



[Articles]

Japan and the United Nations Convention on Contracts for the International Sale of Goods (Part 1)

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Japan joined the United Nations Convention on Contracts for the International Sale of Goods (the CISG or Vienna Sales Convention) with effect from August 1, 2009. The CISG came into force in 1980, but it took Japan nearly 30 years to accede to it. The Ministry of Foreign Affairs (MOFA) explained in a press release that it expects the CISG “will remove uncertainty regarding the law applicable to trade between Japanese parties and those of other contracting states, and will facilitate international trade involving Japanese parties.”¹

This article will provide readers with a brief background to the CISG and a general overview of its terms. It will also introduce some excellent Internet based resources that readers should get familiar with as Japan begins to see the effect of the CISG in international agreements. In a later article, questions relating to choice of law under the Vienna Sales Convention will be explored. With Japan’s accession, it is clear that arbitrators and practitioners dealing with international commercial disputes involving the sale of goods will now have to consider carefully the applicability of the CISG.

Background to the CISG

The CISG is a multilateral treaty created under the auspices of the United Nations Commission on International Trade Law (UNCITRAL).² The purpose of the CISG is to harmonize contract rules governing the international sale of goods across different social,

economic and legal systems.³ Ultimately, it aims to facilitate international trade by reducing the inherent uncertainty that arises when different countries (and legal systems) apply domestic contract rules to international transactions.

The Vienna Sales Convention traces its roots to work done by the International Institute for the Unification of Private Law (UNIDROIT).⁴ UNIDROIT is an independent inter-governmental organization, founded in 1926 as part of the League of Nations, devoted to modernizing and harmonizing private law among nations primarily through the promotion of model laws and principles. Readers involved in international contracting are likely to be familiar already with the UNIDROIT Principles of International Commercial Contract 2004. These principles have become quite influential globally since their formal endorsement in 2007.

Work to harmonize private international law was interrupted by World War II, but continued in the post-war era with renewed vigor. This resulted in the promulgation of two conventions made at The Hague in 1964, dealing with various aspects of international sales agreements.⁵ However, differences between the common law and the civil law systems led to a gradual recognition that global adoption of conventions perceived as being too strongly tilted towards Western European civil code principles would not gain the needed traction in common law jurisdictions.⁶ The

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¹ Ministry of Foreign Affairs at http://www.mofa.go.jp/announce/announce/2008/7/1181058_1030.html (last visited on February 28, 2010).

² For more information on UNCITRAL, see, <http://www.uncitral.org/uncitral/en/about/origin.html> (last visited on February 28, 2010). UNCITRAL reports to the U.N. General Assembly and it is the main legal body at the U.N. dealing with international trade and commerce.

³ The Preamble of the CISG states as follows:

“Being of the opinion that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and the development of international trade...”

⁴ For additional information on UNIDROIT, see, <http://www.unidroit.org/dynasite.cfm?dsmid=84219> (last visited on February 28, 2010).

⁵ These were the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF), and the Convention relating to a Uniform Law on the International Sale of Goods (ULIS). See, *Antecedents to the CISG* at <http://www.cisg.law.pace.edu/cisg/text/antecedents.html> (last visited on March 13, 2010).

⁶ Paragraph 3 of the Explanatory Note by the UNCITRAL Secretariat proclaimed: “Almost immediately upon the adoption of the two conventions there was wide-spread criticism of their provisions as reflecting primarily the legal traditions and economic realities of continental Western Europe, which was the region that had most actively contributed to their preparation.” UNCITRAL surveyed various nations to determine if they were likely to adhere to these conventions and based on the responses, it was decided that the conventions needed to be modified in order to appeal to countries with different legal, social and economic systems. See, <http://www.cisg.law.pace.edu/cisg/text/p23.html> (last visited on March 13, 2010).

drafters turned their attention to what would eventually become the Vienna Sales Convention as a way of addressing this criticism. The CISG is, as stated in its Preamble (see footnote 3 for the relevant text), expressly intended to appeal to countries with different legal, social and economic systems. The CISG ranks as one of UNCITRAL's major accomplishments as evidenced by the fact that a total of 74 nations (including virtually all of the industrialized countries, the UK excepted) have now joined it.

Japan's Accession to the CISG

Much speculation exists as to why it took Japan so long to join the CISG. Japan participated actively in the initial diplomatic conference in 1980, and its delegation was involved through the finalization of the Vienna Sales Convention at UNCITRAL. As late as 1989, the director general of the Civil Affairs Bureau of the Ministry of Justice gave assurances to the Secretary General of the United Nations that treaty ratification would be given a top priority.⁷ It did not happen that way in the end.

