

Introduction to Japanese Arbitration Act with Court Cases

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Overview

The purpose of this report is to provide an overall explanation of the court cases related to the Arbitration Act of Japan after the enforcement of the Arbitration Act (April 1, 2004).

As a premise for the overall explanation of court cases, the current Arbitration Act of Japan is enacted based upon the UNCITRAL Model Law on International Commercial Arbitration (hereinafter, the “Model Law”).¹ In this regard, in the Tokyo High Court decision of August 1, 2018 (Kinyu Shoji Hanrei No. 1551, p.13) which dealt with a petition for the annulment of an arbitral award, the court stated that “common interpretations with the arbitration laws of other countries, and internationally acceptable interpretations should be aimed in the interpretation of the Arbitration Act of Japan”, upon perceiving that the Arbitration Act reflected the legislative intent that domestic law discipline should have contents which are common with other countries to the extent possible since the Arbitration Act was formed based upon the Model Law.²

Currently, work to amend the Arbitration Act is progressing with such purposes as reflecting the 2006 version of the Model Law. Japan is also a member of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter, the “New York Convention”). Other than this, Japan is also a member country of the ICSID Convention and the Energy Charter Treaty, and provisions related to the recognition and enforcement of arbitral awards exist in the treaties executed with some countries.³

Hereafter, this report firstly provides an explanation of the operations in Japan of the annulment,

¹ Unique provisions related to arbitration based upon consumer arbitration and individual employment contracts are also added.

² The Tokyo District Court decision of June 13, 2011 (2009 (arbitration) No.6) Hanrei Jiho No.2128 p.58, LEX/DB literature no.25473502 referred to the provisions of Article 4 of the Arbitration Act and stated as follows: “Since the arbitration system is a dispute resolution system with the substance being the autonomous intent between the parties and being based upon the agreement of the parties, the court is not permitted to excessively interfere.”

³ For example, there are bilateral treaties including provisions related to recognition and enforcement of arbitral awards between such countries as the United States of America, the United Kingdom of Great Britain and Northern Ireland, the Republic of China, Pakistan, Peru, El Salvador, Argentina, Romania, Poland, Bulgaria, and Hungary.

as well as recognition and enforcement, of arbitral awards for which there are many inquiries from overseas. Next, this report provides a similar explanation regarding arbitration agreements and arbitrators.

I. Annulment of Arbitral Awards

1. Introduction

(1) Basic Stance of the Courts Annuling Arbitral Awards

Article 44 of the Arbitration Act provides for the annulment of arbitral awards. Events for the annulment of arbitral awards are provided in Article 44 Paragraph 1 of the Arbitration Act, which is based upon Article 34 Paragraph 2 of the Model Act. Regarding its role, the Tokyo District Court decision of July 28, 2009 (2008 (arbitration) No.3) LEX/DB literature no.25451576, Hanrei Times No.1302 p.292 stated as follows: “Arbitration procedures are out-of-court dispute resolution procedures based upon the agreement of the parties without appellate proceedings, and their decisions are positioned as being final; also, in light of the fact that Article 4 of the said act provides that the court can exercise its powers in relation to arbitration procedures only when the Arbitration Act so provides, it is without saying that arbitral awards should be respected as much as possible”⁴, and also, the aforementioned Tokyo High Court decision of August 1, 2018 stated as follows: “examinations which perform a substantial re-examination of arbitral awards are not permitted in cases of petition for annulment of arbitral awards.” On top of that, the said decision stated as follows: “even in the case where the fact-finding and legal judgment of an arbitral award appears to be erroneous from the perspective of the domestic court of the seat of arbitration, the domestic court of the seat of arbitration cannot interfere with and annul the arbitral award on grounds of mere errors in fact-finding and legal judgment (those which do not satisfy events for annulment of an arbitral award)”⁵.

⁴ The Tokyo District Court decision of June 13, 2011 (2009 (arbitration) No.6) Hanrei Jiho No.2128 p.58, LEX/DB literature no.25473502 stated the same intent on this point.

⁵ The Tokyo District Court decision of February 17, 2016 (2015 (arbitration) No.4) *not recorded in casebooks, etc.*, 2016WLJPCA02176008 and the aforementioned Tokyo District Court decision of August 1, 2018 also state the same intent. Even in court cases before the enforcement of the Arbitration Act, the former Supreme Court (“*Taishinin*”) judgment of October 27, 2918, Taishinin Minji Hanreishu Vol.7 p.848, 861 stated that the appropriateness of the grounds for the arbitral award “is not a matter to be examined by the court, so even if the grounds are said to be inappropriate, this cannot be the grounds for requesting annulment.” The Kobe District Court judgment of September 29, 1993, Hanrei Times No.863 p.273 and the Tokyo District Court judgment of January 16, 2004 also cited the aforementioned Taishinin judgment.

As seen in the following court cases regarding individual annulment events, the Japanese courts repeatedly reach decisions to respect the arbitral award.

(2) Procedural flow of cases of annulment of arbitral awards

The procedural flow of cases of annulment of arbitral awards is petition, interrogation and decision. These procedures are undisclosed.

Firstly, according to Article 44 Paragraph 2 of the Arbitration Act, a petition for the annulment of an arbitral award must be made to the district court of Japan with jurisdiction provided in Article 5 of the Arbitration Act within three (3) months from the date on which a notification was made by sending a copy of the written arbitral award.⁶ Even if the petition is made within the period for petition for annulment of the arbitral award, the Tokyo District Court decision of July 28, 2009 (2008 (arbitration) No.3) LEX/DB literature no.25451576, Hanrei Times No.1302 p.292 and the Tokyo District Court decision of June 13, 2011 (2009 (arbitration) No.6) Hanrei Jiho No.2128 p.58, LEX/DB literature no.25473502 have decided that it is not permitted to newly add and assert events for the annulment of arbitral awards after such period has elapsed, with the exception of the annulment events which are matters which the court investigates under its own authority provided in Items 7 and 9 of Article 44 Paragraph 1 of the Arbitration Act.

