WaveLength

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Recent Developments and Changes in Japanese Maritime Laws*

*Mitsuhiro Toda***

Introduction

Japan is one of the major shipping countries with the big shipbuilding capacity and many number of shipping companies, some of which are based in very small local town called Imabari.

We have also lots of trading companies who import or export millions tons of the cargoes from and to Japan.

However, contrasting to the volume of the shipping trade and shipbuilding, there are a very few court precedents concerning the shipping law. The number of the shipping lawyers is also not so many. Why? Because most of the disputes concerning the shipping law have been settled by compromise without resorting to the court procedures or even without involvement by maritime lawyers.

Therefore, we do not have special departments in handling shipping cases in our court system. Ordinary civil court judges hear the shipping cases.

Even when disputes are referred to maritime lawyers, most of cases are settled through negotiations unless lawyers at odds have difficulties in exchanging arguments fashionably each other from the difference of their own personalities or clients' strict instructions.

Anyhow, in these circumstances, we do not have many court cases on the shipping law. However, just for past 2 years, we have very important changes in the legislation of the shipping law which have a great influence on handling shipping law disputes in Japan.

I would like to introduce to you these changes in our legislation together with my short comments as follows:

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* An Address to the Asian Maritime Law Conference 2007, Singapore on 13 October, 2007

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1. Limitation of Shipowners' Liability

(1) 1996 Protocol Introduction

I understand Singapore has become a member state to 1976 Limitation Convention since May 2005.

I handled one collision case which took place in Malacca Straits in 2001. At that time, Japan was a member state to 1976 Convention. However, Malaysia was a member to 1957 Convention as well as Singapore at that time. Two procedures were commenced; one in Malaysia and another in Japan. The case was settled for the sum between the two limitations of 1957 and 1976. This is a very Japanese way.

Anyway, from August 1, 2006, the limitation as per 1996 Protocol has come into force in Japan as Japan revised the domestic law to conform to 1996 Protocol.

Shortly before 1996 Protocol taking effect in Japan, we had 6 limitation cases pending in various district courts in Japan. However, the amount of the limitation of shipowners' liability has now been greatly increased. We expect that the number of limitation cases applied to the court would decrease.

(2) Substantial or Procedural?

In Japan, limitation of liability is deemed not as the substantial law, but the procedural law and therefore, if Japanese jurisdiction is established in commencing limitation procedures, Japanese court would apply Japanese Limitation Act only (Judgment of Sendai High Court of September 19, 1994, 1551 *Hanreijiho* 86).

Therefore, it is possible that if you have a collision in Singapore territorial waters and you are a receiving party, but are not satisfied with 1976 Limitation, then, you can come to Japan to seek more recovery based upon 1996 Protocol if you can establish Japanese jurisdiction by arresting a sister ship or other assets.

(3) Tug & Tow's Limitation

We have an interesting precedent concerning limitation amount when tug and tow apply for limitation. There were arguments on how the limitation amount of the tug and tow should be calculated. Some say that the amount calculated only based upon the tug's

tonnage should be the limitation amount and others say that the aggregate tonnage of the tug and the tow should be the basis for the calculation of the limitation amount.

It was ruled by Osaka High Court in Japan that first, each limitation amount of the tug and the tow should be calculated and the amount of the limitation should be the total of the two limitation funds of the tug and the tow (Judgment of April 15, 1985, 1163 *Hanreijiho* 139). This ruling seems to be quite different from the English Law on this point (The Law of Tug and Tow by Simon Rainey, QC, P. 301).

(4) Limitation on Claims in respect of the Wreck Removal

If a ship is sunk, wrecked, stranded or abandoned in a harbour or fairway, then, the owner of the vessel will be ordered to remove the vessel. In such case, the owner so ordered can not limit his liability for the costs of the wreck removal as Japan reserves the right to exclude the application of Article 2, 1-(d) and (e) of the London Convention.

If a ship is sunk due to the collision with another ship and the sunken ship has no liability, in such case, there was an interesting question as to whether the colliding ship is entitled to limit its liability for the costs of the removal of the sunken vessel.

The District Court ruled that the colliding ship can not limit its liability saying that claims in respect of the wreck removal are excluded for the Limitation Act. However, the High Court reversed this judgment and concluded that the colliding ship is entitled to limit its liability. The Supreme Court of Japan upheld this High Court judgment.

Therefore, in Japan, from the sunken ship's point of view, the wreck removal costs are not subject to limitation of liability but from the other ship's point of view, the removal costs paid by the sunken ship shall be subject to limitation of liability (The Judgment of the Supreme Court of April 26, 1985, 1155 *Hanreijiho* 296 to 299).

2. Wreck Removal Order by Coast Guard

From the beginning of April, 2007, Japan Coast Guard is given the authority to issue an order to let shipowners remove the wreck regardless the location of the wreck if the presence of the wreck causes damages or fear of the damages to the marine environment (Article 40 of Law Relating to the Prevention of Marine Pollution and Disaster).

Before April, 2007, no such authority was given to JCG. JCG was able to order for the wreck removal only where the wreck prevents safety of the ship's traffic in the port or in the ship's traffic channel. At that time, no consideration was paid to protection of the marine environment in connection with the wreck removal. Concern over the marine environment was focused on pollution from the oil spill or hazardous or noxious substances. Such ideas did not come up as the presence of the wreck itself could harm the marine environment.

Therefore, before April, 2007, if we were instructed by the P&I club of the wreck, we were able to refuse to comply with administrative guidance or recommendation by JCG to remove the wreck arguing that there were no legal basis for the wreck removal since the shipowner did everything for removal of the oil or any other hazardous substances on board the vessel unless the wreck prevents safety of the ship's traffic.

However, such arguments can not be used any more to refuse the removal of the wreck since the presence of the wreck may cause some damage to the marine environment. Of course, there is no rule having exception. If you can succeed in persuading fishermen in the vicinity to agree that the wreck becomes very useful for their fishing as it works as artificial fishing banks, you may escape from the duty for the wreck removal with consent from JCG. In this respect, there may be some bargaining points going between JCG and fishermen at site with some "forbearance or consolation payment".

3. Compulsory P&I Insurance for Non-Oil Tankers

Liability insurance could be an effective tool to recover the damages from the claimants' point of view. Sometimes, tort-feasors do not have enough funds to compensate for losses caused by their negligence. Then, the idea comes up to impose entry of P&I insurance on the vessels who come to the coasts. Some coastal states have imposed compulsory P&I insurances such as U.S.A., Canada and Australia. Japan followed this policy but widened coverage of compulsory P&I insurance. Of course, in case of an oil tanker subject to CLC 1992, any oil tankers should carry on board the insurance certificate issued by member states of CLC including Japan. I am talking about compulsory insurance on non-tanker vessels. The following, therefore, are comments in respect of non-tanker vessels' insurance.

Under the Japanese system which has taken effect since March 2005, no vessels have been allowed to come into the ports of Japan unless the vessel carries a certificate of

insurance issued by Japanese Government in respect of oil pollution and wreck removal.

I attach herewith 3 forms of Certificate of Insurance:

(A) the form for Certificate for non-oil tankers, specifically introduced in Japan;
(B) the form for CLC oil tankers; and
(C) the form for Certificate of Insurance provided in Bunker Convention which has yet to be effective.

At least, 12 vessels which grounded were removed by the public funds of Japanese local governments since the shipowners of these vessels just disappeared after the accident and no P&I insurance was entered to cover the costs for the wreck removal. Some of these vessels were owned by North Korean shipowners.

In view of the above, partly from the political reasons for North Korean vessels' having been involved, the new system of the Compulsory P&I Insurance has been introduced.

Again, there is an exception. If a vessel is entered with Japan P&I club or Japanese insurance company who undertakes P&I risks or entered with P&I club belonging to International Group, then you need not obtain a certificate issued by Japanese Government. Otherwise, you have to carry a certificate issued by Japanese Government on board the vessel before entering any Japanese ports to cover risks for oil pollution and wreck removal with following limits.

(A) Coverage in respect of Wreck Removal

The amount equivalent to the limitation amount in respect of property claims except for loss of life or personal injury claims as provided in Article 3-1 (b) in 1996 Protocol.

(B) Coverage in respect of Oil Pollution Damage

The amount equivalent to the limitation amount in respect of claims for all claims including loss of life or personal injury claims as provided in Article 3-1 (a) and (b) in 1996 Protocol.

The scheme is similar to the convention of bunker oil pollution damage. However, the bunker oil pollution damage convention covers only damages to the bunker oil pollution.

This system covers the wreck removal as well.

Bunker Oil Pollution Convention 2001 provides for Direct Action against liability insurers same as CLC. However, in Japan, Direct Action against insurers is not clearly provided in this new legislation leaving that problem in interpretation of the Civil Code of Japan. The Civil Code of Japan allows direct action against the liability insurers in certain circumstances, for example, where it is proved that the responsible shipowner does not have sufficient assets to compensate losses arising out of the marine accidents for which his vessel is responsible (Judgment of Tokyo District Court of January 28, 2000).

4. Conflict of Laws

New law concerning the conflict of laws has taken effect in Japan from the beginning of 2007. Of course, before that, we had the law relating to the conflict of laws. However, the previous law was very old fashioned and lack of flexibility. As far as the shipping laws are concerned, the new law of the conflict of laws introduced a new concept.

