UK DEFENCE CLUB
125 YEARS NEW

SOUNDINGS

June 2013

Guide to Japanese Maritime Arbitration

Is Japan ever going to be an arbitration friendly jurisdiction for foreign parties?

Introduction

Although Japan has had a national arbitration law since 1890, relatively few arbitrations have occurred in Japan. Japan's low arbitration rates can be attributed to the cultural emphasis on harmony in social relations and consensual dispute resolution as opposed to more confrontational methods of resolving disputes. Notwithstanding this, 40% of the disputes that have been referred to Japanese arbitration were maritime related. Further, the current market is seeing a number of joint ventures entered into on the basis of the Japanese saleform, NIPPONSALE 1999, which provides for Japanese arbitration. The question then arises as to whether Japanese arbitration has become more internationally acceptable?

What follows below is a brief background to Japanese arbitration and a summary of some of the key principles, including comment as to how they should be interpreted.

Background

Arbitration was historically impeded in Japan by the inadequacy of the old 1890 law ("the 1890 Law"). Adopted as part of the 1890 Code of Civil Procedure, the 1890 Law was a literal translation of the 1887 German Code of Civil Procedure and included little detail concerning arbitration, particularly concerning the arbitration process.

The position, however, changed in 2004 when Japan's new Arbitration Law ("the Arbitration Law") entered into effect and replaced the 1890 Law. The Arbitration Law governs arbitration proceedings that have their seat in Japan and is based on the UNCITRAL Model Law ("the Model Law"). Whilst conforming for the most part to the Model Law and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention"), the Arbitration Law provides certain unique rules in order to meet Japan's specific needs. It was also the legislators' intention to make the new arbitration law as compatible as possible with the Model Law, so as to develop an entirely new law in line with today's global standard and to encourage international arbitration in Japan.

Japanese Maritime Arbitration is available in both institutional and ad hoc arbitration. The former is one in which a specialised institution intervenes and takes on the role of administering the arbitration process. Each institution has its own set of rules which provide a framework for the arbitration and its own form of administration to assist in the process. The latter is where the parties agree upon a form of arbitration that is specific to a particular contract or dispute without referring to any arbitral institution. Institutional arbitration is far more popular in Japan and the Tokyo Maritime Arbitration Commission ("TOMAC") of the Japan Shipping Exchange ("the JSE") is involved in maritime business in Japan and is the leading maritime arbitral body dealing with arbitrations involving maritime disputes. TOMAC resolves disputes arising under bills of lading, charterparties, contracts relating to the sale and purchase of ships, shipbuilding, ship financing, manning and so forth.

TOMAC resolves disputes arising under bills of lading, charterparties, contracts relating to the sale and purchase of ships, shipbuilding, ship financing, manning and so forth.

The Arbitration Law and the Rules of TOMAC

NIPPONSALE 1999, published by the JSE, is frequently and increasingly used for the international sale and purchase of ships and it includes a TOMAC Arbitration Clause. The standard TOMAC Arbitration Clause is as follows:

June 2013

Guide to Japanese Maritime Arbitration
continued

An arbitration may be conducted in English if foreign parties are involved and foreign qualified lawyers may represent the parties in arbitral proceedings and attend hearings

"Any dispute arising from or in connection with this Charter Party (or Contract) shall be submitted to arbitration held in Tokyo by the Tokyo Maritime Arbitration Commission (TOMAC) of the Japan Shipping Exchange, Inc. in accordance with the Rules of TOMAC and any amendment thereto, and the award given by the arbitrators shall be final and binding both parties".

Every case referred to TOMAC is dealt with in accordance with the Rules of TOMAC which are subject to the Arbitration Law. The TOMAC Rules complement and sometimes supplement the Arbitration Law. The Simplified Rules of TOMAC and the Rules of Small Claims Arbitration Procedure of TOMAC are applied to claims up to JPY20 million and JPY5 million respectively.

TOMAC

Commencement of a TOMAC arbitration
In order to commence a TOMAC arbitration, a claimant has to submit an application which contains a statement of the claim, and details of it, together with supporting documents and filing fees. The fees are usually JPY100,000. Upon receipt of the service of the claim and its acceptance by the Secretariat of TOMAC, the defendant has 21 days within which to file a defence. The same fees apply where an application for a counterclaim is filed.

Arbitrators
In a dispute involving two parties both the claimant and the defendant each appoint an arbitrator from the TOMAC List of Arbitrators and the two arbitrators then nominate a third arbitrator. The list consists of commercial men from the shipping industry, lawyers, professors and similarly experienced individuals.

Where either party does not make a nomination, or where there are more than two parties to an arbitration, unless otherwise agreed by the parties, TOMAC will make the appointment, taking into account the intention of the parties.

The Rules provide that an appointed arbitrator(s) must have no connection with either party or with the matter in dispute. However TOMAC may appoint a person or persons not on the TOMAC list if it deems such an appointment necessary.

