[Deciding Court]
Tokyo District Court

[Date of Decision]
23 August 2013

[Case No.]
2012 (wa) No.24603

[Source]
Hanrei Times No.1417 p.243

[Summary of Facts]

X (a South Korean company) executed an agreement with Y (a Japanese company) to purchase single crystal silicon wafer for photovoltaic power generation device (X and Y each signed a "Wafer Sale and Purchase Agreement" dated February 23, 2006 and a "Second Wafer Sales Agreement" dated August 8, 2007; hereinafter referred to as the "First Agreement" and the "Second Agreement" in the order of formation). However, since Y suspended production of such wafer and failed to supply, X filed this lawsuit requesting for the payment of the balance after deducting the amount of counter-obligations payable by X to Y from the total amount of the advance payment amount, as well as delinquency damages, claiming that it terminated the said agreement. In response, Y requested dismissal of this action, claiming that this contract contained an arbitration clause that a dispute occurring in relation to this contract would be submitted to the International Commercial Arbitration Court and that the effect of this arbitration clause also extends to this action. Arbitration agencies called "International Commercial Arbitration Court" are established in Russia, Belgium and Ukraine respectively.

[Summary of Decision]
claim dismissed

I "It is reasonable to interpret that, with respect to the formation and validity of an arbitration contract in so-called international arbitration, the governing laws thereof are initially determined in accordance with the intent of the parties. Considering this in

this case, although there is no express agreement regarding governing laws of this arbitration clause in this contract (……), since X and Y are both claiming that, in this litigation, both the formation or non-formation and validity, as well as format, of the arbitration agreement are both based upon the laws of Japan (it is conspicuous in this court), and there is no dispute regarding the selection of the governing laws from the beginning, it is recognized that there exists an implied agreement to render the laws of Japan as the governing laws regarding the formation or non-formation and validity of the arbitration agreement, and it is recognized that the laws of Japan are included in the governing laws of the format thereof. (With respect to the First Agreement, Articles 7 and 8 of the Act on General Rules on Application of Laws (Hourei) prior to amendment by Act No. 78 of 2006, and with respect to the Second Agreement, Articles 7 and 10 of the Act on General Rules on Application of Laws (Tsusokuho).)"

Ⅱ "Reviewing the substantive formation requirements, …… the contents of this arbitration clause are that an arbitration would be filed to any of the International Commercial Arbitration Courts of Russia, Belgium or Ukraine with English being the procedural language, and the decision there of would be the final resolution of the dispute; and this arbitration clause is recognized to contain the contents that 'refer the resolution of all or certain civil disputes which have already arisen or which may arise in the future in respect of a certain legal relationship to one or more arbitrators, and to accept the award made therefor' (Article 2 Paragraph 1 of the Arbitration Act). Since X and Y have signed this contract containing this arbitration clause, it can be said that there was a meeting of manifestation of intent regarding this arbitration clause between X and Y, and an agreement satisfying the substantive formation requirements of an arbitration agreement is recognized to have been formed."

"This contract is a contract regarding large scale international transaction between companies, and considering that the selection of an arbitration agency would have an impact upon the various factors which are material upon resolving a dispute through arbitration, and that X is premised, in this litigation, that the contractual portion regarding the sale and purchase of wafer is formed as described in this contract, it should be said that X and Y affixed their signatures upon sufficiently understanding and reviewing the contents of this contract including this arbitration clause, and there is no evidence sufficient to overrule this. Therefore, X's claim that neither X nor Y had the intent to submit dispute resolution to the International Commercial Arbitration Court is unfounded. In addition, since it is reasonable to interpret that this arbitration clause is an agreement permitting petition of arbitration to any of the International Commercial Arbitration Courts (……) established in Russia, Belgium or Ukraine, Y does

not need to clarify which agency from among these the dispute resolution was intended to be submitted, and the claims of X criticizing this are also unfounded."

Ⅲ "X claims that, since X manifested to submit dispute resolution to the International Commercial Arbitration Court (……) although it had the intent to submit dispute resolution to ICC at the time of executing this contract, there was a mistake in the external manifestation of intent differing from its genuine intent. However, there is no appropriate evidence sufficient to recognize that X had the intent to submit dispute resolution to ICC at the time of executing this contract (X sent to Y a draft arbitration contract stating that arbitration would be performed at ICC (……), but this was only sent after the dispute occurred between Y in relation to this contract, and this does not express X's intent at the time of executing this contract). Furthermore, the description of "ICC; the International Court of Arbitration" and "International Commercial Arbitration Court" differ largely, …… and taking into account together that this contract is related to a large scale international transaction including payment of a huge advance amount related to the sale and purchase of wafer which is necessary for X's main business, and that the selection of an arbitration agency has an impact upon the various factors which are material upon resolving the dispute by arbitration, and that X is premised upon formation of the contractual portion regarding the sale and purchase of wafer in accordance with the description in this contract, it cannot easily be recognized that X signed the First Agreement and the Second Agreement twice in relation to this arbitration clause submitting dispute resolution to the International Commercial Arbitration Court with the intent to submit dispute resolution to ICC, and even considering the entire evidence of this case, no mistake in the manifestation of intent by X can be recognized."