Various reasons have been advanced to explain Japan's tardiness in joining the Vienna Sales Convention.⁸ One explanation is that Japanese industry did not see the need for a harmonized international sales law regime because it had sufficient bargaining power to insist on the application of Japanese, or some other familiar and commercially reasonable, law in international sales contracts.⁹ The Japanese business community resisted the adoption of the CISG,¹⁰ or at least did not pressure the government to make it a priority because of concerns that joining the Vienna Sales Convention could bring uncertainty and increased risk to international contracts.¹¹

A closely related point contends that, at least where large companies were concerned, disputes arising between foreign suppliers and foreign subsidiaries (who often buy goods locally and then send them to the parent) of Japanese parent companies were typically handled in the foreign country by local lawyers under domestic law, and were less likely to give rise to legal disputes in Japan. As a result, many large Japanese law firms and corporate law departments had little interest in the CISG. Corporate law departments being familiar with Japanese law and the law

of most of Japan's major trading partners were not interested in bearing the costs, in time and effort, of developing a working knowledge and degree of comfort with the CISG.¹²

The final, and perhaps most telling, reason is structural in nature. Initial efforts to accede failed because of a lack of bureaucratic manpower, and not because the bureaucrats and legislators bore any strong hostility to the CISG.¹³ It is an undeniable fact that government ministries and study groups have been working flat out for nearly 20 years to enact a sweeping set of legal reforms including a restructuring of certain ministries, the introduction of a new Company Act, a lay judge system (*saibanin seido*) for serious criminal matters, wholesale revisions to most other laws, and a massive project to translate many of the most important laws into English so that they will be more widely accessible. In short, the bureaucrats simply lacked the bandwidth to tackle an issue that was not seen as being a particularly high priority for Japanese businesses.

Overview of the CISG

The Vienna Sales Convention is first and foremost a treaty intended to harmonize the private law governing the international sale of goods. The CISG is meant to promote international commerce by removing uncertainty thereby increasing the predictability of outcomes. Signatory nations agree to incorporate the CISG into domestic law so that national courts will apply it to disputes involving international contracts. It is divided into four major parts: Sphere of Application and General Provisions; Formation of the Contract; Sale of Goods; and Final Provisions. A brief summary of the main points of each follows.

I. Sphere of Application

The CISG applies to the sale of goods when parties are located in different countries, without regard to the nationality of the parties. Article 1 provides:

- (1) This Convention applies to contracts of sale of goods between parties whose place of business are in different States:
 - (a) when the States are Contracting States; or
 - (b) when the rules of private international law lead to the application of the law of a Contracting State.

⁷ See, Noboru Kashiwagi, *Succession by Japan to the Vienna Sales Convention (CISG)*, available online at: http://www.law.usyd.edu.au/anjel/documents/ZJapanR/ZJapanR25/ZJapanR25_16_Kashiwagi.pdf (last visited on March 13, 2010).

⁸ See, Hiroo Sono, *Japan's Accession to the CISG: The Asia Factor*, available online at http://www.law.usyd.edu.au/anjel/documents/ZJapanR/ZJapanR25/ZJapanR25_15_Sono.pdf (last visited on March 13, 2010). The United Kingdom is the notable exception among industrialized nations remaining outside of the CISG regime. Sono speculates that the UK has not joined the CISG because English law is often chosen as the governing law, and England as the place for dispute resolution, leading the English legal community to resist adoption of the CISG. English law is also characterized by a high degree of certainty in the field of contract law and interpretation obviating the need for a uniform international regime so far as UK concerns perceive the situation.

⁹ *Id.*; See also Luke Nottage, *Who's Afraid of the Vienna Sales Convention (CISG)? A New Zealander's View from Australia and Japan*, 4 VICTORIA U. OF WELLINGTON L. REV. 815 (2005) available online at <http://cisgw3.law.pace.edu/cisg/biblio/nottage.html> (last visited on March 13, 2010).

¹⁰ See Yoshihisa Nomi, *The CISG from the Asian Perspective*, available online at <http://cisgw3.law.pace.edu/cisg/biblio/nomi.html> (last visited on March 13, 2010). Nomi contends that two main groups opposed accession to the CISG: international traders and those (mainly in the Ministry of Justice) who felt that the CISG would require significant revisions to the Civil Code.

¹¹ *Id.* (noting that industry lacked enthusiasm for the CISG because of a lack of foreseeability and that large companies were satisfied with the status quo).

¹² See Kashiwagi, *supra* note 7. See also Nottage, *supra* note 9 ("a problem for lawyers is that they prefer the familiar.") at p. 830.

¹³ See, Sono, *supra* note 8 explaining that Japanese bureaucrats were distracted by the downturn of the Japanese economy in the early 1990's.

(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

The effect of Article 1 is to make the CISG applicable to contracts for the sale of goods so long as both contracting parties have their places of business in different countries and both countries are parties to the Vienna Sales Convention.¹⁴ It applies regardless of nationality meaning that a contract, for example, between a Japanese corporation and its wholly-owned subsidiary in the US will be covered.

Expressly excluded from coverage are contracts for (a) goods bought for personal, family or household use, unless the seller neither knew or should have known before or at the time of conclusion that the goods were purchased for such use; (b) auction sales; (c) sales by authority of law (execution or otherwise); (d) sales of financial instruments (shares, negotiable instruments, etc.) or money; (e) sales of ships, vessels, hovercraft or aircraft; or (f) sales of electricity.¹⁵ It should also be noted that so-called "framework agreements" such as master sales agreements, distribution agreements, and joint venture agreements that establish procedures and general rules pursuant to which individual sales agreements (usually via a purchase order and acceptance process) will be executed are not covered, although the particular sales contract (or PO's and acceptances) are included. Other agreements not included are (i) contracts for the supply of goods to be manufactured where the ordering party supplies a substantial part of the materials,¹⁶ or (ii) where the preponderant part consists of labor or service.¹⁷ Matters relating to liability for death or personal injury (i.e., product liability)¹⁸ are not covered, nor are issues of validity of the contract or rights in goods.¹⁹

The CISG is to be interpreted with regard "to its international character and to the need to promote uniformity...".²⁰ This has led many courts to make concerted efforts to apply the CISG consistently with other jurisdictions by referring to decisions of other national courts in similar cases. Party intent is to be given effect whenever possible as is usage. There is no requirement of a writing (i.e., no Statute of Frauds as in most common law jurisdictions) and contracts "may be proved by any means, including witnesses."²¹

Perhaps the most significant provision dealt with under the Sphere of Application section is contained in Article 6. This provision allows parties to opt-out of the CISG or vary the effect of any of its provisions freely, with a few exceptions.²² Concern over the interpretation of the CISG has led many common law trained lawyers routinely to recommend that their clients exercise the right to opt-out, undermining to some degree the intended effect of the CISG.