In the old law, the applicable law as to the tort claim was provided as the law where the action of the tort or results of the tort occurred should apply to the claims of the tort. If a collision occurred on the high seas with different flags of the colliding vessels, it was said that two laws of the two flag states should apply at the same time and be overlapped. However, this caused lots of arguments as to the extent of the concrete application of this theory.

Now, the new law has introduced the different approach. If there is another venue which has close and substantial links with that tort claims, then, the law of such close state regardless of the flags of the vessels should apply (Judgment of Tokyo District Court of June 13, 2003, 175 *Kaijiho Kenkyu Kaishi*, 64, Judgment of Tokyo High Court of May 27, 2004, 181 *Kaijiho Kenkyu Kaishi*, 58). These judgments applied this new idea even under the old law.

Therefore, for example, if a ship's collision occurs on the high seas between the two different flag vessels, then the law of the coastal state which suffered serious damages from the collision or which makes major investigations or to which most of the crews belong who were deceased would be applied.

Anyhow, we may have a wide range of possibilities of the governing law as to the tort claims under the new law of the conflict of laws.

Appendix (A)　Non-Tanker

番号第 [redacted] 号
(Certificate Number)

一般船舶保障契約証明書

CERTIFICATE OF INSURANCE OR OTHER FINANCIAL SECURITY FOR SHIPS NOT CARRYING OIL IN BULK AS CARGO

船舶油濁損害賠償保障法第39条の6において準用する同法第17条第1項又は第18条第2項の規定に従つて発行する。

Issued in accordance with the provisions of Article 39-6 of the Law on Liability for Oil Pollution Damage, 1975, under which Article 17 paragraph 1 or Article 18 paragraph 2 of the law is applied correspondingly.

船　名 Name of ship	船舶番号又は信号符字 (及び国際海事機関船舶識別番号) Distinctive number or letters (and IMO number,if any)	国　籍 Flag	船舶所有者又は船舶賃借人の氏名又は名称及び住所 Name and address of owner or charterer
[redacted]	[redacted]	[redacted]	[redacted]

上記の船舶に関し、船舶油濁損害賠償保障法第39条の5の要件を満たす保障契約が締結されていることを証明する。

This is to certify that a contract of insurance or other financial security satisfying the requirements of Article 39-5 of the Law on Liability for Oil Pollution Damage, 1975, is concluded in respect of the above-named ship.

保障契約の種類　船主責任相互保険
Type of Security　P and I Insurance (Mutual)

保障契約により担保される保険金額又は賠償の義務の履行が担保されている額　[redacted]米ドル
Guaranteed limit under the Security　[redacted]USD

保障契約の期間　[redacted] ～ [redacted]
Duration of Security　From [redacted] to [redacted]

保険者及び（又は）保証提供者の氏名又は名称及び住所
Name and Address of the Insurer(s) and / or Guarantor(s)

氏名又は名称
Name　[redacted]
住所
Address　[redacted]

この証明書は、[redacted]から[redacted]まで効力を有する。
This certificate is valid from [redacted] to [redacted]

[redacted]
(date of issue)

関　東　運　輸　局　長　　山下　恭弘
Director-General of Kanto District Transport Bureau

Appendix (B) CLC

ANNEX

CERTIFICATE OF INSURANCE OR OTHER FINANCIAL SECURITY IN RESPECT OF CIVIL LIABILITY FOR OIL POLLUTION DAMAGE

Issued in accordance with the provisions of Article VII of the International Convention on Civil Liability for Oil Pollution Damage, 1969.

NAME OF SHIP	DISTINCTIVE NUMBER OR LETTERS	PORT OF REGISTRY	NAME AND ADDRESS OF OWNER

This is to certify that there is in force in respect of the above-named ship a policy of insurance or other financial security satisfying the requirements of Article VII of the International Convention on Civil Liability for Oil Pollution Damage, 1969.

Type of Security _____

_____

Duration of Security _____

_____

Name and Address of the Insurer (s) and/or Guarantor (s)

Name _____

Address _____

_____

This certificate is valid until _____

Issued or certified by the Government of _____

_____

(Full designation of the State)

At _____ On _____

(Place) (Date)

_____

Signature and Title of issuing or certifying official.

Explanatory Notes:

1. If desired, the designation of the State may include a reference to the compent public authority of the country where the certificate is issued.
2. If the total amount of securty has been furnished by more than one source, the amount of each of them should be indicated.
3. If security is furnished in several forms, these should ce enumerated.

4. The entry "Duration of the Security" must stipulate the date on which such security takes effect.

Appendix (C) Bunker Convention (Not in force)

ANNEX. CERTIFICATE OF INSURANCE OR OTHER FINANCIAL SECURITY IN RESPECT OF CIVIL LIABILITY FOR BUNKER OIL POLLUTION DAMAGE

Issued in accordance with the provisions of article 7 of the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001

Name of Ship	Distinctive Number or letters	IMO Ship Identification Number	Port of Registry	Name and full address of the principal place of business of the registered owner.

This is to certify that there is in force in respect of the above-named ship a policy of insurance or other financial security satisfying the requirements of article 7 of the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001.

Type of Security .....

Duration of Security .....

Name and address of the insurer(s) and/or guarantor(s)
Issued or certified by the Government of.. ....

(Full designation of the State)

OR

The following text should be used when a State Party avails itself of article 7(3)

The present certificate is issued under the authority of the Government..... .....(full designation of the State) by..... (name of institution or organization)

At _____ On _____
(Place) (Date)

.....
(Signature and Title of issuing or certifying official)

Explanatory Notes:

1. If desired, the designation of the State may include a reference to the competent public authority of the country where the Certificate is issued.
2. If the total amount of security has been furnished by more than one source, the amount of each of them should be indicated.

Non-disclosure and Fraudulent Disclosure under Japanese Insurance Law and Practice*

*Tetsuro Nakamura***

Japanese Commercial Code has provisions with respect to non-marine insurance (Articles 629 to 683) and marine insurance (Articles 815 to 841). In my topic here is no special provision for the latter, and thus most of the provisions I will refer to are those with respect to non-marine insurance, which shall be applied to marine insurance as well (Article 815(2)). Relevant Articles of Commercial Code and Japanese H&M policy are attached in the end for the reference.

A. Disclosure at time of contract

Articles 644 (1) provides, *inter alia,* that if the person effecting insurance, with intent or gross negligence, at the time of insurance contract, did not disclose material facts or circumstances or did disclose false material facts or circumstances, the insurer is entitled to terminate the insurance contract, unless the insurer knew, or did not know with his fault, such material facts or circumstances.

1. Who owes duties?

The person effecting insurance shall be found as having committed gross negligence, not a simple fault. The insurer has burden of proof for gross negligence of the person effecting insurance. Article 644 does not impose the duty to disclose the material circumstances to the assured. However, in most of cases, if the assured is at gross negligence or with intent, the person effecting insurance would be considered at gross negligence.

The prevailing Japanese Hull Insurance Policy Form (hereinafter, 'Japanese H&M Policy') in its Clause 17 imposes both the party effecting insurance and the assured the duties to disclose material circumstances. Also, Japanese H&M Policy in the same Clause excludes cases where the party effecting insurance or the assured at gross negligence did not know the material circumstances or knew it without accuracy, by

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* An address to the Asian Maritime Law Conference 2007, Singapore on 13 October, 2007

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providing, “did not disclose the circumstances in spite of his knowledge or did disclose the circumstances falsely.

Japanese laws do not have the misrepresentation as the cause of action, in which I understand, the assured’s intent or fault is not necessary but need only three factors; (i) the representation must usually be one of fact; (ii) the representation must be false; and (iii) the representation must have induced the resulting transaction. Japanese laws has the cause of action based on collateral mistake or fraud, but it would be the same as English law, very rare in practice.

MIA s. 17 provides: A contract of marine insurance is a contract based upon utmost good faith and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party. We do not have such general provision, which would affect interpretation of each of other provisions with respect to the insurance.

2. Materiality

The insurer also has burden of proof as to ‘material circumstances.’ Whether a certain fact or circumstance is ‘material’ shall be found based on objective review as to if such fact or circumstance would have affected the insurer’s decision to take a risk to be covered under the policy. I understand, MIA s.18 could be construed that in order to avoid the policy non-disclosure had induced the insurer, on the mind as a prudent insurer, to enter into the policy. I do not think if there would be any significant difference between these objective and subjective way of observation even when they are applied in practice.

Japanese H&M Policy defines this ‘material circumstances’ as those to be filled in the application form for insurance and other material circumstances, which should affect the insurer’s determination to enter into the policy or to fix the terms of the policy. See clause 17 (1) (iii) and (iv). Japanese H&M Policy has not restricted material circumstances to the items listed in their application form, unlike some of non-marine insurance policy. The form and its listed items may narrow the interpretation of the ‘materiality’ in each case. However, their application form is very simple, same as the H&M policy form, not including specific or detailed facts or circumstances. Among Japanese H&M underwriters, some have set up their internal manual to list the matters to be checked or are setting up such manual. Before the application, all discussions are not necessarily made with the insurer. The policy terms or the application form does not always define ‘material facts or circumstances.’ Thus, there may remain unclearness in

the materiality of certain facts or circumstances.

