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An Insight into Japanese Maritime and Arbitration Law

Yamaguchi Shuji, Managing Partner, Okabe & Yamaguchi

Summary

This article explains the basic Japanese procedure for recognizing foreign arbitration awards, including SCMA awards. This article also introduces readers to the newly proposed amendments to the Japanese arbitration law, which includes provisions for interim measures as provided in the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006.

Overview of Japanese Arbitration Law

The Japanese Arbitration Law (2003) ("**JAL**") is closely modelled after the UNCITRAL Model Law on International Commercial Arbitration (1985) ("**Model Law**"). Article 13(4) of the JAL recognizes arbitration agreements by electronic communications – this is the only one provision that is based on the UNCITRAL Model Law as amended in 2006. The Japanese government is currently in the process of amending the JAL wholly based on the Model Law as amended in 2006. The new JAL is expected to include interim measures as provided in Chapter IV A of the amended Model Law.

Japan has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) ("**New York Convention**"). Arbitral awards issued in member countries of New York Convention are enforceable in Japan in accordance with the JAL. As Singapore has ratified New York Convention, it is clear that SCMA arbitral awards are also enforceable in Japan.

Overview of Maritime Law in Japan

Japan ratified the Hague-Visby Rules, and the Carriage of Goods by Sea Act (1957) as amended in 2019 is in effect. They apply to not only the carriage of goods by bills of lading but also to any contract of international carriage of goods by sea generally, including a carriage by sea waybill.

Under Japanese law, the governing law clause, the jurisdiction clause and the arbitration clause in a bill of lading are considered valid as long as they are not against public policy. Therefore, it is possible for a carrier to issue a bill of lading which is subject to Singapore law and jurisdiction, and/or SCMA arbitration. A Japanese court will regard a Singapore governing law clause, jurisdiction clause and SCMA arbitration clause in a bill of lading as valid.

An arbitration clause is often used in charterparties. The Japanese Commercial Code has provisions on bareboat charterparties, time charterparties and voyage charterparties.
An arbitration clause in a charterparty is considered valid and an SCMA arbitration clause is recognized in Japan. For example the SCMA Model Clause would be recognized by a Japanese court – *"Any and all disputes arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore Chamber of Maritime Arbitration ("SCMA Rules") for the time being in force at the commencement of the arbitration, which rules are deemed to be incorporated by reference in this clause".*

Enforceability of Foreign Awards in Japan

Procedure to execute foreign award

An arbitral award (irrespective of whether the place of arbitration is in Japan) has the same effect as a final and binding judgment. However, an execution order by a Japanese court in accordance with Article 46 of the JAL is required if the award holder

wants to execute the award in Japan (JAL Article 45(1)). A party that intends to have a civil execution based on an arbitral award may file a petition with a Japanese court for an execution order. An execution order is one that allows the civil execution based on an arbitral award, designating the obligor as the respondent (JAL Article 46(1)). The execution order shall be brought before a court which the parties have agreed, or the court which has jurisdiction over the location of the subject matter of the claim, or the court which has jurisdiction over seizable property of the obligor (JAL Article 46(4)).

When filing the petition, the award holder should submit a copy of the written arbitral award, a document proving that the contents of the said copy are the same as those of the original arbitral award, and a Japanese translation of the written arbitral award (JAL Article 46(2)). In addition to these documents, the arbitration agreement and the proof of the notification of arbitration to the respondent will both be required to prove validity of the award. A power of attorney and the company certificate evidencing the authority of the signor of the power of authority, and the company certificate of the respondent, are necessary in accordance with the Civil Procedural Law.

Resisting enforcement of an award

An arbitral award may not be enforceable if the following grounds exist (JAL Article 45(2)):

(i) the arbitration agreement is not valid due to the limited capacity of a party;
(ii) the arbitration agreement is not valid on grounds other than the limited capacity of a party pursuant to the laws and regulations designated by the agreement of the parties as those which should be applied to the arbitration agreement;
(iii) the party did not receive the notice required under the laws and regulations of the country of the place of arbitration in the procedure of appointing arbitrators or in the arbitration procedure;
(iv) the party was unable to present a defence in the arbitration procedure;
(v) the arbitral award contains a decision on matters beyond the scope of the arbitration agreement or of a petition in the arbitration procedure;
(vi) the composition of the arbitral tribunal or the arbitration procedure is in violation of the laws and regulations of the country of the place of arbitration;
(vii) according to the laws and regulations of the country of the place of arbitration, the arbitral award is not final and binding, or the arbitral award has been set aside or its effect has been suspended by a judicial body of that country;
(viii) the petition filed in the arbitration procedure is concerned with a dispute which may not be subject to an arbitration agreement pursuant to the provisions of Japanese laws and regulations; or
(ix) the content of the arbitral award is contrary to public policy in Japan.

These grounds are largely identical to that of the Article 5 of the New York Convention and Article 36 of the Model Law.

The court is required to make an execution order unless one or more grounds provided JAL Article 45(2) exist (JAL Article 46(7)). A court order is different from a court judgment. A court order can be made only by documentary evidence without an oral hearing in court. The losing party can appeal against the execution order to the High Court within 2 weeks from the date of receipt of the execution order (JAL Article 7).

Discussion on grounds to resist enforcement

a. the arbitration agreement is not valid under the governing law of the arbitration (JAL Article 45 (2)(i) and (ii))

An arbitration agreement shall be in writing, such as in the form of a document signed by all the parties, letters or telegrams exchanged between the parties (including

those sent by facsimile device or other communication measures for parties at a distance which provides the recipient with a written record of the communicated content), or other documents (JAL Article 13(2)).

