Collisions at Sea*

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ABSTRACT

This Article is intended to be an overview of the legal issues arising from ship collisions. Firstly, this paper introduces the international jurisdiction and applicable law concerning ship collisions with foreign element. Secondly, this paper introduces exchange of Letter of Undertaking and arrest of ship based on collision claims which may be a topic of great interest from the viewpoint of practice. Thirdly, this paper introduces liabilities between colliding ships and the same for third parties including cargo interests. Finally, this paper introduces damages resulting from collisions and other matters.

KEYWORDS: Overview of Japanese law and practice concerning ship collisions, Japanese legal procedure (jurisdiction and arrest of ships) concerning ship collisions, Japanese way of thinking about liability and damages arising from ship collisions

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I. INTRODUCTION

This article[1] is intended to be an overview of the legal issues arising from ship collisions. Due to their nature, collision actions can be complex, lead to many different issues and involve different jurisdictions and systems of law. This article only deals with Japanese law except where otherwise stated.

II. INTERNATIONAL JURISDICTION AND GOVERNING LAW

A. International Jurisdiction

In the event of the jurisdiction of a case with foreign element (international jurisdiction), there was no clear general provision of law in Japan. However, the bill to amend the Code of Civil Procedure for addition of provisions regarding the international jurisdiction was passed. The promulgation of the amendment was issued on May 2, 2011 and the amendment will enter into force at the latest by May 2, 2012[2].

Before the codification, the judgments from Japanese courts were piling up, and the following precedent theory (case law) is established[3] as follows:-.

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[1] This article is a revised paper appearing on the proceedings of the Third East Asia Maritime Law Forum.
[2] As of the date when this article was drafted, the amendment has not yet entered into force.
[3] Supreme Court of Japan (Oct. 16, 1981), Tokyo District Court (Jun. 20, 1986) and others.

It is originally a principle that jurisdiction is considered to be as aspect of the sovereignty of a state Generally people or companies who are not within the sovereignty are not under the jurisdiction. Therefore, a defendant who is a foreigner having residence in a foreign country is outside Japanese jurisdiction. However, as an exception to the above, when the case has some kind of legal connection with Japan regardless of the nationality of the defendants, like the case being related to a place within Japanese territory, i.e. the location, the Japanese jurisdiction extends to the defendants. Whether jurisdiction is conferred in such cases or not is decided bearing in mind the fairness between the parties concerned, the judiciary appropriateness and/or swiftness of proceedings. Therefore when the place over which the Japanese court has jurisdiction in accordance with the Code of Civil Procedure is in Japan, in principle, jurisdiction can be conferred. However, jurisdiction is not granted to the Japanese court when there are "special circumstances" that would be against the idea of fairness between the parties concerned, the judiciary appropriateness and/or swiftness of proceedings.

The above case law is considered to be codified into provisions of amendment of the Code of Civil Procedure for the international jurisdiction.

It is stipulated in Article 3-3 item 8 of the amended Code of Civil Procedure that an action relating to a tort can be filed with the court that has jurisdiction over the place where the tort was committed, excluding the case where the results of the wrongful act committed in a foreign country happened in Japan, however that was not normally foreseeable.

In addition, it is stipulated in Article 3-3 item 9 of the amended Code of Civil Procedure that an action for damages due to collision and any other accident at sea can be filed with the court that has jurisdiction over the first place where the damaged ship called at.

In view of these provisions, jurisdiction is recognized when (a) a collision occurred in Japanese territorial waters (unless the collision occurred outside Japanese territorial waters and the damage occurred in Japanese territorial waters but the latter was not normally foreseeable), (b) the damaged ship called at a port of Japan after a collision occurred in high seas or within Japanese territorial waters, provided that there are no "Special Circumstances"[4].

There is judgment in a case where the interests of a damaged ship (a flag-of-convenience ship substantially owned by a Japanese company) filed suit against the opponent party claiming damages arising from a collision between two foreign nationality ships that occurred in the high seas. Even though the damaged

[4] Amended Code of Civil Procedure, Article 3-9.

ship called at a Japanese port after the incident, jurisdiction was not granted to the court. It was held that there were "Special Circumstances" involved because the ship concerned and the crew had left Japan by the time of initiating the litigation[5].