At present, Japanese government is reviewing the provisions of Commercial Code with respect to the insurance contract from the aspect if those provisions are corresponding to the modern insurance market and its present situations and if they are fair to the parties. The Legal System Council of the Ministry of Justice set up the Insurance Law Committee in November 2006, in order to pursue the said review. The Committee submitted its intermediate draft for proposal to revise the insurance law in August 2007 (hereinafter 'Intermediate Draft'), and collected the public comments. Intermediate Draft suggests that the above Article 644 should be amended to the effect that the assured shall disclose only the material circumstances, which the insurer has requested to disclose. Article 644 (1) at present demands the assured to judge himself if certain facts or circumstances are material for his disclosure. The above proposal tries to avoid it, and to shift the risk to the insurer. Many of the public comments have accepted this line of amendment.

3. Insurer's knowledge

If the insurer knew, or did not know with his fault, such material circumstances, the insurer cannot terminate the insurance contract. See provisos of Article 644(1).

4. Effect of termination

Article 645 (1) provides that the termination based on non-disclosure or false-disclosure shall have its effect from the termination, but Article 645 (2) provides that the insurer does not need to make payment even if the termination is made after the accident occurred. In the latter case, Article 645(2) continues to say, if there is no causative link between the material circumstances to be disclosed by the assured and the accident covered under the policy, the insurer could not reject the payment under the policy. I understand that there may be three kinds of system in this respect; (i) causation is necessary for the insurer's exemption; (ii) causation is not necessary for the insurer's exemption; and (iii) the amount of insurance payment is prorated. Japanese law adopted (i) It is not certain whether Japanese H&M Policy changed it by its clause 17(2), which provides that the termination shall have a retrospective effect, or if clause 17 (2) still keeps the treatment under Japanese law. Intermediate Draft has proposed (i) and (iii) as alternative, but (iii) was not well accepted by the public comments.

B. Disclosure during contract – Significant change of risk

1. Change of risk by assured's conduct

Article 656 provides that the insurance contract shall become null and void when the risk covered by the policy has significantly been changed or increased by the assured's culpable conduct. At least, it is submitted that the culpable conduct shall not include the assured faulty conduct. The assured shall not be construed to include a wide range of people on the side of the assured. The court seeks whether a person to conduct to increase a risk has the authority to enter into an insurance contract, but the scholars objected against it and submitted that the court should look who can control the subject of insurance, the ship in H&M policy case. While Article 656 makes the insurance contract invalid, it is submitted that the Article shall be amended to protect the assured. Intermediate Draft suggests to stop this different treatment in case the assured's culpable conduct changed or increase the risk, and even in such case the insurance contract should go to the same destiny provided in Article 657 as provided for cases where the risk has been changed or increased significantly without the assured culpable conduct.

2. Change of risk not by assured's conduct

Article 657 provides, *inter alia*, that if a risk is significantly increased not by the assured culpable conduct, the insurer could terminate the contract with its effect thereafter. The assured has to inform a significant increase of risk to the insurer, and in case of his failure, the insurance contract shall be deemed void from the time of the risk increase. In order to make the insurance contract void, we do not need the causation.

3. Significancy

The issue of significancy leaves uncertainty in actual cases. Japanese H&M policy in its Clause 14 (1) lists the circumstances as shown below by which the Policy becomes invalid, though the other insurance often define what is a significant change of risk by listing up such risks.

(i) the ship did not have the inspection of the authority, the class or the insurer
(ii) the class was changed or deleted without the insurer's approval
(iii) the vessel violated trade restriction under law or insurance contract
(iv) the vessel was used for the purpose of violating the law or conventions
(v) the vessel's owner or bareboat charterer was changed without the insurer's

acceptance

(vi) the vessel's structure or use of purpose was significantly changed without the insurer's acceptance thereafter

(vii) and a risk to be insured under the policy was significantly changed by the assured's conduct, for which he shall be liable, without the insurer's acceptance thereafter

Clause 14 (2) provides that the insurer's discretion to terminate the insurance contract even if the assured seeks the insurer's acceptance, in case (i) to (iv) happens, but such circumstances ceased and in case (vi) to (vii) occurred.

Clause 14 (3) amended Article 657 to the effect that the insurer shall be exempted only when the assured failed to inform the circumstance (vii) with intent or gross negligence. Clause 14 (4) provides that if the insurer knew the circumstances (iii) with or without the assured's notice, the insurer could terminate the insurance contract by 10 days' advance notice and the termination will effect only thereafter, and the insurer shall exercise their right to terminate the insurance contract within 30 days after they knew the said circumstances.

Intermediate Draft suggests the provision to request the assured to inform without delay the insurer of the circumstances that the risk has been increased due to the change of the material circumstances which are demanded by the insurer to inform at the time of insurance contract. If the assured fails to make a notice as demanded with intent or with gross negligence, the insurer is entitled to terminate the insurance contract. As to the treatment in case where the accident occurred before termination, Intermediate Draft suggests two patterns of solution. (A) The insurer shall be exempted unless the assured establishes no-causation between the uninformed material circumstance and the accident, and (B) (i) If the assured did not inform such circumstances with intent, the insurer shall be exempted unless the assured establishes no-causation between the uninformed material circumstance and the accident, and (ii) If the assured did not inform such circumstances with gross negligence, the insurer shall be exempted unless the assured establishes no-causation between the uninformed material circumstance and the accident and that the insurer would have terminated the contract if he had known such uninformed circumstances. In case where, assuming the same situation, the insurer only would have raised the premium if he had known such uninformed circumstances, the insurer will not be exempted at all but will have to pay the insurance proceed proportionally deducted. It is my personal opinion that the solution (B) would not be adopted finally, since the terms are so complicated that the parties to the insurance contract could not foresee a result. The public comments are not leaning to either (A) or (B).

C. Features and recent trend of Japanese H&M market

Before 1996, there was no restriction under the anti-trust law against H&M underwriters' collaboration to make the insurance contract terms. H&M underwriters set up the H&M insurance contract form through the Japan Federation of the Hull & Machinery Underwriters, and used the form in their businesses to undertake H&M risks. Under the united H&M insurance terms, Japanese H&M underwriters offered to the customers the same level of the premium, and thus there was substantially no competition in respect of the insurance terms and the premium.

At present, collaboration in the terms and/or premiums of H&M policy among H&M underwriters shall be regarded as violation of the anti-trust law, and the Japan Federation of the Hull & Machinery Underwriters was resolved. By this system change, H&M insurance market has been totally freed, and it is said that at present H&M insurance premium in Japan is one of the lowest over the world. The Unfair Trade Committee sometimes says that H&M insurance market freedom since 1996 is one of the typical successful cases.

Further to the above, as you know, Japanese companies including the underwriters are employing their staff normally for their life long up to the age of 55 to 60, sometimes further. Of course, there is a new trend where some employees move from company to company more often but it is still not usual among Japanese insurance companies. As to H&M businesses, most of H&M staff would not move to the other section of the same company. It is not often that a person in non-marine section is coming to H&M sections. H&M staff will be divided into the business, underwriting and claim departments, among which close communications are kept. For instance, the business department staff is visiting the ship owner's office very often, and the claim department staff in case of casualty or other insurance claims will closely communicate with the ship owner, involving business department people as well. When they leave the position at 4-5 year interval, they will pass all information of that ship owner to a person who will take over his position. Of course, during his term of the office, he will report what he knew through his contact with the ship owner. The information about the ship owner, their fleet and business plan is commonly retained among H&M staff. They even know a divorce or potential divorce of the ship owner's president's nephew. They also visit the dockyard and other companies relevant to the shipping circle, and thus know what kind of ship the ship owner will build or plan to build and whom she would be chartered out.

Also here, it shall be pointed out the influence of 4/4th collision liability clause

Japanese H&M policy has adopted since long time ago. By that clause, H&M underwriters are compelled to handle the collision cases in addition to pure p.a./g.a. case, which is significantly different from the situation overseas. Through those cases, they become to know more about the ship owner and their fleet. Japanese underwriters are sometimes using 3/4th collision liability clause with Japanese form of English H&M policy, which adopts most of ITC Hulls policy, or ITC Hull policy itself, but still 4/4th collision liability clause is prevailing in Japanese market.

Recent mergers among H&M underwriters may well contribute such well-informed position H&M underwriters have enjoyed to keep. By those recent mergers, nearly 90 percent of Japanese H&M insurance market is occupied by three major H&M underwriters. It would rarely happen that H&M underwriters would undertake H&M insurance without having full details of the assured company and their ship. It could be said that most of uncertainty under the provisions of Commercial Code regarding insurance and Japanese H&M policy with respect to the disclosure has overcome by those close relationship between the underwriter and the ship owner and by their business promotion and underwriting practice in Japan. Review and amendment of the insurance law, now under work, would make legal relationship between the underwriter and the ship owner more stable with respect to the disclosure, and would reasonably protect the assured, which is one of the targets if insurance shall support the society.

A story of 'Kakkontoh':

Kakkontoh (葛根湯) is a traditional and long-used herbal medicine in Japan, consisting of arrowroot gruel, adding crude drugs like tree's wigs, grass roots, etc. Old and junk doctors were giving patients Kakkontoh, every occation. A patient has a headache, give Kakkontoh. He/she is catching a cold, Kakkontoh. Hangover, Kakkontoh! Ohhh, you are pregnant.. Congraturation! Have Kakkontoh! Who are you? A hasband? waiting for your wife? You must be bored. Have Kakkontoh… My grandma once fell from the stair from 2nd to 1st floor. Doc. gave her 'Kakkontoh', and my grandpa said to grandma, "why you did not take Kakkontoh before fell-down!" Insurance shall never be Kakkontoh like this. Depending on what and how you mix up crude drugs, Kakkontoh will be a good medicine, so be the insurance.

