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The International Comparative Legal Guide to:

Shipping Law 2013

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A practical cross-border insight into shipping law

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Chapter 21

Japan

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1 Marine Casualty

1.1 In the event of a collision, grounding or other major casualty, what are the key provisions that will impact upon the liability and response of interested parties? In particular, the relevant law / conventions in force in relation to:

i) Collision

Japan has ratified the International Convention for the Unification of Certain Rules of Law Relating to Collision between Vessels, Brussels 1910 (hereinafter "1910 Convention"). Where the 1910 Convention does not apply, the private international law of Japan named as Act on General Rules for the Application of Laws (Act No.78 of 2006) provides that a claim arising from a tort shall be governed by the law of the place where the result of the wrongful act occurred, and accordingly the Commercial Code of Japan (Act No.48 of 1899) applies as far as the collision took place within Japanese territorial waters.

Concerning the governing law of a collision claim which occurred on the high seas, there has been a controversy among scholars and legal practitioners. The most prevailing theory is called the "dual applications" theory, under which a collision claim is acceptable only when, and to the extent where, both laws of the flag states of colliding vessels accept such claim.

The provisions of the Commercial Code are almost the same as those of the 1910 Convention, but there are some remarkable differences in respect of time-bar periods between the 1910 Convention and the Commercial Code: firstly, the time bar for a collision claim is provided as one year by the Commercial Code, whereas the 1910 Convention provides for two years. Secondly, the starting point differs from the 1910 Convention which clearly states "from the date of the casualty". Despite the fact that the Commercial Code is silent on that point, the Supreme Court held that the time bar for a collision claim shall be commenced from the date on which the claimant comes to know the damages and to identify the perpetrator. *(59 Minshu 2558 (Supreme Court, Nov.17.2005).)* Thirdly, it is established that a one-year time bar does not apply to personal injury claims arising from a collision.

Regarding the navigational rule, Japan has ratified the Convention on the International Regulations for Preventing Collisions at Sea, 1972 (hereinafter "COLREG 1972"), so the same rule as COLREG 1972 shall be applied on apportionment of liability in a collision case.

ii) Pollution

Japan has ratified the International Convention on Civil Liability for Oil Pollution Damage, 1992 (1992 CLC) and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (1992 FC) including the 2003 Protocol, but has yet to ratify the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (hereinafter "Bunker Convention").

However, the Act on Liability for Oil Pollution Damage (Act No.37 of 2004) provides for strict liability of shipowners and bareboat charterers for pollution damage caused by bunker oil from general ships other than Oil Tankers. In such a sense, it is fair to say that the Bunker Convention is virtually introduced into Japanese domestic law.

iii) Salvage / General Average

Japan is a signatory state of the 1910 International Convention for the Unification of Certain Rules of Law related to Assistance and Salvage at Sea (hereinafter "1910 Salvage Convention") but not of the 1989 Salvage Convention. The Commercial Code of Japan has some provisions for salvage which are nearly consistent with the 1910 Salvage Convention except with regard to the time bar period. It should be noted that the Japanese Commercial Code provides that the time-bar period for a salvage claim is one year, though Japan has ratified the 1910 Salvage Convention which provides for two years.

The Commercial Code has a few provisions for General Average which are insufficient for daily practice of average adjusting. In practice, as most Bills of Lading or similar documents have the clause of York-Antwerp Rules, average adjusters usually apply the York-Antwerp Rules in preparing G/A statement.

iv) Wreck Removal

Though Japan has not ratified the Nairobi International Convention of the Removal of Wrecks 2007, the Act on Prevention of Marine Pollution and Maritime Disaster (Act No.89 of 2012) empowers the Commandant of a Japan Coast Guard to order a shipowner to remove the wreck and/or to take the necessary measures to prevent marine pollution when it is feared that the sea would be polluted by a vessel's waste, wreck or grounding, and such pollution would cause significant repercussions upon conservation of the marine environment.

v) Limitation of Liability

Japan has ratified the Convention on Limitation of Liability for Maritime Claims 1976 including the 1996 Protocol. The Act of Limitation of Shipowners' Liability (Act No.58 of 2005) has been enacted to implement the Convention. Unlike under English law, limitation of liability can be invoked only by constitution of the Limitation Fund.

