[News]

ADR Law

The Law Concerning the Promotion of the Use of Alternative Dispute Resolution Procedures (the “ADR Law”), which was promulgated on December 1, 2004, will come into force on April 1, 2007. The purpose of the ADR Law is to facilitate citizens’ selection of private means suitable to resolution of disputes and to allow citizens to protect their rights and interests.

In Japan, there are three types of ADR providers; courts, administrative agencies, and private institutions. Of these, private ADR is the least popular. The Judicial System Department (“JSD”; part of the Minister’s Secretariat, Ministry of Justice) points to two reasons why private ADR has not been able to firmly take root and function effectively. Firstly, citizens are worried about using private ADR because of insufficient information on these institutions. Secondly, inadequacies in the private ADR system discourage citizens from using it.

Taking these concerns into consideration, as well as the necessity of ADR in general, and the State’s responsibility for promotion of its use, the ADR Law provides for the accreditation system for private ADR proceedings excluding arbitration. The aim of the accreditation system is to exclude private ADR providers incapable of administering ADR proceedings properly and to ensure the quality of private ADR.

The accreditation system is intended mainly for conciliation or mediation in various types of ADR. In order to be accredited by the Ministry of Justice, a private ADR provider must fulfill sixteen requirements enumerated in Art. 6 and certify that it has the knowledge, ability and financial base required for conducting administration of ADR proceedings.

The accredited ADR proceedings enjoys the following privileges:

a. Commencement of the accredited ADR proceedings shall give rise to an interruption of limitation (Art. 25).

b. Based on the joint request of parties to the dispute, the court may suspend the proceedings of the civil action (Art. 26).

c. The accredited ADR proceedings can be alternative to court-annexed conciliation mandatory before commencing civil actions of disputes on divorce and rent (Art. 27).

d. The accredited ADR provider and the person conducting the process such as conciliator and mediator are entitled to receive remuneration (Art. 28).

The ADR Law does not expressly provide legal requirements for the conciliator or mediator. While the Lawyers Law allows only lawyers to act as a conciliator or mediator, under the ADR Law any person without a lawyer’s license can act as a conciliator or mediator for the purpose of obtaining fees as long as he or she can get advice from a lawyer as may be necessary.

[Articles]

A New Dawn: Investment Arbitration and Japan

Dominic Roughton*

Wednesday, 18th July 2001 was a momentous day in Japanese legal history. While the press reported breaches by China of the World Trade Organisation (WTO) Rules, the merger of Furukawa Electric with Fujikura and high level discussions for security with the Government of Vietnam, thousands of miles away, an UNCITRAL Notice of Arbitration was being

served in Europe.

In and of itself, this was not particularly unusual. Nor was the amount claimed, notwithstanding that the damages sought were large (about Euro 1.4 billion). Even the identity of respondent – the Czech Republic – was not entirely unusual, it having been sued on at least two previous occasions.

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1 The JSD is working on an English translation of the ADR Law. It is to be published by the end of March 2007.
2 Partner, Herbert Smith, Tokyo and Official Representative of the LCIA in Japan.
The real significance of the arbitration was that it was commenced by Saluka Investments B.V. ("Saluka"). Saluka is a Dutch subsidiary company of Nomura, the Japanese investment bank. Its claim was filed under a bilateral investment treaty or "BIT" between its country of incorporation (The Netherlands) and the Czech Republic.

As such, this was the first known example of a Japanese investor bringing a BIT claim against a sovereign State. Against a deteriorating political and economic climate around the world, the likelihood of other Japanese investors bringing similar claims can only increase – not least as Japan expands her portfolio of bilateral, regional and multilateral investment treaties, Free Trade Agreements (FTAs) and Economic Partnership Agreements (EPAs).

Japan's Foreign Investment Treaty Programme

By contrast to many other developed nations, Japan has historically been slow to adopt investment treaties.

Its first treaty was with Egypt, ratified 30 years ago on 28 January 1977. There were then a number of treaties ratified sporadically with the Indian sub-continent (Sri Lanka 1982, Bangladesh and Pakistan (1998))¹ and with China (1988), Hong Kong (1997) and Russia (1998), before a more systematic policy was adopted in 2002.

This policy was set out in a document entitled Japan’s FTA Strategies, issued by the Ministry of Foreign Affairs in October 2002. It recognised that "entering into FTAs is a highly useful way of broadening the scope of Japan's economic relationships with other countries". In that connection, it saw an FTA programme as being "important to maintain and strengthen the free trade system". This was in part to improve Japan’s bargaining position within the WTO but also with the more specific goal of lowering tariff rates on Japanese products in Malaysia and elsewhere in East Asia. Finally, given the political and economic turbulence that followed in the wake of the Russian Financial Crisis of the late 1990s and its impact on Japanese investments specifically, it was considered that FTAs would "help reduce the likelihood of economic frictions becoming political issues" – no doubt with half an eye on the recent negotiations between the Japanese and Russian governments in relation to protecting if not restoring various Japanese investments in numerous Russian oil, gas, coal, gold and other projects.