II. Formation of the Contract

This part consists of 11 articles dealing with the mechanics of offer and acceptance. An offer must be addressed to one or more specific persons and must be sufficiently definite by indicating the goods and either expressly fixing the quantity and price or implicitly by providing a method for doing so.²³ The CISG rejects a strict "mirror-image rule" in favor of a provision that allows an acceptance to add terms that "do not materially alter the terms of the offer...", unless the offeror, without undue delay, objects orally to the discrepancy...²⁴ Material changes in the acceptance result in a rejection of the original offer and constitute a counter-offer on the new terms.

III. Sale of Goods

This part deals with issues relating to the obligations of sellers and buyers, remedies, passing of risk, and breach of contract. It begins by stating that a breach is fundamental "if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result."²⁵

¹⁴ For companies with more than one place of business, Article 10(a) provides that the place of business with the closest connection to the contract and its performance shall be used.

¹⁵ CISG, Article 2.

¹⁶ CISG, Article 3(1).

¹⁷ CISG, Article 3(2). For example, a contract for the sale of software is covered by the CISG, while a contract for the development (and then sale) of software would not be if the preponderant part consists of development.

¹⁸ CISG, Article 5.

¹⁹ CISG, Article 4.

²⁰ CISG, Article 7.

²¹ CISG, Article 11.

²² The exceptions are contained in Article 12, which generally deal with the effect of the absence of a writing requirement in jurisdictions taking a reservation under Article 96.

²³ CISG, Article 14.

²⁴ CISG, Article 19.

²⁵ CISG, Article 25.

Sellers are generally obligated to “deliver the goods, hand over any documents relating to them and transfer the property in goods, as required by the contract ...”²⁶ Likewise, buyers “must pay the price for the goods and take delivery of them as required by the contract...”²⁷ Additionally, buyers must examine the goods as soon as possible after delivery to determine if they conform to the contract. Damage to the goods after the passing of the risk of loss does not relieve the buyer of its obligation to pay for the goods unless the loss is “due to an act or omission of the seller.”²⁸

Damages consist of an amount “equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach.”²⁹ To be recoverable, damages claimed must have been foreseeable at the time of entering into the contract.³⁰ A party can escape liability if it can prove that failure to perform was the result of “an impediment beyond his control” (i.e., *force majeure*) and not reasonably foreseeable at the time of making the contract.³¹ There is a general duty imposed on both sellers and buyers to preserve goods under circumstances of breach.³²

IV. Final Provisions

This section deals mainly with the procedures for acceding to the Vienna Sales Convention and for taking reservations to specific provisions. Article 95 expressly permits nations to declare that they will not be bound by the provisions of Article 1(1)(b). This will be discussed in greater detail in Part 2 of this article. Article 96 allows nations with a Statute of Frauds to derogate from the general civil law approach of the CISG of not requiring contracts to be in writing.

Online Resources for Researching CISG Issues

As indicated earlier, many international practitioners routinely advise their clients to opt-out of the CISG under Article 6. This position was advocated out of a fear that the relatively bare-bones statutory framework would not provide the same level of certainty as would domestic laws such as the Uniform Commercial Code in the US. It would be safer, goes the argument, to opt-out and bargain for the application of the law of some jurisdiction familiar to the practitioner. This underlying concern has largely been abated by the past 30 years of experience with the CISG and the commencement of two excellent online resources for everything needed to understand the Vienna Sales Convention.

The first is the Case Law on UNCITRAL Texts (CLOUT) system.³³ CLOUT relies on a network of national correspondents to report the results of case law (and arbitral decisions to the extent information is available) relating to the following laws, as well as all other model laws generated in the future:

- Convention on the Limitation Period in the International Sale of Goods (New York, 1974), and as amended by the Protocol of 1980
- United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)
- UNCITRAL Model Law on International Commercial Arbitration (1985)
- United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg)
- United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995)
- UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994)
- UNCITRAL Model Law on Electronic Commerce (1996)
- UNCITRAL Model Law on Cross-Border Insolvency (1997).
- United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988)
- United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991)
- UNCITRAL Model Law on International Credit Transfers (1992).

CLOUT reports are in the form of abstracts.

The second and more comprehensive online research resource is the CISG Database maintained by the Institute of Commercial Law at Pace Law School.³⁴ This site provides one-stop shopping with links to the text of the CISG in multiple languages, legislative history, antecedent laws, articles by scholars, and case reports. The case report section is most impressive covering 2,500 cases and 10,000 case annotations, which are regularly updated. The cases are searchable and they are organized by CISG article. It also includes links to materials on drafting CISG contracts and provides guides for managers and counsel. The Pace CISG Database is a rich resource that will prove invaluable to counsel and arbitrators alike.

