Wave Length

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Reflections of the Amendment of the Code of Civil Procedure on the Maritime Collision Cases in Japan

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1. Introduction

There is no special procedure rule to be applied to maritime cases in Japan. So we have to take legal proceedings according to the Code of Civil Procedure (hereinafter CCP) even in maritime cases. However, the japanese CCP did not have the articles which clearly provide the international jurisdiction until the amendment of the CCP in 2011 (enforced on April 1st, 2012)[1]. The problems arising from the international jurisdiction have been ruled by the case law formulated by the decision of the Supreme Court in Japan for a long time. The amendment of the CCP in 2011 has established the new articles for the international jurisdiction.

The purpose of this article is to introduce these new articles for the international jurisdiction relating to the cases of collision between vessels and to discuss the reflections of its amendments on the cases.

2. The amendment of the CCP relating to the international jurisdiction on the cases of collision between vessels

1) The international jurisdiction before the amendment of the CCP in Japan

There was no explicit article which provided the international jurisdiction in the CCP before the amendment in 2011. However, two important decisions of the Japanese Supreme Court relating to the international jurisdiction – one is the decision of *Malaysian Airline* case[2] and another is the decision of *Family Company* case[3] – have existed. These Decisions laid down the rules on the international jurisdiction.

The former case was the case of the accident of the airplane. An employee of a Japanese company was killed in the crash of Malaysian Airline's airplane in Malaysia. So the family of the deceased man brought the action against the Airline Company seeking

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[1] For the details of the amendments of the CCP relating to maritime matters, see Akiyoshi Ikeyama, *LEGAL ISSUES ON JURISDICTION AND GOVERNING LAW*, the handout of the 4th East Asia Maritime Forum 80-100 (2011).

[2] 35 Minshu No.7, 1224 (Sup. Ct., Oct. 16, 1981).

[3] 51 Minshu No. 10, 4055 (Sup. Ct., Nov. 11, 1997).

damages for his death. The Supreme Court in Japan recognized the international jurisdiction over the action on the ground that Malaysian Airline had a business office in Japan. And it also showed the general rules of the international jurisdiction as follows;

> "Under the circumstance which there is no article in the CCP which provides the international jurisdiction in Japan, the international jurisdiction of Japanese courts shall be recognized in accordance with the reasonableness on the basis of the legal principle which expects the fairness between the parties, the appropriateness and the promptness of legal proceedings and when one of the venues which the articles of the CCP relating to the domestic geographical jurisdiction shall provide is in Japan, the recognition of the international jurisdiction by Japanese courts to the case meets the reasonableness[4]".

The latter case was the case regarding the claim for seeking the refund of a deposit. The appellee was mainly operating the purchase of auto mobiles in Germany. The appellant, a Japanese company which was established for the purpose of importing auto mobiles and its parts, concluded the consignment contract for purchase of auto mobiles and so on with the appellee in Frankfurt. The appellant sent the appellee money as a deposit for the purchase according to the contract. After that, the appellant was distrustful of appellee's management of the deposit. So the appellant brought the action against the appellee seeking the refund of the deposit. The Supreme Court, basically following the decision of the *Malaysian Airline* case, stated that when there were the "special circumstances" which the judicial proceedings in Japan would be contrary to the fairness between the parties, the appropriateness and the promptness of legal proceedings, Japanese courts should decline to recognize the international jurisdiction[5]. In this case, the Supreme Court found the facts as follows and declined the international jurisdiction over the action; the contract concluded in Germany, the appellee had its business office in Germany, the most evidence for the defense by the appellee was in Germany and the appellee might take the heavy burden to appear in Japan[6]. That is to say, the Supreme Court added the "dismissal of action on account of the special circumstances" into the general rules of the international jurisdiction which were established by the decision of *Malaysian Airline* case.

2) The articles of the CCP relating to the cases of collision between vessels

The articles for providing the international jurisdiction which has newly been included by the amendment of the CCP in 2011 basically followed the case law mentioned above and replicated the articles for domestic geographical jurisdiction provided in the CCP. The

[4] 35 Minshu No.7, 1230, 1231.
[5] 51 Minshu No. 10, 4058.
[6] *Ibid*. at 4058, 4059.

important articles relating to the cases of collision between vessels, typical maritime tort cases, are as follows[7];

Article 3-2 Jurisdiction by the domicile of defendant etc.
Paragraph 1 The courts shall have jurisdiction over an action against a person:
- if he/she has his/her domicile in Japan;
- if he/she has residence in Japan, when he/she has no domicile or his/her domicile in unknown; or
- if he/she has ever had his/her domicile in Japan before the filling of the action, when he/she has no residence in Japan or his/her residence is unknown (excluding cases where he/she had his/her domicile in a foreign state after the date when he/she had his/her last domicile in Japan) .

Paragraph 3 The courts shall have jurisdiction over an action against a judicial person or any other association or foundation, if its principal office or business office is located in Japan, or if its representative or any other principal person in charge of its business has his/her domicile in Japan, when it has no business office or other office or its location is unknown.

Article 3-3 Jurisdiction over an action relating to an obligation under a contract etc.
Actions listed in the following items may be filed with the courts of Japan in the cases specified in the respective items:
Item 3 An action on a property right; In case where the subject matter of the claim is located in Japan, or, if the action is to claim payment of money, seizable property of the defendant is located in Japan (excluding cases where the value of such property is extremely low).
Item 4 An action against a person who has a business office, which relates to the business office or said other office; In case where the business office or said other office is located in Japan.
Item 5 An action against a person engaged in business in Japan (including a foreign company (provided for Article 2, paragraph 2 of Companies Act, Act No.86 of 2005) carrying out transactions continuously in Japan); In cases where the action is related to the business of the person in Japan.
Item 8 An action relating to a tort; In case where the place where the tort was committed located in Japan (excluding cases where a harmful act was committed in a foreign state but where the occurrence of consequence of said act in Japan was not normally foreseeable).

[7] There has not been the official English translation for the articles of the amended CCP by the government of Japan, so the translation of these articles depends on Masato Dogauchi, *Forthcoming Rules on International Jurisdiction*, 12 Annual Reports of International Private Laws, 228-237 (2010).

Item 9 An action for damage due to ships collision or any other accident at sea; In case where the first place where the damaged ship docked is located in Japan.

Among these items, the most important items are the item 8 and item 9 on the cases of collision between vessels. The item 8 has relation to the action on tort. This item provides that when the place where the tort was committed is located in Japan, Japanese courts shall have the international jurisdiction over the action arising from the case. But this item excludes the cases where a harmful act was committed in a foreign state but where the occurrence of consequence of said act in Japan was not normally foreseeable.

And the item 9 is typical of the collision between vessels. It provides that on an action for damage due to ships collision or any other accident at sea, in case where the first place where the damaged ship docked is located in Japan, Japanese courts shall have the international jurisdiction over the action arising from the case.

Article 3-7 Agreement on Jurisdiction
Paragraph 1 The parties may determine by agreement the state with whose court or courts an action between them may be filed.
Paragraph 2 The agreement set forth in the preceding paragraph shall not become effective unless it is made with respect to an action based on certain legal relationships and made in writing.
Paragraph 3 If the agreement set forth in Paragraph 1 is made by means of an electromagnetic record (meaning a record made in an electronic form, a magnetic form or any other form not recognizable to human perception, which is used in information processing by computers; the same shall apply hereinafter), the provision of the preceding paragraph shall be applied by deeming such agreement to have been made in writing.
Paragraph 4 An agreement to the effect that an action can be exclusively filed with a court or courts of a foreign state may not be invoked, if such court or courts are unable to exercise their jurisdiction by law or in fact.

Article 3-8 Jurisdiction by Appearance
If a defendant, without filing a defense that the Article 3-8 provides that if a defendant, without filing a defense that the courts of Japan have no jurisdiction, has presented oral arguments on the merits or made statements in preparatory proceedings, the court shall have jurisdiction.e courts of Japan have no jurisdiction, has presented oral arguments on the merits or made statements in preparatory proceedings, the court shall have jurisdiction.

Thus, it is decided that Japanese courts have the international jurisdiction over the action in the cases of collision between vessels which is brought in Japan according to

these articles under the CCP now, except for the dismissal of action on the ground of Article 3-9. This article shall be discussed in more detail later.

3. The problem of the decision of the governing law in the cases of collision between vessels and the amendment of CCP

As we have seen the new articles which were introduced into the CCP by the amendment, the amendment makes the international jurisdiction of Japanese courts clear by including the articles for the international jurisdiction into the CCP. The Japanese courts have the international jurisdiction over the cases of collision between vessels on these articles.

Then, the issue of the governing law on the cases of collision between vessels as a subject matter of the reflections of the amendment of the CCP should be discuss here, because, it seems remarkable that the article for the dismissal of action on account of the special circumstances is also included into the CCP by its amendment in 2011.

1) The governing law on the cases of collision between vessels

The general rules relating to the determination of the governing law are provided by the Act on General Rules for Application of Laws (hereinafter AGRAL) in Japan. But Japan is a signatory of the 1910 Collision Convention[8], therefore when a Japanese vessel collides with a vessel which belongs to the state of any contracting party, the rules of the Convention shall be applied to the case (Art. 12 of the Convention).

When the Convention shall not be applied, if collisions between vessels occur and the damage from it arises in inland or territorial water of any country, according to the AGRAL Art. 17, the law of the country as *lex loci delicti* shall govern the case, because the article provides that the requirements and the effects of tort is regulated by the law of the place where the damage caused by wrongful act occurs. However, the problem difficult to solve arises, if vessels collide on the high sea, because we cannot apply *lex loci delicti* there. In this case, some doctrines are proposed to solve this problem. The commonly accepted view on this problem in Japan is that the law of the flag governs the case if the colliding vessels are of the same flags and the common part of both laws of the flags on the requirements and the effects of tort if flags which are flown by each vessel involved the collision are different (the doctrine of the application of both laws of flags)[9].