Japanese policy was to be further refined in 2004 with the publication of the "Basic Policy towards Further Promotion of Economic Partnership Agreements". This enshrined the primary aim of Japan’s investment treaty programme as the promotion of economic partnerships primarily in East Asia. Outside East Asia, the Japanese government made clear its intention to study the possibility of negotiating with other countries or regions, including those specifically comprising APEC as well as ASEAN. In the broad scheme of global contacts, the government decided to "review possible alternative measures of economic partnership to Free Trade Agreements (FTAs)" such as investment agreements, mutual recognition agreements and the rather loosely worded goal of an "improvement of investment environment".

Today, these broad aims have been translated into five priority issues according to the Diplomatic Bluebook 2006. In the chapter entitled "Efforts Aimed at Realising Prosperity in the International Community", those issues are described as:-

1. "Maintaining and strengthening the multilateral trading system... mainly under the World Trade Organisation (WTO), and creating rules in order to promote economic partnership at the regional and bilateral levels to compliment the multilateral trading system;
2. Active participation in international efforts to cope effectively with global issues such as world economic growth and sustainable development;
3. Reinforcing frameworks for interregional cooperation such as the Asian Pacific Economic Cooperation (APEC) and the Asia-Europe Meeting (ASEM)...;
4. Strengthening economic security...; and
5. Support for Japanese companies overseas...”.

In practical terms, this policy has translated into a spate of new investment treaties, including FTAs and EPAs with investment protection chapters. These include two further BITs, one with South Korea (2002) and the other with Vietnam (2003), making a total of 11 BITs ratified in total since 1977.

In addition, FTAs and EPAs have been ratified with Singapore (2002), Mexico and Malaysia (2005) and the Philippines (2006). Others are under negotiation with ASEAN, Indonesia, Vietnam, Brunei, South Korea as well as India, Chile, Australia, Switzerland and the GCC.²

Of perhaps equal significance is Japan’s ratification on 23 July 2002 of the Energy Charter Treaty. The fundamental aim of this is described as being “to strengthen the rule of law on energy issues, by creating a level playing field of rules to be observed by all participating governments, thereby mitigating risks associated with energy related investments and trades”. In addition to Japan, the Energy Charter Treaty has been ratified by most European and CIS States. Significantly, it is provisionally applied by Russia.

¹ No investment treaty currently exists with India, although an EPA has been under negotiation since July 2005.
² Bahrain, Oman, Qatar, Saudi Arabia, UAE and Kuwait.
General trends in modern Japanese Investment Protection Chapters

To say that Japan has ratified 11 BITs, 4 EPAs and the Energy Charter Treaty is all very well. However, the statistics need to be understood in terms of the practical effects for Japanese investors abroad.

Most Japanese investment protection provisions tend to include a very wide definition of ‘investor’ as well as of ‘investment’. These provisions are of the utmost importance in deciding whether or not an ‘investor’ and/or his ‘investment’ are protected by any one or more treaties.

As a general principal, a qualifying “investor” is any person who is a citizen or “national” of Japan. It also includes a broad range of “legal persons” including companies and similar entities constituted under the laws of Japan. These definitions tend not to exclude shell companies – an important concession when considering how to structure an investment in a difficult foreign jurisdiction.

Similarly, the definition of “investments” in Japan’s investment treaties is very widely defined. Most of Japan’s investment treaties define “investments” very generally to include shares, concessions (for example, under an oil and gas agreement), IP rights, moveable and immovable property as well as “claims to money and any performance under contracts having a financial value”.

Of particular significance is the existence of the so-called “umbrella clause” found for example in two of Japan’s BITs1 and the Energy Charter Treaty. Its effect is arguably to elevate certain contractual obligations of the host State to obligations under public international law protected by the investment treaty containing the umbrella clause. Whilst the true meaning and effect of umbrella clauses has for some time been unsettled,2 the prevailing view amongst leading international lawyers is that where there is an investment treaty containing an umbrella clause, the host State’s contractual obligations are elevated to obligations under international law protected by the investment treaty. In other words, an investor may be able to use an investment treaty to sue a host State for breach of a contract in accordance with the dispute resolution provisions contained in the investment treaty; these are typically much more favourable to the investor than the usual dispute resolution found in contracts (as will be discussed below).