Commercial Code

Article 644

(1) If the party effecting insurance, with intent or gross negligence at the time of insurance contract, did not disclose material circumstances or did make false disclosure as to material circumstances, the insurer is entitled to terminate the insurance contract, unless the insurer knew, or did not know with his fault, such material circumstances.

(2) The insurer's right to terminate the insurance contract as provided in the preceding paragraph shall be extinguished, unless the insurer exercises the said right within one month after he knew the said cause for termination or within five years after the execution of the contract

Article 645

(1) The termination made by the insurer in accordance with the preceding Article shall have the effect only after the termination.

(2) Even if the insurer terminates the contract after the risk occurred, the insurer shall be exempted, and in case the insurer made payment of the insurance proceed, the insurer is entitled to claim the return of the said insurance proceed, unless the party effecting insurance proves that the risk occurred has not caused by the circumstances which he did not disclose or did disclose as true.

Article 656

The insurance contract shall become null and void when during the term of the contract the risk is significantly changed or increased due to the circumstances for which the assured shall be liable.

Article 657

(1) The insurer is entitled to terminate the insurance contract when during the term of the contract the risk is significantly changed or increased due to the circumstances for which the party who effected insurance or the assured shall not be liable, but the said termination shall have effect only after the termination.

(2) In the preceding paragraph, when the party who effected insurance or the assured knew the facts that the risk has been significantly changed or increased, they without delay shall notify the insurer of such facts, and if they fails to make such notice, the insurer shall regard the insurance contract as null and void from the time when the change or increase of such risk.

(3) In case the insurer fails to terminate the contract without delay after he received the notice as provided in the preceding paragraph or knew the said change or increase of the

risk, the insurer shall be deemed as having approved the said contract.

Article 825

In case the assured fails to commence or continue the voyage, changes the navigation route, or otherwise makes significant change or increase of risk involved, the insurer shall be exempted for the accident after the said change or increase, unless the said change or increase did not cause the accident or unless the accident arose from the force majeure or the justifiable reason, for which the insurer shall be liable.

Japanese H&M Policy

Clause 14

(1) The company shall be exempted from indemnifying the damage or loss arisen after the occurrence of the circumstances listed below, provided that the company shall indemnify the same if the company approved it in writing after the circumstance listed below had ceased: -

(i) the ship did not have the inspection of the authority or the class or the inspection designated by the insurer in order to pursue the voyage safely,

(ii) the ship's class was changed or deleted without the insurer's approval,

(iii) in the term policy, the vessel went out of the trade limit designated in this policy or was engaged in navigating the place out of usual navigation route; and in voyage policy, the ship failed to leave the port within a period described in this policy, was engaged in navigating the place out of usual navigation route, or deviated from the route designated in this policy or changed the port of destination, except in case where such actions was taken in order to avoid an imminent danger or for life salvage or medical treatment of the person on board or in case where the insurer approved such actions in writing,

(iv) the ship was used for the purpose of violating the law or conventions,

(v) the ship went into a place of war or warlike operation or was used for the matter in connection with war or warlike operation, except in case where the insurer approved such actions in writing,

(vi) the ship owner or bareboat charterer was changed, except in case where the insurer approved such change in writing,

(vii) the ship's structure or use of purpose was significantly changed, except in case where the insurer approved it in writing, or

(viii) except the circumstances listed above, a risk to be insured under the policy was

significantly changed by the assured's conduct, for which he shall be liable, except in case where the insurer approved it in writing.

(2) Even if the party who effected insurance or the assured requests the Company in writing to continue the coverage with the Company's approval in the circumstance set out below, the Company shall have discretion to terminate the insurance contract as at the time of the request for the Company's approval. The said termination shall have the effect only after the termination.

(i) in case where the circumstances listed as above (i) or (iv) of the preceding paragraph, or

(ii) in case where the circumstance listed (vi) to (viii) of the preceding paragraph

(3) Except the circumstances listed in (i) to (vii) of the first paragraph hereof, in case where the risk to be covered by the Company was significantly changed or increased due to the circumstances for which the party who effected insurance or the assured shall not be liable, the party who effected insurance or the assured shall notify the Company of the circumstances without delay after he knew the circumstances. The party who effected insurance or the assured with intent or at gross negligence fails to notify the Company of such circumstances without delay, the Company shall not be liable to indemnify the damage or loss arisen after the circumstances to be notified occurred.

(4) In the preceding paragraph, if the Company knew the circumstances (iii) with or without notice from the party who effected insurance or the assured, the Company shall be entitled to terminate the insurance contract by 10 days' advance notice, and the termination will have its effect only thereafter.

(5) The Company's right to terminate the insurance contract shall become invalid, unless the Company shall exercise it within 30 days after he knew the said circumstances for the termination.

Clause 17

(1) The party effecting insurance or the assured, at the time of contract with intent or at gross negligence, did not disclose the circumstances set out below or made false disclosure of such circumstances, notwithstanding he knew them, the Company shall be entitled to terminate the insurance contract, except in case where at the time of contract the Company knew the circumstances which the party effecting insurance or the assured did not disclose or failed to know them at fault.

(i) The other insurance contract has been executed as to a part or all of the insured interests, the risk to be covered and the period of insurance as doubled.

(ii) This insurance contract is for a third party as the assured

(iii) The items to be filled in the insurance application form

(iv) Except the above, the material circumstances which would affect the Company's

acceptance for underwriting the insurance or its determination of the terms of the insurance.

(2) In case the Company terminates this insurance contract in accordance with the preceding paragraph, the termination will have retroactive effect back to the time when the insurance contract was executed.

(3) The right to terminate the insurance contract as provided in the first paragraph shall become invalid, unless the Company shall exercise it within 30 days after the Company knows the said circumstances for the termination.

Judicial Decree to Terminate the Validity of Lost Bills of Lading

*Koji Takahashi**

A judicial decree (hereafter "the decree") is available in Japan to render bills of lading null and void in the cases where they have been lost, destroyed or stolen. Upon petition by the person who claims to be the last holder or the last endorsee of the lost bills of lading, the court may decide to put up a public notice in the court compound and publish it in the official gazette for a period of at least two months, urging any rightful holders of the bills to come forward and present the bills. If nobody comes forward, the court will issue the decree to cancel the bills. The decree also has the effect of restoring to the ex-holder the status of the holder of the bills. The decree has been issued to cancel bills of lading in some 440 cases in the past 60 years according to the announcements made in the official gazette. It may also be interesting to note that the JETRO (Japan External Trade Organization)[1] is recommending on their website[2] a petition for the decree in the cases of the loss of bills of lading.

The decree is available for negotiable instruments generally, which in this context mean instruments embodying rights. Bills of lading are among them since the right to claim delivery of goods is embodied in them. The decree is designed to remove the right embodied in a negotiable instrument from the instrument by rendering it null and void. By restoring to the ex-holder of a negotiable instrument the status of the holder, it is also designed to allow him to exercise the right embodied in the instrument without actually possessing it.

In practice, however, the decree issued in respect of bills of lading is often not used for the purpose of claiming the delivery of goods without possessing the bills. Where bills of lading have been lost, the carrier usually delivers the goods in exchange for letters of indemnity. The carrier may alternatively re-issue bills of lading in exchange for letters of indemnity if so requested by the consignor in the cases where bills have been lost whilst in the hands of the consignor or its servants. In either of those cases, charges made by the

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* Professor, Doshisha University Law School, Japan. (ktakahas@mail.doshisha.ac.jp) I would like to thank Ms Asuka Noda, my student assistant, for her help with my research for this article. I would also like to thank the Japan Shipping Exchange Inc for providing me with an opportunity to present a paper on this topic in their seminar on 28 November 2007. The comments received from the audience on that occasion proved to be particular helpful.

1 A semi-government body advising Japanese business on various trade related issues.

2 http://www.jetro.go.jp/jpn/regulations/import_04/04A-A10837 (in Japanese)

bankers on their letters of indemnity may keep accruing while they remain in the hands of the carrier. To stop them from mounting, the return of the banker's letters of indemnity may be claimed. The claim would be legally substantiated when the potential liability of the carrier for misdelivery of the goods ceases to exist by virtue of the time bar.[3] But the return may be requested earlier to cut down on the banker's charges. Whether the carrier will accede to the request depends on their business judgment. They will take into account, *inter alia*, the need to keep cordial relationships with the consignee and the likelihood of the lost bills of lading being acquired in good faith for value. And in that context, if the decree is attached to the request, the carriers feel more assured since holders in due course will no longer come into existence in respect of the cancelled bills of lading. So the decree is mainly sought in practice for the purpose of requesting the return of banker's letters of indemnity.

Among some 440 cases in which the decree was granted in respect of bills of lading, nearly 130 appear to have involved foreign carriers.[4] The question when the decree may be obtained in Japan will therefore be of interest to foreign readers. Though the decree is sought *ex parte*, the Japanese courts are supposed to ascertain its jurisdiction *ex officio*. The case law on the jurisdiction of the Japanese courts to issue the decree will be outlined below.

