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The Legal 500 Country Comparative Guides

Japan

SHIPPING

Contributor

TMI Associates

Jumpei Osada

Partner | josada@tmi.gr.jp

Masaaki Sasaki

Partner | msasaki@tmi.gr.jp

Yuki Shiraishi

Senior Associate | yshiraishi@tmi.gr.jp

This country-specific Q&A provides an overview of shipping laws and regulations applicable in Japan.

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JAPAN
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1. What system of port state control applies in your jurisdiction? What are their powers?

Japan has entered into a memorandum of understanding on port state control in the Asia-Pacific region (known as the "TOKYO MOU"), which is one of the most active regional PSCs. Thus far, the TOKYO MOU has been used to carry out concentrated inspection campaigns with other PSC MOUs each year, which generally last for several months. The TOKYO MOU introduced the New Inspection Regime a few years ago, under which vessels are categorised as High-Risk Ships, Standard-Risk Ships or Low-Risk Ships based on a consideration of the vessel type and age, flag, recognised organisation, company performance, and number of deficiencies and detentions.

Vessels are detained by the PSC in the event that the condition of the vessel or its crew fails to substantially satisfy the requirements of the applicable conventions to ensure that the vessel can proceed to sea with no danger to the vessel or persons on board and no threat of harm to the marine environment. The Ministry of Land, Infrastructure, Transport and Tourism ("MLIT") publishes a list of the vessels detained in Japan on its website.

2. Are there any applicable international conventions covering wreck removal or pollution? If not what laws apply?

Japan has ratified various major maritime conventions covering pollution, such as the 1992 CLC Convention and the Fund Convention, MARPOL 73/78 with its Annexes, SOLAS, and other relevant rules and regulations. These conventions, etc. are incorporated into or codified by Japanese local laws and regulations.

In May 2019, the Japanese Diet approved the ratification of both the Nairobi Convention and the Bunker Pollution Convention 2001, as well as amending the Act on Liability for Oil Pollution Damage and other related domestic laws, which came into force on 1 October 2020. The amendments to the Act on Liability for Oil Pollution Damage mainly purport to bring such legislation into line with these conventions. The gist of the amendments lies in: (i) expanding the scope of the vessels which are required to obtain compulsory insurance; (ii) admitting a direct claim against an insurer for compensation for loss and damage arising from bunker oil or wrecks; (iii) limiting the defence arguments which may be made by the insurer other than the defences which such owner may have been entitled to invoke against the claimant; and (iv) recognition and enforcement of judgments made by the state parties under the Bunker Pollution Convention 2001.

3. What is the limit on sulphur content of fuel oil used in your territorial waters? Is there a MARPOL Emission Control Area in force?

The Law Relating to the Prevention of Marine Pollution and Maritime Disaster sets out requirement of maximum sulphur content of 0.5% m/m (mass by mass) for marine fuel oil in Japanese territorial water. This is mostly identical to the worldwide low sulphur regulation, which is known as the global 2020 sulphur cap. The Law also requires the vessel to use marine fuel oil of maximum sulphur content of 0.1% m/m in a MARPOL Emission Control Area, such as the North America area, the Baltic Sea area etc.

4. Are there any applicable international conventions covering collision and salvage? If not what laws apply?

Japan has ratified the 1910 Collision Convention and the Convention on the International Regulation for Preventing Collisions at Sea 1972, which have each been promulgated and enforced as domestic laws. While there was previously a major difference between the 1910 Collision Convention and the applicable domestic law in terms of the relevant limitations period, such gap has

now been resolved by the reform of the Commercial Code which was enacted on 1 April 2019.