Although the breadth and scope of treaty provisions will vary from treaty to treaty, there are a number of common protections contained in most Japanese investment treaties and these form the basis of the discussion that follows. However, careful analysis of the particular provision in question is essential to determine the availability and scope of such protections available in any particular case and under any particular treaty.

National treatment

The host State promises to treat the investments covered by the investment treaty in a manner no less favourable than the way in which it treats the investments of its own nationals.

This guarantee may, however, be of little comfort in States that do not treat their own investors fairly. Further, this standard is often subject to a number of exceptions because many States reserve certain industrial sectors for their own nationals such as for example, national security and political activities.

Most favoured nation treatment (“MFN”)3

An MFN guarantee provides that the host State (say, Russia) will treat investments belonging to Japanese investors in a manner no less favourable than that accorded to comparable investments of nationals of third States (such as the US).

The scope of application of the MFN clause has been the subject of some debate since the high-water mark of the Maffezini decision.4 However, the prevailing view is that an MFN clause should not apply to grant investors rights to which they are not otherwise entitled under their applicable investment treaty; it may only be invoked to improve the terms upon which they enjoy the substantive rights already granted to them under their investment treaty. For example, it should not allow an investor to invoke the benefit of an umbrella clause where none exists in the treaty under which he is claiming; on the other hand, if his treaty contained an umbrella clause, and a separate treaty also contained an umbrella clause but on better terms, the investor may be able to claim the benefit of the second umbrella clause.5

Fair and equitable treatment

There is some debate as to the true meaning and scope of a guarantee of “fair and equitable treatment” and whether it extends further than merely codifying the minimum international standard of treatment due to all foreign investors under customary international law.

Nevertheless, it is reasonably settled that this standard of treatment should guarantee transparency in dealings with investors and protects against bad faith, wilful neglect and clear unreasonableness.

Protection against illegal expropriation

Japan’s investment treaties also typically protect against illegal expropriation. Often this guarantee will also protect against “indirect” or creeping expropria-

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1 Hong Kong/Japan BIT, article 2(3); Russia/Japan BIT, article 3(3).
2 Largely as a result of the decision in SGS v Pakistan (ICSID Case No. ARB/01/13), Decision on Jurisdiction, 6th August 2003.
3 Emilio Agustín Maffezini v. Kingdom of Spain (Case No. ARB/97/7).
4 See Herbert Smith Dispute Avoidance Newsletter, May 2006 for further discussion.
tion and "measures having equivalent effect". Typically, these broader protections apply when licences or incentives are gradually eroded or completely revoked, thus diminishing the value to the investor of his investment, rather than a straightforward nationalisation in the classical sense.

Expropriation may be legal in some circumstances. Typically, a host State may expropriate an asset legally, provided it does so according to law, and the expropriation is in the public interest, is not discriminatory and is accompanied by prompt, adequate and effective compensation.

**Guarantee of the free transfer of funds**

Of particular concern to Japanese investors will be the ability to expatriate the profits derived from their investments in the host country. Japan's investment treaties typically guarantee the free transfer of funds from the host State back to Japan for this purpose.

**Subrogation rights for insurers**

Many of Japan's investment treaties provide subrogation rights for insurers. This means that in cases where investors have acquired political risk insurance (say, through NEXI or MIGA), the insurers will be able to bring claims against the host State directly in place of the investor.

**Constant protection and security**

This guarantee is often understood to refer to principles of international law requiring a minimum level of police protection for foreign property. Consequently, if a Japanese-owned factory is burned down in a riot whilst the local police stand idly by, the investor may have a claim against the host State under the investment treaty.

**Dispute Resolution under Japanese investment treaties**

Having such a wide range of protections and guarantees is one thing, but enforcing them is quite another. With the famous exception of the Philippines/Japan FTA, all the investment treaties ratified by Japan contain dispute resolution mechanisms enabling the investor to bring claims for breach of the treaty directly against the host State.

Generally, the investor has the choice of any one of a number of different options. These include any pre-agreed dispute resolution mechanisms (e.g. a contractual jurisdiction or arbitration clause), or UNCITRAL arbitration in a neutral venue. Typically such UNCITRAL arbitrations are heard in New York Convention countries and are administered if not by the PCA in The Hague, then by one of the leading arbitral institutions, whether the SCC, ICC or LCIA. There is no reason in principle why Japan, as a New York Convention country could not be the seat of an investment treaty arbitration, with the JCAA acting as the administering authority. This would be an exceptionally welcome development in the context of developing Japan as an Asian regional arbitration centre.