Conclusion

Early misgivings about the Vienna Sales Convention

²⁶ CISG, Article 30.

²⁷ CISG, Article 53.

²⁸ CISG, Article 66.

²⁹ CISG, Article 74.

³⁰ CISG, Article 74. This is a change from the general rule in Japan that foreseeability is to be determined at the time of the breach.

³¹ CISG, Article 79(1).

³² CISG, Articles 85 and 86.

³³ See, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V00/507/65/PDF/V0050765.pdf?OpenElement> for a users guide.

³⁴ See, <http://www.cisg.law.pace.edu/>

have largely given way to a realization of the substantial benefits a uniform body of international sales law can provide. Numerous cases, summaries and scholarly articles about the CISG are readily available on internet sites such as CLOUT and the Pace CISG Database, removing much of the concern about uncertainty of interpretation. Moreover, since the early 1990s, the number of CISG member states has more than doubled giving it much needed critical mass.³⁵ These factors support the likelihood that the CISG will increase international contracting predictability and that it will have a positive impact on the Japanese business and legal community.³⁶

The impact of the CISG on transactional practice in Japan is a topic that must be addressed by all practitioners working on behalf of Japanese clients, and arbitrators called upon to resolve disputes governed by the CISG. Early doubts about the application of the CISG have been largely overcome as negative predictions and fears have given way to a widespread international acceptance of the regime. While the CISG has critics, there seems to be a general consensus that it has largely succeeded in setting forth the basis for a normative worldwide system for the international sale of goods.

Sports Disputes Resolution in Japan -The activity and role of Japan Sports Arbitration Agency-

Kazushige Ogawa*

1 Introduction

It is wellknown that while there are some arbitration institutes for commercial or maritime disputes in Japan, Japan Sports Arbitration Agency (JSAA), an arbitration institute for sports disputes, is also active and accepting the requests for arbitration. JSAA was established on 7 April 2003 by Japan Olympic Committee (JOC), Japan Sport Association (JASA) and Japan Sports Association for the Disabled (JASD) after the deep consideration and extensive research on sports arbitration such as the Court of Arbitration for Sport (CAS) since 1998. The occurrence of a dispute between Japan Swimming Federation and a female swimmer¹, Ms. Suzu Chiba, concerning the selection of the swimming team for the Sydney Olympic Games also gave the sports circle in Japan an incentive to establish a Japanese sports arbitration body.

JSAA is financed mainly by JOC, JASA and JASD. Each donates to JSAA JPY 3,000,000 a year (total budget is JPY 9,000,000, approximately USD 90,000). Although arbitrations and mediations are conducted by independent and impartial arbitrators or mediators, such financial situation may cause to invite concern about its independence and neutrality of JSAA. In order to ensure independence and impartiality, JSAA has a unique system for selection of the member of the Board of Directors that makes it impossible for any collective of all Directors from a single interest group to decide any matter without the

support of two other groups of Directors.

This article aims to give an overview of JSAA and the current situation about sports disputes resolution in Japan². I will explain why sports disputes need to be resolved through arbitration in the next section (2). Next I will explain the dispute resolution services which JSAA provides (3). Then I will discuss the current circumstances and problems of sports arbitration in Japan (4).

2 Why Arbitrate Sports Disputes?

Imagine that athlete X is not selected for the Olympic Games or other international competitions by the National Sports Federation (hereinafter referred to as "NF") or has imposed a sanction of two years ineligibility for some anti-doping rule violations. Athlete X may well want to make an appeal to a national court against those decisions by NF or anti-doping organization, but unfortunately such an appeal is inadmissible at the courts in Japan and ineffective for Athlete X due to the two features of sports disputes mentioned below.

Firstly, as to the inadmissibility, by virtue of article 3, paragraph 1 of Court Act (Judicature Act), only legal disputes can be dealt with in the courts of Japan³, and it is the majority view that sports disputes mentioned above are not recognized as legal disputes for the reason that such disputes are merely an internal issue of a private body and should not be

³⁵ Sono, *supra* note 8; See also UNCITRAL website, *supra* note 2.

³⁶ *Id.* (arguing that the materialization of a "vast array of court and arbitral decisions, and the enormous amount of scholarly writing" has resulted in greater confidence in the predictability of the Vienna Sales Convention; and stating that the Japanese legal community is becoming more comfortable with the CISG); See also Kashiwagi, *supra* note 7 at 210 (arguing that with regard to the international sale of goods, the CISG has become more predictable even than the Civil Code).

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¹ This dispute had been finally arbitrated at CAS, see CAS 2000/A/278, M. Reeb ed., "Digest of CAS Awards II 1998-2000", [Kluwer International, 2002], pp.534-541.

² For more detail about JSAA, see Masato Dogauchi, "The Activities of the Japan Sports Arbitration Agency," in Ian Blackshaw, Rebert Siekmann and Janwillem Soek eds., "The Court of Arbitration for Sport," [T.M.C. Asser Press, 2006], pp.300-312.

³ Act No.59 of 1947 as amended. English translation is available from the site of Japanese Law Translation (<http://www.japaneselawtranslation.go.jp/>), which is sponsored by the Ministry of Justice and a very useful tool for research on Japanese Law.

resolved by the national laws but by the internal rules of such private body⁴.

