Reform of Japanese Maritime Law

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I. Background

1. Japanese Maritime Law is now in the process of amendment.

Japanese Commercial Code (the "Code") has the provisions about the maritime law in its "Part 3", which includes provisions regarding (1) the contract for carriage of goods, (2) liability of the carrier and/or shipper, (3) bills of lading, (4) the contract for carriage of passengers, (5) General Average, (6) Salvage, (7) Collisions, (8) Marine Insurance and (9) Maritime Lien. Most of these provisions are now being amended.

2. The Code was enacted in 1899 and its Part 3 on maritime law has not been substantially changed until now.

In the period from the first enactment until now, there are lots of changes and improvements in the shipping market, technologies and the relevant international conventions.

Therefore, in order to cope with such changes, the Japanese government, the "Ministry of Justice", started the examination to amend the provisions in the Code in February, 2014 and published their "Provisional Draft" ("Draft") in the last month.

The government is now collecting opinions from the public for the Draft until 22nd May and after examining such opinions, they will make the "Final Draft" within this year and submit it to the Parliament for its resolution within this year or the next.

3. Those provisions in the Code have been understood to apply mainly to the carriage within Japan because the international carriage is governed by 1993 Japan COGSA, which is equivalent to Hague-Visby Rules.

However, some of the provisions in the Code apply directly to the international carriage and the construction of provisions in the Code affects the Japan COGSA, so this amendment process is important for the international carriage bound to or from Japan.

In such a meaning, some important provisions in the Draft are to be introduced

hereafter, together with the author's opinions, for the foreign parties who are interested in the new Japanese law.

II. Obligation of the shipper for dangerous goods

1. The Code does not have any provisions regarding the shipper's obligation for the dangerous goods.

The Draft creates the provision that the shipper has to notice to the carrier before loading that the loading cargo is dangerous, and the shipper is liable for the damage caused by the failure to do so.

However, the Draft describes two opinions about the nature of such shipper's obligation, i.e., that the shipper's obligation is absolute, or that the shipper is liable only if it fails to exercise the due diligence.

2. The principle in Japanese law is so-called "due diligence obligation", i.e., that any person cannot be blamed unless it is regarded to be negligent, or have acted with fault or without exercising the due diligence. Therefore, the above latter opinion is prevailing so far.

3. Japan COGSA, as well as the Hague-Visby Rules, provides that the shipper is liable for the damage caused by dangerous goods if they are loaded without consent by the Master or the Owner, however, it is not described therein what kind of the liability the shipper is to owe.

On the other hand, it was held in the English case, *The Giannis NK* ([1998] 1 Lloyd's Rep. 337), as the Hague Rules case that the shipper's obligation is absolute.

4. However, it is likely that the due diligence obligation is to be adopted, considering its harmony with the principle in law, which will affect very much the construction of Japan COGSA.

III. Error in navigation

1. The Draft does not adopt the exemption due to the error in the navigation by the crews, in the similar way as the Code.

On the other hand, Japan COGSA does have the provision for such exemption.

2. The Japanese Civil Code, which is the basic law for the civil liability, provided that the company should be liable for the damage caused by its employees during doing the business of the company, which seems to be similar to the "vicarious liability" in English law. Under this rule, the shipowner is liable for the damage caused by the crews as their employees.

3. In the discussion for making the Draft, it was contended that the Draft should have the same rules as COGSA or Hague-Visby Rules.

However, the Hamburg Rules or the Rotterdam Rules are known in Japan to abolish the exemption, therefore, the majority has the opinion that the Draft does not need to have such an exemption.

4. It is reported from the government that the Draft permits the freedom of contract, so the Owner and the Cargo Interest can agree the exemption effectively in their contract.

However, it is unlikely that the freedom of contract cannot resolve all of the disputes arising from the situation where the carriage contract is made between the parties who do not have bargaining power equally.

IV. Time Charter

1. The Code does not have the word, "Time Charterer", but has the words as "Owner", "Ship Hirer" (which is understood to be equal to the Bareboat Charterer) and "Charterer" (which is understood as the Voyage Charterer as one of the cargo interests).

The Draft decides to make the definition of the "Time Charter" for the first time.

2. As to the Time Charter, its legal character has been disputed in Japan, i.e., whether it is the "mixture" of the contracts for hiring the vessel and for providing the service by crews, or it is the contract for carriage. The Code also has the provision that the Ship Hirer owes the same liability as the Owner against the third party.

