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MARITIME ARBITRATION IN JAPAN

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1 Ratification of Convention and Law

I first review the legal infrastructure of the arbitration in Japan.

Japan has ratified 1923 Geneva Protocol on Arbitration Clauses, 1927 Geneva Convention on the Enforcement of Foreign Arbitral Awards, and 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Japan also entered into treaties of commerce and navigation with many countries, including US, China, Peru, and these treaties mostly include provisions with respect to recognition and enforcement of the arbitral award of a party country in the other country.

Following 1985 UNCITRAL Model Law on International Commercial Arbitration, a new Arbitration Law (Law No. 138 of 2003)[1] was promulgated in 2003 and came into force in March 2004 to replace the old law of 1890 and to promote international arbitration. Though modeled by UNCITRAL Model Law, the said Arbitration Law shall be applied both domestic and international arbitration, when the place of arbitration is in Japan.

2 TOMAC Arbitration

Though there are a minor number of ad hoc arbitration, mostly the arbitrations in Japan are made through organizational arbitration managed by non-administered organizations such as International Chamber of Commerce, Japan Commercial Arbitration Association[2] and Japan Shipping Exchange Inc. (JSE)[3]. As far as maritime arbitration is concerned, most of them are made by Tokyo Maritime

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1 http://www.kantei.go.jp/foreign/policy/sihou/law032004_e.html
http://www.jseinc.org/en/laws/new_arbitration_act.html

2 http://www.jcaa.or.jp/e/index.html

3 http://www.jseinc.org/index_en.html

Arbitration Committee (TOMAC) of JSE. Its history can be traced back to 1913, and TOMAC was set up in 1926. TOMAC will play a role of secretariat to the arbitration and its procedure, and set out its rules for the arbitration, the latest revision came into force on April 1, 2010[4]. By virtue of TOMAC's efforts and more knowledge and experiences of those who (and thus the arbitrators) are in the shipping circles in Japan, I can say that TOMAC are now enjoying good reputations in its arbitration as stable, reasonable and quick.

JSE has publicized various forms of the contract in relation to the shipping business, such as the ship sales, charter and carriage which refer to TOMAC arbitration. People when using these forms often use their TOMAC arbitration clause as is. For instance, NIPPONSALE 1999 sets forth Article 19; "Any and all disputes arising out of or in connection with this Agreement shall be submitted to arbitration held in Tokyo at the 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." TOMAC has had substantial number of the arbitration cases with respect to NIPPONSALE form, while depending on the parties, this TOMAC arbitration clause is sometimes replaced with London arbitration clause.

I have heard from JSE staff that TOMAC receives about 20-30 cases per year, relating mainly to ship sales, charter and bill of lading. Very rare, but I understand that ICC or JCAA has arbitrations relating to the shipping or trade. Though the number is still minor, the salvage arbitration would be tended to be held more often than before, as JSE Salvage Form[5] was revised recently in 2007 to correspond to LOF with scopic form and the form is often used when all or a part of Japanese salvor, shipowner, hull underwriter and P&I club are involved in a casualty. People say that the salvage award tends to be lower than LOF cases.

We are receiving many inquiries from overseas with respect to TOMAC arbitration, and for a part of them, we will represent one of the parties. Personally, I am on the list of TOMAC arbitrators and a member of the committee of salvage arbitration. I will brief TOMAC arbitration procedure below.

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[4] http://www.jseinc.org/en/tomac/arbitration/ordinary_rules.html
[5] http://www.jseinc.org/en/document/other.html

3 Application of TOMAC Arbitration

To apply for TOMAC arbitration, the applicant will need to prepare the following documents (TOMAC Rules Article 5).

1) a letter of complaint
2) an arbitration agreement
3) a certificate of corporate register of applicant
4) a power of attorney
5) a fee for acceptance of the application

You can ask any question to TOMAC with respect to the arbitration procedure, and TOMAC is always very kind to answer to the inquiries. TOMAC's acceptance of the application is very important for time-bar aspect. TOMAC can accept the application if the above (1) letter of complaint and (2) arbitration agreement is submitted to TOMAC. The time bar is stopped when TOMAC receives these documents. The letter of complaint may be submitted even by fax or e-mail, though the applicant later will have to submit it by mail or hand delivery (TOMAC Rules Article 7). You should keep the record of sending fax or e-mail if the time of submission of the application be important from time-bar aspect.

There are three kind of TOMAC arbitration; i.e. Ordinary, Simplified and Small Claim Arbitration. Ordinary arbitration is prepared for the case which claim amount is more than ¥20,000,000, and for cases of ¥20,000,000 or less, Simplified arbitration. In simplified arbitration, TOMAC nominates the arbitrator as considered fair and having no connection with the case. The fee for the arbitration is lessened, which I will mention later. Small Claim Arbitration is prepared for the case of ¥5,000,000 or less. The procedure is further simplified and the fees are lessened further. Only one arbitrator is nominated by TOMAC, and the case is reviewed without the hearing. Only one pleadings plus the letter of complaint/answer are allowed for the parties to submit.