Secondly, there is a strong need for the fast-track resolution of sports disputes. Suppose that you appeal only a week before you participate in the competition, it is apparent that the proceeding before the court which has a three-tiered judicial system is ineffective for such disputes.

Such features mentioned above force the sporting world to use arbitration for settling disputes.

3 The Dispute Resolution Services of JSAA

3.1 Introduction

JSAA provides arbitration procedures under the three different rules and a mediation procedure. As to arbitration, three arbitration rules are, in order of enforcement of the rules, 1) Sports Arbitration Rules⁵, 2) Sports Arbitration Rules for Cases Based on Specific Arbitration Agreements (Special Sports Arbitration Rules)⁶, and 3) Sports Arbitration Rules for Cases of Doping Disputes (Doping Sports Arbitration Rules)⁷. On the other hand, mediation is provided under the Sports Mediation Rules for Cases Based on Specific Mediation Agreements (hereinafter referred to as "Mediation Rules"). In the subsection below, each proceeding will be explained.

3.2 Arbitration for the Sports Disputes

Arbitration for sports disputes, which is abbreviated as "the sports arbitration", is the original procedure that JSAA has provided since its establishment. The scope of the subject matter for this arbitration is limited to the disputes where athletes request arbitration against sports governing bodies specified by the Sports Arbitration Rules with regard to their decision⁸. Judgments of a referee during games and the disputes, to which Doping Sports Arbitration Rules shall apply, are excluded from this arbitration⁹. Consequently, the typical disputes arbitrated in accordance with these rules are those selections of athletes or disciplinary matters such as ineligibility of athletes or athlete support personnel due to the reasons other than doping matters.

In order to make possible for athletes to request arbitration to JSAA, it is important that financial requirements should be structured in athletes' favor. Therefore Sports Arbitration Rules only require the

athletes to pay JPY 50,000 as an application fee. In principle, all other cost including three arbitrators' remunerations will be borne by JSAA.

As of this writing, nine awards have been rendered since the establishment of JSAA¹⁰. The nature of the disputes dealt with were six cases for a dispute in connection with selection of athletes¹¹, two cases for disciplinary matters¹², and one other¹³. Compared with the fact that CAS has only dealt with the case relating to selection of an athlete constituting less than five percent of the whole, it is noteworthy that almost all cases handled by JSAA are related to selection of athletes.

3.3 Arbitration for the Disputes with Special Arbitration Agreement

Arbitration proceedings for the disputes with a certain arbitration agreement, which is abbreviated as "the Special Arbitration Agreement Arbitration", is prepared to settle the disputes outside the scope of the Sports Arbitration Rules and the Doping Sports Arbitration Rules, i.e., the establishment of such rules made JSAA able to handle almost all disputes related to the sports field.

At the beginning of JSAA, sports arbitration was the only proceeding that JSAA provided. Because the financial and practical reasons made JSAA to limit the scope of subject matter of Sports Arbitration Rules as mentioned above, but in fact it only dealt with a limited number of cases during fiscal year 2003. So JSAA has decided to expand the arbitration services to matters other than the extent covered by the Sports Arbitration Rules.

However, there is a significant difference between the Sports Arbitration Rules and the Special Arbitration Agreement Arbitration. In the former proceedings, athletes have to pay only JPY 50,000 as an application fee, but for the latter they have to pay the fee calculated in accordance with the formula set by JSAA which adopts the same criteria as used in commercial arbitration¹⁴.

Due to the Special Sports Arbitration being less cost-effective than the Sports Arbitration, no request for arbitration has been made until now.

3.4 Arbitration for the Doping Disputes

"To use or attempt to use prohibited substances or

⁴ See, *Dogauchi supra note 2*, at 301.

⁵ Entry into force on 7 April 2003.

⁶ Entry into force on 1 September 2004.

⁷ Entry into force on 1 July 2007.

⁸ Article 3, paragraph 1 of Sports Arbitration Rules stipulates that such sports governing bodies are JOC, JASA, JSAD, prefectural sports associations and other sports associations which are affiliated members or associate of the former three bodies or prefectural associations.

⁹ Article 2, paragraph 1.

¹⁰ All awards rendered under the Sports Arbitration Rules should be published by JSAA through its website unless the special circumstances exist. At the present, only in Japanese language.

¹¹ JSAA-AP-2003-003 (Disabled Swimming Case, 16 February 2004), 2004-001 (Equestrian Case, 14 July 2004), 2004-002 (Disabled Athletics Case, 26 August 2004), 2005-001 (Roller Sport Figure Case, 6 May 2005), and 2008-001 (Canoe Case, 8 May 2008).

¹² JSAA-AP-2003-001 (Weightlifting Case, 4 August 2003) and 2006-001 (Sailing Case, 7 November 2006).

¹³ JSAA-AP-2003-002 (Taekwondo Case, 18 August 2003).

¹⁴ Actually, almost the same formula used by Japan Commercial Arbitration Association.

such prohibited conducts that enhance athletes' performance" is strictly prohibited in the sports world¹⁵. Once an anti-doping rules violation such as "presence of a prohibited substance or its metabolites or markers in an athlete's sample" has occurred¹⁶, then athletes will be imposed a sanction of ineligibility for not so short a period of time by the International Federations (IF) or National Anti-Doping Organizations (NADO)^{17 18}, unless there are very exceptional circumstances to reduce the sanction¹⁹. Although when determining the sanction at first stage, the fundamental procedural rights such as a hearing before a disciplinary panel are assured under the WADC²⁰, an additional right to appeal against such sanctions to other arbitral bodies such as JSAA or CAS is afforded to athletes, WADA, IFs, NADOs, or other stakeholders²¹.