1.2 What are the authorities' powers of investigation / casualty response in the event of a collision, grounding or other major casualty?

A criminal investigation is conducted by a Japan Coast Guard ("JCG") under the supervision of the public prosecutor against seafarers involved in a casualty, usually the officer of the watch. The officer who caused causalities such as collision or grounding is investigated on the charge of "endangering traffic through negligence in the course of professional conduct" (Art. 129.2 of the Penal Code) under the penalty of a fine of up to JPY500,000. When a casualty resulted in personal injury or death, the offender is also investigated on the charge of "causing death or injury through negligence in the pursuit of social activities" (Art. 211.1 of the Penal Code) which prescribes imprisonment for up to five years or a fine of up to JPY1,000,000. A JCG's investigation is conducted against officers regardless of nationalities as far as the casualty took place within Japanese territorial waters.

As to administrative investigation, the Japan Transport Safety Board ("JTSB") was established in 2008 with the purpose to investigate the cause of the accident and to prevent damage arising from casualty. Investigators of the JTSB conduct the necessary investigations, including interviews with relevant persons, on-site inspection, and collection of related materials. Investigators thereafter analyse collected information and deliver the opinion on the cause of the accident. A final investigation report approved by the Board is disclosed to the public on its website in Japanese and English languages.

There is another administrative investigation conducted against the officer involved in a casualty. The Japan Marine Accident Tribunal ("JMAT"), formerly known as Marine Accident Inquiry Agency ("MAIA"), has been established to impose discipline against seafarers who caused the accident. Necessary investigations are conducted in this connection. The discipline is imposed only against seafarers who hold a seaman's passport issued by the Japanese government, and accordingly foreign seafarers are not subject to the JMAT's discipline and may be questioned only as witnesses even if the casualty took place within Japanese territorial waters.

2 Cargo Claims

2.1 What are the international conventions and national laws relevant to marine cargo claims?

Japan has adopted the Hague-Visby Rules including the SDR protocol and enacted the Carriage of Goods by Sea Act (Japan COGSA, Act No.172 of 1957, last revised in 1992) to incorporate those conventions. Japan COGSA is almost consistent with the Hague-Visby Rules regarding package limitation, time-limits for the damages to the goods, exemption of liability for the damage arising from navigational errors, fire and perils of the sea, etc., but there is a difference in respect of the geographical scope of application. Japan's COGSA provides for strict liability of the carrier for damage occurred during the period from the receipt of the goods to the delivery of the goods (Art. 3.1 of Japan's COGSA), nevertheless that strict liability before loading and after discharge can be relieved by a special agreement between the carrier and the shipper.

Japan's COGSA applies to the carriage of goods by ship from a loading port or to a discharging port, either of which is located outside Japan. As to an inland carriage from a Japanese port to another Japanese port, the Japanese Commercial Code shall be applied.

2.2 What are the key principles applicable to cargo claims brought against the carrier?

Under Japan's COGSA, the claimant who claims loss or damage to the goods against the carrier has to be a holder of a B/L, if issued by the carrier. In the meantime, where a Bill of Lading has not been issued, a person designated as the consignee in the carriage contract is entitled to claim loss or damage against the carrier.