Next, according to Article 44 Paragraph 5 of the Arbitration Act, the interrogation is conducted on the date of the oral argument or on a date where both parties can attend. Even if a petition is made within the period for petition of annulment of the arbitral award, the Tokyo District Court decision of July 28, 2009 (2008 (arbitration) No.3) LEX/DB literature no.25451576, Hanrei Times No.1302 p.292 and the Tokyo District Court decision of June 13, 2011 (2009 (arbitration) No.6) Hanrei Jiho No.2128 p.58, LEX/DB literature no.25473502 have decided that it is not permitted to newly add and assert events for the annulment of arbitral awards after such period has elapsed, with the exception of the annulment events which are matters which the court investigates under its own authority provided in Items 7 and 9 of Article 44 Paragraph 1 of the Arbitration Act.

Even if an event for the annulment for the arbitral award exists, according to Article 44 Paragraph 6 of the Arbitration Act (similarly as Article 34 of the Model Law), the court may decide, at its own discretion, not to annul the arbitral award, as also shown in the decision of the Osaka District Court decision of March 17, 2015 (2014 (arbitration) No.3) Hanrei Jiho No.2270 p.74 that even where there is a violation of the obligation to disclose interested relations by the

⁶ According to Article 5 Paragraph 1 of the Arbitration Act, the court with jurisdiction over the petition for annulment of an arbitral award is (i) the district court determined by agreement of the parties, (ii) the district court with jurisdiction over the seat of arbitration, (iii) the district court with jurisdiction over the general venue of the respondent of such case. In preparation of the case of (ii) above, the seat of arbitration is required to be determined as the territory belonging to the jurisdictional territory of one of the district courts of Tokyo or Osaka, etc.

arbitrator, the defect in the arbitration procedures due to this is slight, and therefore it is inappropriate to annul the arbitral award based on such grounds.

Finally, the court renders its judgment by decision. The decision of the court may be immediately appealed in accordance with Article 44 Paragraph 8 of the Arbitration Act. Appeal by permission to the supreme court may be permitted against the appellate decision.

2. Individual grounds for annulment

No court cases can be found in Japan where the arbitral award was annulled on the grounds of Items 1 through 3, 5 and 7 of Article 44 Paragraph 1 of the Arbitration Act.

On the other hand, there are the following court cases which garner attention related to each of the events for annulment of arbitral awards provided in Items 4, 6 and 8 of Article 44 Paragraph 1 of the Arbitration Act.

a. The petitioner was unable to defense in the arbitration procedure (Item 4)

With respect to Item 4, the Tokyo District Court decision of July 28, 2009 (2008 (arbitration) No.3) LEX/DB literature no.25451576, Hanrei Times No.1302 p.292 stated as follows: “It is appropriate to interpret that the intention is to allow the court to annul the arbitral award only in cases where there is a material violation of procedural guarantee such as the parties were absolutely not granted any opportunity to defend themselves, for instance, procedures in which the parties could not attend were implemented, or judgment was made in reliance upon materials which the parties could not perceive, etc. Therefore, it cannot be recognized that it falls under the annulment event under the said Item just by the circumstances that the parties did not perceive that it was a material issue.” (However, as a result, the arbitral award was not annulled.)

The Tokyo District Court decision of June 13, 2011 (2009 (arbitration) No.6) Hanrei Jiho No.2128 p.58, LEX/DB literature no.25473502, and its appellate case which was the Tokyo High Court decision of March 13, 2012 (2012 (1a) No. 1334) LLI/DB L06710125, annulled the arbitral award stating that there was an annulment event of the arbitral award in that “Since rendering facts which are disputed between the parties as undisputed facts is not making any judgment regarding such facts, so long as such facts are material matters impacting the main text of the arbitral award, there is an event for annulment of the arbitral award in awarding an arbitral award by rendering facts which are disputed between the parties as undisputed facts.”⁷

⁷ However, since the parties also filed for annulment of the arbitral award based upon Item 8 at that occasion, the court based the annulment event upon a violation of Item 8 (as stated below). The Tokyo District Court decision of March 28, 2018 (2015 (arbitration) No.2) Kinyu Shoji Hanrei

b. The composition of the Arbitral Tribunal or the arbitration procedure is in violation of Japanese laws and regulations (Item 6)

In relation to Item 6, in a case where a petition was made to annul the arbitral award on the grounds that there was a defect in the arbitration procedures due to the application by the arbitral tribunal of substantive governing laws differing from the substantive governing laws agreed upon by the parties, the Tokyo District Court decision of October 10, 2017 (2014 (arbitration) No.1) *not recorded in casebooks, etc.* did not recognize the petition for annulment of the arbitral award, stating as follows with respect to substantive governing laws: “It falls under the annulment event prescribed in Article 44 Paragraph 1 Item 6 of the Arbitration Act, where the failure of the arbitral tribunal to apply the laws of the most closely related country is a violation of laws and regulations of arbitration procedures, only where there exist special circumstances that the judgment of the arbitral tribunal is a clear contravention of the intent of Article 36 Paragraph 2 of the Arbitration Act, such as where the arbitral tribunal selects the governing law arbitrarily.”