Until 1 July 2007 doping disputes would be handled under the rules for the sports arbitration, but JSAA instituted the Sports Arbitration Rules for Cases of Doping Disputes after the revision of JADC by JADA. Although the Doping Sports Arbitration Rules are similar to the rules for sports arbitration, there are some amendments to comply with JADC's and WADC's requirements and for optimization²².

As of this writing, one case was brought before JSAA but two arbitral awards were rendered²³.

3.5 Mediation

Since JSAA started providing arbitration services, not a negligible number of cases have been consulted with JSAA about resolution of a sports dispute through arbitration. Although parties of some cases were able to request arbitration by parties agreeing to arbitration *ex-post* notwithstanding the absence of an arbitration agreement at the time of consultation, most of the parties were not²⁴.

Although such party could not use arbitration as a

tool for dispute resolution, with assistance provided by JSAA Office²⁵, a certain number of parties could arrive at amicable settlement via negotiation, etc. This fact reminds JSAA of the potential needs for resolution of sports disputes through consultation, negotiation, conciliation, and mediation, and JSAA immediately set up rules for mediation and started a mediation service on 30 September 2006. And as soon as the Act on Promotion of Use of Alternative Dispute Resolution (Law no. 151, 2004) was enforced on 1 April, 2007, JSAA applied for certification and was certified by Minister of Justice on 6 June 2007 as the first certified dispute resolution business operator²⁶.

The scope of the matters referable to mediation should be determined. Basically all kinds of disputes are acceptable for mediation if such disputes somehow relate to sport, but disputes in relation to the judgment of the referee or the disciplinary disposition of a sports federation are not²⁷. Such disputes should not be settled by parties and therefore lack conformity to mediation.

The mediation provided by JSAA is conducted by one mediator and is cost effective for the parties. The fee payable to JSAA is only 25,000 JPY for each party as the application fee or the acceptance fee. Up to the present date, seven cases were handled, of which two came to a settlement.

4 Challenges for the Future

Almost seven years has passed since the establishment of JSAA; during this period JSAA has expanded and improved its services and was able to get more public acceptance by hosting symposiums about sports arbitration every year and workshops for arbitrators quarterly and publicizing arbitral awards. However, JSAA is yet to accomplish the objectives laid out in the Statute²⁸.

¹⁵ Basically World Anti-Doping Code (WADC) established by World Anti-Doping Agency (WADA) in 2003 and National Anti-Doping Code such as Japan Anti-Doping Code covers these matters. WADA is the international and independent organization founded in 1999 to promote, coordinate, and monitor the fight against doping in sport in all its forms. WADA is a Swiss private law foundation whose seat is in Lausanne, Switzerland, and headquarters are in Montreal, Canada. For more detail about WADC, see Paul David, "A Guide to the World Anti-Doping Code," [Cambridge University Press, 2008]. WADC is available at WADA website, <http://www.wada-ama.org/>. JADC is established by Japan Anti-Doping Agency in accordance with WADC and Model Code for National Anti-Doping Organizations prepared by WADA.

¹⁶ Anti-Doping Rules Violation is defined in Section 2 of WADC. There are eight types of situation that infringe the anti-doping rules.

¹⁷ Sanctions to be imposed on standard type of anti-doping violation are, disqualification of results and at least 2-years ineligibility for first anti-doping rules violation or 8-years to lifetime ineligibility for a second violation (see, WADC 10.2, 10.3, 10.4, and 10.7).

¹⁸ Japan Anti-Doping Agency is a national anti-doping organization for Japan, hereinafter referred to as "JADA." JADA is the independent organization founded in 2001 and has the primary authority to adopt and implement anti-doping rules, direct the collection of samples, and the management of test results, in accordance with JADC and WADC in Japan.

¹⁹ Such exceptional circumstances are stipulated in WADC 10.5.

²⁰ The Japan Anti-Doping Disciplinary Panel has the jurisdiction as the first-tier over cases under the JADC.

²¹ According to the WADC, cases with the national level athlete are appealed to JSAA, but cases with the international level athletes are appealed to CAS only. See, WADC 13.

²² Accordingly, the same as the Sports Arbitration Rules, the athletes are only required to pay JPY 50,000 as an application fee.

²³ JSAA-DP-2008-001, 2008-002. In this case both the athlete and JADA appealed against the decision of the Japan Anti-Doping Disciplinary Panel separately, that is why there are two awards rendered.

²⁴ As mentioned below, JSAA continues to ask NFs to stipulate arbitration clauses in their rules or By-Law.

²⁵ Of course JSAA is in the position of an absolutely independent dispute resolution provider and due to the concern of violation of Article 72 of Attorney Act, JSAA will never serve as a party's representative. The only things that JSAA could do are to explain to the other party the substance of the dispute plainly, and to give notice of the existence of some dispute.

²⁶ As of 4 October 2009, 43 dispute resolution business operators have been certified by the Minister of Justice.

²⁷ See, Mediation Rules, Article 2, paragraph 2.

