[Deciding Court]
Tokyo District Court

[Date of Decision]
17 October 2014

[Case No.]
2012 (wa) No.35871

[Source]
Hanrei Times No.1413 p.271

[Summary of Facts]

On July 1, 2002, plaintiff X (a Japanese corporation) executed a software sales agreement (hereinafter, the "Software Agreement") with defendant Y (1 Singaporean corporation). The Software Agreement contained an arbitration agreement, which included a so-called cross-type arbitration clause providing with respect to the seat of arbitration and arbitration proceedings that "if plaintiff X files for arbitration, such arbitration shall be conducted in Phoenix, Arizona, U.S.A., and conducted in accordance with the commercial arbitration rules of the American Arbitration Association, and if defendant Y1 files for arbitration, such arbitration shall be conducted in Tokyo, Japan, and conducted in accordance with the arbitration proceedings of the Japan Commercial Arbitration Association." There also was a governing law clause providing that the main contract was based upon the laws of the state of Arizona and the laws of the United States of America.

On January 14, 2010, Y1 gave notice to X that it would not renew the Software Agreement, and the said agreement terminated on June 30, 2010. Thereafter, defendants Y1 and Y2 (a Japanese corporation belonging to the same company group as Y1) gave notice and demand to X for a claim of obligations such as unpaid license fees stated to have occurred based on the Software Agreement. In response, X filed an action against Y1 and Y2 for the confirmation of the non-existence of compensatory damages obligation based on tort related to the conduct of sales of software in quantity and price which was not approved, as well as such receivables and the delinquency damages thereof. Y1 and Y2 claimed demurrer on grounds of the arbitration agreement.

Y1 filed for arbitration against X to the Japan Commercial Arbitration Association based on this arbitration agreement during the period from the time that the complaint

reached Y2 till the time that the complaint reached Y1. The arbitral tribunal granted an interlocutory decision that such arbitral tribunal has jurisdiction over this dispute between X and Y1 prior to the conclusion of this action.

[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 (please refer to Supreme Court judgment of September 4, 1997, petty bench, Minshu Vol. 51 No. 8 page 3657)."

"Article 18 of the Software Agreement expressly provided that the said agreement would be interpreted in accordance with the laws of the state of Arizona and the laws of the United States of America only. Given that it is clear that there exists an agreement to render the laws of the state of Arizona and the laws of the United States of America as the governing laws of the main contract in this case, it is recognized that there exists an implied agreement to render the laws of the state of Arizona and the laws of the United States of America as the governing laws in relation to this arbitration agreement too." "Even if there exists this cross-type clause regarding the seat of arbitration, the decision of recognition above should not be immediately impacted thereby.

Therefore, the governing laws of this arbitration agreement is recognized to be the laws of the state of Arizona and the laws of the United States of America."

II "It is reasonable to interpret that this arbitration agreement agreed that an arbitration procedure binding also upon the counterparty would commence upon the

petition of either party to the Software Agreement."

"To this, X claims that, based upon such reasons as that the petition for arbitration is provided as 'may' in this arbitration agreement, it should not be interpreted as an exclusive arbitration agreement, and that such interpretation would also be contrary to the case precedents of the courts of the state of Arizona. However, …… in light of the contents of the entire provision of Article 17 of the Software Agreement, it is interpreted that the terms 'may' relate to the timing of transfer of the dispute resolution from discussion to arbitration, and that it does not mean that arbitration is selective in the relationship between resolution by litigation, and also considering that paragraph b of the said Article uses the terms 'shall', …… it is not impossible to interpret that it is a mandatory exclusive arbitration agreement. …… Also, in light of the case precedents of the federal courts of the United States of America, it cannot be recognized that the interpretation of this arbitration agreement as the above in this matter forms the grounds to determine that it violates the laws of the United States of America or the laws of the state of Arizona."

Ⅲ "X claims …… that this arbitration agreement automatically loses effect due to the extinguishment of the effect of the Software Agreement.

However, given that it is normal for a dispute related to continuous transaction to occur even after the conclusion of such transaction, it should be said that it matches the reasonable intent of the parties to interpret that even if the Software Agreement itself, which is the master agreement related to a continuous transaction, terminates due to refusal to renew by either party, the agreement on dispute resolution method does not automatically lose effect, and the effect of this arbitration agreement is not denied at least for a dispute for which the cause occurred while the transaction based on the said agreement was continuing and which the existence thereof was discovered after the termination of the said agreement."

"The interpretation above is also consistent with the case precedent of the appellate court of the state of Arizona and the federal supreme court which has the intent to distinguish between the exemption of the performance of contractual obligations and the legal enforceability of the arbitration contract, and is also recognized to match the laws of the state of Arizona and the laws of the United States of America which are the governing laws of this arbitration agreement."