In addition, it is stipulated in Article 5 section 1 of the Code of the Civil Procedures that an action on a property right can be filed with the court that has jurisdiction over the place of performance of obligation, but the opinion shared by majority of scholars and judicial precedents is that jurisdiction in tort claims do not fall within the provision of this section. The amended Code of the Civil Procedures follows the above opinion and judicial precedents.

B. Governing Law

There is an issue of the governing law concerning a collision between ships not registered in a country which is a party to the 1910 Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels, which Japan ratified[6]. Where all persons interested belong to Japan as the Japanese court trying the case, the provisions of the Japanese law are applicable, and the 1910 Convention does not apply.

Under the provision of Article 17 of the Conflict of Laws, Japanese law applies in case a collision occurred in Japanese territorial waters.

In the case of a collision which occurred in high seas there is no clear provision of law but some judgments. The majority of such judgments are to the effect that the National Flag Laws of both ships apply to the case[7].

C. Jurisdiction agreement

In practice in collision cases, jurisdiction agreement is concluded between the parties concerned. Under Japanese law, such an agreement in written is generally valid[8].

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[5] Sendai District Court (Mar. 19, 2009).

[6] Japan has not ratified the 1952 International Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collision on other Incident of Navigation or the 1952 International Convention on Certain Rules Concerning Jurisdiction in Matters of Collision.

[7] Sendai Appeal Court (Sept. 19, 1997) and others. However, it is submitted by some scholars that "lex fori" principle should be adopted.

[8] Article 11 of the Code of Civil Procedure for domestic jurisdiction and Article 3-7 of the amended Code of Civil Procedure for international jurisdiction.

III. EXCHANG OF LETTER OF GUARANTEE AND ARREST OF SHIPS

Under Article 95 of the Limitation of Shipowner's Liability Act (1996 Limitation Convention) ships causing damage to other ships can be arrested because such claims create a maritime lien[9]. The lien becomes time-barred after the lapse of one year from the date of the accident (Article 847 of the Commercial Code).

In practice, securities are exchanged in order to avoid the arrest. The form of security is normally a letter of undertaking (LOU) from a P&I Club or a Hull underwriter although sometimes a bank guarantee or a cash deposit. A claimant seeking security for its claim is normally entitled to be secured for an amount to cover its best arguable claim plus interest and costs. Where a limitation fund or the right to limit is not yet established, a claimant against a ship is normally entitled to be secured for his full claim although in many cases the level of security is based on the limitation figure plus interest and costs.

IV. APPORTIONMENT OF LIABILITY BETWEEN COLLIDING SHIPS

Liability for collision damage is based upon fault[10]. If the colliding ships are all at fault

In case it is impossible to determine the extent of the proportion of the respective faults, the liability of the colliding ships is apportioned equally. On the

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[9] Japan is not a signatory either of 1926 Convention or of 1967 Convention relating to Maritime Liens and Mortgages. The district court which has territorial jurisdiction over the place where the subject ship is currently located has jurisdiction for the enforcement of maritime lien on her by way of public auction. We have two kinds of view regarding governing law with respect to creation and validity of maritime lien. One is that both the law of the subject ship's flag and the law governing the claim to be secured by the maritime lien should apply and provided that both affirm creation of maritime lien, a Japanese court recognize the maritime lien. Another is that only Japanese law applies i.e. the lex fori principle.

[10] The Japan Coast Guard conducts an investigation for criminal proceedings where the collision occurred. The Master and crewmembers are normally interviewed by the Japan Coast Guard. Once the criminal proceeding closed i.e. sentence was finalized, resulting statement is disclosed subject to prosecutors' approval. The Japan Transport Safety Board (JTSB) routinely investigates collisions for purposes of establishing what happened in order to improve safety in the future. JTSB issues and discloses the investigation report to public. Also, Japan Marine Accident Tribunal gives crewmembers with Japanese license administrative punishment. The report and ruling are very convincing evidence.

contrary, in case it can be determined, each ship will bear liability in proportion to their respective faults[11].

Where a collision was occasioned by the fault of both ships and both were damaged in the collision, there is an issue whether their respective claims should be set off against each other and the balance remains (so-called single liability doctrine) or their respective claims should remain separately (so-called crossing-over liability doctrine).