Regarding the identity of the carrier, the Supreme Court ruled that it should be determined by descriptions on the B/L but did not mention whether the so-called "demise-clause" or "identity clause" is valid or not. *(M.V. Jasmine case 52 Minshu 527 (Supreme Court, Mar.27.1998).)* However, it is widely considered that the "demise-clause" is against Art. 15.1 of Japan's COGSA (identical to Art. III.8 of Hague-Visby Rules) and accordingly null and void. A lower court took the same view on the validity of the "demise-clause". *(M.V. Camfair case 1654 Hanrei Jiho 142 (Tokyo District Court Sep.30.1997).)*

The incorporation of jurisdiction clause or arbitration clause into a B/L is widely considered to be valid. The Supreme Court held that a jurisdiction agreement does not necessarily have to be made by a document mutually signed by both parties, but it is enough if a court of a certain country is clearly specified as the court with jurisdiction in a document prepared by a party. *(M.V. Chisadane case 29 Minshu 1554 (Supreme Court Nov.28.1975).)*

Under Japan's COGSA, the carrier has to show the kind, number, quantity and weight of the goods on a B/L but when there is a reasonable ground for suspecting the accuracy of the shipper's declaration or the carrier had no reasonable means of ascertaining the accuracy of the declaration, it is acceptable to remark "said to contain" or "unknown". On the other hand, as to the quality of the goods, Japan's COGSA obliges the carrier only to show the apparent order and condition of the goods. Therefore, a "quality unknown" remark is not prohibited but it does not negate the statement that the goods were received in apparent good order.

2.3 In what circumstances may the carrier establish claims against the shipper relating to misdeclaration of cargo?

The shipper has an obligation to accurately declare the kind, number, quantity, weight, etc. of the goods to the carrier and if the shipper fails to do so, the shipper is held liable for the carrier's loss or damage arising from inaccuracy of declaration (Art. 8.3 of Japan's COGSA). Furthermore, when it comes to dangerous goods, it is interpreted that the shipper has an obligation to notice the dangerous nature of the goods to the carrier. Therefore, if the shipper failed to notice the dangerous nature of the goods by negligence and the carrier had no actual knowledge of the nature, the shipper is to be liable for any loss and damage sustained by the carrier. It should be noted, however, that the Supreme Court held that the carrier with knowledge of the dangerous nature of the goods has to exercise due diligence to inquire necessary measures to prevent occurrence of an incident. *(M.V. Margo case 47 Minshu 3079 (Supreme Court Mar.25.1993).)*

The "dangerous goods" the nature of which has to be declared to the carrier are interpreted to include "legally" dangerous goods banned to carry by-laws. Though there is no court judgment reported on this issue to date, in case the shipper failed to declare that the goods are subject to international trade sanctions and the carrier suffered loss or damage as a result of the misdeclaration, the shipper is likely to be found liable.

3 Passenger Claims

3.1 What are the key provisions applicable to the resolution of maritime passenger claims?

Japan has not ratified the Athens Convention and accordingly the Commercial Code of Japan applies to maritime passenger claims. The carrier is responsible for the passengers' loss of life and injury claims unless they can establish that there is no negligence on their part (Art. 786.1 and 590.1 of the Commercial Code). The amount of damages and losses to be compensated is calculated from the viewpoint of reasonable foreseeability taking into consideration various factors including the circumstances of the passengers' family members on case-by-case basis (Art. 786.1 and 590.2 of Commercial Code). A passengers' loss of life and injury claims are not subject to limitation of liability including limitation of shipowners' liability of maritime claims (Art. 3.4 of Limitation of Shipowners' Liability Act).

4 Arrest and Security

4.1 What are the options available to a party seeking to obtain security for a maritime claim against a vessel owner and the applicable procedure?

In Japan, we have two ways to obtain security for a maritime claim against a vessel owner. One is the arrest of a vessel by virtue of maritime lien and the other is provisional attachment of the assets belonging to the vessel owner including a vessel herself.

(1) Arrest of a Vessel by Virtue of Maritime Lien

Japanese law provides for the type of the claims which give rise to a maritime lien against the vessel. Those claims are pilotage, salvage remuneration, GA contribution, expenses necessary to continue the voyage (usually including bunker claims), crew claims etc. (Art. 842 of Commercial Code), the claims subject to the limitation of shipowners' liability including collision claims and cargo claims (Art. 95 of Limitation of Shipowners' Liability Act), and oil pollution claims (Art. 39-3, 40.1 of Act on Liability for Oil Pollution Damage).