Japan has ratified the 1910 Salvage Convention, but not the 1989 Salvage Convention. The Lloyd's Standard Form of Salvage Agreement ("LOF") and the Japan Shipping Exchange ("JSE") Form of Salvage Agreement are the two forms most widely accepted by salvage operations in Japan. In the absence of a specific agreement between the parties, the Commercial Code applies and provides that: (i) the basic principle is 'no cure, no pay'; (ii) the labour and costs incurred as a result of any necessary measures to prevent or reduce environmental pollution are taken into account in determining the amount of salvage reward (as special compensation); and (iii) the limitations period for making a claim for the salvage reward is two years from the time of salvage, etc.

5. Is your country party to the 1976 Convention on Limitation of Liability for Maritime Claims? If not, is there equivalent domestic legislation that applies? Who can rely on such limitation of liability provisions?

Japan is a party to the LLMC Convention 1976 and the LLMC Protocol 1996, both of which have been implemented into the Act on Limitation of Shipowner Liability. The increase in the limits of liability brought about by the amendment of the Protocol 1996 have been applied under the Act, which was amended in line with the amendment of the Protocol 1996 and came into effect on 8 June 2015.

Under the Act, an applicant for limitation of liability must be classified as a "Shipowner, etc." or a "Servant, etc." "Shipowner, etc." is widely construed as including shipowners, voyage charterers, time charterers and slot charterers. "Servant, etc." is defined as "the servant of a Shipowner or Salvor, or any other such person whose actions the Shipowner or Salvor is responsible for". Such applicant must file an application with the local District Court to initiate limitation proceedings, and once the court has found the application appropriate, it will order the establishment of a limitation fund by cash equivalent to the liability limit or by guarantee made by a bank, insurance company or P&I club.

6. If cargo arrives delayed, lost or damaged, what can the receiver do to secure their claim? Is your country party to the 1952 Arrest Convention? If your country has ratified the 1999 Convention, will that be applied, or does that depend upon the 1999 Convention coming into force? If your country does not apply any Convention, (and/or if your country allows ships to be detained other than by formal arrest) what rules apply to permit the detention of a ship, and what limits are there on the right to arrest or detain (for example, must there be a "maritime claim", and, if so, how is that defined)? Is it possible to arrest in order to obtain security for a claim to be pursued in another jurisdiction or in arbitration?

Japan has not ratified either the 1952 Arrest Convention or the 1999 Arrest Convention, and therefore neither Convention is applicable to an arrest in Japan. Under Japanese law, the arrest of a vessel may be based upon: (i) a maritime lien (described in more detail in question 8); (ii) a ship mortgage; or (iii) a provisional attachment order. An arrest by maritime lien or ship mortgage can usually be considered as the first option by creditors due to its ease of use, as long as they have a claim secured by such maritime lien or ship mortgage.

If the creditor has their claim secured by a maritime lien or ship mortgage, such creditor will be entitled to arrest the vessel no matter who the debtor is. On the other hand, if the creditor attempts to arrest the vessel by way of a provisional attachment order, the debtor must be identical to the shipowner (i.e. the registered owner in this context), not the demise charterer or the time charterer of the vessel, whilst any monetary claim of any nature whatsoever against the shipowner can be allowed as grounds for the provisional attachment order.

To the extent that the above basic requirements are satisfied, it is considered that the creditor is likely to succeed in obtaining security for its claim to be pursued in another jurisdiction or in arbitration.

7. For an arrest, are there any special or notable procedural requirements, such as the provision of a PDF or original power of attorney to authorise you to act?

In terms of court procedure rules, the original power of attorney and corporate certificates are required in order to file an application for arrest of the vessel by the authorised lawyers. Additionally, Japanese courts are inclined to request the arresting party to provide original paper documents, but this is subject to the courts and

can be discussed between the lawyers and the judges.

8. What maritime liens / maritime privileges are recognised in your jurisdiction? Is recognition a matter for the law of the forum, the law of the place where the obligation was incurred, the law of the flag of the vessel, or another system of law?