Also, the Tokyo District Court decision of February 17, 2016 (2015 (arbitration) No.4) *not recorded in casebooks, etc.* 2016WLJPCA02176008 did not recognize the annulment of the arbitral award, stating as follows with respect to the failure by the arbitral tribunal to recognize the submission of evidence submitted on the final day of the oral proceedings dates as allegation and evidence advanced outside the appropriate time, upon confirming the reason for the delay of submission of the evidence: “It is an appropriate measure based upon the right of command of examination proceedings of the arbitral tribunal, and the claims made by the petitioner for annulment in this regard only mean the unjustness of such right of command.”

The Tokyo High Court decision of August 19, 2016 (2016 (1a) No.497) *not recorded in casebooks, etc.* 2016WLJPCA081900, where a claim was made that an error in judgment by the arbitral tribunal related to the burden share of proof-making fell under an annulment event, stated as follows: “The right or wrong of the interpretation of the burden share of proof-making is an issue of substantive judgment, and it does not fall under an annulment event under Item 6 as a violation of the laws and regulations of Japan regarding arbitration procedures even if there were an error in its interpretation.”

In the Supreme Court decision of December 12, 2017 (2016 (kyo) No. 43) Saibansho Jiho No. 1960 p.6, court website, Kinyu Shoji Hanrei No.1533 p.28, where a petition was made to annul the arbitral award stating that the breach of obligations to disclose interested relations by the arbitrator provided in Article 18 Paragraph 4 of the Arbitration Act fell under Article 44 Paragraph

No.1551 p.24 also annulled the arbitral award due to the same reason (however, the appellate case reversed the decision to annul the arbitral award).

1 Item 6 of the Arbitration Act, the court stated as follows with respect to the fact which was the subject of the arbitrator's disclosure obligations: "there is an obligation to disclose matters which may normally become evident through investigation within a reasonable scope"; however, the court did not clarify the relationship between the breach of disclosure obligations and the annulment event of arbitral award (it is the same with the Osaka High Court decision of March 11, 2019 (2017 (la) No.1552), Hanrei Times No.1468 p.65, LEX/DB literature no. 25564932, which was the remanded appellate case).

c. The content of the Arbitral Award is contrary to public policy in Japan (Item 8)

Item 8 states as follows: "The content of the arbitral award is contrary to public policy in Japan." In this regard, the Tokyo District Court decision of July 28, 2009 (2008 (arbitration) No.3) LEX/DB literature no: 25451576, Hanrei Times No.1302 p.292 stated as follows: "Since it should be said that the court is in a position to respect an arbitral award as much as possible, the intent of Item 8 of Article 44 Paragraph 1 of the Arbitration Act is not to recognize that the court can annul the arbitral award in the case where merely the fact-finding or legal judgment by arbitral tribunal is found to be unreasonable; it is appropriate to interpret that the intent is to recognize that the court can annul the arbitral award only when the legal results realized by the arbitral award is found to be contrary to public policy in Japan."

With respect to whether or not the contents of the arbitral award is contrary to public policy, the Tokyo High Court decision of August 19, 2016 (2016 (la) No.497) *not recorded in casebooks, etc.*, 2016WLJPCA081900 stated as follows: "since it should be judged not by the application or non-application of the legal regulations breaching public policy, but by whether or not the results of the application is contrary to public policy, the violation of substantive law on which the arbitrator should rely and the violation of mandatory legal regulations do not all become the grounds for annulment."

Furthermore, the Osaka District Court decision of March 17, 2015 (2014 (arbitration) No.3) Hanrei Jiho No.2270 p.74, the Tokyo District Court decision of February 17, 2016 (2015 (arbitration) No.4) not recorded in casebooks, etc. 2016WLJPCA02176008, and the Osaka High Court decision of March 11, 2019 (2017 (la) No.1552) Hanrei Times No.1468 p.65, LEX/DB literature no. 25564932 also state that a violation of public policy is not found where "only the fact-finding or legal evaluation of the arbitral award is said to be unjust."

On the other hand, with respect to whether "public policy" in Item 8 includes procedural violations of public policy, the Tokyo District Court decision of June 13, 2011 (2009 (arbitration) No.6) Hanrei Jiho No.2128 p.58, LEX/DB literature no: 25473502 stated as follows: "According to the provisions of the Arbitration Act regarding procedures and their intent, regardless of what

the governing laws of the arbitration procedures are, if the arbitration procedures are contrary to the procedural public policy of our country, the arbitral award granted pursuant to such procedures would be contrary to the basic legal order of our country as the contents of the arbitral award would not carry the procedures conforming to procedural public policy, and the mandatory effect of dispute resolution of the country cannot be affirmed, and it would fall under an annulment event under Item 8 of Article 44 Paragraph 1 of the Arbitration Act.” This decision was also affirmed by the Tokyo High Court decision of March 13, 2012 (2012 (1a) No.1334) LLI/DB L06710125, the appellate case of this decision, and the aforementioned Tokyo District Court decision of March 28, 2018 (the Tokyo District Court granted a decision to recognize annulment; however, the decision of the district court was reversed at the appellate stage and the annulment of the arbitral award is not recognized) also followed this decision. When the parties disputed on the premise that the public order under Item 8 of Article 44 Paragraph 1 of the Arbitration Act also includes procedural public policy in the aforementioned Tokyo District Court decision of February 17, 2016 and its appellate case, the aforementioned Tokyo District Court decision of August 19, 2016, and the aforementioned Osaka High Court decision of March 11, 2019, the courts did not recognize the annulment of the arbitral award as a conclusion, but the courts examined the existence or non-existence of the breach of the said Item in the process of reaching their decisions. The aforementioned Tokyo District Court decision of October 10, 1998 made a reservation, stating that “even if the annulment events prescribed in Item 8 of Article 44 Paragraph 1 of the Arbitration Act includes the case where the arbitration procedures are in contravention of public policy in Japan.”