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[8] Convention internationale pour l'unification de certaines règles en matière d'abordage, Signée à Bruxelles, le 23 septembre 1910.

[9] Kaichi Yamato, *Maritime International Private Law*, 355 (1943), Hidebumi Egawa, *International Private Law* 331 (1995), Yoshio Tameike, *Lectures on International Private Law*, 389 (2005), Masato Dougauchi, *Maritime International Private Law*, Kaihou-Taikei 684 (2003).

The High Court of Sendai which dealt with the case of collision between the vessels flying different flags on the high sea also stated the same view as this in 1994[10]. This was the case of collision between Korean fishing vessels owned by the plaintiff (appellant) and Japanese fishing vessels owned by the defendant (appellee) on the high sea. The plaintiff filled the action against the defendant seeking damages for the loss of its vessel on the ground of tort.

In contrast, the High Court of Tokyo did not follow the commonly accepted view and held that Japanese law as most closely connected to the parties are applied in a similar case to the case of the High Court of Sendai[11]. This was the case of collision between Japanese fishing vessel owned by the plaintiff and Liberian vessel owned by the defendant on the high sea. The plaintiff brought the action against the defendant seeking damages for the damage of the vessel suffered from the collision with the defendant's vessel on the ground that the fault of the vessel of the defendant caused the collision, but defendant declined the claim on the ground of the Article 798, paragraph 1 of the Japanese Commercial Code. This article provides the extinctive prescription of the right to claim resulted from the collision. According the article, the duration of it is only one year. The High Court of Tokyo stated on the governing law in the case of collision on the high sea as follows; it is unreasonable that there is no governing law over this case on the ground that there is no *Lex Loci Delicti* on the high sea. Therefore the law which has a close connection with this case shall be applied[12].

And then, the court showed the factors which should be considered on the issue of choice of the governing law as the law which has a close connection with this case. The court indicated the laws of flags of the vessels involved as the first factor. But it stated that the law of flag could not been directly chosen as the governing law which had strong connection with the parties, because there was a problem of flags of convenience. As the second factor, the court indicated the laws of domicile of the parties. But it stated that they were inconsistent in this case[13].

In conclusion, in this case, the court held that Japanese law should be applied to the case, on the ground of the other conditions, such as the law of the place where damage of the plaintiff's vessel realized was in Japan, the original action of this case was brought to the District Court of Tokyo on the agreement between the parties and so on[14].

On the issue of governing law of the case where vessels collide on the high sea, we unfortunately have not had the Supreme Court decision yet.

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[10] 47 Kominshu, No. 3, 173 (Sendai H. Ct., Sep. 19, 1994).
[11] Kinyu-Syojihanrei, No. 1242, 36 (Tokyo H. Ct., May 27, 2004).
[12] *Ibid*. at 37, 47.
[13] *Ibid*. at 37, 48.
[14] *Ibid*.

2) The dismissal of action on account of the special circumstances

The amendment of the CCP in 2011 makes the international jurisdiction of Japanese courts clear by including new articles for the international jurisdiction into the CCP. Japanese courts have the international jurisdiction over the cases of collision between vessels based on these articles. At the same time, the article for the dismissal of action on account of the special circumstances is also included into the CCP. The legal theory of the dismissal of action was stated in the Supreme Court decision of the *Family Company* case in 1997. As mentioned above, when there are the "special circumstances" that the judicial proceedings in Japan will be contrary to the fairness between the parties, the appropriateness and the promptness of the legal proceedings, Japanese courts shall decline to recognize its jurisdiction. This decision also showed three factors which should be taken into account on the dismissal of action, a) the foreseeability of the action to be filled against defendant in Japan by plaintiff, b) the means of evidence for defense by the defendant, c) the burden of the plaintiff for the action in the state of the defendant[15]. This case law was codified as the article 3-9 on the amendment of the CCP in 2011. This article provides as follows;

Article 3-9; Dismissal of action on Account of Special Circumstances[16]
Even where the court of Japan has jurisdiction over the action (excluding cases where the action is filed on the ground of choice of court agreement designating the courts of Japan), the court may dismiss the whole or a part of such action when it finds special circumstances under which a trial and judicial decision by the courts of Japan would undermine equity between the parties or disturb the realization of a proper and prompt trial, taking into consideration the nature of the case, the degree of the defendant's burden of submitting defense, the location of the evidence and any other circumstances.

There is a recent decision on the dismissal of action under the special circumstances[17], though it is before the amendment of the CCP. This decision followed the legal theory of dismissal of action under the special circumstances which was established in the decision of the *Family Company* case and declined the international jurisdiction of the High Court of Sendai over the action, taking into account the nature of the case, the possibility of prediction for the defendant, the burden of the defendant, the convenience of submitting evidence and the governing law of the case. The abstract of this case is as follows;

The collision occurred between the vessels which the appellant (plaintiff) who bare-

[15] 51 Minshu No. 10, 4058.
[16] The English translation of this article also depends on Masato Dogauchi, *supra* note 7, 237.
[17] Hanrei-Times No. 1367, 240 (Sendai H. Ct., Sep. 22, 2011).

boat-chartered from its Panamanian owner and the fishing vessel owned by the Russian company, the appellee (defendant), on the high sea, offshore of Chishima Islands in Japan. After the collision, the Panamanian vessel entered Ishinomaki Port in Miyagi Prefecture in Japan and the temporary repair was made there. After that, the vessel navigated to Hakodate Port in Hokkaido and the repair was completed there and returned to its voyage. The cause of this collision was that the Russian fishing vessel did not avoid its route, though it was under the obligation to avoid the route of Panamanian vessel according to the Collision Prevention at Sea Act. So the bare-boat-charterer of Panamanian vessel (plaintiff) brought the action against the Russian Corporation (defendant) seeking damages for the repair of the vessel on the ground of the Article 690 of Japanese Commercial Code. At the first trial, the District Court of Sendai declined its international jurisdiction over the action and dismissed the action, because the trial there was contrary to the fairness between the parties, the appropriateness and the promptness of the proceedings. So the plaintiff appealed.

The decision of the High Court of Sendai at the hearing of the intermediate appeal held that the action was dismissed. At the beginning, the court considered the general rule of the international jurisdiction of Japanese courts, following the decision of the Japanese Supreme court. After that, the court considered whether the special circumstances which the court dismissed the action on the case law was in the case or not, taking into account of four factors as follows[18];

The first factor was on the nature of the case. The court held on this factor that this case did not have the strong legal connection with Japan regarding every matter such as the nationalities of the parties, the flags of the colliding vessels, the place of the collision occurred, the sailing routes of the vessels and the nationalities of crews on both vessels. The second factor was the foreseeability of the action in Japan and its burden of the appearance by the defendant. The court held that the foreseeability of the action in Japan for the defendant was low, because the defendant was the Russian company, the vessel of the defendant flew Russian flag, all crews of the vessel were Russian people, the vessel was navigating on the route from Russia in order to fishing, making a fleet of vessels and the burden of defendant to appear in Japan was heavier than that in Russia, taking into account of such matters as time to be taken to prepare the appearance and the costs for it. The third factor was on the place where the evidence were and the convenience for the examination of them in Japan. At the beginning, the court stated on the intended meaning of Article 5 of the CCP which provides that Japanese courts had the special jurisdiction over the place where the damaged vessel arrives first, this article was for the convenience for the examination of evidences, the realization of the prompt trial and the reduction of

[18] *Ibid*. at 245, 246.

trial cost, because a lot of evidence and crews, witnesses involved were there in usual cases. However, in this case, there was no convenience for the trial in Japan and the circumstance which was helpful for realizing the prompt trial and the reduction of the cost of trial, because the vessels and the crews involved did not stay in Japan and there was no useful evidence of the collision. The fourth factor was on the governing law of the case. At the beginning, on the general rule of governing law, the court stated that there was no law which should be chosen as *Lex Loci Delicti* on the high sea, though the Article 11 of *Hourei* - this was equivalent to the Article 17 of AGRAL at present - provided that the governing law of tort was the law of the place where the cause of tort occurred, under the circumstances like this, the laws of flags of the vessel involved should be chosen as the governing law and it was fair to recognize the rights and the obligation to the extent that the common part of both laws of flags recognized.

And then, regarding this case, the court held as follows[19]; In this case, the court must properly investigate and construe the tort law of both of Russia and Panama and apply them to the case. But it would be so difficult for the Japanese court to do that and it would take so much time to do investigate such both laws. It must be also said that there would be a limitation to keep the properness of the trial in this case as compared with the trial in each country where each vessel involved belonged to. Therefore, the court could not say that the trial in Japan was in accordance with the reasonableness on the basis of the legal principle which expects the fairness between the parties, the appropriateness and the promptness of the legal proceedings.

3) The dismissal of action and the cases of collision between vessels

The clarification of the international jurisdiction by the amendment of the CCP in 2011 would contribute to the appropriateness and the promptness of the legal proceedings in the cases of collision between vessels including the collision on the high sea, because it provides the cases which the Japanese courts have the international jurisdiction. In addition, the codification of the dismissal of action on account of the special circumstances could exclude unreasonable legal proceedings in Japan such as “forum shipping”. However, Art.3-9 of the CCP only provides some general factors to be considered on the dismissal of action under the special circumstances and does not show factors to be considered especially in the cases of collision between vessels. It does not also show the relative importance of each factor. In this present condition, where the vessels flying different flags collide on the high sea, there seems to be a concern that Japanese courts which attach importance to the issue of the governing law have a tendency to dismiss the

[19] *Ibid*. at 246.

action, because of the difficulty of the application of two competitive laws, such as Russian Law and Panamanian Law in the case of High Court of Sendai mentioned above, even if Japanese courts have the international jurisdiction over the case according to the articles of the CCP and it is easy for the parties to submit evidence in Japan. It seems to be so important to discuss what factors should be considered regarding the dismissal of action in the cases of collision between vessels and which factors should be emphasized.