In addition, a Japanese investor may have the option of referring a breach of the investment treaty to ICSID arbitration. Little is known about ICSID arbitration in Japan. It is a specialist form of arbitration only available against States which have ratified the Washington Convention 1965 (the "Washington Convention").

In broad terms, an investor may only submit a dispute with a host State to ICSID arbitration if both the host State and the investor's home State have ratified the Washington Convention 1965. To date, 143 States from Afghanistan to Zimbabwe have ratified the Convention, including Japan. As such, ICSID arbitration is available to Japanese investors provided that the host State has itself ratified the Washington Convention and has given its consent to ICSID arbitration.

The issue of consent is said to be the cornerstone of ICSID arbitration. Consent may manifest itself in different ways. The classical approach was to include an ICSID arbitration clause in a contract between the investor and the host State. Alternatively, and unlike conventional arbitration, no arbitration clause is strictly necessary: consent is also deemed to have been given by any host State that has agreed to ICSID arbitration in the dispute resolution provisions of an investment treaty – as is the case with many Japanese investment treaties.

The beauty of ICSID arbitrations is that an award rendered under ICSID against a host State is automatically enforceable as though it were a final judgment of the court of that host State. Moreover, the existence of an ICSID arbitration is made public and awards are generally published on the ICSID website. This means that there is some political stigma attached to a State that finds itself on the ICSID list.

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7 The Malaysia/Japan FTA also enables investors to bring claims before the KLRCA
8 Many investment treaties also provide for State to State arbitration. In Japanese investment treaties, this tends to be ad hoc or under UNCITRAL rules. Such dispute resolution mechanisms tend to be reserved for disputes between the two contracting States regarding the "interpretation or application" of the investment treaty.
9 Convention on the Settlement of Investment Disputes between States and Nationals of Other States done at Washington on March 18, 1965. It is also known as the ICSID Convention.
10 Where either the host State or the investor's State is not a member of ICSID (or where the dispute does not arise directly out of an investment), a claim may be brought under the ICSID Additional Facility Rules. Awards rendered under this Additional Facility are not enforceable under the Washington Convention.
11 Washington Convention 1965, Article 54.
12 See http://www.worldbank.org/icsid/cases/cases.htm
Moreover, where a country fails to comply with an award it may find itself less likely to receive financial assistance from the World Bank and other institutions such as the IMF. Even the threat of an ICSID arbitration against a host State can therefore provide a powerful tool when negotiating a settlement with its government. Indeed, with one known exception, every known ICSID award has been voluntarily honoured by the respondent host State. This is an enviable record compared with enforcement of commercial arbitral awards under the New York Convention.

The success of ICSID arbitration is reflected by its increasing popularity. The first ICSID case was registered on 13 January 1972. For many years, the number of registered ICSID arbitrations rarely exceeded 4 new cases a year. Since 1996, however, the number of cases has been steadily increasing with a record of over 30 new cases in 2003. In 2006, ICSID administered 118 cases, reflecting the philosophy of many European and North American investors that the ability to resort to ICSID arbitration is essential as a means of doing business with difficult host States. No ICSID arbitration is yet known to have been brought by a Japanese investor or against Japan.

The future for Japanese companies

That said, the traditional reluctance of Japanese investors to take advantage of investment treaties is changing. Part of this change may be attributed to the Government of Japan’s policy of broadening the reach of its investment treaties and thereby increasing the range of host States against which Japanese investors can claim protection in respect of their investments. Even so, the relatively limited territorial scope of Japanese investment treaties can be offset by structuring investments to take advantage of investment treaties entered into between the host State and a third country – as was the case in Saluka. Indeed, it is said by leading European jurists that failure to advise in relation to how to structure investments to take advantage of BITs is professional negligence: Saluka’s advisers could no doubt afford to sleep easy. Part of the change may also be to do with a growing acceptance by Japanese companies that to compete with their European and North American peers effectively, they must be prepared to take the same steps to protect their rights and investment as their principal competitors. Saluka was the first known example where this took place (although arguably not the best as the claim was made through a subsidiary managed in Europe rather than directly out of Japan).

Even so, the signs are there. As Japanese companies are made aware of their rights under investment treaties, they are becoming increasingly open to using them to negotiate a settlement with problem governments. From water purification plants in Pakistan to gas fields in Kazakhstan, the Japanese are rightly making – indeed have made – their presence felt and have achieved commendable results. Only in the last 6 months, a number of Japanese companies have taken advice under the Russia/Japan BIT and the Energy Charter Treaty in relation to the current problems at Sakhalin Island. With this increasing acceptance that investment treaties are there for their benefit, the legacy of Saluka will endure: it will not be long before the first claim against a host State is made by a Japanese investor directly under a Japanese investment treaty.