I have also mentioned before that the aforementioned Tokyo District Court decision of June 13, 2011 and its appellate case, as well as the aforementioned Tokyo District Court decision of March 28, 2018, annulled the arbitral award on the grounds of the said Item with respect to the arbitration procedures in which the arbitral tribunal organized the facts disputed between the parties as undisputed facts, on the premise that the said Item includes procedural public policy.⁸

II. Recognition and Enforcement of Arbitral Awards

Articles 45 and 46 of the Arbitration Act provide for the recognition and enforcement of arbitral awards. In addition, Japan is a member of the New York Convention, and foreign arbitral awards may also be recognized and enforced based on the said convention. The requirements of both are substantially the same, and there is no substantial difference depending upon whichever the

⁸ The aforementioned Tokyo High Court decision of March 13, 2012, which was the appellate case, also stated the same intent.

recognition and enforcement of a foreign arbitral award is based.⁹

Upon petitioning for an enforcement decision, in accordance with Article 46 Paragraph 4 of the Arbitration Act, (i) a copy of the arbitral award and (ii) a document evidencing that the contents of such copy and the written arbitral award are identical must be submitted to the district court recognized to have jurisdiction in accordance with Article 5 of the Arbitration Act¹⁰ or the district court with jurisdiction over the location of the assets of the debtor which may be attached or the target of the claim. If the written arbitral award is not prepared in the Japanese language, a Japanese translation must be submitted.

According to Article 44 Paragraph 5 of the Arbitration Act which is applied *mutatis mutandis* by Article 46 Paragraph 10 of the Arbitration Act, the date of oral argument, or interrogation which can be attended by both parties, is established.

According to Article 46 Paragraph 7 of the Arbitration Act, a petition for an enforcement decision of an arbitral award may be dismissed only when the court recognizes that there exists an event provided in each of the items of Article 45 Paragraph 2 of the Arbitration Act. This means that the cases where recognition and enforcement may be rejected are limited to the cases provided in each of the items of Article 45 Paragraph 2, and the court may possibly refuse to dismiss a petition for an enforcement decision even if there exists an event provided in each of the items of the said Paragraph.

With respect to cases of petition of an enforcement decision of arbitral awards, statistics¹¹ show that approximately 2 or 3 cases are filed to the court every year, and there were a total of 34 cases of petition from 2004 through 2016 including 2 unresolved cases. From among these, petitions for enforcement decisions were recognized by the courts in approximately 70% of the cases.¹²

⁹ However, Article 4 Paragraph 2 of the New York Convention requests that the party requesting for recognition and enforcement submit the original, or a duly certified copy, of the arbitration award and the arbitration agreement, and in the cases where these are not prepared in the official language of the country invoking the arbitral award, it requests the party to submit a translation certified by a public or certifying translator, or a diplomat or consular officer. On the other hand, the Arbitration Act of Japan does away with the obligation to submit the arbitration agreement, and with respect to the translation, it also provides that it does not have to be a translation certified by a public or certifying translator, or a diplomat or consular officer, so long as it is a translation, so there is a difference in this regard.

¹⁰ Please refer to note (5) above in relation to Article 5 of the Arbitration Act.

¹¹ Hidenobu Nagasue, "Status of Examination of 'Arbitration Related Cases' at the Main Offices of the Tokyo District Court", JCA Journal Vol.64 No.7 p.3 (2017), p.5.

¹² Hidenobu Nagasue, "Status of Examination of 'Arbitration Related Cases' at the Main Offices of the Tokyo District Court", JCA Journal Vol.64 No.7 p.3 (2017), p.5. For example, as for court cases recorded in publicly published casebooks, etc. from among those which recognized the petition for an enforcement decision of an arbitral award, there are the following: (i) the Osaka District Court decision of March 25, 2011 (2010 (arbitration) No.3) Hanrei Times No.1355 p.249, Hanrei Jiho No.2122 p.106, (ii) the Osaka District Court decision of December 9, 2014 (2014 (arbitration) No.2)

In most of the remaining cases, the procedures concluded by withdrawal by the parties, and there was also 1 case where the petition was dismissed.¹³

It is reported that the statistics regarding the examination period of the cases which concluded, from among the cases of petition for enforcement decision of the arbitral award pending at the main offices of the Tokyo District Court, are as follows.¹⁴

	Within 3 month s	Within 6 month s	Within 1 year	Within 2 years	Withi n 3 years	Withi n 4 years	Withi n 5 years	Exceedin g 5 years	Tota l
Total number of cases conclude d (from 2004 to 2016)	11	5	8	4	2	1	0	1	32
	34.38 %	15.63 %	25.00 %	12.50 %	6.25 %	3.13 %	0.00 %	3.13%	

(Source: Hidenobu Nagasue, “Status of Examinations of ‘Arbitration Related Cases’ at the Main Offices of the Tokyo District Court”, JCA Journal Vol.64 No.7 p.3 (2017), p.12)

Cases in which the enforcement decision procedures concluded within 6 months exceed 50%, and the courts of Japan speedily handle the cases of petition for enforcement decisions of arbitral awards.