4. Conclusion

Pertaining to the issue of the governing law on the cases of collision between vessels on the high sea, the doctrine of the application of both laws of flags is strongly supported in Japan, because the law of flag is the most proper connection between the parties involved and it is fair to both parties[20]. However, as mentioned above, the solution depending on this doctrine has some problems which could be pointed out. For examples, there is the problem of the vessels which fly flags of convenience[21] and the possibility that the court cannot find the common ground of both laws regarding the requirements and the effects of tort depending on the situations[22].

Then, some other doctrines are recently proposed, such as the application of the law of the state where the office of the substantial owner of the vessel exists[23], the application of the law which has close connection with the claim[24] and so on[25]. Among these new proposals, on the view point of maritime law, the doctrine that *Lex fori* (the law of the

[20] Masato Dogauchi, *supra* note 9, 684 (2003).

[21] Hisashi Tanigawa, *The Change of the Law of Flag and Maritime International Private Law* 2, 43 Seikei-Hougaku 34 (1996), Akira Takakuwa, *The Civil Jurisdiction and the rule of Conflict of Laws on the Maritime Matters and Its Direction in the Future in Japan*, The memorial Collections of Academic Papers of Japan Maritime Association 110 (2001).

[22] Akira Takakuwa, *Critical Notes on the Decision of Sendai High Court on Sept. 19*, Jurist, No.1104, 194 (1997).

[23] Koresuke Yamauchi, *A Study on Maritime International Private Law* 169 (1988).

[24] Kazunori Ishiguro, *The Critical Note on the Decision of the Sendai High Court on Sept. 19, 1994,* Hanrei-Jiho, No. 1570, 222, 223 (1996).

[25] For the details of doctrines in Japan, see Fumiko Masuda, *The Maritimes*, Commentaries on the International Private Law, vol. 1, 620-622 (2011).

[26] Hisashi Tanigawa, *The Governing Law on the Cases of Collision Between Vessels on the High Sea*, Jyuyouhanreikaisetsu, 273 (1997), Akira Takakuwa, *The Collection of Academic Papers on International Jurisdiction and International Private Law* 340 (2011), Tadahiro Matsuda, *The Governing Law on the Cases of Collisions Between Vessels Which Fly Different Flags on the High Sea*, 79 Waseda Law Review, No.1, 251 (2003), Takashi Hakoi, Masahiro Amemiya, Satoshi Nakaide, Tadahiro Matsuda, Jumpei Osada, *The Law of Marine Collision* 334 (2012). Professor Masato Miura argues that *Lex Fori* should be applied on the requirements of tort, but the law of flag of the plaintiff's vessel should be applied on the effects and the scope of the damages for which the defendant should be liable as far as the law of flag of defendant's vessel permits (Masato Miura, *The Governing Law on the Cases of Collision Between Vessels on the High Sea*, 12 Hougaku (Osaka City University) No.2, 58 (1965).

[27] Masato Dogauchi, *supra* note 9, 677.

[28] Masato Dogauchi, *supra* note 9, 684.

place where the action is brought) should be applied to the cases of collision between the vessels flying different flags on the high sea has been recently gaining prominence in Japan on the ground that the collision between vessels on the high sea is the exception of the rule which AGRAL does not suppose[26].

However, the doctrine of *Lex Fori* is also criticized that it promotes "forum shopping" by the plaintiff[27] and the application of *Lex Fori* to the problems of substantial law destroys the basis that the international legal relationship should be constructed by the international private law[28]. But it can be said that the cases of collision between vessels on the high sea are beyond expectations of the theory of the international private law. Therefore, the different treatment of such cases from other cases relating to the governing law should be allowed and the solution peculiar to the maritime law should be applied. Regarding to the doctrines which emphasize the rule of the international private law, the application of the laws of flags in such cases has also some problems as mentioned above. On the other hand, it may be also said that there are difficulties for the courts on finding where the substantial owner's office is or which law has a more close connection with the case, if the courts apply the law of the place where the office of the substantial owner of the vessel exists or the law which has close connection with the claim. Then, it seems that it is fair to say that when the collision occurs between the vessels which fly different flags on the high sea, the application of *Lex Fori* to such cases is reasonable as a last resort.

The solution that *Lex Fori* shall be applied to the cases of collisions between vessels which fly different flags on the high sea is adopted in the major maritime states such as United Kingdom[29], United States[30], France[31] and so on. Professor Repert who was an influential scholar of maritime law in France also said that not being *Lex Loci Delicti* on the high sea, an inherent rule of maritime law on the solution of the problem of choice of governing law must be found in the cases of collision between vessels which fly different flags and he expressed his opinion that *Lex Fori* as a last resort should be applied in such cases[32].

However, on the application of *Lex fori* to the cases of collision between vessels on the high sea, the problem of "forum shopping" by plaintiff should be also solved. Then, paying attention to the amendment of the CCP in 2011 in Japan, the dismissal of action under the special circumstances has been codified as Art.3-9 as mentioned previously. In this circumstance, now Japanese courts can avoid the unfair and unreasonable forum shopping by the plaintiff on the ground of Art.3-9 of the CCP not a mere case law, even if

[29] Marsden, *Collisions at Sea*, 622 (13th ed. 2003).
[30] John Wheeler Griffin, *The American Law of Collision*, 44 (1949), Thomas J. Schoenbaum, *Admiralty and Maritime Law*, vol. 2, 132 (4th ed. 2004).
[31] DMF 1966, 408 (Cour de Cass. 9 Mars 1966).
[32] Georges Ripert, *Droit Maritime*, Tome 3, 20 (1953).

Lex Fori is applied to the case. Therefore, it seems that the application of *Lex Fori* is enhanced its reasonableness by this amendment of the CCP. But the factors which should be considered in the cases of collision between vessels must be defined to some extent to make this view more forcible, because it appears that the question whether the international jurisdiction is recognized or not must be foreseeable for the parties and a rash dismissal must be also avoided for the benefit of not only defendants but also plaintiffs.

Summary of TOMAC Arbitration

"STAR ISLAND"

Sale of ship – NIPPONSALE 1993 – Construction of MOA Clause 5 - Whether alleged defect was an 'average damage affecting her present class'

Claimants: Buyers (Liberia)
Respondents: Sellers (Panama)
Tokyo, 3 December 2010

Facts and Discussion

Common ground between the parties

1. On 5 August 2006 the Claimants/Buyers inspected the vessel "STAR ISLAND" (container ship built in 1995 by Murakami Hide Shipbuilding Co., Ltd. in Japan; 6,384 gross tons, 8,713 deadweight tons, Loa 115.02 meters, Lpp 105.50 meters, Breadth 18.20 meters, Depth 11.00 meters, Maximum Summer Draft 8.00 meters, powered by Diesel engines capable of producing 6,080 PS; 400 TEU, classed by NK; hereinafter referred to as the Vessel) at Shanghai. On 21 August the Vessel's price was provisionally agreed between the parties to be US$9,200,000. On 30 and 31 August a second inspection was held in Japan after the Claimants were informed by the Respondents/Sellers that the Vessel had once run aground. By a Memorandum of Agreement ("MOA") on the NIPPONSALE 1993 form dated 1 September 2006 the Respondents agreed to sell and the Claimants agreed to buy the Vessel for US$9,160,000.
2. The MOA contained the following clauses:
   Clause 5 DELIVERY CONDITION: The Sellers shall deliver to the Buyers the Vessel substantially in the same condition as when the Vessel was inspected by the Buyers at the place mentioned in the preamble, fair wear and tear excepted, but free from outstanding recommendations/notations and average damage affecting her present class with all her class, national and international trading certificates clean, valid and unextended at the time of delivery.
   Clause 15 ARBITRATION: Any dispute out of this Agreement shall be submitted to arbitration held in Tokyo Maritime Arbitration Commission ("TOMAC") of the Japan Shipping Exchange, Inc. in accordance with the Rules of TOMAC and any amendments thereto, and the award given by the arbitrators shall be final and binding on both parties.

Clause 16 INSPECTION: The Vessel has been accepted by the Buyers after their superficial inspection of the Vessel at Shanghai, China, on 5th August, 2006 and at Naikai Zosen Corporation, Takuma Works, Japan, on 30th -31st August, 2006 and their inspection of the Vessel's class records. Therefore, this purchase is definite and outright with no further inspection except underwater inspection as per Clause 19 herein.