Examination of Witnesses in Court for Arbitration Proceedings in Japan

Junya Naito*

I. Introduction

1. New Arbitration Law and Court Assistance in Taking Evidence

Article 35.1 of the new Arbitration Law1 (“Law”) of Japan effective March 1, 2004 allows an arbitral tribunal and a party to an arbitration proceeding to apply to a court for assistance in taking evidence by any means that the arbitral tribunal considers necessary. Such means, enumerated in Article 35.1, areenthusiasm of investigation, examination of witness-

es, expert testimony, investigation of documentary evidence or inspection prescribed in the Code of Civil Procedure of Japan2 (“Code”). It is reported that in 2005, an examination of a witness held for the assistance of an arbitration proceeding was conducted at the Tokyo District Court. To my knowledge, this is the first case of the examination of witnesses under the new Law. This article is a brief explanation of the procedural issues surrounding examination of witnesses in court for the assistance of an arbitration

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1 Arbitration Law, Law No. 138 of 2003.

2. Purpose of Court Assistance in Taking Evidence

The authority of arbitration as a method of dispute resolution derives from an arbitration agreement between parties. It seems natural therefore that the parties are responsible for their own collection and submission of evidence.

On the other hand, an arbitration agreement gives an arbitration tribunal exclusive jurisdiction over a dispute concerning the subject of the arbitration agreement. In addition, an arbitral award has final and binding effect under Article 45.1 of the Law and is equivalent to a court’s final and conclusive judgment. Fact finding by evidence submitted to the arbitral tribunal provides the basis for an arbitral award, and hence is as important in an arbitration proceeding as it is in a civil lawsuit in court.

3. Weaknesses of Examination of Witnesses in Arbitration Proceeding

The examination of witnesses is one of the most important and powerful measures in providing evidence to the arbitral tribunal. However, compared to the examination in court, there are some weaknesses involved in the examination of witnesses in an arbitration proceeding. For example, the arbitral tribunal cannot legally force a potential witness to testify, while a court can do so with compulsory sanctions (See, e.g., Articles 192.1, 193.1 and 194.1 of the Code). In an arbitral proceeding, no sanction exists even if a witness refuses to appear before the arbitral tribunal. And even if a witness testsifies at an arbitration proceeding, the witness is not subject to the penalty of perjury. In recognition of such weaknesses regarding the examination of witnesses before an arbitral tribunal, the Law allows the arbitral tribunal or a party to the arbitration to apply to the court for assistance in the examination of witnesses.

4. Key Points of Examination of Witnesses in Court

Before elaborating on the issues, it is worth noting several key points of the examination of witnesses in court for assistance of an arbitral proceeding.

First, there are two steps in the procedure: an application to the court for the examination of witnesses; and the examination of witnesses in court. Second, it should be noted that the examination of witnesses in court is a court proceeding. It is managed and administered by the court. Third, the examination of witnesses is governed by the Code. The language in Article 35.1 of the Law, “prescribed in the Code of Civil Procedure,” is interpreted to mean that not only are the enumerated methods of taking evidence (including the examination of witnesses) taken from the Code, but also that the procedures implementing the methods should comply with the Code.

II. Requirements for Application

1. Who Can Apply

Article 35.1 of the Law allows application by either the arbitral tribunal or a party to the arbitration proceeding.

2. Necessity for Examination

The application can be made only when the arbitral tribunal considers it necessary (Article 35.1 of the Law). The arbitral tribunal, not the court, decides whether it is necessary to examine the witness or not. The court may not take into consideration whether the examination of the witness is necessary or not when issuing its decision to admit or deny the application.

3. Consent of Arbitral Tribunal

In case of an application by a party, the applying party must obtain the consent of the arbitral tribunal before making the application (Article 35.2 of the Law).

III. Application for Examination of Witnesses and Decision of Court

1. Method of Application

An application must be made in writing and must include the items enumerated in Articles 2.1 to 2.3 of the Rules for Procedure of Matters Concerning Arbitration (Rules of the Supreme Court No. 27 of 2003, “Procedural Rules”).

2. Venue

The following courts have exclusive jurisdiction over the application: (i) the district court having jurisdiction over the place of arbitration, (ii) the district court having jurisdiction over the domicile or place of residence of the person to be examined, or (iii) the district court having jurisdiction over the general forum of the applicant or respondent but only if there is no court described in the preceding two items (Article 35.3 of the Law).