The Tokyo Summary Court decision on 20 October 2005[5] is a recent case in point. In that case, the decree was sought in respect of a set of three bills of lading issued in Tokyo on which Yokohama was named as the port of loading and Keelung in Taiwan as the port of discharge. The bills were issued on 26 April 2005 by an anonymous Japanese company with its principal place of business in Tokyo. They named an anonymous manufacturer of electrical appliances as the consignor and were made out to the order of an anonymous bank. There was a choice-of-law clause in favour of Japanese law with respect to the issues of the contract evidenced by the bills and a choice-of-court clause giving the Tokyo District Court exclusive jurisdiction over actions against the carrier. Those bills of lading were lost sometime between 29 April and 6 May 2005 while they were stored in a building in Tokyo. The bills were apparently in the custody of the cargo division of an airline company, which presumably acted as the carrier of the bills between the consignor and the consignee. They made a petition to the Tokyo Summary Court for the decree. The court denied jurisdiction, holding that the Japanese courts had jurisdiction only where the

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3 After the goods have been delivered, one year under Article 3(6) of the Hague Visby Rules, 2 years under Article 20 of the Hamburg Rules.

4 The present author, with the help of his student assistant Ms Noda, has counted the number of cases in which the carriers (shipowners and charterers) or the issuers of the bills are incorporated outside Japan and, by the sound of their names, are apparently not the subsidiaries of Japanese companies.

5 Reported in 196 (August 2007) *Kaiji-ho Kenkyu-kai Shi* (Japan Shipping Exchange) p 60 (in Japanese).

port of delivery was situated in Japan. The court noted that Japan had no statutory rules providing for the jurisdiction and reasoned that, in view of the interests and convenience of those concerned, the decree should be sought in the country where the port of discharge was situated in order to ensure the effectiveness of the decree. The court acknowledged that a similar decree might not be available in the country where the port of discharge was situated but showed no concern, holding that there should be alternative rules in that country to deal with the same issue, i.e. how goods should be delivered where the bills of lading have been lost. The court refused to rely on the choice-of-court clause in the bills of lading, noting that it was only concerned with adversarial procedures for determining the rights and obligations of the carrier as distinguished from the non-contentious procedure for invalidating bills of lading.

This is the only case in which the Japanese courts gave a reasoned decision on the jurisdiction of the Japanese courts to issue the decree in respect of bills of lading.[6] The decisions of the Japanese courts, except those of the Supreme Court, are not binding on the courts in the future cases. But it would be safe to assume that the Japanese courts will exercise jurisdiction to issue the decree in the cases where the port of discharge is situated in Japan. What is less clear is whether they will do so in other cases. It should be noted in this connection that among some 440 cases in which the decree was issued in respect of bills of lading, in nearly forty of them, have the Japanese courts exercised jurisdiction even though the port of discharge was not situated in Japan. It is not entirely clear what were the bases of jurisdiction in those cases since they were merely announced in the official gazette which, unlike law reports, does not set forth the courts' reasoning. It can be observed though that in almost all of them, the place of issue of the bills of lading was situated in Japan. There was however one case in which clearly neither the port of discharge nor the place of issue was situated in Japan.[7] So the law in this area has not been settled. In the last-mentioned case, a set of three bills of lading naming International Fisheries (a company incorporated in Myanmar) as the consignor were issued by Pacific International Lines (presumably a Singaporean company) in Yangon (Myanmar) on 25 September 2002 and were made out to the order of Sumitomo Corporation (a Japanese company). Yangon (Myanmar) was named as the port of loading and Singapore as the port of discharge. The bills were lost while in the custody of Myanmar Investment and Commercial Bank. Presumably because they were to be transmitted via Hachinohe

6 In respect of bonds, there is a decision on 25 July 1931 (Reported in 10 *Minshu* 603 in Japanese). In this case, the Grand Court of Judicature (the highest court in the pre-WWII period) declined jurisdiction to issue the decree in respect of lost bonds which had been issued by a Japanese company and were to be reimbursed in London and New York.

7 The Hachinohe Summary Court decision on 4 November 2003, announced in the official gazette on 2 December 2003.

(Japan), a petition was made for the decree there by Sumitomo Corporation (which was presumably the last endorsee). In all likelihood, the decree obtained was used by Sumitomo to support their request to Pacific International Lines as the carrier to return the banker's letter of indemnity which probably they had submitted when receiving delivery of goods in Singapore without the bills of lading. Even if the decree did not have legal effect in Singapore, the carrier may have taken it into account in their business judgment in deciding whether to return the letter of indemnity.

Before the law on jurisdiction is settled, those who would like to petition for the decree in Japan in the cases where the port of discharge is not situated in Japan would be advised to stress in their submission on jurisdiction the practical usefulness, rather than the legal effectiveness of the decree for their intended purpose of requesting the return of their banker's letters of indemnity.

JSE2007

The Documentary Committee of The Japan Shipping Exchange, Inc.

Issued 18/12/1980
Amended 5/ 6/1985
Amended 3/10/1991
Amended 25/ 1/2007
Amended 14/12/2007

SALVAGE AGREEMENT
(No Cure – No Pay)

Salvage Agreement (Part I)

①	Name of the Salvor	
②	Property to be Salved	Vessel Type: Name: and her cargo and other property (hereinafter referred to together as "the Property")
③	Date of Agreement	
④	Place of Agreement	
⑤	Special Remuneration Clause: ☐ incorporated ☐ not incorporated (Select and mark either of the above two. If not marked, to be deemed as 'not incorporated'.)	
⑥	If the Special Remuneration Clause is incorporated, the rate as provided in paragraph 2 of Clause 5 of the said Clause is; ☐ (i) the tariff rates for the Special Remuneration Clause publicized by the Salvor. ☐ (ii) the tariff rates mutually agreed by the Owners of the Vessel and the Salvor. _____ (Select and mark (i) or (ii) and specify the rate if (ii) is selected.)	

This Salvage Agreement is made and entered into by and between the Master of the vessel in Box ② above ("the Vessel") for and on behalf of the Owners of the Property in Box ② above (hereinafter referred to together as "the Property Owners") and the salvor in Box ① above ("the Salvor") in accordance with the provisions of Part I, and if the parties have chosen to incorporate the Special Remuneration Clause in Box ⑤ above, Part II of this Agreement.

IN WITNESS WHEREOF, the parties hereto have signed and executed two originals of this Agreement and each party shall hold one original.

Master of the Vessel Salvor

Clause 1 (Salvage Services)
The Salvor agrees to use his best endeavours to render all necessary services to salve the Property and to take it to the nearest place of safety or other place to be agreed for delivery to the Property Owners. The Salvor further agrees, while performing the salvage services, to use his best endeavours to prevent or minimize damage to the environment (which means substantial physical damage to human health or to marine life or resources in coastal or inland waters or areas adjacent thereto, caused by pollution, contamination, fire, explosion or similar major incidents).

Clause 2 (Assistance from other Salvors)
Whenever circumstances reasonably require, the Salvor may seek assistance from other salvors. The Salvor shall further accept the intervention of other salvors when reasonably requested to do so by the Property Owners or the Master of the Vessel ("the Master"); provided however that the amount of the Salvor's remuneration shall not be prejudiced should it be found that such request was unreasonable.

Clause 3 (Co-operation of Property Owners)
The Property Owners and the Master shall co-operate fully with the Salvor in and about the salvage services including obtaining entry permits to the place stipulated in Clause 1 and providing the Salvor with information reasonably required by him regarding the Property, and in so doing, shall exercise due care to prevent or minimize damage to the environment. The Property Owners shall promptly accept redelivery of such of the Property as is salved at the place stipulated in Clause 1.

Clause 4 (Termination of Salvage Services)
Even if the Salvor has commenced the salvage services under this Agreement, the Owners of the Vessel or the Salvor shall be entitled to terminate the salvage services, when there is no longer any reasonable prospect of success leading to a salvage remuneration after consideration of every relevant factor, upon making a notice in writing to the other party with a reasonable period prior to the termination.

Clause 5 (Salvage Services rendered prior to the date of the Agreement)
In the event that the salvage services, or any part of such services, as defined in this Salvage Agreement, were rendered by the Salvor to the Property prior to the date of this Agreement, it is agreed that the provisions of this Agreement shall apply retrospectively to such services.

Clause 6 (Use of the Property by Salvor)

With the consent of the Master in advance, the Salvor and/or his employees may, without being held liable for any costs or expenses, and without any responsibility or obligation in respect of restitution, loss and/or damage, use the hull, engines, machineries, appurtenances of the Vessel and the whole or part of her cargo, and may also dismantle, sever and work upon any part of the Vessel and/or jettison the whole or any part of her cargo, which may be reasonably required for the purpose of the salvage services. However, in the event of urgent and unavoidable need, the Salvor may, at his own discretion and without obtaining the prior consent of the Master, resort to the aforementioned measures in such manner and to such extent as would be within the scope of reasonable necessity for the purpose of the salvage services.

Clause 7 (Daily Salvage Report)

The Salvor shall report daily to the Master and the Owner of the Vessel on the condition of the Vessel and the situation regarding the salvage services.

Clause 8 (Salvage Remuneration)

(1) In the event that the Salvor succeeds in salving the Property whether entirely or partially ("the Salved Property"), the Salvor is entitled to salvage remuneration from the owners of the Salved Property ("the Salved Property Owners").