A maritime (statutory) lien over the vessel will arise in relation to the following claims:

(a) a claim listed in Article 842 of the Commercial Code (e.g., claims for death or personal injury, salvage and general average, taxes, pilotage, towage, those arising from the necessity to continue a voyage, and mariners' claims arising from their employment contracts);

(b) a claim subject to a limitation held in accordance with the Limitation of Liability Act; and/or

(c) a claim pertaining to the damage caused by oil pollution resulting from the spill or discharge of oil from a tanker.

It is the widely accepted view in our jurisdiction that the maritime liens (as described above) are required to be recognised by both the law of the flag of the vessel and the law specified by the secured claims to enforce them in Japanese courts, whilst there are some Japanese court cases indicating other views or requirements for the enforcement.

Additionally, it is worth noting that maritime liens are 1-year time barred and have priority over ship mortgages.

9. Is it a requirement that the owner or demise charterer of the vessel be liable in personam? Or can a vessel be arrested in respect of debts incurred by, say, a charterer who has bought but not paid for bunkers or other necessaries?

As described in question 6, if the vessel is arrested based on a provisional attachment order, the shipowner (registered owner) must be a debtor and be liable in personam. If the claimant is entitled to exercise a maritime lien as listed in the Commercial Code or a ship mortgage, it is not necessary for the shipowner to be the debtor. If the debtor is a charterer who has bought but not paid for necessities for the specific vessel, an arrest based on a maritime lien will be successful in relation to the said vessel.

A claim for the necessities to continue a voyage, including a claim for unpaid bunkers, is secured by a maritime lien (see item (a) in question 8 above). Therefore, a bunker supplier, who sold the bunker to a charterer, is basically permitted to arrest the vessel under Japanese law; however, it should be noted that there are several issues with respect to the interpretation of 'necessities' under the Commercial Code and in the governing law of the fuel supply contracts which may bar the creation of a maritime lien.

10. Are sister ship or associated ship arrests possible?

It is not possible for sister or associated ships to be arrested on the basis of execution of a maritime lien.

On the other hand, sister ships can be arrested under a provisional attachment order. It should be added that the associated ships owned by wholly-owned subsidiaries of the shipowner (e.g. a 100% SPC of the shipowner) may theoretically be arrested on the ground of piercing the corporate veil, but this is not usually admitted by Japanese courts.

11. Does the arresting party need to put up counter-security as the price of an arrest? In what circumstances will the arrestor be liable for damages if the arrest is set aside?

The arresting party only needs to provide counter security, such as cash or a bank guarantee, in case of arresting a vessel by way of a provisional attachment order. In this event, the court will determine the security amount at its discretion, and may be, for example, one-third of the vessel's value. In the case of an arrest by maritime lien or ship mortgage, the arresting party does not need to put up counter security.

Japanese courts tend to recognise that the arresting party may be liable to pay damages under specific circumstances. In particular, a tort claim on the ground of wrongful arrest can be made if bad faith or negligence on the part of the arresting party is proved by the shipowner whose vessel has been arrested.

12. How can an owner secure the release of the vessel? For example, is a Club LOU acceptable security for the claim?

If a vessel is arrested based on a maritime lien or ship mortgage, the arrested party must provide security in

the sum of the claim plus the estimated costs to release the vessel. Cash, bank guarantees, insurance bonds and a LOU from a P&I club can be acceptable to the Japanese courts as a form of security.

If a vessel is arrested based on a provisional attachment order, the courts will normally accept only cash as a security to lift the arrest.

13. Describe the procedure for the judicial sale of arrested ships. What is the priority ranking of claims?

Arrest of a vessel based on a maritime lien or mortgage is commenced by a court order for compulsory judicial auction. This means that the arrest of a vessel is automatically part of the judicial auction procedures. On the other hand, arrest of a vessel under a provisional attachment order does not allow for a judicial auction to be conducted until the arresting party's substantive claim is adopted and settled by the courts.