3. Attorney for Applicant and Respondent

Only bengoshi (a licensed attorney of Japan) can act on behalf of an applicant or respondent in the case of such application, and in the examination of witnesses as well.
4. Examination of Application by Court and its Decision

An applicant must submit a document to court setting out the matters in relation to which the witness is to be questioned pursuant to Article 107.1 of the Rules for the Code of Civil Procedure (Rules of the Supreme Court No. 5 of 1996, "Code Rules"). In addition, the application should state the likely duration of the examination (Article 106 of the Code Rules). As the court will have no knowledge of the subject matter of the dispute, it is practically impossible for it to limit the matters to be questioned or the duration of the examination.

5. Date of Examination of Witnesses

In international arbitration proceedings, arbitrators, parties and attorneys are often located in many places, including foreign countries. Scheduling is often very difficult. Therefore, it is common that the hearing, including the evidential hearing, occurs on consecutive days. It is convenient if the examination in court be held on a day that falls between such consecutive evidential hearing days. For that purpose, it is advisable that the applicant explain to the court the schedule of the arbitration proceeding and request that the examination be held on a certain date that falls in between the evidential hearing dates of arbitration.9

6. Place of Examination

The hearings of an arbitration proceeding usually occur in a hearing room of the arbitration institution (or another location as agreed by the parties). The examination of a witness in court can be held outside of the court if the court considers it appropriate (Article 185.1 of the Code). It is convenient for the arbitral tribunal and the parties that the examination in court also be held in the hearing room or another location the arbitral proceeding has to date been held. Considering, however, that the examination is a court procedure, it is advisable that an applicant confer with the court about the place of the examination after the submission of the application.10

7. Notification of Decision

A decision by the court (ketetei) for the examination of a witness is effective upon notification as the court deems appropriate (Article 119 of the Code). While a judgment (hanketsu) is effective upon pronouncement (Article 250 of the Code) and must be served on the parties (Article 255.1 of the Code), such "service" is not required for a decision.

The date when the parties receives a decision is important, as the parties have two weeks from the receipt in which to file an appeal. Difficulty arises when the respondent resides in a foreign country and has not retained a bengoshi for the examination in court. As a decision need not be "served," the applicant’s attorney should ask the court to notify the respondent via regular mail or facsimile, or may ask the attorney of the respondent in the arbitration proceeding to submit a Power of Attorney to the court for the notification of the decision.11

8. Appealing the Court’s Decision

The decision of the court is appealable (Article 35.4 of the Law). An appeal must be made within two weeks from the time of notification of the decision (Article 7 of the Law).

An appeal will suspend enforcement of the decision (Article 334.1 of the Code). This means that even if the decision for the applicant is issued, the respondent can suspend the examination by an appeal for a certain period of time. Moreover, the court will usually designate as the date of the examination a date which is more than two weeks ahead of the decision, as the suspension by appeal may affect the fixed date of the examination if it was set within such two weeks. On the other hand, it is convenient to schedule the examination in court in between the evidential hearing dates of the arbitration proceeding. Therefore, an applicant should be careful of its time management, considering the time for an appeal and the suspension effect of an appeal.

9. Confidentiality

One of the merits of arbitration is that the proceedings are not open to the public. This confidentiality is protected in the examination of witnesses in court as well. The court records are confidential and only

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10 Id.

11 Only the receipt of the decision on behalf of its client should not be regarded as a violation of Bengoshi ho.
interested parties may access the records (Article 9 of the Law). In addition, the examination of a witness is only open to interested parties. The examination of a witness in court, including its application, is therefore as confidential as the arbitration proceeding.

IV. *Preparation of Examination of Witnesses*

1. **Interpreter**

   While the language to be used in an arbitration proceeding is decided by the agreement of parties or the arbitral tribunal (Articles 30.1 and 30.2 of the Law), Japanese must be used in the courts of Japan.\textsuperscript{12} If an arbitrator(s), parties or witness is not fluent in Japanese, an interpreter should be retained (Article 154 of the Code).\textsuperscript{13} Usually, an interpreter is appointed by reference to the list of interpreters prepared by the Supreme Court.\textsuperscript{13} However, it is more efficient if the interpreter retained at the arbitration proceeding is appointed in court as well, because the interpreter already has an understanding of the dispute. The applicant may want to consult with the court regarding the appointment of that interpreter.

2. **Submission of Documents to be Used in Examination of Witnesses**

   A party can examine a witness using documents with the permission of the presiding judge (Article 116.1 of the Code Rules). If such documents have not been examined by court, the other party must be provided a chance to read the documents in advance (unless the other party has no objection) (Article 116.2 of the Code Rules). As the examination in court is officially a new court case, the documents to be used in the examination must be shown to the other party in advance, even if the documents have already been submitted at the arbitration proceeding.

