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—The Empowerment of International Arbitration—

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Ⅰ. The Revision Process of the Arbitration Act in Japan

Chiaki Tsukamoto

In Japan, the word “arbitration” appeared for the first time in the Old Code of Civil Procedure[1] in 1890, which was based on the civil procedure act in Germany. This old legislation was not adapted to the actual correspondent needs in those days. That was because, in order to abolish extra-territoriality and regain autonomy, Japan had to come up with codes which the Great Powers of the world could accept. Therefore the Meiji government made codes based on the French and the German codes.

After that, the Old Code of Civil Procedure was amended three times, and some acts were separated and renamed, one of which was the Law Concerning Public Summons Procedures and Arbitration Procedures. This is what is now referred to as the Old Arbitration Act, and it was not revised for 110 years because Japanese people in those days did not really need arbitration. In fact, the number of arbitration cases was very small back then. In addition, the Japanese people had the confidence in the court of justice and preferred to bring their cases there. This is why JCAA was not quite active.

After the WW Ⅱ, countries around the world were in need of better arbitration systems to develop their economy and facilitate investment. In Japan, a research committee for studying arbitration was established in 1979. Thereafter, researchers of law and economy often emphasized the need for an amendment of the Old Arbitration Act. This cry for a new statute became louder in 1985, when United Nations Commission on International Trade Law (UNCITRAL) established

[1] Because Japan’s civil code was revised wholly after WW2, we distinguish former from latter and call former “Old Code”.

the UNCITRAL Model Law on International Commercial Arbitration.

Looking at the world trends on arbitration, the arbitration research group in Japan released the draft proposal of the arbitration act based on the model law in 1989, but it was still influenced by the Old Arbitration Act.

On the other hand, the idea of revising the Old Arbitration Act was discussed by the legislative council of the Code of Civil Procedure, which is a consultative body commissioned by the Minister of Justice, in the meetings held respectively in1990 and 1996. However, they could not deal with revision of the Old Arbitration Act because they were too busy deliberating about the new Insolvency Act owing to the serious economic depression in 1990's.

In 2001, a brief issued by the Justice System Reform Council altered this situation. The brief demanded that "efforts to reinforce and vitalize Alternative Dispute Resolution should be made so that it will become an equally attractive option to adjudication for the people. An appropriate legal scheme for arbitration should be established at an early date, while observing the trends in the international society."

As a result of this statement, yet another investigation committee of arbitration was established as the task force on judicial reform. The committee set two major goals for itself. One was to make the new act reflect the current circumstances of the Japanese society while adopting the basic principles of the UNCITRAL model law. The other was to design the act so that it could be applied equally to all arbitrations, whether national or international, commercial or civil. Also, they invited the public, scholars, and other concerned parties to offer their opinions.

Through these steps, the Old Arbitration Act was revised and the new Arbitration Act was finally established in 2003.

Ⅱ. Case Example of International Arbitration under the Former Act

Kondo Nako

Before the current Arbitration Act was enacted in 2003, Part VIII of the former Code of Civil Procedure had been used for arbitration. This section will introduce a case of international arbitration decided under the former act and will consider how such problems are solved under the current Arbitration Act.

The case examined in this article is the "Ringling Circus Case." The court held an important opinion on applicable law in international arbitration agreements in this case, and so it is used as a reference.

The Ringling Case is an international arbitration between a Japanese corporation (hereinafter referred to as X) and an American circus (hereinafter referred to as Y). Both parties had concluded a contract prior to the dispute allowing the circus to tour Japan. It included an arbitration clause providing that an arbitration institution in New York City shall settle a dispute arising from allegations on the part of X. This theory is also applied to the opposite case. This agreement is referred to as a cross arbitration agreement.

After the conclusion of this agreement, X sought compensation from Y on the basis of Y's performance with defect. Representatives of Y, however, demurred at the existence of the arbitration agreement. In the arbitration proceedings, the parties needed to decide which law was applicable.

The court held that the New York City should be the place of arbitration and

that the laws of New York City were applicable. The reasoning behind this was that the parties had given implied consent and that the demurrer of Y's representative should be accepted under Article 7 of the General Rules on the Application of Law. This provision states that the enactment and effect of law should depend on the law used in the place chosen by the parties. In this case, the laws of New York City were adopted as there was cross arbitration agreement.

This case exposes problems of arbitration under the former law. Firstly, the determination of applicable law depends upon the agreement of the parties. If there is no clear agreement, then implied consent will need to be sought in a very broad context.

The current Arbitration Act attempts to address these issues in its provisions. In particular, Articles 44 and 45 deal with applicable law for disaffirmance, confession and the enforcement of arbitral awards. It was speculated that applicable law should be determined by the parties and, secondly, by the law of the place where the arbitration is to occur. Although applicable law in the case of demur, which is the problem in the circus case, is not speculated, analogically referring to Articles 44 and 45 can solve the problem.

It is no longer necessary to search for implied consent in a broad context because of these developments. There are two reasonable methods by which to determine applicable law (party autonomy and relevant law). It therefore follows that there are fewer situations in which implied consent is needed.

In conclusion, the enactment of the Arbitration Act has solved many problems in the process of international arbitration. The former law was flawed as its speculation was unclear and required a search for implied consent in a broad

context. The new act, by contrast, has introduced clear speculation that has resulted in the law becoming more practical.