The arrest of a vessel is conducted to satisfy the claims of all potential claimants who have right or title over the vessel or debtor. Thus, the proceeds from the sale of the vessel through a judicial auction are distributed to all claimants who submit a petition demanding distribution, in accordance with the statutory order of priority. The basic priority ranking of claims is: (i) claims for costs of the procedure for the judicial auction; (ii) claims secured by maritime liens; (iii) claims secured by ship mortgages; and (iv) unsecured (ordinary) claims.

It normally takes between 6 and 12 months from the commencement of the judicial sale until its completion (i.e. the completion of distribution to each creditor).

14. Who is liable under a bill of lading? How is "the carrier" identified? Or is that not a relevant question?

Under the Act on International Carriage of Goods by Sea ("JCOGSA") and the Commercial Code as applicable to the carriage of goods by sea, the carrier is liable to a lawful holder of a bill of lading who may make claims for loss, damage or delay of cargo against the carrier under the bill of lading.

If an issue arises as to who is the carrier under the bill of lading, the Supreme Court has established basic rules that have been widely accepted, suggesting that the carrier shall be identified on the basis of the description on the bill of lading. The Supreme Court concluded that the shipowner shall be considered to be the carrier in the case that the bill of lading includes a signature 'for the Master', a demise clause on the reverse side and a statement of receipt of freight by the agent of the shipowner or master, even if the time charterer's logo is on the face of the bill of lading.

15. Is the proper law of the bill of lading relevant? If so, how is it determined?

If a bill of lading indicates a specific foreign law as a governing law, Japanese courts will respect and accept such foreign law. In the absence of a governing law clause in a bill of lading, it would be extremely difficult to predict the decision on what laws should be applicable to and govern the bill of lading. Almost all bill of lading forms issued by Japan-related carriers have a governing law clause.

16. Are jurisdiction clauses recognised and enforced?

The courts tend to broadly admit an exclusive jurisdiction clause on the reverse side of a bill of lading, which means that the courts will dismiss a claim brought to an undesignated jurisdiction under the contract of carriage covered by such bill of lading.

17. What is the attitude of your courts to the incorporation of a charterparty, specifically: is an arbitration clause in the charter given effect in the bill of lading context?

Where a bill of lading has clear clauses or wording for the incorporation of the terms set out in the specific charterparty, the incorporation of such terms (including dispute resolution, arbitration clauses and jurisdiction clauses) into the bill of lading will be adopted by the Japanese courts, but it should be noted that the specific requirements for such incorporation have not yet been clarified by the courts.

18. Is your country party to any of the international conventions concerning bills of lading (the Hague Rules, Hamburg Rules etc)? If so, which one, and how has it been adopted – by ratification, accession, or in some other manner? If not, how are such issues covered in your legal system?

Contracts of international carriage are governed by the JCOGSA, which incorporates the essence of the Hague-

Visby Rules, though with some variations. For example, unlike the Hague-Visby Rules, the JCOGSA extends the period of the carrier's obligation for reasonable care of cargo from receipt by the carrier up to delivery to the receiver.

The JCOGSA has force of law for the carriage of goods by sea when either the port of loading or the port of discharge, or both, is located outside Japan, whether or not the bill of lading is issued. In contrast, contracts for domestic carriage of goods by sea are subject to the Commercial Code.

19. Is your country party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? If not, what rules apply? What are the available grounds to resist enforcement?

As Japan is a contracting state to the 1958 New York Convention, arbitral awards rendered in signatory countries of the Convention are enforceable in Japan, as long as the requirements of the Convention have been fulfilled. On the contrary, the enforceability of arbitral awards in non-party states is subject to the conditions set out in the Arbitration Act.