There is no judicial precedent of the Supreme Court about this matter, but a judgment of Tokyo District Court admitted the so-called crossing-over liability doctrine[12]. The doctrine is consistent with the opinion shared by majority of maritime law scholars.

In practice, once the claim has been assessed and percentage representing collision liability is applied to the claims which are then set off to discover the amount payable by one ship to the other. It is this set-off figure to which the limitation provisions apply so that one can never be certain that limitation is of relevance in any matter until final claims are agreed. However, in many cases, it is possible to estimate when limitation will apply. In any event, under the Limitation of Shipowner's Liability Act, if a limitation fund is established and it is ultimately discovered that limitation does not apply i.e. the set-off figure is lower than the limitation fund established, then the party seeking to limit can obtain a refund of the balance from the court and the party seeking to recover will receive only the set-off figure and no more.

V. LIABILITY FOR CARGO LOSS AND/OR DAMAGE IN BOTH-TO-BLAME CASES

In case of collision caused by the fault of the mariners on both ships, in what way should the court determine the liability for the cargo loss and/or damage?

It is stipulated in Article 719 of the Civil Code that

If more than one person has inflicted damage on others by their joint tortious acts, each of them shall be jointly and severally liable to compensate for that damage. The same rule applies if it cannot be ascertained which of the joint tortfeasors inflicted the damage.

If Article 719 of Civil Code applies, both colliding ships should jointly

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[11] Commercial Code, Article 797.
[12] Tokyo District Court (Jul. 20, 1965).

compensate the cargo loss and/or damage.

It is stipulated in Article 797 of the Commercial Code that

If, in case of a collision caused by the fault of the mariners on both ships and it is impossible to determine which side was the more to blame, the damage which has arisen from such collision shall be born by the owners of both ships in equal shares.

If Article 797 of the Commercial Code applies, the colliding ships should assume responsibility for cargo loss and/or damage according to their respective blame for the collision.

It is clear that Article 797 of the Commercial Code concerns the apportionment of liability between the colliding ships but it is not clear whether the article applies to liability for third party claims including cargo claims. There is a judicial precedent to the effect that in such case Article 719 of the Civil Code applies and both colliding ships should jointly compensate the cargo loss and/or damage[13].

VI. DAMAGES

It is beyond the scope of this Article to deal with every possible item of damages, but principal items of damages are dealt with herein.

The law of tort is generally applicable to collisions at sea in the same way as it is applicable to torts on land[14]. In general, owners of colliding ships have to place owners of innocent ships as nearly as possible in the same position as they were before the collision. With respect to this matter the judgments are piling up and the following precedent theory[15] is established in Japan;

Article 416 of the Civil Code[16] as to assessment of loss and damage in case of breach of contract shall apply to tort cases likewise.

It is stipulated in Article 416 of the Civil Code that

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[13] Tokyo Appeal Court (Jul. 22, 1926) and others.

[14] The Lisbon Rules were drafted by the Comite Maritime International (CMI), at Lisbon, in 1985. They have no legal force and they are not designed to deal with the question of liability. Their sole purpose is to provide a uniform method of assessment of damages arising from collision and to save both parties time and expense otherwise incurred in proving their respective claims. However, in Japan it is but seldom that the parties agree that their respective claims arising out of the collision shall be assessed in accordance with the Rules.

[15] Supreme Court of Japan (May 22, 1926).

[16] This concept is considered to have been introduced from England i.e. the famous case, *Hadley v Baxendale*, 156. Eng. Rep. 145 (Ex. 1864).

> (a) A demand for damages shall be for compensation from the obligor for such damages as would ordinarily arise from the non-performance of the obligation-duty.
> (b) The obligee may also recover for damages which have arisen through special circumstances, if the parties have foreseen or could have foreseen such circumstances.

Tortfeasors shall compensate a claimant for loss and/or damage which would have been able to be anticipated to occur before the tort from the view-point of reasonable people.

