**Jurisdiction and Arbitration Clauses in Bills of Lading**

**and Other Sea Carriage Documents in Japan**

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# 1. Introduction

There were no statutory regulation which directly addresses the international jurisdiction of Japanese court until recently (See, 3). Therefore, the issue including the validity of the jurisdiction and arbitration clauses on bills of lading developed as case law. Section 2 introduces the relevant cases which shows the current status in Japan. We see the recent revision of the Code of Civil Procedure in Section 3, which does not change the situation very much. Section 4 shows prospects for the development in the future.

# 2. Relevant Cases

## (1) Jurisdiction Clause on Bills of Lading

The following Supreme Court Decision discusses the general condition for jurisdiction clause on bills of lading being effective[[1]](#footnote-1).

**Supreme Court, November 28, 1975 [The Chisadane][[2]](#footnote-2)**

A bill of lading was issued in connection with an ocean carriage of crude sugar by a ship (“Chisadane”) from Santos (Brazil) to Osaka (Japan). There was a jurisdiction clause on the bill of lading which provides: "any and all suits under this contract of carriage shall be brought before the court of Amsterdam and no other court shall have jurisdiction over any other suit unless the carrier brings such suit before a court of other jurisdiction or voluntarily accepts the jurisdiction of such court". The Supreme Court held the jurisdiction clause valid and dismissed the litigation stating that Japanese court has no jurisdiction on the case.

The Court specifies the following conditions for the exclusive jurisdiction clause being valid.

(1) “The formalities for the agreement of international jurisdiction shall be deemed to be satisfied if at least a court of certain country expressly designated on the document prepared by either of the parties and if the existence of such agreement between the parties and the contents thereof are explicit.”

(2)The case is not subject to the exclusive jurisdiction of Japan.

(3)The designated foreign court has the jurisdiction over such case under the laws of such foreign country.

(4) The agreement of exclusive international jurisdiction designating the court which has jurisdiction over the general forum of the defendant as the court of first instance having exclusive jurisdiction over the case shall be deemed valid in principle, unless such agreement is very unreasonable and against the law of public policy.

## (2) Jurisdiction Clause Which Is “Very Unreasonable and Against The Law of Public Policy”

The following case denied the validity of the jurisdiction clause based on the condition (4) of the 1975 Decision.

**Tokyo District Court, September 13, 1999[[3]](#footnote-3)**

A bill of lading was issued in connection with a carriage of wood from Malaysia to Japan. The bill includes an exclusive jurisdiction that only courts in Malaysia have jurisdiction for the dispute arising out of the contract of carriage. The carrier delivered goods to a person who did not possess the bill of lading. Plaintiff, the holder of the bill of lading, brought an action in Tokyo District Court in Japan seeking for the delivery of the goods or the damage caused by the misdelivery.

The court held that it has a jurisdiction in this case, stating that the jurisdiction clause on the bill is invalid as “very unreasonable and against the law of public policy.”

The court found (1) the dispute relates to the delivery of the cargo in Japan, (2) many relevant parties involved are Japanese who live in Japan, and (3) the relevant facts in the dispute has nothing to do with Malaysia.

## (3) Jurisdiction Clause and Himalaya Clause

While some Himalaya clauses explicitly refer to the jurisdiction clause(See, Fukuoka District Court Kokura Branch, March 17, 2006 (unreported case) and Kyoto District Court January 24, 2007 (unreported case)), others do not.In the latter case, **Tokyo District Court, June 4, 2010** (unreported case) did not allow the agent of the carrier to rely on the jurisdiction clause contained in the bill of lading pursuant to Himalaya clause. The court observed that the Himalaya clause which gives the agents of the carrier “exoneration, defense and limitation of liability applicable to the carrier” does not cover the agreement on jurisdiction.

## (4) Arbitration Clause Incorporated by Reference to the Clause in the Charterparty

There are not many cases for the validity of arbitration clause incorporated by reference to the clause in the charterparty. The following lower court case held it valid although many commentators have criticized it.

**Osaka District Court, May 11, 1959**[[4]](#footnote-4)

The bill of lading incorporate the arbitration clause contained in the charterparty which provides “all dispute arising out of this charterparty is referred to the arbitration in London”. The holder of the bill of lading brought an action in Osaka District Court (Japan) against the carrier for the loss caused by the damage to the goods. The court dismissed the claim stating that the arbitration clause effectively prevents the bill of lading holder from bringing a suit against the carrier.

***Cf.* Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (The Rotterdam Rules)**

*Article 76. Arbitration agreement in non-liner transportation*

1. Nothing in this Convention affects the enforceability of an arbitration agreement in a contract of carriage in non-liner transportation to which this Convention or the provisions of this Convention apply by reason of:

(a) The application of article 7; or

(b) The parties’ voluntary incorporation of this Convention in a contract of carriage that would not otherwise be subject to this Convention.