3. On 13 September the Buyers paid US$916,000-, representing 10% of the purchase price, to the Sellers.
4. Some time on or before 24 September the Buyers suggested that the delivery place should be altered from Innoshima, the original delivery place, to Itozaki, the suggested new place of delivery and that the Buyers' engineer should be allowed to be on board the Vessel during the short voyage. The distance between Innoshima and Itozaki is about 10 miles.
5. On 24 September the Vessel shifted from Innoshima to Itozaki.
6. On 25 September the Sellers tendered the Notice of Readiness.
7. On 26 September the Sellers broker received a notice from Buyers' broker to the effect that on 24 September the Buyers' engineer, who had been allowed by the Sellers to be on board the Vessel during the short voyage from Innoshima to Itozaki, heard an incessant, abnormal and loud noise at the stern and became aware of an irregular or uneven motion of the rudder stock in the steering gear room. (The Sellers do not agree that there was an abnormal noise or an irregular motion of the rudder stock. The Sellers only agree that they received such notice from the Buyers' broker.) On the same day the Claimants gave notice to the Respondents that they were calling off the closing and instructed their Bank not to make payment of the balance of the purchase price. On 27 September and later days the Claimants proposed a joint inspection to the Respondents who, relying on Clause 16 of the MOA, declined to participate in a further inspection.
8. On 5 October the Buyers obtained from the Hiroshima District Court an order for preservation of evidence. A judge of the court attended the same day on board the Vessel lying at anchor off Itozaki, examined the condition of the upper part of the rudder stock while the rudder blade was turned up to 33 degrees to both port and starboard, the examination of which was video-recorded. The judge also examined condition of the rudder trunk beneath the steering gear room of which the photographs were taken. The judge examined as well deck and engine log books on board of which the photostat copies were taken.
9. On 6 October the Claimants sent a message to the Respondents which read: WE REFER TO SELLERS E-MAIL OF 6TH OCTOBER RECEIVED VIA BROKERS THIS MORNING AND WE SEE THAT YOU LEAVE US NO CHOICE BUT TO

ACCEPT DELIVERY OF THE VESSEL AS IS. THIS IS THEREFORE TO CONFIRM THAT WE SHALL PROCEED WITH THE CLOSING AND TAKE DELIVERY OF THE VESSEL WITHOUT PREJUDICE TO OUR POSITION UNDER THE MOA, I.E. THAT THE CONDITION OF THE VESSEL DOES NOT CONFORM TO THE TERMS OF THE MOA. INSTRUCTING OUR BANK TO REMIT THE BALANCE 90% PLUS THE 10 DAYS LIQUIDATED DAMAGES, AT $8,000 PER DAY FOR 10 DAYS AS PER MOA, PLUS BUNKERS ETC. WE ANTICIPATE THE CLOSING TO TAKE PLACE ON 10TH TUESDAY AS MONDAY IS A PUBLIC HOLIDAY IN JAPAN …"

10. On 10 October the protocol of delivery and acceptance was signed by both parties and the Vessel was delivered to the Claimants.
11. On 20 October the Buyers advised the Sellers that as a result of the Russian Maritime Register of Shipping's inspection of the Vessel during the period from 12 to 19 October at Onomichi, Japan, the classification society pointed out that the excessive movements of the rudder stock was observed; required that the excessive movement of the same should be rectified by 19 November 2006; recommended that full inspection after dismantling of the rudder and rudder stock should be carried out; prohibited the Buyers to put the Vessel in commercial operation; allowed her only to proceed in ballast condition under her own power to a dry-dock in China for repairs of the rudder stock. The Buyers suggested that the Sellers should attend the expected inspection in China. The Sellers declined the Buyers' suggestion.
12. The Buyers/Claimants claimed US$502,463.45 for the repairs to the rudder, dry-dock charges and related losses.

The Claimants stated as follows:

1. Pursuant to Clause 5 of the MOA ("Seller's Warranty against Defects"), the Respondents were obligated to deliver the Vessel in a condition free from outstanding recommendations/notations and average damage affecting her present class which in turn means that the Vessel should be delivered in a condition without any defects affecting the seaworthiness of the Vessel.
2. The "superficial inspection" referred to in Clause 16 of the MOA was not an inspection of the efficiency and performance of the Vessel's machinery and appurtenances but of the Vessel's apparent condition only. Furthermore, the words of "this purchase was definite and outright" in the same clause were only meant to confirm that the sale was without routine preconditions such as "Subject to Board approval". Therefore, the sale under this clause was still subject to Clause 5 of the MOA as well as to Article 570 of the Civil Code of Japan.
3. After the Vessel was delivered in October 2006, the Vessel's rudder system was

surveyed at Onomichi and the following recommendation was issued by Russian Maritime Register of Shipping.

> NOTE 2: Upon operation test of steering gear excessive movements of the rudder stock have been detected. It was found necessary to submit rudder and rudder stock dismantled completely for the inspection and rectifying aforesaid defect.
>
> NOTE 3: Taking into account the deficiency mentioned above, in item 2, Conditional Classification Certificate to be issued with validity till 19.11.2006. The Vessel is allowed to proceed to Dry Dock by her own power in ballast condition for repairs of the rudder stock. Any other commercial operation until fulfillment of Requirements #1 is prohibited.
>
> Requirements 1: Rudder and rudder stock is to be submitted dismantled completely for the inspection and rectification of excessive movements of the rudder stock till 19.11.2006.

4. NK's maximum allowance for clearance with respect to carrier bearing for the Vessel was 3.00 *mm*. Therefore, the clearance of the carrier bearing (F-A 2.32 *mm*; P-S 4.80 *mm*) of the rudder stock as measured by calibration method in China on 23 October 2006 indicates the existence of defects of "average damage affecting her present class" within the meaning of Clause 5 of the MOA. In addition evidence shows lack of water tightness between the steering gear room and the rudder trunk located there beneath at the time of the delivery in violation of the NK Class Rules.
5. The delivery of the Vessel having such defects without notice to the Claimants was a breach by the Respondents of Clause 5 of the MOA or, alternatively, such delivery without notice was a concealment of the defect for which the Respondents are liable in tort. The damage amounts to US$502,463.45 plus interest of 6% per annum to be accrued from the date following the date of service of this arbitration application until the date of full payment.

The Respondents stated as follows:

1. The Respondents' crew members had never noticed the alleged noise and the Vessel had been operated at all times without any trouble.
2. The Claimants asked the Respondents for their permission to have the second inspection saying: "In view of the Respondents' non-disclosure that the Vessel was in dry dock while the MOA was being negotiated, and the non-disclosure of the reported damage to the vessel, the Claimants would now like to re-examine the vessel which examination will include without limitation:

> Further to the underwater inspection, the measurement of the main engine deflection and the rudder clearance as same is balanced rudder type (easily

could be affected by a grounding)."

The wording of the request indicates that the intention of the second inspection was focused on the rudder. Moreover, the Respondents agreed to reduce the price by US$40,000 in response to the Claimants' demand for a discount of US$100,000 to allegedly compensate for the cost of future possible repairs which might be necessitated by the grounding in the past.

3. The protocol of delivery was signed clean without any reservation of the Claimants' right under the MOA in contrast with the wording of the Claimants' message of 6 October.
4. Clause 5 of the MOA should be read literally. "Present class" in the clause was NK and the Vessel was classed by NK without any recommendation at the time of the delivery. At the time of the sale the Vessel had no relationship with the Russian classification society, whose recommendations would not affect the parties' obligations under the MOA.
5. "Average damage" in Clause 5 of the MOA meant casualty damage or damage occasioned by a peril which would be covered by insurance as opposed to defects through wear and tear or old age. The Claimants' surveyor wrote in his survey report that the defect was the result of wear and tear caused by passage of time and that the defect was not associated with any external factor such as contact damage to the rudder blade. Therefore, by the wording of Clause 5 the alleged defect was of a kind for which the Respondents were expressly excepted from liability.
6. While NK Rules provide for certain maximum allowance for clearance with respect to neck bearing and bottom bearing, the same are silent on this point with respect to carrier bearing.
7. Water tightness between the steering gear room and the rudder trunk there beneath was maintained at the time of the delivery.

Decision and Reasoning:

1. Although the governing law was not stipulated in the MOA, by choosing to contract under the terms of the NIPPONSALE 1993 form which included a provision for TOMAC arbitration in Clause 15, the Tribunal considers that the parties impliedly agreed that Japanese law would be applicable to this case. This was affirmed by both parties at the first hearing held on 9 July 2007.
2. The main issues here are, first, what is the proper construction of Clause 5 of the MOA and second, whether, at the time of the delivery, "average damage affecting her present class" existed in or on the Vessel. However, the Respondents' submission that the words "(T)he Vessel has been accepted by the Buyers---this purchase is definite and outright with no further inspection" in Clause 16 of the MOA, together with the

fact that the protocol of delivery was signed by the Claimants without reservation, deprived the Claimants of their right to claim damages may constitute a third issue. Under the circumstances, if the third issue is resolved in favor of the Respondents/ Sellers, then the first and second issues need not be considered. Therefore the Tribunal will consider the third issue first.

3. The Tribunal denies such submission. The wording of "definite and outright" in Clause 16 of the MOA represented only the closure of the negotiation and did not deprive the Claimants of their right to claim damages. And the description of "(T)he Claimants hereby accept delivery, title and risk of and to the Vessel pursuant to the terms of the MOA" in the protocol is construed to mean "delivery ---in accordance with terms of the MOA " and cannot be construed to mean that the Vessel satisfied the terms of the MOA at the time of the delivery.
4. Whether the Vessel satisfied the terms of the MOA depends on the following two issues.
   (1) The proper construction of Clause 5 of the MOA.

   Claimants' Exhibit No. 20 "SHIP SALE AND PURCHASE" third edition published by LLP in 1998 describes to the effect that the words "and free of average damage affecting class" frequently amending Clause 11 of SALESFORM 1987 (issued by Norwegian Shipbrokers' Association and adopted by BIMCO in 1956) have been held by certain English judgments to mean "free from casualty damage which would be covered by insurance" and "free from damage affecting class and occasioned by a peril ordinarily covered by insurance – as opposed to defects through wear and tear or general old age". Claimants' Exhibit No. 55 "Explanatory Notes on NIPPONSALE 1993", suggest that the words "free from … average damage affecting her present class" were introduced to NIPPONSALE 1993 from the said "SHIP SALE AND PURCHASE" and English authorities. The Tribunal, considering that Japanese law follows English law in this respect, concludes that the Vessel was required not only to have a currently unblemished class certificate but also to be physically free of "average damage" which would affect her class. Accordingly, under NIPPONSALE 1993 of which the form was employed in the shipsale in question, even where the Vessel was delivered with a clean class certificate, the Respondents would not be free from liability if the Vessel had, at the time of the delivery, any physical average damage, apparent or latent, affecting her class. (By the way, under NIPPONSALE 1999 such Sellers' liability is by far reduced, as Clause 5 (b) provides that upon the Vessel being delivered to and accepted by the Buyers in accordance with this Agreement the Sellers shall have no liability whatsoever for any fault or deficiency in their description of the Vessel or for any defects in the Vessel regardless of whether

such defect was apparent or latent at the time of delivery.)