²⁸ Article 3 of the Statute of JSAA stipulates that its purposes are to make the transparency of the sports law higher, to support the understanding of and trust in sport, and to promote sports circumstances by resolving disputes between an athlete and a sport governing body through arbitration or mediation.

Needless to say, each sports arbitration service provided by JSAA is a kind of arbitration, an arbitration agreement between the parties is a prerequisite to commence arbitration. Unfortunately not a few sport governing bodies are relatively reluctant to use especially Sports Arbitration for resolving disputes in the sports field²⁹. Taking into consideration JSAA's objectives, the situation mentioned above is undesirable.

It is important and indispensable for not only athletes but also sports governing bodies that a transparent, impartial and rule-oriented dispute resolution mechanism will be always available whenever disputes arise. This way, athletes are able to perform without reserve. To make available such dispute reso-

lution mechanism for the sports field, JSAA has continued to persuade sport governing bodies to insert automatic arbitration clause. As of this writing, only 44.3 per cent of sport governing bodies affiliated to JOC or JASA have already adopted such measures.

It took over 20 years for CAS to acquire a reputation and trust among the international sports world to be able to handle as many cases as in recent years. Compared with CAS, JSAA is still entering its dawn. Accordingly, JSAA should endeavor to develop the atmosphere of the sports field in Japan in a more transparent and rule-oriented way and persuade sport governing bodies to insert an automatic arbitration clause with patience.

[Court Decision]

Dismissing the Application for Setting Aside an Award

Tokyo District Court, July 28, 2009

292 Hanrei Times 1304

Facts

On October 3, 1997, an accidental fire took place in the semiconductor manufacturing plant of UICC, a Taiwanese semiconductor manufacturer located in Hsinchu, Taiwan, utilizing semiconductor manufacturing equipment manufactured, sold and installed by Plaintiff and it caused the plant to be entirely destroyed. UICC was paid insurance by three Taiwanese insurance companies that were reimbursed insurance by Defendant under reinsurance agreement. As a result, Defendant subrogated UICC's right to claim damages against a responsible person for this fire accident and it claimed these damages from Plaintiff due to its default of obligation. In December 2005, Plaintiff and Defendant agreed that the dispute on the damages was to be referred to arbitration in Tokyo under the auspicious of the International Centre for Dispute Resolution of the American Arbitration Association (ICDR) and based on this agreement Defendant initiated arbitration against Plaintiff. The arbitral tribunal rendered an arbitral award in which it determined that Plaintiff failed to perform its obligation to warn of possible dangers in connection with its equipment and that this failure caused the accidental fire. In the award, it ordered Plaintiff to pay Defendant some NT\$2.7 billion with its default interest and US\$1.6 million as attorneys' fees.

Plaintiff was unsatisfied with the award and on October 14, 2008, it requested Tokyo District Court to set it aside. Plaintiff made three allegations to set aside the award. First, Plaintiff alleged that it was not able to present its case in the arbitral proceedings because Defendant did not make allegations on

Plaintiff's failure to warn of possible dangers in connection with its equipment in the arbitral proceedings and that this constituted the grounds for setting aside an award as set forth in Article 44 (1) (iv) of the Japanese Arbitration Law.

Second, Plaintiff alleged that the content of the arbitral award was in conflict with the public policy or good morals of Japan because although in the circumstances of this case the Plaintiff's obligation cannot exist nor can a sufficient cause exist between the Plaintiff's failure to warn and the accidental fire under the applicable law of laws of Taiwan, the arbitral tribunal found both such existences and the arbitral tribunal, based on unreasonable rulings, ordered Plaintiff to pay a huge amount of more than JPY10 billion. This constituted a ground for setting aside an award set forth in Article 44 (1) (viii) of the Arbitration Law.

Third, Plaintiff alleged that the arbitral proceedings had not been in accordance with the agreement of the parties because the fact that Plaintiff was unable to present its case in the arbitral proceedings violated the proviso of Article 16 of the International Arbitration Rules of the ICDR providing that "...provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case," and that it constituted a ground for setting aside an award as set forth in Article 44 (1) (vi) of the Arbitration Law. However, this Plaintiff's allegation was made belatedly and separately from the other two on March 6, 2009.

The Tokyo District Court, finding that in the arbitral proceedings Defendant alleged the Plaintiff's failure

²⁹ As to doping disputes, sport governing bodies are obliged to accept JADC and accepting JADC generates an arbitration agreement. So, to the extent the disputes under JADC and respective article of JADC permits, parties to such disputes are able to use arbitration of JSAA.

to perform its obligation to warn and its sufficient cause with the accidental fire and that Plaintiff recognized such allegations, dismissed the Plaintiff's application for setting aside the award, reasoning as follows:

Excerpt

"...Article 44 (1) (iv) of the Arbitration Law sets forth the grounds for setting aside an arbitral award that provides that the party making the application was unable to present its case in the arbitral proceedings. The arbitral procedure is an alternative dispute resolution based on the agreement of the parties. It does not contemplate the appeal procedure and the arbitral award is placed as final. Further, Article 4 of the Arbitration Law provides that with respect to arbitral proceedings, no court shall intervene except where so provided in this Law. In light of this, it goes without saying that an arbitral award should be respected as much as possible. From this point of view, it is reasonable to understand the purport of Article 44 (1) (iv) which means that the courts set aside an arbitral award only in cases where serious violation of due process exists in arbitral proceedings by which the party was entirely unable to present its case such as a case where the party was unable to appear in arbitral proceedings and the arbitral award was made relying on the materials which the party was unable to recognize. Therefore, the circumstances of the degree to which the party did not recognize as important issues in dispute does not constitute the ground for setting aside an arbitral award under Article 44 (1) (iv)."