Language / Legal representation
An arbitration may be conducted in English if foreign parties are involved and foreign qualified lawyers may represent the parties in arbitral proceedings and attend hearings with or without employing Japanese qualified lawyers (although, in practice, they do usually employ Japanese lawyers).

Proceedings and Hearings
At an early stage of proceedings, a tribunal will usually agree with the parties the issue(s) to be determined, evidence to be filed, timetable and so on. The parties would usually try to cooperate in this and in relation to any timetable set down.

A tribunal may conduct an oral hearing to give the parties the opportunity to clarify certain issues or, alternatively, an arbitration may proceed on the basis of documents alone. No disclosure system is available in Japan.

The Tribunal may, at any stage of the proceedings, attempt to facilitate settlement of the whole or part of a dispute, and the written consent of the parties is not a prerequisite to this.

Awards
Arbitration awards published in Japan have the same effect as a final and conclusive court judgment. As such, it may not be appealed to the local courts unless, for example, there are significant procedural errors, the arbitration agreement was invalid, the composition of the Tribunal or the proceedings were not in accordance with the laws of Japan.

Although the Rules are silent on the issue of confidentiality, the general principle is that arbitration proceedings should be confidential. Accordingly, the award may only be published with the agreement of the parties and provided that the identities of the parties are not disclosed.

In recent years there have been significant changes to the law in relation to the enforcement of arbitration awards, whether domestic or international.

Japan is a signatory to the New York Convention ("the Convention"). As such, TOMAC arbitration awards issued in Japan are enforceable in New York Convention signatory countries, subject to the limitations contained in the Convention.

Recognition and enforcement of arbitration awards in local courts / in other jurisdictions

The local courts
In recent years there have been significant changes to the law in relation to the enforcement of arbitration awards, whether domestic or international. As such, TOMAC arbitration awards rendered in Japan have the same effect as a final and conclusive court judgment.

The Arbitration Law provides for the enforceability of an arbitration award without the need for an oral hearing whereas the previous 1890 Law required the court to hold an oral hearing before ruling on the enforceability of an award, which significantly delayed enforcement. Under the Arbitration Law, a party seeking enforcement of an award must apply to the court for a decision. Once obtained, this decision can be enforced according to the Japanese Civil Execution Act.

Other jurisdictions
Japan is a signatory to the New York Convention ("the Convention"). As such, TOMAC arbitration awards issued in Japan are enforceable in New York Convention signatory countries, subject to the limitations contained in the Convention.

Enforcement of foreign awards
Awards made in a state that is also a party to the Convention can be enforced in Japan. The Arbitration Law adopts the provisions of the Model law on the recognition and enforcement of awards and includes no reciprocity requirement. This is an important development for the enforcement of international awards in Japan because while Japan is a party to the Convention, it made precisely such a reciprocity reservation to its obligations under the Convention. As a result, an arbitration award is theoretically enforceable even if it was issued in a jurisdiction that is not a signatory to the Convention.

Costs
The Tribunal has the power to decide the level of fees for an arbitration, which are payable in advance. This is calculated in accordance with the value of the claims and the TOMAC tariff.

If there is no agreement between the parties to the contrary, each party has to bear the costs it has incurred in relation to the proceedings. The Rules of TOMAC do not provide that the unsuccessful party should always bear the costs of an arbitration.

If there is agreement between the parties then a tribunal has the discretion to apportion costs in accordance with the Rules of TOMAC. The courts have the power to review a tribunal's ruling on costs in accordance with the procedure to set aside or refuse recognition and enforcement of an award.

Conclusion

The Arbitration Law modernised arbitration in Japan by introducing a simple procedure, eliminating the Japanese language requirement and easing the restrictions on the selection of arbitrators and these changes are reflected in the Rules of TOMAC. As a consequence, the arbitration process in Japan is now broadly what one would expect to encounter in any other arbitration friendly jurisdiction. Furthermore, the Arbitration Law and the Rules of TOMAC allow a Tribunal to attempt to facilitate settlement between the parties (although it restricts this power by requiring the consent of the parties). Efforts by Japanese arbitrators to encourage settlement and avoid "all or nothing" awards have played a significant role in the willingness of foreign parties to arbitrate in Japan, thereby enhancing Japan's reputation as an arbitral centre. In fact, various TOMAC arbitration cases in respect of sale and purchase disputes under NIPPONSALE Form have been reported and many foreign interests regularly obtain a favourable result. If this continues to be the case then it can be expected that the appeal of the Japanese arbitration process will continue to grow.

If Members have any questions concerning Japanese arbitration please contact your usual contact at your local Managers' office.

UK DEFENCE CLUB
125 YEARS NEW

THE UK Defence Club
Thomas Miller Defence Ltd, 90 Fenchurch Street, London, EC3M 4ST
tel: +44 207 283 4646 fax: +44 207 204 2131
email: tmdefence@thomasmiller.com web:www.ukdefence.com