(2) The amount of salvage remuneration shall be decided taking into account the costs and expenses reasonably incurred by the Salvor as a main factor, and further taking into account the value of the Salved Property and other factors collectively: these being the nature and degree of the danger to which the Salved Property was exposed, the degree of difficulties and dangers encountered by the Salvor, the skill of the Salvor in performing the services, the measure of success obtained by the Salvor, the promptness of the services rendered, the state of readiness and efficiency of the Salvor's equipment and the value thereof and the skill and efforts of the Salvor in preventing or minimizing damage to the environment. The amount of salvage remuneration shall not exceed the total value of the Salved Property at the time of termination of the salvage services, exclusive of any interest and legal costs (including costs of mediation and/or arbitration; should the same be applied as hereinafter provided).

(3) The Salved Property Owners shall each bear the salvage remuneration in proportion to the respective values of such of their property as is salved.

Clause 9 (Special Compensation)

(1) Notwithstanding paragraphs (1) and (2) of Clause 8, if the Salvor has carried out salvage services in respect of a vessel which by itself or its cargo threatened damage

to the environment and has failed to earn a remuneration under Clause 8 at least equivalent to the special compensation assessable in accordance with this Clause, he shall be entitled to claim special compensation against the Owners of the Vessel equivalent to the expenses incurred by him as herein defined.

(2) If, in the circumstances set out in paragraph 1 of this Clause, the Salvor by his salvage services has prevented or minimized damage to the environment, he shall be entitled to claim special compensation against the Owners of the Vessel equivalent to the expenses incurred by him plus an increment of up to a maximum of 30% of such expenses. However, in exceptional circumstances if it should be fair and just to do so bearing in mind the relevant criteria set out in paragraph 2 of Clause 8, he shall be entitled to claim special compensation equivalent to the expenses incurred by him plus an increment of up to a maximum of 100% of such expenses.

(3) Expenses incurred by the Salvor for the purpose of paragraphs 1 and 2 of this Clause mean the out-of-pocket expenses reasonably incurred by the Salvor in the salvage services and a fair rate for equipment and personnel actually and reasonably used in the salvage services.

(4) The special compensation under this Clause shall be paid only if and to the extent that such total amount of the special compensation is greater than the amount of the remuneration recoverable by the Salvor under Clause 8.

(5) If the Salvor was at fault and has thereby failed to prevent or minimize damage to the environment, he may be deprived of the whole or part of any special compensation due under this Clause.

(6) Nothing in this Clause shall affect any right of recourse on the part of the Owners of the Vessel.

Clause 10 (Effect of the Special Compensation Clause and the Special Remuneration Clause)

The Salvor's services shall be rendered as salvage services upon the principle of "no cure - no pay" and any salvage remuneration to which the Salvor becomes entitled shall not be diminished by reason of any exception to the principle of "no cure - no pay" under the Special Compensation Clause or the Special Remuneration Clause.

Clause 11 (Security)

(1) Upon the termination of the salvage services, the Salved Property Owners shall on demand of the Salvor provide security of a reasonable amount to ensure payment of the salvage remuneration (inclusive of interest and costs). Until security has been provided, the Salvor shall have a maritime lien on the Salved Property. In case security is not provided within 21 (twenty-one) days after the date of termination of

the salvage services, the Salvor is entitled to attach the unsecured property in accordance with his right of maritime lien. The Owners of the Vessel shall use their best endeavours to ensure that the cargo owners provide security before the cargo is released.

(2) The Salved Property Owners shall each provide the Salvor with security in proportion to the respective values of their property salved. The salvage security shall be provided to the Salvor irrespective of general average security.

(3) Where Clause 9 is likely to be applicable, the Owners of the Vessel shall on the Salvor's demand provide security of a reasonable amount for the Salvor's special compensation payable under Clause 9.

(4) In case the amount of security demanded by the Salvor under preceding paragraph (1) or (3) of this Clause is found to be excessive, the Salvor shall bear any additional costs of providing security in excess of a reasonable amount.

(5) The aforesaid security means cash money and/or a written guarantee issued by bank, insurance company, P&I Club and/or surety company, or any other form of guarantee equivalent thereto, acceptable to the Salvor. In case the security is in the form of a written guarantee issued by bank, insurance company, P&I Club and/or surety company, the amount of such guarantee shall be specified in Japanese currency unless otherwise agreed by the parties to the Agreement. In case the security is in cash and/or in any other forms equivalent thereto, such security shall be in Japanese currency or specified in Japanese currency.

(6) Unless otherwise specified, the aforesaid security shall be lodged with the Japan Shipping Exchange, Inc. ("the JSE"). The JSE shall keep the security until such time as payment of the salvage remuneration or the special compensation is effected in accordance with the decision made either by amicable settlement, mediation, arbitration or otherwise. If expenses should be incurred in keeping the security, such expenses shall be borne by the party who has lodged the said security. No interest shall accrue upon the security. In case interest accrues upon the cash security lodged, the said interest shall be credited to the account of the depositor.

(7) The JSE shall not be responsible for any insufficiency arising from the difference between the amount of the security lodged and the salvage remuneration or the special compensation finally decided. Nor shall the JSE be liable for any loss caused by any fluctuation in value of stocks, bonds or any other investment securities which are deposited with the JSE.

Clause 12 (Payment of Salvage Remuneration and/or Special Compensation)

When the amount of the salvage remuneration prescribed in Clause 8 and/or of the special compensation in Clause 9 is fixed finally by amicable settlement between the parties,

mediation or arbitration, the Salved Property Owners shall pay, in exchange for release of the salvage security provided under Clause 11, the said salvage remuneration and/or special compensation and interest due under Clause 15 to the Salvor within 28 (twenty-eight) calendar days after the date when the amount of salvage remuneration was fixed. If such payment is not made within 56 days after the date of fixing the amount of salvage remuneration, the Salvor is entitled to receive the same amount out of the cash deposit, enforce the security or enforce his possessory lien on the property.

Clause 13 (Mediation)

(1) In case the parties to the Agreement fail to agree on the amount of the salvage remuneration and/or of the special compensation or any other dispute out of the Agreement has not been resolved, within 90 (ninety) days after the date of termination of the salvage services, except in the case the parties refer the case to arbitration in accordance with paragraph (1) of Clause 14, the parties shall file a claim with the Mediation Commission of the JSE ("the Mediation Commission") for mediation of the said dispute. However, if both parties in dispute so desire, the above-mentioned period may be changed.

(2) Mediation of the Mediation Commission shall be held in accordance with the Rules of Mediation Procedures instituted by the JSE.

(3) When the Mediation Commission, in accordance with the Rules referred to in the preceding paragraph, instructs the parties in dispute to continue their negotiations, the parties in dispute shall continue the negotiations, using their best endeavours to settle the case amicably.

(4) During the period of negotiation or mediation under this Clause, neither of the parties may foreclose or otherwise enforce his interest in the security by any available judicial procedure or refer to arbitration, except taking judicial procedure for preserving his claim.

Clause 14 (Arbitration)

(1) In case the mediation provided in Clause 13 ends in failure or if any of the parties notifies the JSE of its desire to resolve the disputes by arbitration without mediation procedure, the parties shall submit the case to arbitration by the JSE in accordance with the Rules of Maritime Arbitration of the JSE and any amendment thereto (hereinafter referred to as "the Rules"). The award given by the arbitrators shall be final and binding on all parties.

(2) Notwithstanding the provisions prescribed in Article 5 and 9 of the Rules, a Statement of Claim, a document evidencing the capacity of the party and a document empowering the agent or attorney may be submitted via e-mail, fax or similar

method.

(3) For the purpose of smooth proceedings, where there are more than two parties to the arbitration, the JSE may require the party, whose head office or main place of business is located in a foreign country, to appoint an agent or attorney ordinarily resident in Japan. Following such appointment, the JSE need only to communicate with the appointed person(s).

Clause 15 (Interest)

Interest shall accrue on the amount of the salvage remuneration prescribed in Clause 8 and/or of the special compensation in Clause 9 from three months after the date of termination of the salvage services until the date of payment (or the date of a part payment if any). Interest shall be at 6% per annum unless otherwise agreed.

Clause 16 (Changes in the rates of exchange)

In deciding the amount of the salvage remuneration prescribed in Clause 8 and/or of the special compensation in Clause 9, the consequences of any changes in the relevant rates of exchange which may have occurred between the date of termination of the salvage services and the date on which such amount is fixed shall be taken into account.

Clause 17 (Currency in Mediation or Arbitration)

Where the dispute in respect of the amount of the salvage remuneration and/or of the special compensation has been submitted to Mediation provided in Clause 13 or to Arbitration provided in Clause 14, the amount fixed by Mediation or Arbitration shall be specified in Japanese currency unless otherwise agreed by the parties to the Agreement.

Clause 18 (Signature on behalf of the Property Owners)

The Master of the Vessel, or his agent or authorized signatory, by signing this Agreement shall conclude this Agreement for and on behalf of each of the Property Owners.

Clause 19 (Governing Law)

This Agreement shall be governed by and construed in accordance with Japanese law.

Special Remuneration Clause

Clause 1 (General)

This Special Remuneration Clause is supplementary to Part I of the Salvage Agreement ("Main Agreement") published by the JSE. If this Special Remuneration Clause is inconsistent with any provisions of the Main Agreement, the Special Remuneration Clause, once invoked, shall override such other provisions. Subject to the provisions of Clause 4 hereof, the method of assessing Special Compensation under Clause 9 of the Main Agreement shall be substituted by the method of assessment set out hereinafter. If this Special Remuneration Clause has been incorporated into the Main Agreement the Salvor may make no claim pursuant to Clause 9 of the Main Agreement except in the circumstances described in Clause 4 hereof.