If a document containing an arbitration agreement is quoted in a contract concluded in writing as constituting part of the said contract, such arbitration agreement is considered to be in writing (JAL Article 13(3)). An agreement made by electronic record is also regarded as "in writing" (JAL Article 13(4)). Therefore, an arbitration agreement by email exchange, in a PDF file attached to an email, or by facsimile, are all accepted as valid.

The arbitration agreement in a bill of lading quoted from the charterparty is valid. The respondent may argue that the signor did not have the authority to sign the agreement on behalf of the debtor company or the arbitral agreement was too vague. The latter reason may be argued based on the ground in JAL Article 45(2)(v).

b. the respondent did not receive the notice required by the governing law of the arbitration (JAL Article 45(2)(iii))

The respondent may argue that they did not receive "a written Notice of Arbitration" provided in Rule 4 of the SCMA Arbitration Rules, 3rd Edition. Such an argument is quite commonplace where the respondent did not appear in the arbitral proceedings. The respondent's receipt of the notice can be proved by the certificate of receipt issued by the courier or the affidavit of the local lawyer who served the notice to the debtor.

c. the respondent may challenge that they could not defend the case (JAL Article 45 (2) (iv))

A respondent may argue that the Statement of Claim was not served properly one such that it constitutes the Claimant's failure of their obligation provided Rule 8 of SCMA Rules.

d. The composition of the tribunal or the arbitration procedure was illegal under the law of the arbitration place (JAL Article 45(2)(vi))

The argument that the award is illegal as the construction or the application of law to the merits of the case does not constitute the illegality of the procedure. Only procedural illegality shall be taken into consideration under this ground.

There is an interesting case in Japan in where impartiality and independence of an arbitrator was challenged. It was found that an arbitrator whom belonged to a large law firm issued an award without disclosing the fact that one of the lawyers in the same firm consulted one of the parties because the arbitrator did not know of this fact.

The Supreme Court held on 12 December 2017 that the arbitrator would have been in breach of the obligation to disclose all facts which would likely to give rise to doubts as to his impartiality or independence if the arbitrator was aware the facts or could be aware them by reasonable research. Based on the Supreme Court judgment, the Osaka High Court dismissed the debtor's arguments and supported the execution order because the arbitrator was found to be unaware of such facts during arbitration proceedings.

e. the award should be final and binding (JAL Article 45(2)(vii))

It should be noted that interim measures or preliminary orders granted by the tribunal provided the Model Law as amended in 2006, Articles 17A and B, are not enforceable in Japan as they are not considered final.

The Japanese government will amend the JAL to make interim measures and preliminary orders enforceable in near future.

f. the award to the disputes which may not be subject to an arbitration under Japanese law or against Japanese public policy (JAL Article 45(2) (vii) and (viii))

One observation is that "punitive damage" allowed under US law is considered to be against Japanese public policy.

Judicial Sale of Ship by Execution Order

In relation to judicial sale of ship by execution order, an applicant shall apply for the judicial sale of the ship at the court where the ship exists (Civil Execution Law ("**CEL**") Article 113). The necessary documents for application of the ship judicial sale are the execution order, the arbitration award, the power of attorney, the applicant's company certificate, the respondent's company certificate, and the certificate of ship registry. When a foreign ship is still at sea, the applicant may apply for an order to remove the national certificate of the ship at the District Court of Muroran, Sendai, Tokyo, Yokohama, Niigata, Nagoya, Osaka, Kobe, Hiroshima, Takamatsu, Kitakyushu or Okinawa (CEL Article 115(1)).

When arresting the ship for judicial sale, the court sheriff shall remove the national certificate from the ship (CEL Article 114(1)). The court shall nominate the evaluator of the ship and decide the ship's price based on the evaluator's evaluation (CEL Article 58 and 60). The ship shall be for sale by bid or auction (CEL Article 64). The potential buyer who makes the highest offer is considered the official buyer by the court decision (CEL Article 69). The official buyer shall pay the price to the court by the date decided by the court (CEL Article 78). The money paid to the court will be divided to the applicant and other creditors who joined the judicial sale procedure (CEL Article 84).

Institutional Arbitration and Ad Hoc Arbitration

In charterparties, ad hoc arbitration is sometimes agreed but there are not many ad hoc arbitration proceedings in Japan. It is generally difficult to have ad hoc arbitration without any procedural agreement. Such arbitration completely relies on the arbitrator's ability, knowledge and experience. Therefore, Institutional arbitration like TOMAC (Tokyo Maritime Arbitration Commission) of Japan Shipping Exchange is much more popular than ad hoc arbitration. Japanese users may also look towards the SCMA for its robust arbitration rules.

Nevertheless, while the Japanese courts are more familiar with institutional arbitration, no real difference exists between institutional and ad hoc arbitration under the JAL – the quality of procedure and award is of more importance.

Status of SCMA Awards in Japan

While there is no precedent of an SCMA award enforced in Japan, Singapore is a signatory of the New York Convention and Singapore arbitration is generally well regarded. Theoretically, there should be no problem in enforcing an SCMA award in Japan. On this basis, an award creditor may bring enforcement proceedings in Japan against the award debtors assets.

At the time of writing, the amendment of the JAL is underway. If the new JAL becomes effective in Japan, international dispute resolution will be more important both in Japan and Singapore.

Authors:

Shuji Yamaguchi
Managing Partner
s-yamaguchi@olo.gr.jp

OKABE & YAMAGUCHI
COUNSELLORS AT LAW

Website: www.olo.gr.jp

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