Ⅲ. Current Arbitration Act for international commercial dispute

Mai Hakamada

In Japan, after WW2, the frequency in the use of the international commercial arbitration system is very low compared to other countries. Plus, with regard to market expanding into foreign countries and management in the Japanese companies, the governing law of the international contract is most likely to be the law of the certain country where trade is taking place, so use of the Japanese law is consequently very low. To break this dead rock, it is necessary to understand why Japan's international commercial arbitration is at a slump. By doing so, not only earning trust for its arbitration system, but Japan can support its businesses.

First I will look at arbitration law of Japan as a governing law. In Japan, in addition to affiliating with the New York Treaty, many specialists took part in revising the arbitration law in 2003 to make it harmonize with the UNCITRAL model law, therefore the new arbitration law is expected to contribute toward promoting resolution of international commercial dispute in Japanese arbitral tribunal. However, comparing the numbers of applications of arbitration in JCAA before and after the enactment of the new arbitration law, the average in six years was 11 under the former act, and it doubled to 23 in 2004 when the law came into effect, but after 2004, the average from 2005 to 2009 fell back down to 11. It is clear that application of arbitration is scarce in Japan when looking at the American Arbitration Association's average from2000 to 2005 which number is 612, for

instance.

Then, this part will examine how this arbitration system works. In almost all cases of arbitration held in Japan, one or both parties are actually Japanese companies. Next to a Japanese party, US Companies have the second largest share on JCAA. However, recently, the share of Asian countries, such as Chinese and Korean, has been increasing. In the arbitration clause between Japanese and foreign companies, in 39 percent of the cases Japan was chosen as the place of arbitration and in 27 percent of the cases the other country was chosen.

The first reason of the low percentage is the Japanese companies' reluctance to arbitration. Many Japanese companies think that compared with civil suits, the arbitration costs more money and does not accept appeal.

The second reason is opponent parties from other countries' reluctance about arbitration in Japan. For example, worry about the arbitration system in Japan, language problem, geographical inconvenience according to "The research and analysis about the course of resolving dispute in Japanese company", by Mitsubishi UFJ research & consulting Co., Ltd., But it is sure that the Japanese arbitration is evaluated in the light of the privacy and enforceability in international arbitrations.

Therefore, it is important to increase the number of cases to activate Japanese arbitration system. In order to achieve this, it must make people understand what arbitration is and how it is superior to suit in international commercial dispute.

The other is the improvement of the system, making it clear, cutting the cost, and increasing the number of arbitrators who can command foreign language and meet the demands from foreign companies. Reform of law education in universities and law schools is also important in long term. Administrators should encourage

students to have arbitration courses. For ordinary people, some associations of arbitrators offer programs to the public. It is important to support such movements. These attempts to strengthen arbitrator and institution should be realized in the future.

Ⅳ. Cases under the current arbitration law of Japan

Tatsuya Yaguchi

1. The current Arbitration Act in Japan was discussed in the previous section. This section will introduce relevant arbitration cases from an interview undertaken with a legal office[2] in regard to the practical situation under existing legislation.

2. An apparel company in Japan (importing, hereafter Japanese company) vs. an apparel company in EU (exporting, hereafter European company)

Cause	The dispute was caused by defaulting on a contract that required the Japanese Company to regularly buy goods made by the European Company. The Japanese company was thus liable for the damage resulting from its default.
Main argument of the European Company	It was argued that the Japanese Company should buy their goods regularly, pursuant to the contract. Additionally, the Japanese Company should pay damages arising from its default.
Main argument of Japanese Company	The European Company did not make an effort to maintain the commercial value of the products in order to keep up with the fashion. This was needed to ensure that they would sell in the apparel business.

The European Company decided to pursue arbitration proceedings in accordance with the arbitration clause. However, it provided that the place of arbitration would be “Paris or Tokyo.” As a result, the European Company initially started arbitration in Paris, while the Japanese Company started proceedings in

[2] We interviewed to the Kojima Law Office with 3 attorneys on 11th November.

Tokyo. This was a rare case.

Both parties decided to pursue one set of proceedings as the costs of two concurrent proceedings was too expensive. The jurisdiction of the tribunal in Tokyo was admitted because the Arbitration Law of Japan was provided as the applicable law in the arbitration agreement. The arbitration is currently still pending.

3. Publication Company in Japan vs. Publication Company in the U.S.

(Dispute over copyright)

Cause	This arbitration was caused by a dispute over the copyright of a book translated into Japanese. An American Company had copyright over the original English publication. However, the contents of the book were derived from a traditional American fairytale from a certain region. The Japanese Company translated the original book into Japanese and subsequently published it.
Main argument of US Company	The original version of the book was published in English, the copyright of which was owned by an American Company. Therefore, it has copyright over the Japanese book.
Main argument of Japanese Company	It claims to have copyright over the Japanese version as it translated the original fairytale into Japanese.

Ⅴ. Conclusion and Future prospects

Tatsuya Yaguchi

We researched arbitration act from 2 perspectives. One is legal history of Japanese arbitration act and the other is system theory of Japanese attribution act. In first part, we explained that in 2003, Japanese government made arbitration act referring to UNCITRAL model law and it made the process of international attribution in Japan much better. In second part, we explained how the current attribution law in Japan works with some case-examples and actually there are

some problems such as language problem.

In this borderless world, it is said we can't avoid problems on international commerce and so we will have more arbitration than we have now. Therefore, it is necessary that we should make effective and fair arbitration system in Japan. The current arbitration act of Japan solved some problems as we mentioned in chapter Ⅲ.However, there are still other issues, for instance language problem and publicity of our arbitration law. We think that if we make effective promotion, the number of arbitration will increase and we believe that it will help the world business develop furthermore.

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