

## II. Private International Law\*

### Formation and Validity of Arbitration Agreements — Governing Law of Arbitration Agreements — Arbitration Agreements in Form Contracts — Construction of the Arbitration Agreement

Tokyo High Court, Judgment, December 21, 2010;  
H.J. (2112) 36 [2011];  
Case (Ne) No. 2785 (2010)\*\*

*X v. Y*

This case is an appeal of a decision entered by the Tokyo District Court regarding a breach of contract dispute between the Appellant, a port operator based in Maizuru, Japan, and the Respondent, a ship owner based in Seoul, Republic of Korea, with regard to a charter agreement for transport of freight between Japan and Nakhodka, Russia.

The case examines the issue of whether an arbitration agreement is valid when that arbitration agreement is found in a form contract drafted by a third party, incorporated in the parties' contract by reference and not independently executed, and received by the parties after they had executed their main contract. Giving weight to practices within the shipping industry, past dealings of the parties, and performance by the parties after receiving the form contract, the court ultimately decided that the form contract's arbitration clause was properly incorporated in the parties' contract and bound the parties to arbitration under its terms.

The case also addresses the issue of choice of governing law for the construction of an arbitration agreement. Absent other provisions on governing law, the law of the place of arbitration designated in an arbitration agreement should apply in the construction of that agreement.

Held: '1. The appeal shall be dismissed.  
2. All costs of the appeal shall be borne by the Appellant.'

Upon the grounds stated below:

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\*\* Translated by Peter Fisk.

1. Relevant Facts

[The Appellant chartered the Respondent's ship for freight transport from Japan to Nakhodka, Russia, and back. The charter was arranged via a third-party intermediary, Tokyo Freightings Ltd., which brokers roughly half of all such charters between Japan and Nakhodka. The Appellant and the Respondent's charter agreement was executed by a Fixture Note signed by both. This Fixture Note set forth basic concrete terms of the charter, and stated that other details were pursuant to Tokyo Freightings' form charter contract, which itself was based on a form contract of the New York Produce Exchange (NYPE). Tokyo Freightings provided its form contract to the parties sometime after the Fixture Note had been executed. The form contract simply consisted of the above-mentioned NYPE form with revisions made by crossing out and replacing terms inline.

The Fixture Note made no mention of arbitration or any arbitration agreement. The form contract, however, did contain an arbitration clause. As originally written in the NYPE form, this clause called for arbitration in New York, but the clause had been struck through and revised so as to provide for arbitration in Tokyo in accordance with the rules of the Japan Shipping Exchange.]

[...]

2. Applicable Law of the Arbitration Agreement

In the present case, the Appellant and the Respondent contest the validity and content of an arbitration agreement regarding disputes arising from the charter contract executed between [them] on November 7, 2006. Accordingly, the law to apply on this point, in other words the governing law of the arbitration agreement, is an issue.

Considering the nature of arbitration as a dispute resolution method with agreement between the parties as its foundation, in an international arbitration matter such as this case, the validity and effect of the arbitration agreement, as well as procedural matters, should be judged pursuant to Articles 7 and 8 of the law prior to revision by Act No. 78 of 2006, in following with Article 3(3) of the Supplementary Provisions of the Act on General Rules for Application of Laws. According to those provisions, generally the decision as to which country's laws apply to the validity, effect, and procedural aspects of the arbitration agreement should be made in accordance with the intent of the parties. Even if there is no express agreement between the parties, if an implied choice of governing law for the arbitration agreement can be found, such as a designation of governing law in the main contract, then that law should apply. If there is not even an implied agreement on what law should govern the arbitration agreement, then the arbitration agreement should be interpreted and governed by the laws of the state in

which the arbitration agreement's designated place of arbitration is located.

However, here the Fixture Note and the form contract contain no provision setting forth a governing law for the arbitration clause. Moreover, looking through all the evidence and arguments presented in this case, there is no express agreement on governing law in the contract and no circumstance implying that any given law would govern the arbitration agreement between the parties. Accordingly, the validity, effect, and procedural aspects of the arbitration agreement set forth in the arbitration clause should be determined in accordance with the laws of Japan as the country in which is located the designated place of arbitration, Tokyo.

### 3. Validity of the Arbitration Clause

[The court examined formal and substantive requirements of arbitration agreements in order to decide whether an arbitration agreement was validly formed between the parties.]

#### (1) Formal Requirements for Validity

[Regarding formal requirements, the court held that the Arbitration Act's writing requirement pursuant to the Arbitration Act, Article 13.2 (requiring a writing signed by all parties or an exchange of documents), was satisfied by the arbitration clause in the form contract as incorporated by the Fixture Note.]

#### (2) Substantive Requirements for Validity

[The substantive requirement for valid formation of an arbitration agreement is that there be a mutual agreement by the parties.]

[UNCITRAL Model Law on International Commercial Arbitration, Article 7.2.3, shows an assumption that the practices of international commerce include the execution of contracts by citing and incorporating form contracts or generalized terms and conditions that include arbitration clauses.] In the event of an arbitration clause entered [by incorporating a form contract that includes an arbitration clause], in order to determine whether there was mutual agreement to the arbitration clause among the parties, it is appropriate to examine the whole of the circumstances including the nature of the parties, general practices within the industry [...], and previous dealings by the parties.  
[...]

[In the present case,] the Appellant and the Respondent are merchants who have done business on an ongoing basis in an industry in which arbitration agreements are widely employed. The Appellant and the Respondent have both received the same form contract in their previous transactions [with the intermediary Tokyo Freighting] and have had the opportunity to know the content thereof. With

regard to their present contract, although the form contract was received after execution of the contract, after having in fact received the form contract both parties commenced their contractual performance without voicing any objection. Considering all these factors together, we hold that the parties have an agreement pursuant to the arbitration clause to submit any dispute related to the subject matter of the contract to arbitration with the Japan Shipping Exchange in Tokyo.  
[...]

4. Conclusion

Based on the above, in accordance with the laws of Japan wherein the place of arbitration, Tokyo, is located, there is a valid and effective arbitration agreement between the parties pursuant to which the present dispute must be submitted to arbitration before the Japan Shipping Exchange in Tokyo. Accordingly the claims in this case fail to state a cause of action and should be dismissed.'

Judge Takashi Sonoo (presiding)  
Judge Takeru Fujishita  
Judge Sae Sakurai

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