(2) Whether or not, at the time of the delivery, the average damage affecting her present class existed at the time of the delivery:

The Buyers' allegation consists of following two aspects;

(a) aspect 1: There existed a defect in the nature of an excessive clearance between the bushing of the carrier bearing and the sleeve of the rudder stock:

i) As a result of the Tribunal's examination of the Claimants' Exhibit 32-1 (5 minutes 25 seconds long DVD recorded on the occasion of the Hiroshima District Court's preservation of evidence proceedings held on board the Vessel on 5 October 2006) carried out at the third hearing held in Japan Shipping Exchange, Inc. by use of its audio-visual apparatus on 15 May 2008 in the presence of representatives of both parties and also at the fourth hearing held in the office of the Claimants' representatives, at their request, by use of their own audio-visual apparatus on 3 July 2008 in the presence of representatives of both parties, the Tribunal heard constant and slight sound presumably of an electric motor in the steering gear room of which the frequency was about 410 Hz but did not hear any abnormal sound; the Tribunal observed that the rudder stock moved circumferentially up to about 70 degrees while the rudder was ordered from "wheel amidships" to "hard-a-port", then to "hard-a-starboard", then to "hard-a-port", finally to "wheel amidships" including the times of starting of turning and stopping as well, but did not notice a horizontal movement that would suggest abnormal. The Tribunal is not convinced that there was an excessive clearance by the Claimants' Exhibit 32-1. Therefore, the Tribunal is driven to examine in further depth in this regard.

ii) The words "her present class" within the meaning of Clause 5 of the MOA mean NK and do not mean any classification society other than NK. Therefore, the Tribunal considers that whatever the Russian Maritime Register of Shipping may have recommended or required, such does not have any influence upon the dispute in question.

iii) Claimants' Exhibit 18 (Report of Claimants' surveyor who reportedly conducted survey of steering gear of the Vessel on 23 October 2006 at Chengxi Shipyard in China where the Vessel was dry-docked) shows the clearance of carrier bearing of the rudder stock being F-A 2.32 *mm* and P-S 4.80 *mm*, that of neck bearing being F-A 2.65 *mm* and P-S 3.02 *mm*, that of bottom bearing being F-A 3.93 *mm* and P-S 4.53 *mm* (all

measured by way of calibration) of which the credibility the Respondents argue. The Tribunal goes on to deal with the issue on assumption that the reported values above are reliable for the time being.

iv) While the Claimants assert that NK's maximum allowance for clearance with respect to carrier bearing for the Vessel was 3.00 *mm*, Respondents rebut that NK Rules are silent on the clearance with respect to carrier bearing.

v) Respondents' Exhibit 13 (NK's Manual: Rudder) partly reads "the allowance for clearance at pintle bushing is, depending upon diameter of the pintle, is not to exceed 6 *mm* in diameter in case of Rudder Type D and E or 7.5 *mm* in case of Rudder Type A, B and C . The standard neck bearing clearance is to be 4 *mm*."

vi) Claimants' Exhibit 24 (General Arrangement Plan) shows that the Vessel was installed by Type B rudder as classified by NK in reference to Respondents' Exhibit 13 *[Diagram 2 is omitted from this translation.]*;

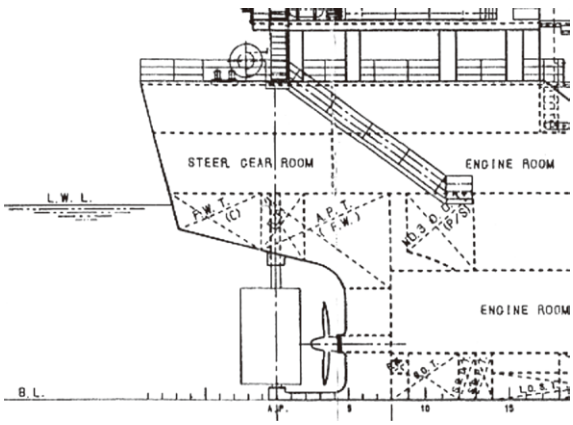

Diagram 1: profile of the stern section of the Vessel

It follows that the allowance for clearance at pintle bushing is, depending upon diameter of the pintle, is not to exceed 7.5 *mm* in this case.

vii) Now, while it is noted that the values of clearance measured in iii) above fall within the allowance applicable to Type B Rudder as shown in v) above, NK's Manual is silent on the maximum clearance to be allowed with respect to carrier bearing.

viii) Claimants' Exhibit 43 (An expert [identified here as "Mr. A"] guidance by Mr. A to marine engineering open to the public through his website) partly reads that "clearance of carrier bearing, which is located upper most of the rudder stock not being subject to corrosion, is normally seen less than 2.00 *mm* evenly F-A and P-S around even in case of an old age.

It would appear that if it is less than 2.00 *mm*, it remains in a safety zone; if it is 2.00 ～ 3.00 *mm*, it requires attention; if it is in excess of 3.00 *mm*, it requires repairs. "

ix) Claimants' Exhibit 44 (The same expert A's opinion) partly reads that "after having graduated from naval architecture section of a university I have had an employment with NK for the period of 44 years---my opinion on allowance of carrier bearing presented in Claimants' Exhibit 43 is based upon my data collected from about 160 vessels surveyed during the period from 1970 to 1982---having examined Claimants' Exhibit 32-1, I presume that the clearance between bearing bush and the rudder stock was much greater than 3.00 *mm* and if I had been the surveyor in charge in active service on the spot, I would for sure have recommended that condition of various sections, including pintle and neck bearing, should, either immediately or soon, be inspected in order to ascertain the extent of wear and tear."

x) The Tribunal pays its high respect to Mr. A for his having made his accumulated knowledge and experience of ship surveying open to the public for many years. The Tribunal still does not deem his opinion in this respect equivalent to one of the rules of NK. The Tribunal finds that NK rules or manual are silent with respect to allowance of carrier bearing.

xi) For the reasons above, the Tribunal reaches a conclusion that there was no damage to carrier bearing affecting her present class at the time of the delivery even if there existed a clearance of 4.80 *mm* at the carrier bearing.

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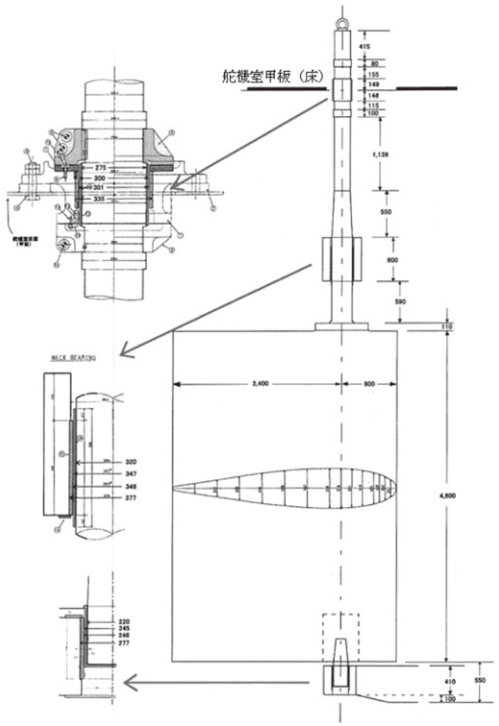

Diagram 3: Rudder Construction of the Vessel

(b) aspect 2: There existed a defect due to lack of water tightness between the rudder carrier and the rudder trunk:

i) Claimants' Exhibit 47 (NK's GUIDANCE FOR THE SURVEY AND CONSTRUCTION OF STEEL SHIPS) [C3.10.1-3(1)] provides that "(I)n rudder trunks which are open to the sea, a seal or stuffing box is to be fitted above the deepest load waterline to prevent water from entering the steering gear compartment and the lubrication from being washed away from the rudder carrier."

ii) "rudder trunks which are open to the sea": From Claimants' Exhibit 30 (MO disc containing still photographs taken on the occasion of the Hiroshima District Court's preservation of evidence proceedings) and Claimants' Exhibit 24 (General Arrangement Plan of the Vessel) it is understood that on board the Vessel a rudder trunk of which the dimension was 120 *cm* fore-and-aft, 140 *cm* port-and-starboard, approx. 200 *cm* high was fitted beneath the rudder carrier separated by 2nd deck steel plate in between and the rudder stock penetrated vertically almost in its middle. The position of the rudder trunk as recognized by the Tribunal is indicated in red in the diagram shown hereunder;

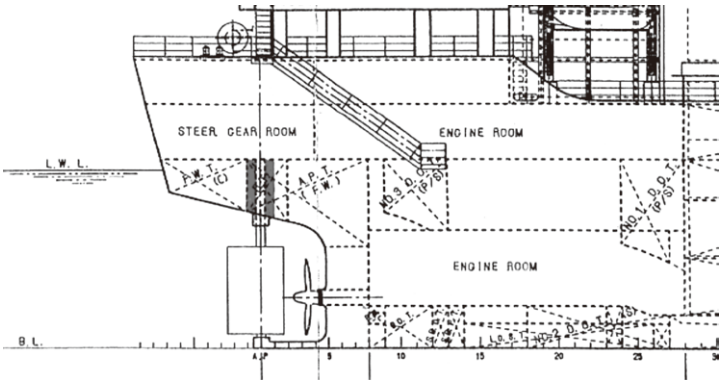

Diagram 4: Position of Rudder Trunk and its form

iii) "steering gear compartment": It indicates the steering gear room in the Diagram 4 above.