2. Notwithstanding paragraph 1 of this article, an arbitration agreement in a transport document or electronic transport record to which this Convention applies by reason of the application of article 7 is subject to this chapter unless such a transport document or electronic transport record:

(a) Identifies the parties to and the date of the charterparty or other contract excluded from the application of this Convention by reason of the application of article 6; and

(b) Incorporates by specific reference the clause in the charterparty or other contract that contains the terms of the arbitration agreement.

# 3. Statute

The revision of the Code of Civil Procedure in 2011 included the provisions on the international jurisdiction for Japanese courts. Article 3-7 of the Revised Code provides the validity of the choice of court agreement which, in principle, is based on the 1975 Decision[[5]](#footnote-5).

**Code of Civil Procedure**[[6]](#footnote-6)

Article 3-7　(1)　The parties may determine, by an agreement, the country in which they may file an action with a court.

 (2)　The agreement set forth in the preceding paragraph shall not become effective unless it is made with respect to an action based on certain legal relationships and made in writing.

 (3)　If the agreement set forth in paragraph (1) is made by means of an electromagnetic record (meaning a record made in an electronic form, a magnetic form or any other form not recognizable to human perception, which is used in information processing by computers; the same shall apply hereinafter) in which the content of such agreement is recorded, the provisions of the preceding paragraph shall be applied by deeming such agreement to have been made in writing.

 (4)　An agreement to the effect that an action may be filed only with a court of a foreign country may not be invoked if such court is unable to exercise its jurisdiction by law or in fact.

 (5)　An agreement as set forth in paragraph (1) which covers a dispute on a consumer contract that may arise in the future shall be effective only in the following cases:

 (i)　Where the agreement provides that an action may be filed with a court of a country where a consumer had domicile at the time of conclusion of a consumer contract (except in the case set forth in the following item, any agreement to the effect that an action may be filed only with a court of such country shall be deemed to be providing that it does not preclude the filing of an action with a court of any other country).

 (ii)　Where a consumer, in accordance with the agreement, has filed an action with a court of the country determined by the agreement, or where a business operator has filed an action with a court of Japan or a foreign country and the consumer has invoked the agreement.

 (6)　An agreement as set forth in paragraph (1) which covers an individual civil dispute in labor relations that may arise in the future shall be effective only in the following cases:

 (i)　Where the agreement has been made at the time of termination of a labor contract, and it provides that an action may be filed with a court of the country in which the place of provision of labor as of that time is located (except in the case set forth in the following item, any agreement to the effect that an action may be filed only with a court of such country shall be deemed to be providing that it does not preclude the filing of an action with a court of any other country).

 (ii)　Where a worker, in accordance with the agreement, has filed an action with a court of the country determined by the agreement, or where a business operator has filed an action with a court of Japan or a foreign country and the worker has invoked the agreement.

# 4. Future Developments

Since the Code of Civil Procedure was revised only five years ago, it is quite unlikely for the Japanese legislator to amend the statute in near future.

Nor can we expect the change in case law. The framework set forth by Supreme Court in the 1975 Decision has been stable and become more solid when the 2011 Revision of the Code basically endorsed it. However, there may be developments how to apply the conditions of the1975 Decision in specific cases (see, e.g., Tokyo District Court, September 13, 1999) or issues on the effect of incorporation by reference to the charterparty provisions.

Judging from the negotiation in UNCITRAL during the drafting of the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (The Rotterdam Rules), I think it is also very unlikely that Japanese Government chooses to opt-in its Chapters on Jurisdiction and Arbitration upon ratification. Therefore, the situation described in this report will continue when Japan ratifies the Rotterdam Rules.

1. There were some lower court cases prior to the 1975 Decision which held the jurisdiction clause on the bill of lading valid. *See*, Tokyo District Court, October 17, 1967, Kakyu Saibansho Minji Hanreishu (Lower Court Civil Case Reporters, 1967), Vol. 18, p.1002, Kobe District Court, April 14, 1970, Hanrei Taimuzu No.288, p.283. They are mostly in line with the 1975 Decision. [↑](#footnote-ref-1)
2. Saiko Saibansho Minji Hanreishu (Supreme Court Civil Case Reporters, 1975), Vol.116, p.525. The translation is available in *Japanese Annal of International Law*, No.20, pp.106-118 (1976). [↑](#footnote-ref-2)
3. Kaijiho-Kenkyu-Kaishi, No. 154, p.89 (2000) [↑](#footnote-ref-3)
4. Kakyu Saibansho Minji Hanreishu (Lower Court Civil Case Reporters, 1959), Vol. 10, p.970 [↑](#footnote-ref-4)
5. For the 2011 Revision of the Code of Civil Procedure, see, Dai Yokomizo, The New Act on. International Jurisdiction in Japan: Significance and Remaining Problems, *Zeitschrift für Japanisches Recht [Journal of Japanese Law]*, No. 34 (2012), p. 95. [↑](#footnote-ref-5)
6. Law No. 109 of 1996, finally amended by Act No.36 of 2011. [↑](#footnote-ref-6)