V. *Examination of Witnesses*

   The examination of the witness should be conducted under the relevant rules for witness examinations in the Code. For example, the examination should take place in the order of the applicant, the respondent and the presiding judge (Article 113.1 of the Code Rules). However, there are several differences that separate this process from a civil court case.

   First, an arbitrator(s) is expected to be present at the examination and may ask questions to the witness with the permission of the presiding judge (Article 35.5 of the Law). The judge has basically no information as to the dispute other than the materials submitted with the application. The judge cannot therefore be expected to raise appropriate questions or to preside over the examination with an understanding of the dispute. Accordingly, in practice, the arbitrator(s) will control and manage the examination of witnesses.

VI. *Post Examination*

1. **Entry in Record of Examination of Witnesses**

   The Law establishes that the court clerk shall enter in the record matters concerning the examination (Article 35.6 of the Law). The record shall be written in Japanese. One issue is whether it is permissible for the arbitral tribunal to make its own record of the examination of witnesses in court. This may be necessary when the language of the arbitration is not Japanese, in which case the arbitral tribunal may request that the applicant party submit a re-translation of the official record of the court into the foreign language used in the arbitration.\textsuperscript{14}

2. **How Results of Examination are Presented to Arbitration Proceeding**

   The Law does not set out how the results of the examination in court are to be presented to the arbitration proceeding. There is no definite legal process for the court to send the record to the arbitral tribunal. Both the parties and the arbitral tribunal can make a copy of the official record (Article 9 of the Law) and such copy can be submitted to the arbitral proceeding.

   It should also be noted that there is no problem from a legal perspective if the arbitral tribunal grants an award (or solicits a settlement award), based upon the witness testimony in court, without having the record itself as evidence, as the arbitrator(s) was actually present at the examination in court.

VII. *Conclusion*

   To date, neither parties nor arbitrators have been active in utilizing any of the methods of court assistance under the Law including examination of witnesses. However, it can be a useful and powerful tool in the fact-finding process. It is the author’s hope that this article contributes to further attention to and usage of court assistance under the new Law.

Acknowledgements: I thank Tsuyoshi Suzuki, Peter Tyksinski and Dr. Richard Small for their invaluable assistance.
[Court Decision]
The First Case Applying the New Japanese Arbitration Law
Tokyo District Court, October 21, 2005
1216 Hanrei Taimuzu 309; 1926 Hanrei Jiho 127

Facts
On October 1, 2002, Plaintiff and Defendant both of which are Japanese companies entered into a patent license agreement by which Plaintiff grants Defendant a non-exclusive license of its patents and Defendant pays to Plaintiff the running royalties for the sale of the licensed products by Defendant and its sublicensee. Some two years later, a dispute arose between the parties about the amount of the royalties payable by Defendant and then Plaintiff sought the payment of the unpaid royalties before the Tokyo District Court, alleging that Defendant underreported the amount of the sale of the licensed products and that as a result Defendant underpaid the amount of the royalties to Plaintiff. In response, Defendant requested the Court to dismiss the Plaintiff’s action under Article 14 of the Arbitration Law, alleging that Article 15 of the license agreement provides an arbitration agreement to refer to arbitration under the ICC Rules the disputes arising between the parties in relation to the license agreement. On the other hand, Plaintiff argued, inter alia, that it terminated the license agreement by reason of Defendant’s nonpayment of the royalties and that Defendant, violating the provision of Article 15 of the said agreement, did not go through the arbitral procedure but instead sought before the Patent Office invalidation judgment of Plaintiff’s two patents out of those licensed hereunder.

The Tokyo District Court dismissed the plaintiff’s action, reasoning as follows.

Excerpt
“...the arbitration agreement between the parties in this case can be considered an arbitration agreement set forth in Article 2 (1) of the Arbitration Law because it is an agreement to submit to one or more arbitrators the resolution of all or certain civil disputes which have arisen or which may arise in respect of a defined legal relationship and to abide by their award. The said agreement is valid under Article 13(1) of the Arbitration Law because its subject matter is considered a civil dispute which may be resolved by settlement between the parties.”

“It is evident that the action in this case was brought in a matter which is subject of the arbitration agreement between the parties and also we cannot find the existence of the instances set forth in each item of Article 14(1) of the Arbitration Law. As a result, the action must be dismissed under the said paragraph.”