Decisions of the courts related to petition for enforcement decisions may be immediately appealed in accordance with the provisions of Article 44 Paragraph 8 of the Arbitration Act applied mutatis mutandis by Article 46 Paragraph 10. Appellate court decisions may sometimes

JCA Journal Vol.62 No.6 p.74, (iii) the Osaka High Court decision of February 26, 2015 (2017 (la) No.74) JCA Journal Vol.62 No.7 p.64 (appellate decision of the decision of (ii)), (iv) the Tokyo District Court decision of February 17, 2016 (2015 (arbitration) No.4) *not recorded in casebooks, etc.*, 2016WLJPCA02176008, and (v) the Tokyo High Court decision of August 19, 2016 (2016 (la) No.497) *not recorded in casebooks, etc.* 2016WLJPCA0819002 (appellate decision of the decision of (iv)).

¹³ Suenobu Nagasue, “Status of Examinations of ‘Arbitration Related Cases’ at the Main Offices of the Tokyo District Court”, JCA Journal Vol.64 No.7 p.3 (2017), p.11.

¹⁴ Suenobu Nagasue, “Status of Examinations of ‘Arbitration Related Cases’ at the Main Offices of the Tokyo District Court”, JCA Journal Vol.64 No.7 p.3 (2017), p.12.

be permitted to be appealed with permission to the supreme court.

The individual events for refusal of recognition are the same as the aforementioned annulment events, and with respect to the interpretation and operation thereof, please refer to the aforementioned contents regarding events for annulment of arbitral awards.

III. Arbitration Agreement

1. Introduction

Article 14 Paragraph 1 of the Arbitration Act provides that if a lawsuit is filed with the court regarding a dispute subject to an arbitration agreement notwithstanding the fact that there is an arbitration agreement between the parties, as a general rule, the court must dismiss the claim by a petition made by the party who is the defendant.¹⁵

However, as a special rule to this, Articles 3 and 4 of the Supplementary Provisions of the Arbitration Act recognize the claims of invalidity and termination from the side of the consumer or worker in relation to an arbitration agreement between a business operator and a consumer as well as an arbitration agreement between an employer and a worker. With respect to the applicable territorial scope of such provision, although it is not clear from the legal text, the Tokyo

¹⁵ Exceptions are provided in each of the items of Article 14 Paragraph 1 of the Arbitration Act. Item 2 provides that demurrer (“*bosokoben*”) of an arbitration agreement is not recognized when arbitration procedures based upon the arbitration agreement cannot be performed, and the Miyazaki District Court judgment of January 23, 2015 (2012 (wa) No.606) *court website* stated as follows: “It is interpreted that ‘when arbitration procedures based upon the arbitration agreement cannot be performed’ means cases where it is recognized that there are obstructions to the performance of procedures related to such arbitration agreement such as in the cases where a specific person selected as an arbitrator under the arbitration agreement dies, or the arbitration procedures cannot commence for a long time because the opinions of the parties regarding how to proceed with the arbitration procedures do not match.” Item 3 also provides that demurrer of an arbitration agreement, made after an argument on the merits or statement in the oral preparation procedures at the court, is not recognized. The Tokyo District Court judgment of November 26, 2008 (2007 (wa) No.35170) 2008WLJPCA11268014 applied this provision and did not recognize the formation of a demurrer, stating that “The petition requesting for the dismissal of a claim on the grounds that an arbitration agreement exists was made after the defendant argued on the merits.” The Tokyo District Court judgment of August 7, 2012 (2012 (wa) No.842) LEX/DB 25496039 stated, with respect to whether or not a deemed statement of an answer towards the statement of a claim fell under “oral argument”, that “An answer towards the statement of a claim belongs to a part of the oral argument; however, since it is normally performed simply, and it cannot be said that, just by performing it, an argument is made on the factual or legal issues and the litigation is progressed and submitting a demurrer of an arbitration after that would confuse and delay the litigation procedures, it should be interpreted that a deemed statement of an answer towards the statement of a claim does not fall under an argument on the merits provided in Article 14 Paragraph 1 Item 3 of the Arbitration Act.”

District Court judgment of February 15, 2011 (2009 (wa) No.37494 and 2010 (wa) No.5622) LEX/DB literature no.25471107, Hanrei Times No.1350 p.189 related to an arbitration agreement between an employer and a worker stated as follows: “It is interpreted that the said Article is not applicable to this arbitration agreement which renders the seat of arbitration and all the procedures as that of the United States of America.”

Below, I would like to provide an explanation of the court cases focusing upon issues for which related court cases exist.

2. Law applicable to arbitration agreement

The governing laws used upon determining the existence or non-existence and validity or the arbitration agreement are as follows according to court cases. Firstly, the laws of the place selected by the parties is followed. Even if there is no express intent of the parties regarding the selection of governing laws, if it is recognized that there is an implied agreement regarding governing laws between the parties in light of the existence or non-existence, or contents, of the agreement regarding the seat of arbitration, the contents of the main contract and other various circumstances, selection of governing laws based upon such implied agreement may be recognized. If an implied agreement regarding governing laws may not be recognized, it is determined by the laws of the country to which the seat of arbitration belongs. Below, I would like to provide an explanation along with the court cases.

The Supreme Court judgment of September 4, 1997 (1994 (o) No.1848) Minshu Vol.51 No.8 p3657 stated as follows: “With respect to the formation and validity of an arbitration contract in international arbitration, it is appropriate to interpret that firstly its governing laws are determined in accordance with the intent of the parties in accordance with Article 7 Paragraph 1 of the Act on General Rules for Application of Laws (*Horei*).” The said Supreme Court judgment stated that, “Even if there is no express agreement regarding the governing laws” of the formation and validity of an arbitration contract, “if it is recognized that there is an implied agreement regarding governing laws between the parties in light of the existence or non-existence, or contents, of the seat of arbitration, the contents of the main contract, and other various circumstances, such implied agreement should be followed.”¹⁶ This Supreme Court judgment was issued prior to the enactment of the current Arbitration Act; however, cases such as the Tokyo District Court judgment of June 19, 2020 (2018 (wa) No.10883) LEX/DB literature no.25585189, Hanrei Hisho

¹⁶ As for the resolution of the specific case, it focused upon the agreement regarding the seat of arbitration, and recognized that the laws applicable to the seat of arbitration (the state of New York in this case) were the governing laws of the arbitration agreement, stating that there was an implied agreement regarding the governing laws of the arbitration agreement.