Clause 2 (Invoking the Special Remuneration Clause)

If this Special Remuneration Clause has been incorporated into the Main Agreement, the Salvor shall have the option to invoke this Special Remuneration Clause, by giving written notice to the owners of the Vessel, at any time and at the Salvor's discretion regardless of the circumstances and, in particular, regardless of whether or not there is a threat of damage to the environment. The assessment of Special Remuneration Clause shall commence from the time the written notice is given to the owners of the Vessel. The services rendered before the said written notice shall be remunerated in accordance with Clause 8 of the Main Agreement.

Clause 3 (Security for Special Remuneration)

(1) The owners of the Vessel shall provide security for Special Remuneration to the Salvor within 2 working days, excluding Saturdays, Sundays and holidays, of receiving written notice from the Salvor invoking the Special Remuneration Clause. The security shall be in the sum of Japanese Yen 300 million, inclusive of interest and costs, in a form reasonably satisfactory to the Salvor such as a Letter of Guarantee issued by bank, insurance company, P&I Club or surety company or cash money or any other security equivalent thereto ("the Initial Security").

(2) If, after provision of the Initial Security, the owners of the Vessel or the Salvor reasonably assess the amount of the security to be excessive or insufficient, either party shall be entitled to request the other party to reduce or increase the amount of the security.

(3) In the absence of agreement, any dispute concerning the proposed guarantor, the form of the security or the amount of any reduction or increase in the security in

place shall be resolved by the Mediation Commission.

Clause 4 (Withdrawal)

If the owners of the Vessel do not provide the Initial Security within the said 2 working days as provided in the preceding clause, the Salvor, at his option, and on giving notice to the owners of the Vessel, shall be entitled to withdraw from all the provisions of the Special Remuneration Clause and revert to his rights under the Main Agreement, including Clause 9 of the Main Agreement, as if the Special Remuneration Clause had not been incorporated from the outset. This right of withdrawal may only be exercised if, at the time of giving the said notice of withdrawal, the owners of the Vessel have still not provided the Initial Security or any alternative security which is satisfactory to the Salvor.

Clause 5 (Special Remuneration)

(1) Special Remuneration shall mean the total of the applicable tariff rates of personnel, tugs and other craft, salvage equipment, out of pocket expenses and bonus due.

(2) The remuneration in respect of all personnel, tugs and other craft and salvage equipment shall be assessed on time spent for the salvage services in accordance with the tariff rates agreed in the Main Agreement ("the Tariff Rates").

(3) Out of pocket expenses shall mean all those monies reasonably paid by the Salvor to any third party and includes the hire of men, tugs, other craft and equipment used and other expenses reasonably necessary for the operation. The amount due in respect of the hire of men, tugs, other craft and equipment shall be calculated in accordance with the Tariff Rates regardless of the actual costs. However if the Special Casualty Representative ("the SCR") (or if an SCR is not appointed, then the Mediation Commission) agrees and/or decides that the higher costs actually incurred were reasonable and necessary, the actual costs may be allowed in full.

(4) Special Remuneration payable to the Salvor shall include a standard bonus of 25% in addition to the Tariff Rates and out of pocket expenses assessed in accordance with paragraphs (2) and (3) of this clause. However, if the amount of actual costs allowed in accordance with the last sentence of the paragraph (3) of this clause exceeds the amount assessed according to the Tariff Rates in accordance with the second sentence of the same paragraph (3), the Salvor shall be entitled to receive the actual costs plus 10% of such costs or the Tariff Rate plus 25% of such rate, whichever is the greater, as the Special Remuneration payable to the Salvor in respect of the relevant out of pocket expenses.

(5) In case the Special Remuneration needs to be converted into Japanese Yen, the exchange rate prevailing at the Tokyo Foreign Exchange Market on the date of termination of the salvage services shall be applied.

Clause 6 (Salvage Remuneration)

(1) Even if the Salvor has invoked the Special Remuneration Clause, the remuneration for salvage services under the Main Agreement shall continue to be assessed in accordance with Clause 8 of the Main Agreement. Special Remuneration as assessed under Clause 5 above will be payable only by the owners of the Vessel and only to the extent that it exceeds the total salvage remuneration (or, if none, any potential salvage remuneration) payable by all Salved Property Owners under Clause 8 of the Main Agreement. In this case, the salvage remuneration shall be the amount of money before currency adjustment and before adding interest, even if the salvage remuneration or any of its part is not recovered.

(2) In the event of the salvage remuneration under the Main Agreement and Special Remuneration being in different currencies, the amount of each remuneration shall be converted for comparison into the same currency at the rate of exchange prevailing at the Tokyo Foreign Exchange Market on the date of termination of the salvage services under the Main Agreement, in order to calculate the amount in excess as provided in paragraph (1) of this clause.

(3) The salvage remuneration under Clause 8 of the Main Agreement shall not be diminished by reason of exception to the principle of "no cure - no pay" in the form of Special Remuneration.

Clause 7 (Discount)

If the Special Remuneration Clause is invoked under Clause 2 hereof and the salvage award under Clause 8 of the Main Agreement (including the salvage remuneration settled by the parties after completion of salvage services) is greater than the assessed Special Remuneration, then notwithstanding the actual date on which the Special Remuneration Clause was invoked, the said salvage award shall be discounted by 25% of the difference between the said salvage award and the amount of Special Remuneration that would have been assessed had the Special Remuneration Clause been invoked on the first day of the services.

Clause 8 (Payment of Special Remuneration)

(1) The due date for payment of Special Remuneration hereunder shall be as follows:

  (i) If there is no potential salvage award under Clause 8 of the Main Agreement, the owners of the Vessel shall pay the undisputed amount of Special Remuneration within one month of the presentation of the claim.

  (ii) If there is a claim for salvage remuneration as well as a claim for Special Remuneration, the owners of the Vessel shall pay within one month 75% of the amount by which the assessed Special Remuneration exceeds the total amount

of salvage securities provided by the Vessel and cargo. Any undisputed balance of the Special Remuneration shall be paid on or before the due date of payment of the salvage remuneration fixed in accordance with Clause 8 of the Main Agreement.

(iii) In relation to the preceding paragraphs (i) and (ii) hereof, if the SCR dissents with the contents of the daily salvage report submitted by the Salvage Master, the owners of the Vessel shall, until the dispute is resolved, make a payment on account of Special Remuneration of the amount assessed in accordance with the Tariff Rates under paragraph (2) of Clause 5 of this Special Remuneration Clause for any equipment, personnel or work which the SCR considers appropriate.

(iv) Interest on any Special Remuneration shall accrue from the date of termination of salvage services until the date of payment at US prime rate plus 1 percent.

(2) The Salvor hereby agrees to give an undertaking in a form satisfactory to the owners of the Vessel in respect of any possible overpayment in the event that the final amount of Special Remuneration due proves to be less than the sum paid on account.

Clause 9 (Termination)

(1) The Salvor shall be entitled to terminate the services under this Special Remuneration Clause and the Main Agreement by written notice to the owners of the Vessel with a copy to the SCR and any Underwriter's Special Representative (if appointed), if the total cost of his services to date and the services that will be needed to fulfill his obligations to salve the Property under the Main Agreement (calculated by means of the Tariff Rates but before the bonus while paragraph (5) of Clause 5 hereof shall remain effective) will exceed the sum of:

(i) the value of the property capable of being salved; and

(ii) the Special Remuneration to which he will be entitled.

(2) The owners of the Vessel may at any time terminate the obligation to pay Special Remuneration after the Special Remuneration Clause has been invoked under Clause 2 hereof, provided that the Salvor shall be given at least 5 clear days' notice of such termination. In the event of such termination the assessment of Special Remuneration shall be made in accordance with Clause 5 hereof including the time for demobilization (to the extent that such time did reasonably exceed the 5 days' notice of termination).

(3) The termination provisions contained in the preceding paragraphs (1) and (2) shall only apply if the Salvor is not restrained from demobilizing his equipment by national or local government, port authorities or any other officially recognized body having jurisdiction over the area where the salvage services are being rendered.

Clause 10 (Duties of Salvor)

The duties and liabilities of the Salvor shall remain the same as under the Main Agreement, namely to use his best endeavours to salve the Vessel and properties thereon and in so doing to prevent or minimize damage to the environment.

Clause 11 (Special Casualty Representative)

(1) Once this Special Remuneration Clause has been invoked in accordance with Clause 2 hereof, the owners of the Vessel may appoint an SCR to attend the salvage operation in accordance with the terms and conditions of Appendix 1 "Rules for Special Casualty Representative" ("Rules for SCR") attached to this Special Remuneration Clause.

(2) An SCR appointed under this Special Remuneration Clause shall perform the following duties on behalf of all the Property Owners, their insurers and other relevant interests:

   (i) The SCR on site shall be entitled to be kept informed about the salvage operation by the Salvor and offer the Salvor his advice regarding the salvage operation as well as personnel, vessels and salvage equipment necessary for the salvage operation (Clause 4 (2) of the Rules for SCR).

   (ii) The SCR shall during the salvage operation review and assess the contents of the daily salvage report and shall issue his Special Remuneration Clause Final Report as soon as the salvage operation has been completed (Clause 4 (4) and (5) of the Rules for SCR).