iv) "rudder carrier": they are normally understood to mean the full set of components as indicated in Diagram 3 shown above and Diagram 5 shown hereunder but the same as employed by the above provision of [‘C3.10.1-3.(1)] of Claimants' Exhibit 47 are understood by the Tribunal to, in its context, mean rubbing surface between BEARING DISC and CARRIER as indicated by Diagram 5 shown hereunder;

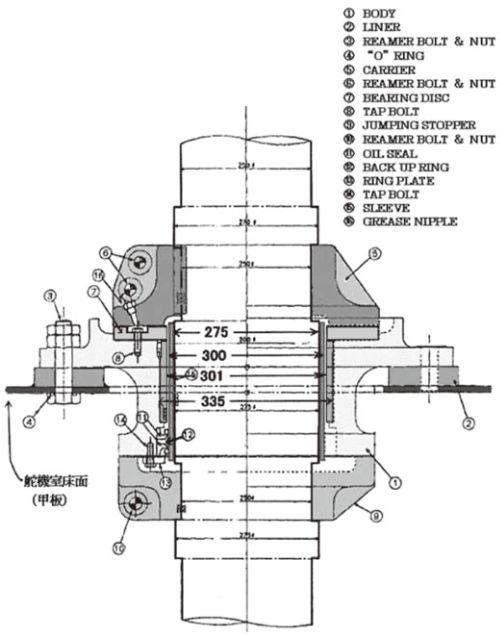

Diagram 5: Rudder Carrier and its components

v) "deepest load waterline" is indicated by L.W.L.(Load Water Line) in Diagram 7 hereunder. Claimants' Exhibit 24 (General Arrangement Plan) indicates it to be 8.00 meters.

vi) "seal or stuffing box": Claimants' Exhibit 35 (RUDDER CARRIER CONSTRUCTION) indicates that it was not a stuffing box but a seal that was equipped on board the Vessel, which corresponds to OIL SEAL appearing at lower left hand side of Diagram 5 hereinabove. Diagram 6 (DET. OF WATER SEALING) is shown hereunder;

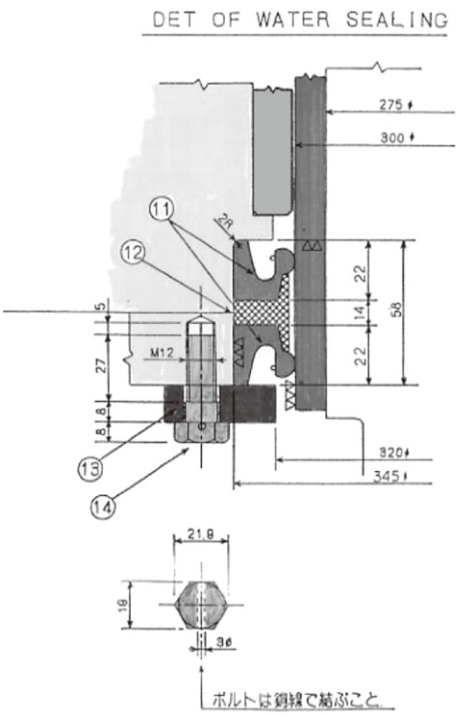

Diagram 6: Details of water sealing

On this diagram the part ⑪ colored in blue is the OIL SEAL of which the component is designated by Claimants' Exhibit 35 to be of Nippon Oil Seal K.K.

vii) Next, the Tribunal deals with the question to what condition the "rudder trunk which is open to the sea" was exposed.

a) Claimants' Exhibit 33 (STERN FRAME CONSTRUCTION) shows that the stern frame is installed with a staunch steel cylinder of which the vertical height being 600 *mm* ; outer diameter being 600 *mm* ; inner diameter of upper 1/3 of the cylinder being 363 *mm*, i.e., 118.5 *mm* thick; inner diameter of lower 2/3 of the cylinder being 377 *mm*, i.e., 111.5 *mm* thick.

b) Claimants' Exhibit 34 (RUDDER CONSTRUCTION) shows that a bushing of which the outer diameter being 377 *mm* and the inner diameter being 348 *mm* is inserted in the lower 2/3 of the above cylinder and supported by RETAINING RING from below. The same exhibit shows that the outer diameter of the sleeve of the rudder stock is 347 *mm*. It follows that the clearance between the sleeve and the bushing is 0.5 *mm* around the sleeve of which the total area is calculated to be about 5.4 cm^2. Because there is no seal between the sleeve and the bushing, water freely comes in and goes out through the interstices while the neck bearing section is submerged under water.

c) On assumption that the Vessel is fully loaded and even keel, the surface of water in the rudder trunk is about 50 *cm* below the 2nd deck level (floor of the steering gear room) as shown in Diagram 7 hereunder;

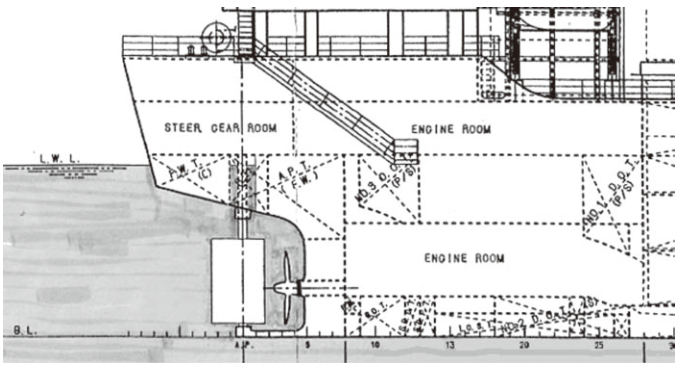

Diagram 7: load water line (even keel) and the surface of water in the rudder trunk

d) On assumption that the Vessel is fully loaded with the trim by the stern (stern draught being 75 *cm* greater than that of even keel, as is normally the case of a vessel such as this), the surface of water in the rudder trunk reaches the ceiling (lower side of the 2nd deck plate) of the rudder trunk. That is to say, the level of the floor of the steering gear room in the vicinity of the rudder trunk is lower than the sea-water level outside by about 20 *cm* at aft of the steering gear room and about 15 *cm* at fore of the steering gear room. It follows that if the water tightness between the rudder trunk and the steering gear room is lost, sea-water enters, with the water-head-pressure of about 20 *cm*, the steering gear room, which is flooded with sea-

water of which the depth being about 20 *cm* at aft and about 15 *cm* at fore. This condition is indicated by Diagram 8 hereunder;

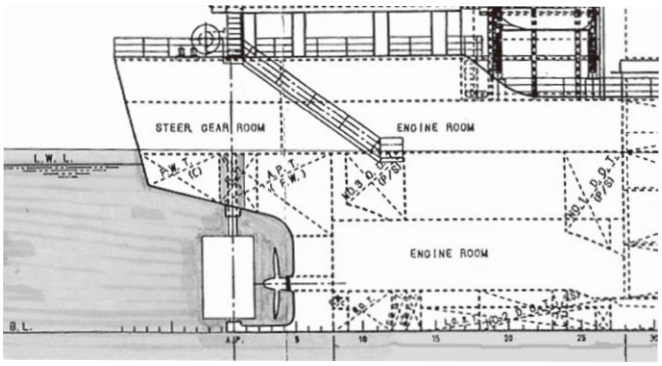

Diagram 8: load water line (trim by the stern), surface of water in the rudder trunk and level of steering gear room

e) When the Vessel is in ballast condition, the rudder trunk is filled up with air alone since water in the rudder trunk, if any, drops through interstices of the neck bearing, as described hereinabove, onto the sea surface. This condition is indicated by Diagram 9 hereunder;

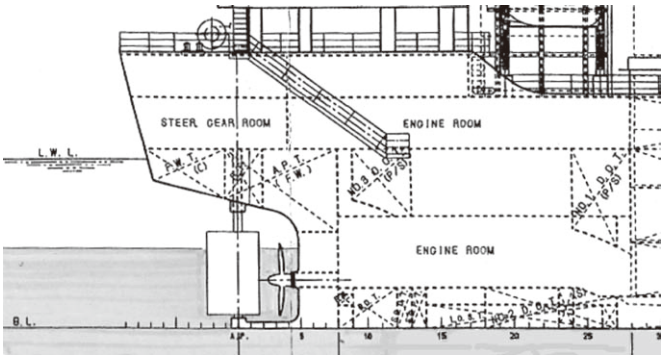

Diagram 9: rudder trunk in ballast condition

viii) Next, the Tribunal deals with the question what was used on board the Vessel as "lubricant" referred to by [C3.10.1-3(1)] of Claimants' Exhibit 47 (GUIDANCE FOR THE SURVEY AND CONSTRUCTION OF STEEL SHIPS).

a) C3.10.1-2(3) of Claimants' Exhibit 47 provides that (T)he bearing part is to be well lubricated by dripping oil, automatic grease feeding, or a similar method.

b) Parties agree that grease was used as "lubricant". The presence of GREASE NIPPLE on Claimants' Exhibit 35 indicates that grease

was injected by hand by use of grease gun, to which parties agree.

ix) The Tribunal's understanding as to general practice of lubrication by use of hand-grease-gun is as follows;

a) Grease is a kind of lubricants and is a soft solid at room temperature. Typical grease looks amber color and semitransparent. The Tribunal assumes for convenient purposes that such typical grease was used on board the Vessel since neither of type nor ingredients nor property of the grease are at issue here.

