Limited v Heidner & Co [1960] 1 LLR 500,*** the Judge referred without disapproval to a provision in the Arbitration clause requiring the arbitrators to take certain matters into account when deciding as to costs. That provision was much more mandatory than BIMCO's Dispute Resolution Clause.

Summary

For these reasons, in my view the BIMCO clause would not fall foul of s.60 of the Arbitration Act 1996.