The arrest by virtue of a maritime lien does not require the claimants to put up the counter-security. It is possible to obtain the arresting order at the particular courts in Japan (the twelve courts including the Tokyo District Court, Yokohama District Court and Kobe District Court) even before the vessel to be arrested enters Japan. The claimants are required to file the applications for the public auction of the vessel within five days after arresting the vessel. After the court decides to commence the public auction of the vessel, the owners of the vessel can apply to the court for the release of the vessel by putting up the security to the court in the sum sufficient to cover the alleged claim amount plus interest. The bonds issued by the banks or the non-life insurers to whom the Japanese government has given the licences to run the business in Japan or by Japan P&I Club are acceptable by the courts as such a security. Of course, if the claimants agree, any bonds/Letter of Guarantees including those issued by a foreign P&I clubs or hull underwriters are acceptable and, in those cases, the claimants voluntarily withdrew the application for the arrest and the public auction of the vessel and make the vessel released in consideration of obtaining such bonds/LGs.

It is impossible to arrest sister ships by virtue of maritime lien because the maritime lien attaches to the vessel in respect of which the secured claim accrues.

The shipowners are subject to the maritime lien against the vessel which he puts to demise-charters (Art. 704.2 of Commercial Code). Therefore, it is possible to arrest the vessel to secure the claims against her bareboat charterers by virtue of the maritime lien.

(2) Provisional Attachment

The claimants can attach provisionally the assets in Japan belonging to the debtor to secure all the claims not limited to maritime claims. It is possible to arrest a vessel owned by the debtor while she is in Japan based upon provisional attachment. But, unlike the arrest by virtue of maritime lien, we can obtain the arresting order based upon provisional attachment only after the vessel to be arrested enters Japan.

The claimants are required to put up the counter-security to the court when they apply for the provisional attachment. The amount of the counter-security is fixed upon the courts' discretion taking into consideration various factors including the amount of claims, the extent of presenting a *prima facie* case, and the value of the assets to be attached. As to the form of the counter-security, in addition to cash, the bonds issued by the banks or the insurers to whom the Japanese government has given the licences to run the business in Japan are acceptable by the courts.

The claimants can arrest sister ships by provisional attachment because sister ships are also the assets belonging to the debtor. It is possible to arrest the vessels belonging to the affiliated companies of the debtor provided that the debtor is regarded as the same legal existence with such affiliated companies based upon the doctrine of piercing the corporate veil although it is not easy to meet its requirements.

4.2 Where security is sought from a party other than the vessel owner (or demise charterer) for a maritime claim, including exercise of liens over cargo, what options are available?

As to the bunker claims against time charterers, theoretically speaking, the claimants can arrest the bunker on board the vessel by the statutory lien for the sale of movable (Art. 311(v) of Civil Code) or by provisional attachment. But, practically, it is not so easy to arrest the bunker on board because the court Marshal needs the shipowners' cooperation to remove or transfer the bunker from the vessel.

Under Japanese law, the master of the vessel can exercise possessory lien over cargoes to secure the freight (Art. 753.2 of the Commercial Code of Japan). But, in case of the Bills of Lading marked "freight prepaid", it is difficult for the Master to exercise possessory lien over cargoes against the holders of such Bills of Lading.

5 Evidence

5.1 What steps can be taken (and when) to preserve or obtain access to evidence in relation to maritime claims including any available procedures for the preservation of physical evidence, examination of witnesses or pre-action disclosure?

The Code of Civil Procedure (Act No.109 of 1996, hereinafter "CCP") prescribes some procedures to preserve or obtain access to evidence: witness (including expert witness) examinations (Art. 190 of CCP); observation (Art. 232 of CCP); expert testimony (Art. 212 of CCP); order to produce documents (Art. 223 of CCP); and inquiry to opponent (Art. 163 of CCP). Those procedures are also available even before commencement of a civil action if the court

finds that there are circumstances under which, unless the examination of evidence is conducted in advance, it would be difficult to examine the evidence (Art. 234 of CCP). This procedure for preservation of evidence is conducted upon party's application.