L07530758, the Tokyo District Court judgment of June 17, 2019 (2018 (wa) No.36570) LEX/DB literature no.25580234, 2019WLJPCA06178003, the Tokyo District Court judgment of June 29, 2018 (2017 (wa) No.4327) LEX/DB literature no.25555966, the Tokyo District Court judgment of October 17, 2014 (2012 (wa) No.35871) Hanrei Times No.1413 p.271, and the Tokyo District Court judgment of March 10, 2011 (2009 (wa) No.11437) LEX/DB literature no.25473642, Hanrei Times No.1358 p.236, 2011WLJPCA03108014 cite this by rereading “Article 7 Paragraph 1 of the Act on General Rules on Application for Laws (*Horei*)”, which was the private international law provision of Japan which was subsequently amended, to “Article 7 of the Act on General Rules for Application of Laws (*Tsusokuho*)” after amendment. As for a case which recognized the existence of an express agreement regarding governing laws in relation to the governing laws of an arbitration agreement, the aforementioned Tokyo District Court judgment of June 17, 2019 (2018 (wa) No.36570) LEX/DB literature no.25580234, 2019WLJPCA06178003 stated as follows: “Any dispute, controversy, violation or claim occurring from this Agreement shall submit to arbitration in Tokyo governed by the laws of Japan, and each party shall respectively select one (1) arbitrator, and the selected two (2) arbitrators shall select the third arbitrator. The decision of the arbitrator^s or two (2) or more of them shall be final” and stated that there was an express agreement to render the laws of Japan as being the governing laws in relation to an arbitration agreement between the parties.

On the other hand, court cases which recognized the existence of implied agreements regarding governing laws by adopting the judgment framework of the aforementioned Supreme Court judgment can be classified into two types. One of such classifications recognize implied agreements regarding governing laws in relation to the governing laws of an arbitration agreement by focusing on the seat of arbitration, similarly as the aforementioned Supreme Court judgment of September 4, 1997. The other classification recognizes implied agreements regarding governing laws in relation to an arbitration agreement by focusing on the governing laws of the contract.

As for court cases falling under the former classification, the aforementioned Tokyo District Court judgment of March 10, 2011 did not expressly refer to the aforementioned Supreme Court judgment of September 4, 1997, but stated wordings similar to the said Supreme Court judgment, and stated as follows: “Although there is no express provision regarding the governing laws of the arbitration agreement, considering such facts as that there is an agreement regarding the seat of arbitration that the arbitration procedures filed by the defendant be conducted in Tokyo and the arbitration procedures filed by the plaintiff be conducted in the Principality of Monaco, with respect to the arbitration filed by the plaintiff, it is recognized that there was an implied agreement to render the laws applicable in the Principality of Monaco, the seat of arbitration, as the governing laws of the arbitration contract.” Also, while the aforementioned Tokyo District Court judgment

of June 29, 2018 stated that no express agreement regarding governing laws related to the arbitration agreement can be recognized, it referred to the aforementioned Supreme Court judgment of September 4, 1997 and took into account that there was an agreement to the effect that “It shall be resolved by arbitration in accordance with the rules of the Singapore International Arbitration Centre at the Singapore International Arbitration Centre in the Republic of Singapore”, and decided that it was appropriate to recognize that there was an implied agreement to render the laws of the Republic of Singapore as the governing laws.

On the other hand, as for court cases falling under the latter classification, the aforementioned Tokyo District Court judgment of October 17, 2014 referred to the aforementioned Supreme Court judgment of September 4, 1997 and decided that there was an implied agreement on governing laws in relation to an arbitration agreement, based upon the governing law provisions that the Arizona state laws and the laws of the United States of America are the contractual governing laws in the contract including the arbitration agreement. Also, the Tokyo District Court judgment of June 19, 2020 (2018 (wa) No.10883) LEX/DB literature no.25585189, Hanrei Hisho L07530758 and the Tokyo District Court judgment of June 17, 2019 (2018 (wa) No.36579) LEX/DB literature no. 25580234, 2019WLJPCA0617800 referred to the aforementioned Supreme Court judgment of September 4, 1997 and stated that, although there was no express agreement regarding governing laws in the arbitration agreement, in light of the fact that the contract governing laws are provided to be the laws of England (England and Wales) and the fact that the seat of arbitration is London, U.K., it is appropriate to recognize that there is an implied agreement that the governing laws of the arbitration agreement is the laws of England.