1) Letter of complaint

The letter of complaint shall be addressed to TOMAC to refer a dispute to the

arbitration, and TOMAC will serve the certified copy to the respondent. The way of service is flexible; mail or fax, and in one case in container salvage case where many respondents are involved, TOMAC served the letter of complaint by e-mail.

The letter of complaint, answer and all other pleadings may be in Japanese or in English. The arbitral tribunal later will decide if the procedure be conducted in Japanese or in English.

2) Arbitration agreement

It should be a document to show that an applicant and a respondent have agreed to refer the dispute to TOMAC arbitration. Following Article 7 of UNCITRAL Model Law, Arbitration Law Article 13 provides that the arbitration agreement shall be in writing but its meaning is very broad as including e-mail exchange and no need of the signature.

TOMAC recommends the following wordings for the arbitration agreement, which is made after a dispute arises, but if the parties' intention is clear in the document that the parties will refer the dispute to TOMAC arbitration, TOMAC will take the application even if the agreement is not in the wordings shown below. The wordings such as "any dispute shall be referred to the arbitration by TOMAC of JSE." should be sufficient.

> It is hereby mutually agreed between AAA and BBB for the settlement of any and all disputes arising out of or in connection with this Contract that:
> The disputes shall be submitted to the Tokyo Maritime Arbitration Commission ("TOMAC") of The Japan Shipping Exchange, Inc. for arbitration in Tokyo: The arbitration proceedings and all other related matters shall be conducted in accordance with the Rules of Arbitration of TOMAC of The Japan Shipping Exchange, Inc. (the "TOMAC RULES"): The award given by arbitrators appointed in accordance with the TOMAC RULES shall be final and binding upon both parties: Other arbitration agreements, if any, with regard to such disputes shall become null and void upon the making of this agreement.

The arbitral tribunal has the power to decide the issue if the arbitration agreement is valid for it to conduct the arbitration (see TOMAC Rules Article 2(3)). This "competence of competence" is acknowledged by Article 23 (1) of Arbitration Law. The same Article 23 provides for a party's request to the court to decide the arbitral tribunal's jurisdiction in case the arbitral tribunal issues a separate decision for its jurisdiction. The court will decide the issue, but even if the court decide it positive, the party could challenge the arbitral award later on the ground that the tribunal did

not have the jurisdiction.

The existence or validity of the arbitration agreement is decided in accordance with the law designated by the parties as provided in Article 7 of Japanese Conflict of Laws (General Law concerning Application of Laws: Law No. 78 of 2006; see Article 5(1)(a) of New York Convention). For instance, the parties to the contract designate English law as the governing law while agreeing to TOMAC arbitration, the validity of the said arbitration agreement would be decided in accordance with English law.

Though Article 8 of Japanese Conflict of Laws provides that the law of the place having the most close connection with the parties' action shall be applied in case the parties did not designate a governing law, the court and the arbitral tribunal shall first review implied intention of the parties even if the parties does not designate the particular law (Judgment of Tokyo District Court dated March 25, 1993, though under the old Conflict of Laws). Thus, if the bill of lading with TOMAC arbitration refers to Gencon Charter Party which does not provide for the governing law, the court or the arbitral tribunal would review the parties' intention first and then check the places having connections with the carriage represented by the bill of lading, though there might be not so much difference between the first and second review.

This issue with respect to the governing law for the validity of the arbitration agreement will appear before the court in a way that the defendant raises a defense referring to the arbitration agreement against the plaintiff's legal action before the court. If the court accepts the defense, the court will dismiss the case. Once dismissed, the litigation's effect to stop the time bar is ceased retroactively. Japanese courts do not have a system of staying the action or compel the parties to the arbitration. Thus, when the claimant faces time bar and considers it unclear if TOMAC arbitration agreement is valid, the claimant would better take two legal actions, the litigation and the arbitration. TOMAC Rules provide for the arbitral tribunal's discretion to decide if the arbitration agreement is valid, but usually the arbitral tribunal await the court's decision i.e. dismissal of the case before the court.

3) Certificate of corporate register of applicant

The applicant shall submit the certificate, which shall identify the name, address and the corporate officer who is authorized to represent the applicant, if the applicant is

a legal entity. The applicant does not need to submit the certificate of corporate register to show the representative officer of the respondent. This is convenient, compared with the civil procedure before Japanese court, which demand the plaintiff to submit the certificate of the corporate register of both the plaintiff and the defendant.