Clause 12 (Underwriter's Special Representative)

After this Special Remuneration Clause is invoked, the hull and machinery underwriter (or, if more than one, the lead underwriter) and one owner or underwriter of all or part of any cargo on board the Vessel may each appoint an underwriter's special representative at their sole expense to attend the Vessel in accordance with the Appendix 2 "Rules for Underwriter's Special Representative". Such Special Representative shall be a technical person and not a practicing lawyer.

Clause 13 (Pollution Prevention)

The assessment of Special Remuneration shall include the prevention of pollution as well as the removal of pollutants in the immediate vicinity of the Vessel insofar as this is necessary for the proper execution of the salvage operation.

Clause 14 (General Average)

The Special Remuneration shall not be a general average expense to the extent that it

exceeds the salvage remuneration under Clause 8 of the Main Agreement and the owners of the Vessel shall be solely liable to pay such Special Remuneration. No claim relating to Special Remuneration in excess of the salvage remuneration shall be made by the owners of the Vessel against the hull and machinery underwriter or any other salved interests for recovery under the relevant insurance policy, general average or by any other means.

Clause 15 (Mediation for Dispute Settlement)

Any dispute arising out of this Special Remuneration Clause or the services thereunder shall be referred to the Mediation as provided for under the Main Agreement.

APPENDIX

1. Rules for Special Casualty Representative
2. Rules for Underwriter' Special Representative

APPENDIX

1 Rules for Special Casualty Representative

Clause 1 [Special Remuneration Clause Sub-Committee]
A Special Remuneration Clause Sub-Committee shall be organized for the operation of the Special Remuneration Clause.

The Sub-Committee shall discuss and decide the matters including producing a List of SCR Candidates and revising the Guidelines for SCRs. The Sub-Committee shall meet from time to time as necessary.

Clause 2 [List of SCR Candidates]
The List of SCR Candidates shall be kept at the JSE.

Clause 3 [Appointment of SCR]
When the Special Remuneration Clause is invoked, the owners of the Vessel shall appoint an SCR who is on the List of SCR Candidates provided in Clause 1 hereof.

Clause 4 [SCR's duty]
(1) An SCR shall fulfill, under the Special Remuneration Clause, his duties for the owners, underwriters and other parties having an interest in the Property.
(2) The SCR shall attend the salvage operation and be kept informed of the details of the salvage operation by the Salvage Master or Salvor's representative. If necessary, the SCR shall consult with the Salvage Master and advise on the salvage operation as well as the personnel, vessels, equipments, etc. required for the salvage operation.
(3) The Salvage Master shall at all times remain in overall charge of the salvage operation, and the SCR shall not direct the salvage operation even though he may give advice to the Salvage Master.
(4) The SCR shall be provided with Salvage Master's the Daily Salvage Reports (including the salvage plan, the condition of the casualty, the progress of the operation and personnel, equipment, etc. used in the operation) by the Salvage Master, and he shall review the Report and if necessary, consult with Salvage Master and offer him advice. The SCR shall record his approval or his dissension on the Report, and send a copy of the Report with his signature to the owners of the Vessel, the P&I Club, the hull and machinery underwriter and the JSE. The JSE shall send a copy of the Report to the cargo underwriters upon their request. If the SCR dissents or is not satisfied with the Report, he shall deliver his reasons in writing to the

Salvage Master and send a copy to the owners of the Vessel, the P&I Club, the hull and machinery underwriter and the JSE. The JSE shall send a copy to the cargo underwriters upon their request. If an SCR is not appointed, or he has not arrived on site, the Salvage Master shall send the Daily Salvage Report directly to the owners of the Vessel, the P&I Club, the hull and machinery underwriter and the JSE. The JSE shall send a copy to the cargo underwriters upon their request.

(5) The SCR, as soon as possible after completion of the salvage operation, shall make a Special Remuneration Clause Final Report (including, to the best of his knowledge, the facts and situation concerning the casualty and salvage operation and personnel, vessel and equipment required for the operation as well as a calculation of Special Remuneration which the SCR considers appropriate) and submit the Report to the owners of the Vessel, the P&I Club, the hull and machinery underwriter and the JSE. The JSE shall send a copy to the cargo underwriters upon their request.

Clause 5 (Replacement of SCR)

The owners of the Vessel, if requested by the SCR or agreed by all parties such as the owners of the Vessel, the P&I Club and the hull and machinery underwriter, shall be entitled to replace the SCR. In this case, the SCR shall fully transfer his duties to the replacement SCR by handing over his records, data, etc. concerning the salvage operation. The previous SCR shall offer his full co-operation to the replacement SCR when the replacement SCR prepares the Special Remuneration Clause Final Report.

Clause 6 (Temporary Absence of the SCR)

Subject to the consent of all parties such as the owners of the Vessel, the P&I Club and the hull and machinery underwriter, the SCR shall be entitled to leave the site temporarily. In this case, the remuneration of the SCR shall be reduced.

Clause 7 (Exception to Appointment of SCR)

The owners of the Vessel, in case of salvage operation which requires an SCR with particular knowledge or experience, subject to the consent of both the P&I Club and the hull and machinery underwriter, shall be entitled to appoint a person as an SCR who is not listed as an SCR candidate.

Clause 8 (Fees and Expenses of SCR)

The owners of the Vessel shall be primarily responsible for paying the SCR's fees and expenses. The mediator shall be entitled at its discretion to include the apportionment of such fees and expenses in his recommendation for the salvage award.

2 Rules for Underwriter's Special Representative

Clause 1 (Cooperation to Underwriter's Special Representative)
If an Underwriter's Special Representative provided for under Clause 12 of the Special Remuneration Clause is sent to the casualty site, the Salvage Master, the owners of the Vessel and the SCR shall cooperate with the Underwriter's Special Representatives so that he can observe the salvage operation, inspect the Vessel's documents relevant to the salvage operation and have full access to the material facts pertaining to the salvage operation. The Underwriter's Special Representative shall be entitled to receive a copy of the Daily Salvage Report from the Salvage Master if an SCR is not appointed.

Clause 2 (Attendance by Other Surveyor or Expert)
The ship or cargo interests shall be entitled to send a surveyor or expert to the Vessel other than an Underwriter's Special Representative. If an SCR or Underwriter's Special Representative has already been appointed, the Salvor shall be entitled to limit their access to the Vessel if the Salvor considers that their attendance will impede the salvage operation.

Guidelines for Special Casualty Representative

1. SCR's Duty

An SCR shall perform his duties under Clause 11 of the Special Remuneration Clause and Clause 4 of the "Rules for SCR" in the Appendix 1 of the Special Remuneration Clause.

2. SCR's Power

In connection with Clauses 4 (4) of the "Rules for SCR", if the SCR does not agree with any method, planning or work being pursued by the Salvage Master or with the contents of the Salvage Master's Daily Salvage Report, the SCR is entitled to notify the Salvage Master in writing of his disapproval and enters his remarks in the Daily Salvage Report. The SCR has, however, no power to direct the Salvage Master including whether to increase or decrease the resources being used in the salvage operation and the Salvage Master's decisions will be final.

3. Cooperation with the SCR

The SCR shall be entitled to obtain sufficient information from the Salvage Master, the master of the Vessel and others to enable him to calculate the amount of Special Remuneration accrued not only from the time when the Special Remuneration Clause was invoked but also from the time when the salvage operation was commenced, taking into account the calculation of any potential discount provided for in Article 7 of the Special Remuneration Clause. The Salvage Master, the master of the Vessel and others should cooperate with the SCR in this regard.

4. Special Remuneration Clause Final Salvage Report

(1) In making the Special Remuneration Clause Final Salvage Report in accordance with Clause 4 (5) of the "Rules for SCR", if a salvage award under Clause 8 of the Main Agreement is anticipated, the SCR shall include in his Report a brief description of the condition of the Vessel and the salvage operations, taking into account the factors to be considered in determining the amount of the salvage remuneration under the same Clause 8 (2) but shall not refer to the cause of the initial casualty.

(2) If the amount of salvage remuneration is likely to exceed the Special Remuneration, the SCR shall include in his Report the assessed amount of Special Remuneration calculated from the commencement of the salvage operations, for the purpose of calculating the discount to the salvage remuneration under Clause 7 of the Special Remuneration Clause.

5. Disagreement as to the Calculation of Special Remuneration

If the parties cannot agree to the amount of Special Remuneration due in respect of the particular items, the SCR shall prepare a statement of calculation of the Special Remuneration excluding such unresolved matters. The unresolved matters shall be left pending with a footnote which includes the amount of Special Remuneration as assessed by the SCR.

6. SCR's Responsibility

(1) Even if damage or loss occurs to the Salvor, any party having an interest in the Salved Property or any third party as a result of the SCR's conduct in connection with the salvage operation, the SCR shall not be liable for such damage or loss, unless it arose out of his act with his intention or gross negligence.

(2) It is strongly recommended that the SCR, in performing his duties, shall have an appropriate insurance to cover injury, damage or loss which may occur to himself, his properties, etc.

7. SCR's Fees and Expenses

In addition to the fees of Japanese Yen 150,000 per day, the SCR shall be entitled to claim his reasonable out-of-pocket expenses.

8. Underwriter's Special Representative

The Underwriter's Special Representative provided for in Clause 12 of the Special Remuneration Clause may go on board the Vessel in order to observe the salvage operation, report on the relevant issues and estimate the salvage remuneration and Special Remuneration, but if his activities go beyond these purposes, the SCR shall inform all the relevant parties so that the owners of the Vessel may decide what action should be taken.

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