Also, the Attorney Act (Act No.205 of 1949) empowers an attorney-at-law to make inquiries through the Bar association to public offices or public or private organisations for necessary information for his/her case-handling (Art. 23-2 of Attorney Act).

5.2 What are the general disclosure obligations in court proceedings?

There is no general procedure for the disclosure like "discovery" in common law jurisdictions, but an order to produce documents (Art. 223 of CCP) has the function of disclosure. Art. 220 of CCP imposes a general obligation to produce a document upon a holder of a document, and exempts the holder from his/her obligation of production only in the circumstances that the document contains (a) a close relative's secret subject to criminal prosecution or conviction, (b) public classified information, (c) professionals' client privilege, that (d) the document was prepared for exclusive internal use, or (e) the document is related to a criminal case or juvenile case. Among those exemptions, the above (d) is most frequently raised as a defence against a court order for document production.

6 Procedure

6.1 Describe the typical procedure and time-scale applicable to maritime claims conducted through: i) national courts (including any specialised maritime or commercial courts); ii) arbitration (including specialist arbitral bodies); and iii) mediation / alternative dispute resolution.

i) National Court

There is no admiralty/maritime court nor commercial court in Japan, and accordingly the Civil Court has jurisdiction over all civil disputes including maritime claims.

A civil action is commenced by a plaintiff filing a complaint that specifies the parties, statement of claim and allegation of the fundamental facts from which the claim arises under the applicable law.

An arbitration agreement shall be made in the form of signed documents, letters or telegrams exchanged between the parties, or any other written instrument (Art. 13.2 of Arbitration Act). When a written contract refers to a document containing an arbitration agreement clause, the arbitration agreement is presumed to be made in writing (Art. 13.3 of Arbitration Act). If the court finds that the dispute is subject to an arbitration agreement, the action shall be dismissed (Art. 14.1 of Arbitration Act). To the contrary, Japanese courts do not enforce "anti-suit injunction" orders rendered by a foreign court.

After acceptance of a complaint, it shall be served onto the defendant together with a writ of summons for the first hearing for oral argument.

Once a complaint is served, the defendant is required to file a written answer with the court, in which the defendant clarifies which facts alleged by the plaintiff he/she admits and which facts he/she denies. Furthermore, the defendant is required to allege the affirmative defences, if any. After the answer is filed, the first hearing is held in an open court with both parties' presence. Both parties subsequently submit its arguments and documentary evidence in turn, and after several exchanges of the arguments and evidence, in most cases, witness or expert examinations are held at the parties' request to prove the affirmative facts in dispute.

After witness/expert examinations, the court concludes oral argument and fixes a date to render a judgment. The court, however, usually encourages the parties to settle the case before rendering a formal judgment hinting its conclusion if the case goes to the judgment. Then, it is quite often that the case is resolved by reaching a compromise settlement. In case parties do not reach a compromise settlement despite the encouragement of the court, the court renders a judgment in which the court accepts or denies the claim and orders the losing party to bear the minor procedural costs (exclusive of attorneys' fee).

The timescale for the above proceedings in first instance varies on a case-by-case basis, but mostly, one or two years are required. If appealed, it further takes two or three years (or more) to finish the whole proceedings.

ii) Arbitration

The Tokyo Maritime Arbitration Commission ("TOMAC") of the Japan Shipping Exchange, Inc. ("JSE") administers and supervises arbitrations for various maritime disputes in relation to a Bill of Lading, charter party, Sale and Purchase of ships, shipbuilding and ship financing, etc. Though the number of cases is not much, TOMAC arbitration has a long history of more than 80 years and good reputation as an arbitration institution among those who are involved in maritime business in Japan. Accordingly *ad hoc* arbitrations are not so popular in Japan. TOMAC Arbitration Rules are available at the website of the JSE. The timescale for arbitration at TOMAC is one or two years in average.

iii) Mediation

There is a great tendency to encourage the use of Alternative Dispute Resolution including mediation in Japan and the Act of Promotion of Use of Alternative Dispute Resolution (so-called "ADR Act", Act No.151 of 2004) has been in force since April 2007. The ADR Act stipulates the Certification Procedure for an ADR institution and grants some exceptional position regarding interruptions of prescription, etc. to the certified ADR institution in order to promote the use of ADR. However, it is quite rare that mediation is used to resolve maritime disputes in Japan.