4) Power of attorney

In Japanese litigation and arbitration, the power of attorney is necessary, but not necessary to be notarized or legalized. For the litigation, we need it when we file the litigation before the court, but in TOMAC arbitration, we may submit it later. However, as a practice, for both of the certificate of corporate register and power of attorney, we confirm them by e-mail/fax, since if the form has defect, the effect of our application for arbitration to stop the time bar will be lost later.

Who could be a counsel on an arbitration. Though Attorney Law (Law No. 205 of 1949) prohibits in its Article 72 non-attorney-at-law licensed in Japan from doing legal business in Japan, Foreign Attorney Law (Law No. 66 of 1986) provides for certain exceptions in its Article 5-3 and 58-2, by which foreign attorneys could attend TOMAC arbitration as a counsel, as far as the relevant law to govern a dispute is the one which that foreign attorney could do its legal business.

5) a fee for acceptance of the application

It is ¥100,000, and the applicant must pay it when they apply for TOMAC arbitration.

4 Respondent's Answer

Upon the acceptance of the application, TOMAC will serve the letter of complaint to the respondent. The respondent then has to submit the answer to TOMAC and the applicant within 21 days upon its receipt of the letter of complaint. Usually, but when the respondent applies for extension of such period TOMAC will grant extension of the period as considered reasonable.

TOMAC arbitration does not have the default proceeding, by which the tribunal will

hold the award in favor of the applicant in case the respondent did not submit its answer or did not appear at the first hearing.

In TOMAC arbitration, in case the respondent would not take any action, the arbitration would last in the following sequence. (i) Though the respondent has obligation to submit the answer within 21 days (or extended period) upon the receipt of the letter of complaint, the tribunal may not regard the respondent's failure to submit the answer as their admittance of the letter of complaint (Article 33 (2) of Arbitration Law). (ii) The respondent on the other hand should nominate the arbitrator, and in case of their failure, TOMAC will nominate the arbitrator, by which the arbitral tribunal will be set up. This will take some period such as a few months. (iii) At the first hearing date, the arbitral tribunal, though depending on the case, may be able to consider it enough for their issuing the award based on the letter of complaint and evidence the applicant produced, and if so, may close the hearing (TOMAC Rule Article 28), and will issue the award.

5 Arbitrator

The applicant does not need to designate an arbitrator when he applies for the arbitration, but he will have to do so shortly, and if the respondent agrees to the designated arbitrator, that sole arbitrator will preside the arbitration. If the respondent designates a different arbitrator, those two arbitrators will select a third arbitrator, and the arbitral tribunal will consist of three arbitrators.

TOMAC has the list of arbitrators[6], and the parties shall select the one on the said list. The list consists of about 200 arbitrators from shipping companies, shipbuilders, underwriters, scholars, maritime lawyers and the other people related to the shipping circle. You should consult with attorneys or those who know well about those who are on the list to choose an appropriate arbitrator, since there are so various characters, experiences and knowledge as well as relationship there.

The parties could designate a person not listed on TOMAC's list of arbitrator if TOMAC agree to it as there's such need or if two arbitrators designated by the parties consider it necessary. In case any of the parties or two arbitrators

[6] http://www.jseinc.org/search/temp/meibo/arbitrator_search_en.html

designated by the parties fails to designate an arbitrator or a third arbitrator, TOMAC will designate such an arbitrator.

A party to the arbitration could challenge the other party's designation of the arbitrator in case the said arbitrator based on his position or relationship with the parties might not be considered impartial or independent (TOMAC Rules Article 20). TOMAC will decide if the challenge be accepted. Arbitration law provides in its Article 19 (3) (4) for a party's right to refer the issue to the court.

6 Arbitration fee

At the first hearing, the fees for arbitration is decided. TOMAC has the standard arbitration fee tariff, and in most of cases, the cost is decided based on the said tariff shown below. The claim amount is calculated to add the amount of counter claim, if any. Each party shall pay the fee decided. When the arbitral tribunal issues the award, they will also decide how the fees of the arbitration be apportioned.