b) A typical hand grease gun is of a form of metal cylinder of which the length being about 40 *cm* and the diameter being about 6 *cm* to which a lever of about 40 *cm* long is attached alongside. On the tip of the cylinder a nozzle adaptable to the grease nipple is fitted. As the lever is operated up and back, a small plunger mechanism pushes out about one (1) *cc* of grease per stroke, having the pressure of about 200-500 Kgf/cm^2.

c) Inside the tip of a grease nipple a small steel ball is pressed outward against an opening by spring from inside, of which the pressure is normally about 5 Kgf/cm^2.

d) On the other hand, the space in the machines in need of lubrication is devised to form a sort of semi-closed space, in that if it forms an open space, grease would drop or leak outside before it reaches the desired location or, if reached, would drop by gravity or be washed away in short period of time, and if it forms a complete closed space, freshly injected grease (looking amber and semitransparent) is unable to extrude and replace the old grease, which normally looks stained black in color, in the location in need of lubrication. For these reasons, the semi-closed space is devised to keep closed until a certain pressure is applied and allow grease to be extruded out of the space when more pressure is given.

x) The semi-closed space for grease lubrication observed on the rudder carrier equipped on board the Vessel is indicated in red in Diagram 10 hereunder;

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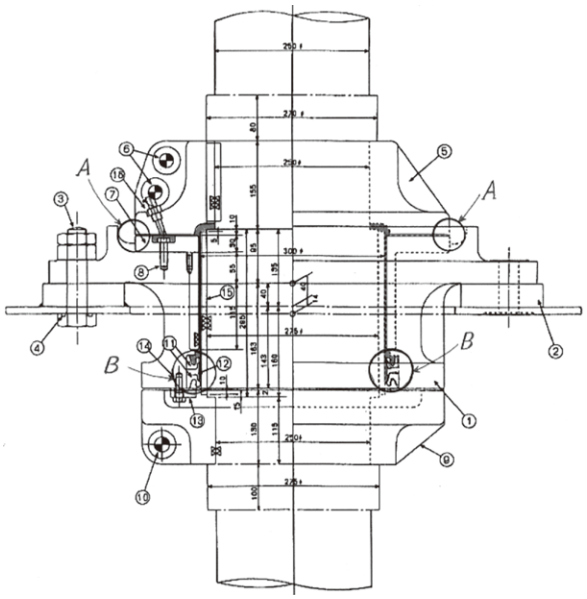

Diagram 10: semi-closed space for grease lubrication

On this diagram, *A* represents the location where old black- stained grease is extruded peripherally, at the final stage of the grease-up operation, from the rubbing surface between the bearing disc and the carrier as pressure is applied by fresh amber/semitransparent grease injected through the grease nipple which is numbered ⑯. On this diagram, *B* represents the location where old black-stained grease is extruded down, at the final stage of the grease-up operation, through interstice between 2 seal rings and sleeve of the rudder stock as pressure is applied from above by fresh amber/semitransparent grease which has come down between bush and sleeve on the rudder stock.

xi) *Translation of the arrangement of circular as well as radial lubrication grooves engraved on the upper surface of the horizontal bearing disc (See Diagram 11 hereunder) and axial and circular lubrication grooves engraved on the inner surface of the cylindrical /vertical bush (See Diagram 12 hereunder) is omitted*.

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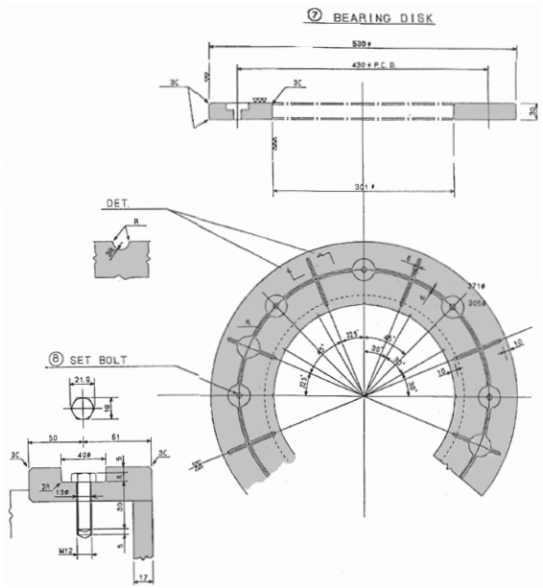

Diagram 11: bearing disc and circular as well as radial lubrication grooves engraved thereon

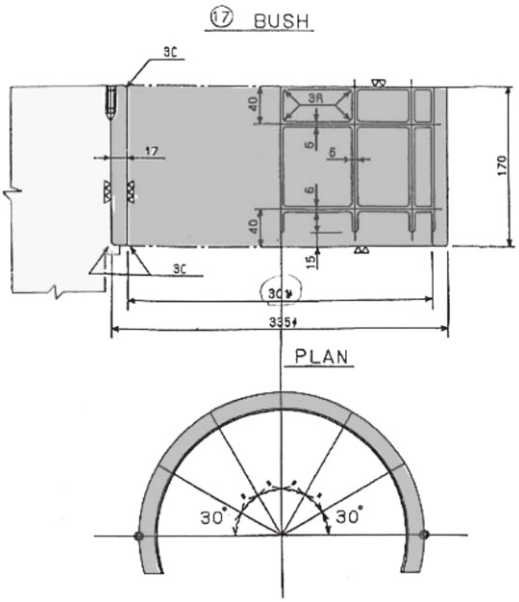

Diagram 12: cylindrical/vertical bush and axial and circular lubrication grooves engraved thereon

xii) Diagram 6 above shows ⑪ OIL SEAL having 2 rings in contact with the sleeve on the rudder stock, of which the component is designated by Claimants' Exhibit 35 to be MG Type Nippon Oil Seal K.K. The material property of the OIL SEAL is not known to the Tribunal, but from its

form and similarity to widely known stern-tube sealing rings of Simplex type, it is estimated to be of rubber or synthetic material of elasticity.

xiii) Although Claimants' Exhibit 35 (Diagram 5) indicates as if both of the two rings served as oil seals, from page 13 of Claimants' Exhibit 43, the fact that the lower ring looks to be devised to cope with pressure from below, that is to say, water from a splash and/or of a certain water-head-pressure in the rudder trunk, the Tribunal understands that these two sealing rings serve as water seals as well as oil seals. The heading of "DET. OF WATER SEALING" (Diagram 6) as appearing on the Claimants' Exhibit 35 endorses the above Tribunal's understanding.

xiv) The total approximate weight of the rudder is calculated to be 7,200 *Kgs*, consisting of pintle section (approx. 230 *Kgs*), rudder stock (approx. 2,300 *Kgs*), outer rudder blade (approx. 3,600 *Kgs*) and internals of rudder blade (approx. 1,070 *Kgs*). While the Vessel is underway, most of the rudder blade is, whether fully loaded or in ballast condition, under water and the rudder receives buoyancy equal to the weight of water it displaces. The volume the rudder displaces is roughly estimated, from Claimants' Exhibit 34, to be 5.5 m^3 resulting in the buoyancy of 5,500 *Kgsf* disregarding the gravity of sea-water. Thus, the total load of the rudder while the Vessel is underway born by the horizontal bearing disc is roughly 1,700 *Kgs*. The area of the upper surface of the bearing disc is, from Claimants' Exhibit 35, calculated to be about 1,494 cm^2. Similarly, the area of the lower surface of the carrier is known to be about 1,400 cm^2. On board the Vessel no bearing that sustains weight of the rudder is equipped on the shoe piece. Therefore all load of the rudder is born by rubbing surface between lower surface of the carrier and upper surface of the bearing disc. It follows that load per cm^2 of the rubbing surface is known to be approx. 1.2 $Kgsf/cm^2$.

xv) *Translation of the Tribunal's understanding of practical operation of injecting grease by use of hand-grease-gun is omitted*.

xvi) With respect to the Claimants' assertion that presence of rust on jumping stopper and bearing disc (Claimants' Exhibits 30 and 18) suggests that the water tightness was lost there and it is therefore highly likely that sea-water entered the steering gear room from the rudder trunk and lubricant leaked out of the Vessel, the Tribunal finds as follows: A Jumping Stopper is located at the uppermost in the rudder trunk and is exposed to water splash or is completely submerged in water depending on draught and trim, as stated above. Therefore, contact with sea-water

was assumed from the time of construction. Claimants' Exhibit 35 indicates that the material property of the jumping stopper is SC42 (a type of cast steel). The jumping stopper takes the form of a deep dish of which the thickness is about 40 *mm*. Thus rust, if any, over the jumping stopper can do no harm.