A. Person to Pay the Compensation

1. Shipowner

When a collision arose from a fault, the person guilty of the fault shall be liable for damages arising out of the collision. Collision is usually caused by faults of crewmembers. The negligent acts/omissions originate from them. However, as for damage arising out of a collision, the amount of compensation to be provided normally is a large sum. Therefore, commonly a person sustaining damage from a collision demands compensation from the owners of the ship at fault, and by virtue of Article 690 of the Commercial Code the owner is liable for damages arising out of the collision.

It is stipulated in Article 690 of the Commercial Code that owners shall be liable to compensate for any damage done intentionally or negligently to another person by mariners such as masters in the performance of their duties.

Both colliding ships are jointly and severally liable to innocent cargo on board. However, the carrying ship can enjoy the nautical fault immunity to its own cargo under the Japan COGSA (which implemented the Hague-Visby Rules.) There is a judicial precedent that the non-carrying ship can enjoy such an immunity for his own defense and liable only in proportion to the fault committed by the non-carrying ship[17].

Even though a bill of lading is not issued, Japan COGSA is applied to the

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[17] Tokyo District Court (May 21, 1930). In this case, ship A collided with Ship B laden with cargo. The collision occurred by the fault of the mariners on both ships. The cargo was damaged by the collision. Ship B issued the standard B/L to the cargo interests. There was a clause of the nautical fault immunity. It is stipulated in Article of 437 of the Civil Code that a release of an obligation effected for one joint and several obligors shall also be effective for the benefit of other joint and several obligors solely to the extent of the portion of the obligation which is born by such joint and several obligors. The immunity clause should be regarded as the release of the obligation and then it should be effective for Ship A.

international carriage of goods by sea. Japan COGSA differs slightly from the Hague Visby Rules. The carrying ship is not liable for loss or damage arising from nautical fault by virtue of Article 3 section 2 of Japan COGSA. In such a case the non-carrying ship is most likely to be able to enjoy such immunity for his own defense. The cargo interests will be able to recover from the non-carrying ship only a percentage of their claim equivalent to the percentage of liability for the collision of the non-carrying ship.

However, there is the possibility of cargo interests suing their carrying ship where they suspect that the collision has been caused as a result of the unseaworthiness of the carrying ship and that the owners of that ship did not exercise due diligence to make the ship seaworthy at the commencement of the collision voyage, thus breaching Japan COGSA (Hague Visby Rules).

2. Bareboat Charterer (a Lessee of Ship)

When a ship is bareboat chartered and a collision occurred by a fault of master or other employees of the bareboat charterer, the bareboat charterer incurs liability for damages arising out of the collision. Relevant provision is Article 704 of the Commercial Code. It is stipulated in that Article that if the lessee of a ship (bareboat charterer) makes her available in navigation for the purpose of engaging in commercial transactions, he shall, in relation to third persons, have the same rights and duties as the owner in connection with matters relating to the use of the ship.

3. Time Charterer

There is an issue, i.e., when a ship which is time chartered collided with another ship at fault, whether the time charterer incurs liability for the negligent act. The Supreme Court decided as follows[18]:-

In order to determine whether the time charterer incurs liability for the collision, consideration must be given to clauses of the time charter party. The ship was exclusively engaged in carriage operated by the time charterer and was under the order, direction and supervision of the time charterer. That is, the ship was employed by the time charterer as if the ship had been possessed by the time charterer. Under the circumstances, the time charterer should be liable for the collision.

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[18] Supreme Court of Japan (Apr. 28, 1992).

An opinion shared by the majority of scholars is that time charterers should assume liability for the collision. However, most of practitioners have different opinion that time charterers are not liable for the collision unless they cause the accident. In practice, time charterers are hardly involved in collision cases as a perpetrator.

B. Total Loss of Ship

Where a ship has sunk as a result of a collision and cannot be salved and restored to useful service in an economical manner, i.e. where she has become an actual or constructive total loss, the owner's damage is measured by the market value of the ship.

1. How much owners of a lost ship can recover from owners of a colliding ship when the market value of the ship has changed between the time of the collision and the time when a hearing is concluded.

We have a leading judgment in Japan[19] as follows:-.

FUKIMARU sank as a result of collision. World War I broke out after several months of the collision and then the demand for ships had gone up sharply. Accordingly the market had exploded, but some time later the market turned and deteriorated. The value of FUKIMARU at the time of conclusion of the court hearing returned to the same level as that at the time of the collision. The plaintiff insisted on compensation at highest value. However, it was held that the recoverable amount should be the just market value when the collision occurred unless the defendant foresaw or should have foreseen that the plaintiff could have earned more than that value by disposal of the ship or other means if the collision had not occurred.