In cases where the party to an arbitral award attempts to resist its enforcement, the main available grounds are set forth under the Arbitration Act, and are that: (i) the arbitration agreement is not valid due to the limited capacity of a party, etc.; (ii) the arbitration proceedings have serious defects such as lack of proper notice or opportunity for defence; (iii) the arbitral award is not valid on the premise that it contains a decision on matters going beyond the scope of the arbitration agreement, or 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, etc.; or (iv) the content of the arbitral award is contrary to public policy in Japan. These grounds are very similar to those provided in the 1958 New York Convention provides.

20. Please summarise the relevant time limits for commencing suit in your jurisdiction (e.g. claims in contract or in tort, personal injury and other passenger claims, cargo claims, salvage and collision claims, product liability claims).

The time limits/prescription periods as set out in substantive laws vary depending on the nature of the claim. It should be noted here that the revision of the Civil Code came into effect on 1 April 2020 and largely changed these time limits/prescription periods.

General Time Limits / Prescription Periods

Type of Claim	Time Limits / Prescription Periods
Claims in contract (general)	* 5 years from when the creditor becomes aware of the possibility to exercise the right, or * 10 years from when it becomes possible to exercise the right
Claims in contract for damage caused by death or personal injury	* 5 years from when the creditor/victim becomes aware of the possibility to exercise the right, or * 20 years from when it becomes possible to exercise the right
Claims in tort (general)	* 3 years from when the victim first becomes aware of the damage and the identity of the wrongdoers, or * 20 years from when the tort occurs
Claims in tort for damage caused by death or personal injury	* 5 years from when the victim first becomes aware of the damage and the identity of the wrongdoers, or * 20 years from when the tort occurs
Product liability claims (general)	* 3 years from when the victim first becomes aware of the damage and the identity of the wrongdoers, or * 10 years from when the manufacturer delivers the product
Product liability claims for damage caused by death or personal injury	* 5 years from when the victim first becomes aware of the damage and the identity of the wrongdoers, or * 10 years from when the manufacturer delivers the product

Time Limits/ Prescription Periods for Maritime Related Claims

Type of Claim	Time Limits / Prescription Periods
Claims for carrier's liability for breach of contract for carriage of goods	* 1 year from the date of delivery of goods or the date when the goods should have been delivered in the case of total loss of the goods
Shipowners/carriers' claims against charterers, shippers or consignees for freight and demurrage, etc.	* 1 year from when it becomes possible to exercise the right
Shipowners/carriers' claims against passengers arising from contract for carriage of passengers	* 1 year from when it becomes possible to exercise the right
Claims arising from collision for damage caused by property	* 2 years from when the tort (i.e. the collision) occurs
Claims arising from collision for damage caused by death or personal injury	* 5 years from when the victim first becomes aware of the damage and the identity of the wrongdoers, or * 20 years from when the tort occurs
Claims for salvage award and special compensation arising from salvage	* 2 years from when salvage is completed
Claims for contribution arising from general average	* 1 year from when the adjustment is completed

21. Does your system of law recognize force majeure, or grant relief from undue hardship? If so, in what circumstances might the Covid-19 pandemic enable a party to claim protection or relief?

Whilst Japanese law does not expressly stipulate force majeure in the Civil Code or other Code, the force majeure clause agreed by contractual parities are generally recognised as valid and enforceable. Further, force majeure is logically interpreted as 'an event or circumstance caused by an external cause beyond the parties' control' and in case of occurrence of force majeure event the parties are likely to be released from their liabilities under the contracts by relying on the no-fault defense.

It is difficult to state clearly what circumstances the Covid-19 pandemic constitutes force majeure/exemption of liability in, since no precedent judgements in Japanese courts explicitly have set out the requirements/factors to make the specific events force majeure. However, one of the key factors for the issue must be whether Covid-19 spread and lockdown can be considered to be unforeseeable and uncontrolled for the parties.

Contributors

Jumpei Osada
Partner
josada@tmi.gr.jp

Masaaki Sasaki
Partner
msasaki@tmi.gr.jp

Yuki Shiraishi
Senior Associate
yshiraishi@tmi.gr.jp