There are also court cases which do not mention the aforementioned Supreme Court case of September 4, 1997 and independently determine the governing laws of the arbitration agreement. However, most of such court cases determine the governing laws of the arbitration agreement by focusing on the governing laws of the main contract. For instance, the Tokyo District Court decision of August 28, 2007 (2007 (yo) No.20047) Hanrei Jiho No1991 p.89 stated that “Since the Arbitration Act does not have an express provision regarding the governing laws of the arbitration agreement, the validity of the arbitration agreement would be determined by the laws of the place selected by the parties at the time of such legal act” and decided that, since there is an agreement in the contract to render the laws of South Korea as the governing laws, the governing laws regarding the validity of this arbitration agreement would be the laws of South Korea. Also, the Tokyo High Court judgment of December 21, 2010 (2010 (ne) No.785) LEX/DB literature no.25471557, Hanrei Jiho No.2112 p.36 stated as follows: “The laws of the country regarding the formation and validity as well as format of the arbitration agreement should as a general rule be determined in accordance with the intent of the parties, and even if there is no express agreement regarding this point, if it is recognized that there is an implied agreement

regarding the governing laws between the parties such as in the case where the parties designate the applicable laws regarding the main contract, then such laws should be followed.” The Tokyo District Court interlocutory judgment of January 28, 2015 (2012 (wa) No.35587) Hanrei Jiho No.2258 p.100 did not refer to the aforementioned Supreme Court judgment of September 4, 1997 and stated as follows: “Considering that it is provided that the time charter contract should be interpreted by the laws of England and the seat of arbitration is London of the said country, it is appropriate to recognize that there was an implied agreement that the laws of England are the governing laws of this arbitration agreement.”¹⁷

Also, in the case that an implied agreement regarding the arbitration agreement cannot be recognized between the parties, the Tokyo High Court judgment of December 21, 2010 (2010 (ne) No.2785) LEX/DB literature no.25471557, Hanrei Jiho No.2112 p.36 stated that “Taking into account the intent of the provisions of Article 44 Paragraph 1 Item 2 and Article 45 Paragraph 2 Item 2 of the Arbitration Act, it is appropriate to interpret that the laws of the country of the place which is the seat of arbitration should be followed in relation to such arbitration agreement” and decided that the governing laws were the laws of Japan as the laws of the country of Tokyo which was the seat of arbitration.

3. Adhesive contracts and arbitration agreement

Article 13 Paragraph 2 of the Arbitration Act requires that the arbitration agreement be in writing. In this regard, even if the contract cites an adhesive contract and such adhesive contract contains an arbitration clause, according to Paragraph 3 of the said Article, it satisfies the writing requirement as a case where a document describing provisions, of which the contents are an arbitration agreement, constitutes a part of the said contract. In this regard, as for court cases, the aforementioned Tokyo High Court judgment of December 12, 2010 also decided that an arbitration clause within the written format cited by the contract satisfied the writing requirement.¹⁸

¹⁷ There also is the Tokyo District Court judgment of August 23, 2013 (2012 (wa) No.24603) Hanrei Times No.1417 p.243 which is a court case that recognized “that there was an implied agreement between the plaintiff and the defendant to render the laws of Japan as the governing laws regarding the formation or non-formation and validity of the arbitration agreement since there was no dispute regarding the selection of governing laws from the start”, on the grounds that both parties “claimed that the formation or non-formation and validity, as well as format, of the arbitration agreement are both based upon the laws of Japan” in the court.

¹⁸ The said judgment is particular in that it recognized that an arbitration agreement was formed in a case where, separately from the writing requirement, “a document describing an arbitration clause upon such contracting was not delivered to the contracting parties”, it stated as follows regarding whether or not an arbitration agreement was formed: “Since it is recognized to be premised upon

In a case where an adhesive contract containing an arbitration clause cited in a contract was delivered before such contracting but was not delivered once more at the time of such contracting, the Tokyo District Court judgment of March 12, 2010 (2008 (wa) No.33387) 2010WLJPCA03128005 recognized that an arbitration agreement was formed, stating that it could not be recognized that the parties had an intent to use a separate adhesive contract other than this adhesive contract.

Furthermore, in a case where an adhesive contract containing an arbitration clause was cited in the back side of the contract, and only the upper side of the contract was delivered, the Tokyo District Court judgment of March 26, 2008 (2007 (wa) No.886) Kaijiho Kenkyukaishi No.216 p.61, 2008WLJPCA03268009 took into account that 100 or more cargo transportation transactions were performed annually since previously, in which cases only the upper side was delivered by facsimile, and that there was only one type of contract format used between both parties; and perceiving that even if the back side was not received, the back side contained a description of an adhesive contract related to the details of the transportation contract, and upon stating that it could be presumed that the parties considered that it was also applicable to the transportation contract in this case, it recognized that an arbitration agreement existed.

4. Designation of arbitral institution in arbitration agreement

The aforementioned Tokyo District Court judgment of August 23, 2013 decided, in the case where an arbitration clause could be interpreted to be an agreement permitting the filing for arbitration to either of the agencies of the International Commercial Arbitration Court established in Russia, Belgium or Ukraine, that it was valid as an arbitration agreement even if it was unclear as to which of such agencies the dispute was intended to be submitted.

5. Insolvency law and arbitration agreement

Other than the above, in a case where a decision was requested on issues regarding the Corporate Reorganization Act of Japan, the Tokyo District Court interlocutory judgment of January 28, 2015 (2012 (wa) No.35587) Hanrei Jiho No. 2258 p.100, which dealt with the issue

commercial transaction practices frequently performed among merchants engaged in international commercial transactions, that is, international commercial transaction practices where contracts are executed in the form of citing general contractual terms or standard formats including the arbitration clause, upon determining whether or not there was a meeting of the minds between the contracting parties regarding the arbitration agreement executed in this manner, it is appropriate to determine upon comprehensively taking into account the various circumstances such as the characteristics of such contracting parties, the general industry practices in which the contracting was made, and the transaction experiences of such contracting parties up till then.”

as to whether the jurisdiction of the Japanese court was lost, decided that the parties could not be recognized to have agreed to submit to arbitration even in a dispute related to the merits of this lawsuit, on such grounds as that it was an issue specific to the interpretation of the Corporate Reorganization Act of Japan.