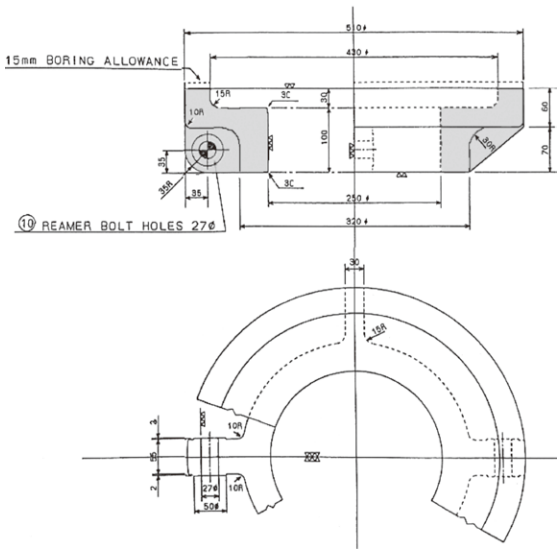

Diagram 13: Details of jumping stopper

The material property of the bearing disc is known to be BC3 (a type of bronze alloy) which is in turn known to be pressure-resistant, abrasion-resistant, corrosion-resistant and of good mechanical property. It is doubtful if the images like rust on the photographs 7, 8, 9 and 15 of Claimants' Exhibit 18 represent rust. Even if they represent rust on the bearing disc, the Tribunal does not consider that the rust falls in the "damage affecting her present class". Some photographs produced suggest that certain apparatus in the steering gear room were rusty. But the Tribunal has noted no evidence of water having entered the steering gear room from the rudder trunk through the 2nd deck. Experience has taught us that some metals including iron and steel tend to get rusted even in the room air, particularly in a marine environment with corrosive spray and sea air. Presence of certain rust in the steering gear room neither prove water having entered there nor prove defect allowing water to enter there.

xvii) With respect to the Claimants' assertion that presence of grease on the jumping stopper as evidenced by 5 photographs of Claimants' Exhibit 30 suggest that water tightness between the rudder trunk and the rudder

carrier was lost in violation of NK Rule [3.10.1] (Claimants' Exhibit 46) and NK's GUIDANCE [C3.10.1-3(1)] (Claimants' Exhibit 47), the Tribunal finds as follows; The Tribunal, having had an opportunity of examining 5 photographs of Claimants' Exhibit 30 as well as A-3 size still photographs printed from the MO disc of the same exhibit, assumes that images of a substance adhered to the surface of lower part of the jumping stopper are those of grease. The Tribunal's understanding of practical operation of injecting grease by use of hand-grease-gun is, however, to continue pumping until old black-stained grease has been extruded by fresh amber/semi-transparent grease through interstices of rubbing surface between the rudder carrier and the bearing disc (shown as *A* by Diagram 10 above) and, in addition, through oil/water seals (shown as *B* by Diagram 6 above), the fact that grease was adhered to the surface of lower part of the jumping stopper is understood to be a piece of evidence for the lubrication operation having been properly carried out. The rudder trunk being inaccessible most of the time, the fact that the grease adhered to jumping stopper remained unwiped is not to be blamed. It was, however, possible that the oil/water seals fractured and grease short-circuited the seals resulting in adhesion to the lower part of the jumping stopper. In this case, however, grease had not reached every part of the system and therefore, the rubbing surface of the bearing disc sustaining the rudder weighing about 1,700 *Kgsf*, after lapse of certain period of time, must have been abnormally worn down. The bearing disc before us was found to be more or less normal as is examined in detail hereafter. Claimants' Exhibit 18 reporting the condition of the rudder after it was dismantled in China is silent about the condition of the oil/water seals.

xviii) *Translation of the Tribunal's reasoning for disallowing Claimants' assertion with respect to alleged dry condition of grease recess in reference to NK's GUIDANCE [C3.10.1-2(3)] is omitted.*

xix) *Translation of the Tribunal's reasoning for disallowing Claimants' assertion that a gap between the inner surface of the back-up-ring and the outer surface of the sleeve on the rudder stock was greater than 2 mm as deemed to be normal, is omitted.*

xx) With respect to the Claimants' assertion that while the clearance between bottom plate of the rudder blade and the upper surface of the shoe piece is 40.0 *mm* on the Plan at the time of building, the Claimants' surveyor found it to be 34.0 *mm* in China before repairs and that the same

surveyor concluded that it indicates that "the rudder blade has been shifted downwards", the Tribunal finds as follows; The Tribunal notes that Claimants' Exhibit 18 carries an article to that effect. Claimants' Exhibit 34 (RUDDER CONSTRUCTION) shows that the distance between the two is 40 *mm*. It follows if the surveyor's measurement was correct, the distance between the two was decreased by 6 *mm*. But it does not necessarily follow that the rudder blade had dropped.

xxi) With respect to the Claimants' assertion that the decrease of the distance by 6.0 *mm* was caused by drop of the rudder which was caused by wear of the bearing disc, the Tribunal finds as follows;

Because the material property of the bearing disc was BC3 (a type of bronze alloy) and that of the carrier was SC42 (a type of cast steel), if the lubrication of the rubbing surface had been insufficient, most of the wear would have occurred on the upper surface of the bearing disc. Did such wear occur? The bearing disc has a circular lubrication groove and eight radial lubrication grooves crossing the circular groove both engraved on the upper surface. See Diagram 11 above. As the Claimants' Exhibit 35 indicates, the cross section of the groove takes a form of a semicircle with the radius of 3 *mm*. It follows that the depth of the groove when new was 3 *mm*.

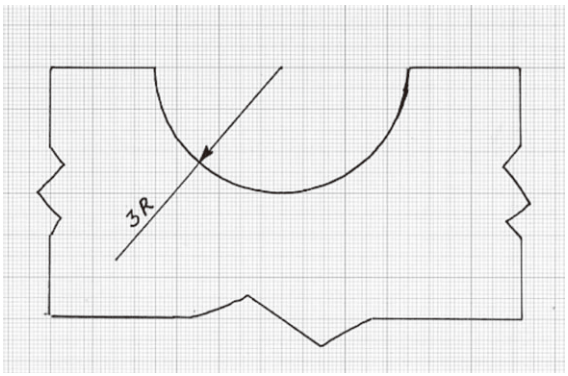

Diagram 14: cross section of the lubrication groove

Therefore, if the upper surface of the bearing disc had been evenly worn by 3 *mm* or more in depth, one would no longer have been able to observe grooves on its surface at all. Photograph 9 of Claimants' Exhibit 18 show presence of lubrication grooves as Diagram 11 illustrates. (In contrast, the photograph 6 on page 15 of Mr. A' s website of Claimants' Exhibit 43 shows an example where lubrication grooves have completely vanished .) Diagram 14 above indicates that the width of the groove on

the surface of the bearing disc is 6 *mm* at the time of building. Photograph 9 of Claimants' Exhibit 18, taken in October 2006 in China shows that the width of the groove was approximately 1/8-1/7 of the diameter of the recess for set bolt of which the diameter is precisely known to be 40 *mm* by Diagram 11 above. It follows that the width of the groove in October 2006 was approx. 5.0-5.7 *mm*, which in turn suggests that the bearing disc was not worn more than 1.0-1.5 *mm* downward. From a different angle, Diagram 5 indicates that the distance from the surface of the bearing disc to the top of the set bolt in the recess was 5 *mm* when new, which follows if the surface of the bearing disc had worn in excess of 5 *mm*, carrier (of cast steel) would have started metal contact with eight set bolts (of steel) resulting in destructive damage on both surfaces, which, if any, could not have been overlooked by Claimants' surveyor when the rudder system was dismantled in October 2006 in China. Claimants' Exhibit 18 is, however, silent in this respect.

xxii) With respect to the Claimants' assertion that the drop of the rudder by 6 *mm* must have rendered the water seals ineffective and it is highly likely that water entered the steering gear room from the rudder trunk through ineffective seals in violation of NK's rules concerning seaworthiness, the Tribunal finds as follows; The Tribunal considers that while there is negative evidence in support of drop of the rudder by 6 *mm*, there does not exist evidence that sufficiently proves drop of the rudder by 6 *mm*. Even if the rudder had dropped by 6 *mm*, the result would have been that the contact point of the seal rings on the surface of the sleeve on the rudder stock relatively shifts upward by 6 *mm* only and water tightness remains unaffected. See Diagram 6 above. The reason why the Tribunal considers that the oil/water seals allow grease to pass downward but do not allow water to pass upward is as follows. If and when the Vessel is fully loaded even keel, the surface of the water in the rudder trunk is about 50 *cm* below the floor of the steering gear room (2^{nd} deck), and, therefore, the steering gear room receives no pressure of water from below. (See Diagram 7 above.) On assumption that the sea is calm, it is the only occasion that the Vessel is fully loaded with the trim by the stern as illustrated by Diagram 8 above. The maximum difference of draught between that of fore and that of aft practically being 1.5 meters, the aft draught is estimated to be 8.75 meters. This condition is illustrated by Diagram 8 above on which the distance between the top of

the rudder trunk and the then load line is about 20 *cm*, which in turn means that the floor of the steering gear room immediately above the rudder trunk receives upward water-head-pressure of 20 *cm* equivalent to 0.02 $Kgsf/cm^2$ disregarding the gravity of the sea-water. Since the level of the seals in question is deemed to be equal to the level of the top of the rudder trunk, the pressure that the seals receive from the sea-water is deemed to be 0.02 $Kgsf/cm^2$. On the other hand the maximum pressure that a conventional hand grease gun can produce is 200-500 $Kgsf/cm^2$ as already explained above and the minimum pressure for fresh grease to pass the grease nipple is approx. 5 $Kgsf/cm^2$ as explained above. Even taking into account that the lubricating space is semi-closed, the pressure that grease applies to seals from inside is estimated to by far exceed 0.02 $Kgsf/cm^2$. This explains why seals of elasticity deform under pressure of 5 $Kgsf/cm^2$ to allow grease to pass downward but the same seals do not deform under pressure of 0.02 $Kgsf/cm^2$ to allow water to pass upward. If and when the Vessel encounters rough weather where stern section submerges, for example, 5 meters under water for a few seconds but repeatedly, the water-head-pressure is 0.5 $Kgsf/cm^2$, which is 1/10 of the pressure that fresh grease applies to the seals from inside.

5. Based upon the foregoing, the Tribunal finds no average damage in or on the vessel at the time of the delivery and, therefore, the Claimants are not entitled to claim damages under Clause 5 of the MOA or Article 570 of the Civil Code or in tort.
   The Claimants' claim is hereby denied.
   TOMAC sole arbitrator: Ikuya Fujii

[The complete arbitration award, rendered in Japanese, is 153 pages in length.]

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