"...the court should have the position to respect the arbitral award as much as possible and therefore it is reasonable to understand the purport of Article 44 (1) (viii) which does not mean that the court may set aside an arbitral award in cases where it merely finds the fact findings and legal decision by the arbitral tribunal to be unreasonable but instead means that the court may set it aside only where it finds that the legal outcome realized by an arbitral award is in conflict with the public policy or good morals of Japan." "Examining this case from this point of view, Plaintiff's allegation that although the Plaintiff's obligation cannot entirely exist nor can a sufficient cause exist between the Plaintiff's failure to warn and the acci-

dental fire, the arbitral tribunal finds such existences and as a result, the content of the arbitral award is in conflict with the public policy or good morals of Japan, merely amounts to the one that the fact findings and legal decision made by the arbitral tribunal are unreasonable and therefore it cannot be found that the content of the arbitral award is in conflict with the public policy or good morals of Japan." "In addition, Plaintiff alleges that the huge amount of damages is in conflict with the public policy or good morals of Japan but according to the all the records, Defendant paid the reinsurance for the actual damages due to the accidental fire and then it demands Plaintiff to pay this amount. The arbitral tribunal made an arbitral award in which it orders plaintiff to pay Defendant the amount within the range of the Defendant's claim and no special circumstances exist in the arbitral award other than the amount of damages determined by the arbitral tribunal being only large. Therefore, the legal outcome realized by the arbitral award cannot be in conflict with the public policy or good morals of Japan."

"It is reasonable to understand that generally the additional allegation based on Article 44 (1) (i) through (vi) after the period has elapsed as prescribed in Article 44 (2) after the request for setting aside an arbitral award is not allowed because it violates Article 44 (2)." "This is because in order to promptly make clear the effect of an arbitral award, Article 44 (2) limits the time to apply to set aside an arbitral award to three months from the date on which the party making the application had received a copy of the arbitral award. If an additional allegation based on a new ground for setting aside an arbitral award is allowed after the application period has elapsed, it is difficult for Defendant to foresee whether the arbitral award will be set aside and prompt determination of the effect of an arbitral award will be hindered."

"Therefore, the Plaintiff's additional allegation based on Article 44 (1) (vi) violates Article 44 (2) and it is not allowed."

The Plaintiff appealed to the Tokyo High Court but on February 26, 2010, the Court dismissed this appeal for similar reasons except that as regards the Plaintiff's third allegation, it cannot find such facts as alleged by the Plaintiff.

[JCAA Activities]

1. Arbitration Seminar on "Arbitration in Korea and Japan"

Last December 4 in Osaka, JCAA, Osaka Office, held the International Commercial Arbitration Seminar

entitled "The Present and Future of Arbitration in Korea and Japan", under co-sponsorship of Japan Association of Arbitrators, Kansai Branch, and Osaka Chamber of Commerce & Industry. Mr. Kyung-Han

Sohn, Attorney at Law, of Jung & Sohn, delivered his presentation on topics as follows; "The Current Situations in Arbitration and ADR in Korea", "Overview of the Arbitration Law and Rules of Institutional Arbitration", "Key Points in the Situation of the Japanese Enterprises Institute Arbitration in Korea", and "Korean Perception toward Japanese Arbitration". About 50 participants, consisting of lawyers, business people, etc., attended the seminar.

2. International Commercial Arbitration Seminar - Practical Guidance for Japanese Companies-

In Osaka, on March 4, this year, JCAA, Osaka Office, co-organized the International Commercial Arbitration Seminar -Practical Guidance for Japanese Companies- with Herbert Smith, Tokyo, Japan Association of Arbitrators, Kansai Branch, and Osaka Chamber of Commerce and Industry. The speakers and their theme were as follows:

1. Mr. Dominic Roughton (Partner, *Gaikokuho-jimben-*

goshi, Herbert Smith, Tokyo)

"Introduction to Arbitration, Advantages of Arbitration for Japanese Companies, Legal Structure/Process of Arbitration".

2. Mr. Peter Coney (Of Counsel, Herbert Smith, Tokyo) "Major Arbitration Institutions (e.g., LCIA, HKIAC) and Strategies for Effective Use of Arbitration".

Following their speeches, the Panel Discussion was held under the theme of "Selection of Arbitrators - What is the Factor for an Effective Arbitrator for the Parties? Role and Duties of the Arbitrator". Panelists were Mr. Dominic Roughton, Mr. Peter Coney and Mr. Masaharu Onuki, Executive Director of JCAA, and the coordinator was Mr. Masafumi Kodama, (Partner, Kitahama Partners). The Seminar was completed successfully and attracted audiences of more than 100, consisting of business people, lawyers, and academics. After the Seminar ended, a reception was held, and an exchange of opinions and information took place among the participants with the panelists.

Standard Arbitration Clause

All disputes, controversies or differences which may arise between the parties hereto, out of or in relation to or in connection with this Agreement shall be finally settled by arbitration in (name of city) in accordance with the Commercial Arbitration Rules of the Japan Commercial Arbitration Association.

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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