It was once held by the Japanese Supreme Court in 1992 in the collision case that the Time Charterer of "Ship A" has the same character as the Ship Hirer, so it is liable for the damage incurred by the collided "Ship B" as well as the Owner of "Ship A".

3. However, the opinion for the character of the Time Charter as the "mixture" of the contracts is now minority one. Therefore, the Draft is trying to find the definition not to be stuck too much with the dispute about the legal character as described above.

4. Moreover, the key for development of Japanese shipping market seems to be the system of Time Charter. The big shipowners do not like to increase the number of vessels as their assets in their balance sheets under their financial policies, however, they also have to respond to the need for importing huge amount of the materials into Japan. To cope with such situation, the system of Time Charter, by which the ownership of the vessel and the power for deciding her voyage can be divided, has been used by many shipping companies in Japan.

After adopting the definition of Time Charter, the words in the other part in the Code or other regulations should be amended to specify what the word of "Charterer" in each provision shall mean.

V. Combined transportation

1. The Draft makes a new provision for the contract to undertake the carriage by air, land and sea.

The Code does not have such provisions, but such mode of transportation becomes so popular and the Draft decides to make such new provisions.

2. The Draft also makes a new provision for the combined B/Ls which can include the carriage by land and by sea, not by air. It is understood that the B/Ls are not usually issued for the combined transportation which includes the air transportation, so the new provisions in the Draft shall govern the combined B/Ls which represent the carriage by sea and by land.

3. As to the liability of the carrier under such Combined Transportation Contract, the Draft adopts the so-called "network system", which means the liability of the carrier shall be governed by each law which applies to the place, i.e., land, sea or air, where the damage actually occurs. However, the Draft does not have a provision for the situation where it cannot be proved easily where the damage occurred.

Under the Draft, the shipowner has to prove by themselves that the damage occurred on the sea if they want to apply their favorable rules for the carriage by sea.

VI. Maritime lien

1. The Code has the provisions as to which claim creates the maritime lien for the

claimant onto the relevant vessel. For example, the claim for unpaid wage entitles the crews to enforce the maritime lien. The claim for the unpaid price for the bunker gives to the supplier the maritime lien as the claim “necessary to keep the voyage”.

2. The Draft does not change the claims which create the maritime lien, but tries to change the priority among the liens.

It is proposed that (1) the lien for the claim for the damage to the human body or lives should have the first priority, and (2) the claim by the salvor should have the next, (3) followed by the lien for the tax, and then (4) the claim for the necessary to keep the voyage, including the lien by the bunker supplier, should have the fourth priority and (5) the lien for the cargo claim should have the last priority.

3. The Draft also tries to change the priority between the maritime lien and the mortgage.

It is described in the Draft as its opinion that the mortgage should be prior to the liens as described in the above (4) or (5). If this opinion is adopted, the banks shall be prior to the bunker suppliers.

VII. Collision

1. The Code provides to the effect that the colliding two vessels shall owes liability equally for the damage incurred by each vessel when the negligence or blameworthy for each vessel cannot be clearly proved.

However, this rule is quite different from those in the Collision Convention, so the Draft provides that each negligence for each vessel should be examined by the court and each vessel shall be liable against the opposite vessel to the extent of each own negligence.

2. The Code also provides that each colliding vessel shall be liable at 100% against the third party, including the owners of the cargoes on board.

However, this rule is also different from the Convention, so the Draft provides that each vessel shall be liable against the third party to the extent of each own negligence.

In addition, the effect of the so-called “Both-to-Blame Collision Clause” is confirmed in the Japanese practice.

3. The Code provides that the claim for damage caused by the collision shall be time

barred by the elapse of 1 year from the time when the claimant finds the damage and the defendant.

This rule is also unique one, so the Draft provides that the claim due to the collision shall be time barred by the elapse of 2 years after the time of the collision accident. On the other hand, the Draft provides that the claim for the damage to the human body or life due to the collision shall be time barred by the elapse of 3 years from the time when the claimant finds the damage and the defendant.

VIII. Salvage

1. The provisions in the Code were enacted by the entry by Japan to the 1910 Salvage Convention, so most of such provisions are to be amended by the Draft.

The Draft has the provisions similar to the 1989 Convention.

2. As the consequence of adopting the new Convention, the Draft also set out the new provisions for the "Special Compensation" for preventing the environmental damage.

In case the salvor can claim for these provisions, the rule of "No Cure No Pay" is not applied.