

[Deciding Court]

Tokyo District Court

[Date of Decision]

10 March 2011

[Case No.]

2009 (wa) No.11437

[Source]

LEX/DB no.25473642, Hanrei Times No.1358 p.236, 2011WLJPCA03108014

[Summary of Facts]

In February 2005, a distributorship agreement granting X (see below) the sole and exclusive distributorship right of Y products in Japan, with a term of thirty (30) years, was executed between plaintiff X (a Japanese corporation, representative director A), an import and sales company of cosmetics, etc. and defendant Y (a Monaco corporation, representative director B), a manufacturing and sales company of cosmetics, etc (hereinafter, the “Agreement”). Article 17(c) of the Agreement provided an arbitration agreement clause (hereinafter, the “Arbitration Agreement”) to the effect that if X files for arbitration in relation to a breach of the Agreement, it would be submitted to arbitration in Monaco in accordance with the arbitration rules of the International Chamber of Commerce interpreted in accordance with the laws of Monaco, and if Y files for arbitration, it would be submitted to arbitration in Tokyo in accordance with the rules of the Japan Commercial Arbitration Association interpreted in accordance with the laws of Japan.

X executed an employment agreement with E and engaged E in establishing, etc. the business above. However, since the business establishment did not go smoothly, at the end of June 2007, X terminated the employment agreement with E and also notified Y to such effect. Then, in July 2007, a termination notice of the Agreement in the name of attorney C, an agent of B, was sent to X, and Y suspended shipment of the products to X. To this, X filed this lawsuit against Y etc., claiming for compensation of damages under joint tort, raising such claims as that although X executed the Agreement with Y, Y, B, E, D (an import and sales company of cosmetics, etc. with E as the representative director, and a subsidiary of Y), etc. contemplated to render D as a new distributorship of Y in Japan, and E established D, and Y terminated the Agreement and suspended the

supply of products to X, and jointly interfered with the continuance of business of X (B, D, E etc. are co-defendants before separation of proceedings). Y claims that X's claims should be dismissed due to demurrer based upon the Arbitration Agreement, and X claims that, from the perspective of fairness, Y's demurrer falls under an abuse of rights and should not be recognized.

[Summary of Decision]

claim dismissed

I “Arbitration is a procedure where the parties agree to entrust the resolution of the dispute between them to the arbitration award of a third party arbitrator and to resolve the dispute without undergoing litigation by rendering the parties bound to the arbitration award in accordance with such agreement. Considering the inherent nature of arbitration as a dispute resolution method based on such agreement between the parties, it is reasonable to interpret that, with respect to the formation and validity of the arbitration contract in so-called international arbitration, the governing laws thereof are initially determined in accordance with the intent of the parties pursuant to Article 7 of the Act on General Rules for Application of Laws. Even if there is no express agreement regarding such governing laws within the arbitration contract, if it is recognized that there exists an implied agreement regarding the governing laws between the parties in light of the existence or non-existence contents of an agreement regarding the seat of arbitration, the contents of the main contract and other various circumstances, the same should be followed.”

II “Although there is not express provision regarding the governing laws of the Arbitration Agreement in the Arbitration Agreement, considering such facts as that there is an agreement regarding the seat of arbitration that the arbitration procedures filed by Y be conducted in Tokyo and the arbitration procedures filed by X would be conducted in the Principality of Monaco, 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.”

III With respect to X's claim that the claim of demurrer by Y falls under an abuse of rights, it was decided that specific circumstances evidencing that the claim of demurrer by Y falls under an abuse of rights under procedural law could not be found from the evidence in this case, stating as follows: “Since the laws which should be applied upon deciding whether or not a claim in litigation falls under an abuse of rights under

procedural law and should not be permitted is a procedural issue, it should be determined by *lex fori*. Under the Code of Civil Procedure of Japan where this case was filed, a claim of demurrer falls under an abuse of rights and is not permitted when there exist specific circumstances such as that a claim of demurrer falls under an abuse of rights as an act under procedural law.”