“...Plaintiff argues that it notified Defendant of its termination of the license agreement because of Defendant’s nonpayment of the running royalties and that as a result the license agreement was terminated and also the arbitration agreement premising the existence of the license agreement became invalid. However, while Defendant does not dispute the formation of the arbitration agreement itself, in the first place, it is not evident at this moment whether Plaintiff validly terminated the license agreement based on Defendant’s default. As Plaintiff argues, assuming that the license agreement was terminated by Plaintiff’s indication of its intention on the ground of Defendant’s unpaid running royalties, under Article 13(6) of the Arbitration Law, ‘even if in a particular contract containing an arbitration agreement, any or all of the contractual provisions, excluding the arbitration agreement, are found to be null and void, cancelled or for other reasons invalid, the validity of the arbitration agreement shall not necessarily be affected,’ and therefore the arbitration agreement will not retroactively be null and void by reason of the termination of the license agreement and Plaintiff’s argument in this respect is improper.”

“In addition, ...while Plaintiff raises the issue of Defendant’s application for the invalidation of Plaintiff’s two patents out of those licensed under the license agreement, Article 6(2) thereof provides that any provisions therein does not preclude Defendant from disputing the validity of each patent in this case and therefore Defendant’s dispute on the validity of such patent is not contrary to the license agreement. Furthermore, the patent invalidation judgment is the one as an administrative disposition to void the decision to grant a patent if there exists a reason to void the patent and this is not ‘a dispute which may be resolved by settlement between the parties’ and therefore it should be considered that Defendant’s application for invalidation judgment is not contrary to Article 15 of the license agreement. Assuming that this is an action contrary to Article 15 of the license agreement, it only follows that the said application will be unlawful. There is no reason to conclude that the validity of the arbitration agreement itself will cease and that the application of Article 14(1) of the Arbitration Law will be precluded in relation to this action and therefore Plaintiff’s argument in this
respect is improper.”

“Thus, Plaintiff’s action is unlawful and we dismiss it....”

Plaintiff further appealed to the High Court of Intel-

lectual Property, alleging, *inter alia*, that the period of request for arbitration has expired by the operation of the contractual provisions, but this appeal was dismissed on February 28, 2006. The court decision is available at website of the Supreme Court of Japan, www.courts.go.jp/.

**[JCAA Activities]**

**International Commercial Arbitration Forum 2006 held in Osaka**

JCAA held the International Commercial Arbitration Forum 2006 on November 28, 2006 in Osaka. The forum was supported by the Ministry of Economy, Trade and Industry, the Osaka Chamber of Commerce and Industry, the Osaka Bar Association and the Osaka Branch of the Japan Association of Arbitrators and subsidized by the Japan Keirin Association. The main theme was “Prospects and Existing Problems of International Commercial Arbitration in Asia”. The JCAA invited four lecturers: Mr. Nozomu Ohara, Attorney at Law, Executive Director of the Japan Association of Arbitrators, Mr. Lawrence Boo, Deputy Chairman of Singapore International Arbitration Centre, Mr. Dato’ Syed Ahmad Idid, Director of Kuala Lumpur Regional Centre for Arbitration and Mr. Philip Yang, Chairman of Hong Kong International Arbitration Centre.

**International Commercial Arbitration Seminar held in Tokyo**

JCAA co-organised the International Commercial Arbitration Seminar with the Japan Association of Arbitrators and Price Waterhouse Coopers on December 6, 2006 in Tokyo. The speaker was Professor Dr. Loukas Mistelis, Clive M Schmitthoff Professor of Transnational Law and Arbitration; Director, School of International Arbitration, Centre for Commercial Law Studies, Queen Mary, University of London. He introduced and analyzed the research into the corporate attitudes and practices on international commercial arbitration conducted in 2005 by the School of International Arbitration, Queen Mary, University of London (Its report is published on www.pwc.com/arbitrationstudy). In addition, the discussions in the UNCITRAL Arbitration Working Group and the progress of arbitration in Europe were also addressed. Prof. Yoshihisa Hayakawa of Rikkyo University served as the moderator.

**Formation of the Commercial Arbitration Advisory Committee**

The Commercial Arbitration Advisory Committee (hereinafter the “Committee”) was set up by the JCAA with the task of discussing, investigating and making suggestion on important matter of commercial arbitration for the JCAA to play an appropriate role as the only permanent commercial arbitral institution in Japan. The Committee is chaired by Professor Yasuhei Taniguchi and consists of 14 prominent scholars, practitioners and business persons. The Committee held its inaugural meeting on December 15, 2006.

**Notes to Contributors for Article Submissions**

The Editor welcomes submissions of articles and essays on international arbitrations. Articles should not normally exceed 2500 words in length including notes. Manuscripts must be submitted in the format of MS Word together with CV. Material accepted for publication becomes the property of JCAA. However, author may use the article without permission from JCAA. Submission must be sent via E-mail: nishimura@jcaa.or.jp

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