Claim amount	Fee
<u>For Ordinary Arbitration</u>	
¥ 20,000,000 or less	¥450,000
¥ 20,000,000 - ¥ 120,000,000	¥450,000+(Claim amount - ¥20,000,000)x1%
¥ 120,000,000 or more	¥1,450,000+(Claim amount - ¥120,000,000)x0.2%

For instance, if Claim amount is ¥30mil, fee would be ¥550,000, if ¥50mil, ¥750,000, and if ¥100mil, ¥1,250,000, and if ¥500mil, ¥2,210,000

<u>For Simplified Arbitration</u>	
¥ 10,000,000 or less	¥ 300,000;
¥ 10,000,000 - ¥ 20,000,000	¥ 350,000;
¥ 20,000,000 or more	90% of Fees for Ordinary Arbitration.
<u>For Small Claims Arbitration</u>	5% of Claim amount but ¥100,000 at maximum

Here, it would be convenient to talk about legal fees and the cost other than arbitration fees. As a continental law country, if the claimant could recover the legal cost (except the court/arbitration fee) is the issue of substantial law. Briefly

saying, the legal cost could be recovered in tort and not recoverable in contract, unless there is any agreement to cover legal cost. The arbitral tribunal would find if the claimant/defendant should bear the legal cost under the governing law, as a part of their award, and decide the apportionment of the arbitration fee as a award on the cost separately from the main award.

7 Hearings

Also, at the first hearing date the arbitrator and the parties discuss the relevant issues to be argued. Thereafter, the parties exchange the pleadings and evidence, and if necessary, TOMAC will hold testimony of the witnesses. The period of the arbitration is rather quick. I understand that the ordinary arbitration will last around a year or less, and the simplified arbitration, 3-5 months and the small claim arbitration, 5-10 weeks. The hearings are not open to the public or the audience. However, a staff of the underwriter or the club who has the coverage on the claim or the liability is often allowed to attend the hearing.

8 Rule of evidence

Neither TOMAC Rules nor Arbitration Law provides detailed rules of evidence and the arbitral tribunal may decide the collecting/producing of evidence as it considers appropriate. Very often, the arbitral tribunal consists of one or more Japanese lawyers, and in such case, the way to produce/admit evidence in TOMAC's arbitration is very similar to the Japanese civil procedure though more flexible. Even when the tribunal does not have a lawyer, the secretariat to TOMAC has substantial knowledge and experience, and we have not seen any unusual treatment with respect to evidence in TOMAC arbitration. There is no full discovery procedure in TOMAC arbitration, but increasingly in TOMAC arbitration the parties demand a broad scope of document production, and the arbitral tribunal follows it as far as such demand is reasonable. Japanese Civil Procedure Law introduced in 1998 a certain scope of discovery system, but it is not in anyway comparable to US discovery. The tribunal or either party to the arbitration could apply to the court to conduct the investigation, inspection, testimony etc, provided in the Civil Procedure Law (Arbitration Law Article 35) but as far as I know, TOMAC arbitration has not had any of such application to the court. The evidence may be in English, even when the arbitration procedure is conducted in Japanese. This will save the cost of

the parties.

9 Conciliation

TOMAC at the first stage check with the parties if they could proceed to conciliation to avoid further arbitration procedure, and if they agree, the conciliator will be nominated by TOMAC and if it fails the arbitration will be resumed to proceed. There are also many opportunities for the parties to make amicable settlement before the arbitrators.

10 Award

After closing the hearing, TOMAC targets to let the arbitral tribunal to hold the award in a month more or less. TOMAC arbitral award is enforceable in Japan as same as the final and conclusive judgment of the court.

Under Arbitration Act 1996 in U.K., the award may be challenged not only on the ground of non-jurisdiction/irregularity of the procedure but on point of law. However, Japanese Arbitration Law Article 44 allow the parties to apply to the court to set aside the arbitral award only on more limited grounds, such as :-

(i) the arbitration agreement is not valid due to limits to a party's capacity;
(ii) the arbitration agreement is not valid for a reason other than limits to a party's capacity under the law to which the parties have agreed to subject it (or failing any indication thereon, under the law of Japan);
(iii) the party making the application was not given notice as required by the provisions of the laws of Japan (or where the parties have otherwise reached an agreement on matters concerning the provisions of the law that do not relate to the public policy, such agreement) in the proceedings to appoint arbitrators or in the arbitral proceedings;
(iv) the party making the application was unable to present its case in the arbitral proceedings;
(v) the arbitral award contains decisions on matters beyond the scope of the arbitration agreement or the claims in the arbitral proceedings;
(vi) the composition of the arbitral tribunal or the arbitral proceedings were not in accordance with the provisions of the laws of Japan (or where the parties have otherwise reached an

agreement on matters concerning the provisions of the law that do not relate to the public policy, such agreement);

(vii) the claims in the arbitral proceedings relate to a dispute that cannot constitute the subject of an arbitration agreement under the laws of Japan; or

(viii) the content of the arbitral award is in conflict with the public policy or good morals of Japan.

11 Enforcement of award

As mentioned, Japan is a contracting state of New York Convention, and declared its application to the recognition and enforcement of awards made in the contracting states. Also, Arbitration Law Article 45 and 46 provide for enforcement of the award of arbitration held not only in Japan but also the other country with exceptions for recognition and enforcement, which are almost same as those in New York Convention.

[End]