2. Ships without market value

A ship may have a value peculiar to itself, having regard to its special construction or use, or the position or occupations of the owner. The lost ship cannot fairly be valued at a market price, then the basis of assessment may be the special value of the ship to her owners. In these cases the original cost less depreciation, or scrap value may be evidence of value.

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[19] Supreme Court of Japan (May 22, 1926).

3. Insurance

With respect to insurance, the insured value is agreed between owners and hull underwriters. Generally speaking, insured value is agreed based on the amount needed for which the owner will procure a replacement for the insured ship. Therefore, it may be considerably higher or occasionally lower than the market value.

C. Loss of Earnings

The loss of profits or of the use of a ship pending repairs arising from a collision is a proper element of damage.

We have judicial precedents rendered by the Supreme Court that expected earnings in case of a total loss of a ship is not recoverable because the value of the lost ship should cover all losses sustained by the owner[20].

However, on July 17, 1981 the Supreme Court gave a different judgment ruling that expected loss of earnings during the period reasonably required to obtain a replacement ship is recoverable. The case was concerning loss of earnings of a fishing boat owner. The Tokyo Appeal Court also accepted the expected loss of earnings during period reasonably required if he had built a new ship[21]. In that case the plaintiff did not build a new ship. Also, a judgment rendered by the local court recently admitted the expected loss of earnings during the period reasonably required to build a new fishing ship as a recoverable damage[22].

D. Other Recoverable Damages

Salvage costs[23], tugboat charges[24], repair costs[25] including dock costs and towage of a ship, superintendence expense, class inspection expense, wreck removal costs[26], contribution of general average are allowable as head of damage. It is usual to allow the claimants around 10% of the total claim to cover his legal

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[20] Supreme Court of Japan (May 22, 1926).
[21] Tokyo Appeal Court (Mar. 27, 2002).
[22] Miyazaki District Court(Mar. 12, 2010).
[23] Osaka District Court (Oct. 13, 1997) and others.
[24] Osaka District Court (Nov. 9, 1956) and others.
[25] Osaka District Court (Mar. 25, 1986) and others.
[26] Supreme Court of Japan (Apr. 26, 1985) and others.

fees[27]. An injured person may claim against either of two ships or jointly against both ships.

VII. STATUTE OF LIMITAION

Claims arising from a collision at sea are extinguished by prescription upon the lapse of one year[28].

There is a judgment to the effect that by virtue of Article 724 of the Civil Code the claim is time barred if it is not exercised by the claimant within one year from the time when the claimant comes to know of the damages and the identity of perpetrators[29]. There is crucial difference between the judgment and the Convention. The judgment, therefore, is criticized by some scholars.

There is an old judgment to the effect that Article 798 of the Commercial Code did not apply to personal injury claims arising from a collision and by virtue of Article 724 of the Civil Code the claim is time barred if it is not exercised by the claimant within three years from the time when the claimant comes to know of the damages and the identity of perpetrator[30].

If negotiations are underway, it is possible for parties to waive benefits of prescription. Even though the parties cannot conclude such an agreement, claimant's demand nullifies the prescription, whether the demand was made in writing or orally. However, the demand shall not have the effect of interruption of the prescription unless a judicial claim, filing for demand of payment, filing for settlement, participation in bankruptcy procedures, participation in a rehabilitation procedure, participation in a reorganization procedures, attachment, provisional seizure, or provisional disposition is commenced within 6 months[31].

VIII. INTEREST

Interest on damages is recoverable in addition to the principal sum. Normally, interest runs from the date of the collision to the date of payment. However, where the loss was sustained or the expense was incurred after the

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[27] Supreme Court of Japan (Feb. 27, 1969) and others.
[28] Commercial Code, Article 798.
[29] Supreme Court of Japan (Nov. 19, 2005).
[30] Supreme Court of Japan (Apr. 20, 1915).
[31] Civil Code, Article 153.

collision, interest runs from that date to the date of payment. The rate of interest is 5 percent per year[32].

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