6. Court's confirmation of arbitration agreement

Article 23 Paragraph 1 of the Arbitration Act provides that the arbitral tribunal has the power to rule on its own jurisdiction, including a ruling on claims related to the existence or non-existence or validity of an arbitration agreement. Paragraph 5 of the said Article recognizes that the parties may petition to the court to decide the existence or non-existence of the jurisdiction of an arbitral tribunal, separately from the decision of the arbitral tribunal, in the case where the arbitral tribunal has decided that it has jurisdiction.

As for court cases where the court did not recognize the existence of an arbitration agreement even though the arbitral tribunal recognized that an arbitration agreement existed, there are the Osaka District Court decision of September 27, 2015 (2015 (arbitration) No.2) *not recorded in casebooks, etc.* and the Tokyo District Court decision of September 18, 2020 (2020 (tribunal) No.3) *not recorded in casebooks, etc.* These are cases where, in cases where a sport organization controlling specific sports had an arbitration agreement, and an arbitration was filed to the sport organization under its jurisdiction, it was decided that the filing for arbitration could not be recognized, since it was a separate organization even though it was under its jurisdiction, and there was no arbitration agreement unique to such sport organization under its jurisdiction.

IV. Arbitrators

From among the provisions of the Arbitration Act regarding the arbitrators, the disclosure obligation under Article 18 Paragraph 4 of the Arbitration Act was raised as an issue in court cases. Paragraph 3 of the said Article imposes disclosure obligations upon a person who intends to respond to negotiations upon being requested to become an arbitrator, and Paragraph 4 of the said Article imposes disclosure obligations upon an arbitrator progressing arbitration procedures in relation to facts with the likelihood of causing doubts regarding his/her fairness or independency to occur. There are court cases for these Articles as to (i) the scope of the facts which should be disclosed as “facts with the likelihood of causing doubts regarding his/her fairness or independency to occur” (“facts under Article 18 Paragraph 4 of the Act” cited in the following judgment), and (ii) how disclosure needs to be made in order to satisfy the disclosure obligations

provided in Paragraphs 3 and 4 of Article 18 of the Arbitration Act.

With respect to (i), the Osaka High Court decision of March 11, 2019 (2017 (la) No.1552) Hanrei Times No.1468 p.65, LEX.DB literature no. 25564932, which was the remanded appellate case of the Supreme Court decision of December 12, 2017, stated with respect to the intent of Article 18 Paragraph 4 of the Arbitration Act that “It is interpreted as an attempt to secure the efficacy of the system of arbitrator avoidance by causing the arbitrator to disclose facts broader than the facts falling under ‘probable cause sufficient to doubt the fairness or independency of the arbitrator’ so that the parties may appropriately file for an avoidance”, and furthermore, “whether or not it falls under the facts to be disclosed mentioned above should be objectively determined in light of the nature of the facts” and “it is not appropriate for the determination as to whether it falls under facts to be disclosed to depend upon circumstances known only to the arbitrator side”. On top of that, as an application to the specific facts, it recognized that the fact that an attorney belonging to the same law firm as an arbitrator was acting as the litigation agent in an affiliated company of the party was a fact with the likelihood to cause doubts of his/her fairness or independency to occur (however, as stated below, the said Osaka High Court decision recognized that there was no breach of disclosure obligations because the arbitrator did not perceive such fact and there was no possibility that it would normally become evident by investigation within a reasonable scope by the said arbitrator).

With respect to (ii), the aforementioned Supreme Court decision of December 12, 2017 stated that “an arbitrator owes to the parties” “an obligation to disclose matters that would normally become evident by investigation within a reasonable scope” regarding facts with the likelihood of causing doubts to his/her fairness or independency to occur. Also, the aforementioned Osaka High Court decision of March 11, 2019, which was the remanded appellate case of the Supreme Court decision of 2017, stated that the conflict check system in this matter was “a standard system generally used in large-scale firms in the United States of America and is recognized to be in line with the professional rules of conduct of the ABA”, that such arbitrator “was, upon being selected as an arbitrator for these arbitration procedures, recognized to have conducted an investigation within a reasonable scope, in confirmation of the possibility of conflicts of interest, using the conflict check system”, that the possibility of conflicts of interest due to the problematic facts had not occurred at the time the arbitrator was selected, that such arbitrator did not perceive the problematic facts till the arbitral award was rendered, and that the existence of these facts occurring due to the exceptional circumstances, namely, the failure to notify to the transfer destination law firm the resignation notice of matters in which he/she had ceased to become involved, could not be recognized to normally become evident even if an investigation within a reasonable scope were conducted, and concluded that the arbitrator had not committed a breach of disclosure obligations.

The aforementioned Supreme Court decision of December 12, 2017 stated as follows: “If an arbitrator were treated to have ‘already disclosed’ as above only by abstractly stating to the parties that there is a possibility that the facts under Article 18 Paragraph 4 of the Act would occur, then, the parties would not be able to appropriately file for avoidance based upon specific facts, and the intent of the said Paragraph to secure the efficacy of the arbitrator avoidance system may be lost, and that would be inappropriate.” As an application to specific facts, it decided that an attorney of such law firm “may possibly advise such client or represent a client in the future in a matter where the interests of the client conflict with the interests of a party and/or its affiliated company of this arbitration case even though it does not have any relationship with this arbitration case. Furthermore, a written statement that an attorney of such law firm ‘may possibly advise or represent a party and/or its affiliated company of this arbitration case in the future in a matter which does not have any relationship with this arbitration case’ merely abstractly states that there may possibly be a conflict of interest in the future between an arbitrator and an attorney to which he/she belongs, and it does not fall under ‘already disclosed’ under Article 18 Paragraph 4 of the Arbitration Act.”

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