6.2 Highlight any notable pros and cons related to Japan that any potential party should bear in mind?

In a tort claim, it is an established practice that the court orders the defendant to pay around 10% of the acceptable amount of the plaintiff's claim as legal costs (i.e. attorney's fee), but even if the defendant succeed in defending a tort claim, the court does not order the plaintiff to pay the defendant's legal costs. Meanwhile, in a contractual claim, it is debatable if the court may order the defendant to pay legal costs.

Regarding the interest rate on maritime claims, a fixed rate of 5% is put on a tort claim and 6% on a contractual claim. However, since those rates are far above market rate, it is now being considered to revise Japanese Civil Code and make the interest rates vary according to the actual market rate.

7 Foreign Judgments and Awards

7.1 Summarise the key provisions and applicable procedures affecting the recognition and enforcement of foreign judgments.

The parties who want to exercise the foreign judgments have to

apply to the Japanese courts for the recognition of them before the application for the enforcement of foreign judgments. Art. 118 of Civil Procedure Code of Japan stipulates the four requirements for the recognition of foreign judgments: i) the jurisdiction of the foreign court is recognised under laws or regulations or conventions or treaties; ii) the defeated defendant has received a service (excluding a service by publication or any other service similar thereto) of a summons or order necessary for the commencement of the suit, or has appeared without receiving such service; iii) the content of the judgment and the court proceedings are not contrary to public policy in Japan; and iv) a mutual guarantee with that foreign country exists.

During the procedures of the above recognition, the service to the defendant is required and Japan does not allow personal service or service by direct mail. Therefore, international services should be done through the official diplomatic channel which usually takes a long time, say, more than one year depending upon to which foreign country the services are done.

7.2 Summarise the key provisions and applicable procedures affecting the recognition and enforcement of arbitration awards.

Japan has ratified the New York Convention and its national law (Arbitration Act of Japan) is consistent with the New York Convention.

The parties who want to exercise the arbitration awards including the foreign arbitration awards have to apply to the Japanese courts for the recognition of them before the application for the enforcement of the arbitration awards. The requirements of the recognition are stipulated at Art. 45.2 of the Arbitration Act of Japan the contents of which are similar to Art. 5 of the New York Convention.

8 Updates and Developments

8.1 Describe any other issues not considered above that may be worthy of note, together with any current trends or likely future developments that may be of interest.

Japan enacted a new law about insurance entitled "Insurance Act" which came into effect on April 1, 2010. Art. 22.1 of the Insurance Act stipulates that the claimant for damages and losses the liability for which are covered by liability insurance has a lien upon insurance payment of such a liability insurance to secure its claim. Therefore, for example, it is possible that, in case of the ships' collision, the shipowners have a lien against the insurance payment of P&I insurance of the opponent's vessel to secure the collision claims in case that Japanese law governs the P&I insurance contract.

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The law offices of Toda & Co. provide domestic and overseas clients with legal services concerning varieties of maritime disputes including collision, grounding, fire or explosion, oil pollution, charter party disputes, limitation of liability, arrest of ship, bunker/other supply claims, salvage, towage, ship's S&P, ship building, wreck removal, etc. The firm has a history of nearly 40 years since the law office of Fujii & Toda was established in 1977. The founding partner, Mr. Mitsuhiro Toda is one of the leading maritime lawyers in Japan and is listed as panel of arbitrators in the Japan Shipping Exchange, Inc. The firm is reputed as a boutique law firm with special expertise in maritime business and has a moderate number of members including 5 lawyers, 2 ex-mariners (deck and engine), and 1 claims manager.

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