1. Starting Drafting just after the Receipt of an Answer
(a) Time passes fast

From time to time, I serve as a commercial arbitrator. Most of the arbitration cases that I have handled have been conducted under the Arbitration Rules of the Japan Commercial Arbitration Association (“JCAA”). Some were ICC Arbitration. I experienced one case conducted under the rules of the Vietnam International Arbitration Centre. As I am a professor of law but not a lawyer (benkōshi), I do not represent parties to arbitration. I act either as the third party or umpire arbitrator or as a sole arbitrator. And, as I am not a full-time arbitrator, I perform many other tasks in addition to arbitration. Time runs out quickly. Many arbitration rules sets forth the time during which an arbitration tribunal has to produce a final award. For example, Rule 53 (1) of the old Commercial Arbitration Rules of the JCAA that was effective until January 31, 2014, set forth as follows:

Rule 53. Time of Arbitral Award
1. Once the arbitral tribunal has determined that the proceedings have matured enough for it to render an arbitral award and the examination has been concluded, the arbitral tribunal shall make an arbitral award within five (5) weeks from the date of such conclusion; provided that the arbitral tribunal may, if it deems it necessary in view of the complexities of the case or for any other reason, extend such period of time to an appropriate period of not more than eight (8) weeks.

(b) Preparation of the award soon after the beginning of the procedure

It is too late to start drafting the award after the closing of the arbitration procedure. I usually start drafting an award soon after the receipt of a copy of the answer. Many items of formality to be written on the award can be drafted immediately. For example, names and addresses of parties and of lawyers representing parties, how the...
arbitration tribunal was formed, the relevant arbitration agreement, the applicable law, the language to be used, reliefs sought by the parties and the place of arbitration.

As the procedures develop, from time to time I implement and supplement the other parts of the award such as jurisdiction of the arbitration tribunal, the procedural history, claims by the claimants and the case argued by the respondent, the issues and facts of the dispute. After each hearing, I modify and update the draft. The dispositive part of the award, granting or denying reliefs sought, will be drafted in the last stage. However, when the time matures, it is better to draft the dispositive part and make some minor changes as things develop toward the conclusion of the procedure.

(c) Merits of early drafting
Firstly, early drafting of formal parts of the award such as names, addresses and contacts of parties and of lawyers representing parties, the formation of the arbitrators and relevant arbitration agreement, will save a lot of time later for arbitrators. The arbitrators may refer to the telephone number or e-mail addresses of the attorneys representing parties if the tribunal needs to contact them. From time to time, arbitrators may confirm the facts found so far and confirm the claims and arguments of both parties. This serves to refresh the memory and organize the thoughts of arbitrators.

Secondly, an accurate procedural history can be drafted only by writing and supplementing from time to time directly after every significant procedural step has been taken. Arbitrators tend to forget the details of the procedural steps as time passes.

Thirdly, by writing facts, arguments and reasons, arbitrators often realize any uncertainty in their understanding and other questions that may arise. These uncertainties and questions can be confirmed immediately or at the coming hearing. If arbitrators start drafting the award after the conclusion of the procedure, there is no opportunity to confirm these points with parties.

2. Submission of Draft Award for Review and Comments of the Parties
(a) I usually submit a draft award excluding the conclusion and findings of facts to the parties at some point with the permission of the parties. Parties always welcome such disclosure. The timing of the submission is when a substantial part of the procedure has finished and one or two hearings are still scheduled to be held. I do not disclose all of the draft award. Usually I will keep the confidential (i) dispositive part of the award granting or denying the reliefs sought, (ii) findings of sensitive disputed facts and (iii) the reason for the award. However, I try to disclose as much as possible of the draft award.

(b) The reason for the disclosure of the draft to the parties is to make sure of the accuracy of the award. The corporate name of a party might be wrongfully spelled. The draft might not refer to some procedural steps. Arbitrators might misunderstand the facts concerning technical matters. The statement of the claim by the claimant or arguments by the respondent summarized by arbitrators might not be accurate or correct in the eyes of the parties.

(c) From my experience of interviewing and counseling as an in-house corporate legal staff, I many times experienced the inaccuracy of my understanding after an interview with clients. I used to try to prepare a memorandum summarizing the meeting and ask the client to review it. Often times, clients have pointed out inadvertent errors and incorrectness in my memorandum. This made me cautious to finalize the statement of facts without the confirmation of the client.

(d) Parties to the arbitration will be given an opportunity to state their opinions and objections to the draft award. I will consider these opinions and objections and, if necessary, reflect these opinions and objections to the draft. I do not take all of these opinions and objections into consideration. It is solely at my discretion whether these opinions and objections are taken into consideration and result in the correction and modification of the draft. I confirm this point with parties in advance to the disclosure of the draft award. There will be no more review of the draft award by the parties.

(e) This review by the parties of the draft award may avoid some fatal errors in the award. In the case where a losing party sought an arbitration award to be set aside, an arbitrator stated disputed facts as undisputed facts, in the arbitration award.4 Article 44 (1)(viii) of the Arbitration Act of Japan sets forth:

Article 44 (1) If any of the following grounds

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exist, the parties may make an application with the court to set aside the arbitral award: (viii) the content of the arbitral award is against public policy in Japan.

The court held that if the arbitration procedure violates procedural public policy of Japan, then such violation constitutes the violation of “public policy” provision of Article 44 (1)(viii). Therefore, the arbitration award in which disputed facts were stated as undisputed facts violate Article 44 (1)(viii). Thus, the award was set aside by the court.

The original arbitration case was decided by a sole arbitrator. In the case of the arbitration by a sole arbitrator, the risk of similar kinds of inadvertent errors will increase. If the arbitrator had asked parties to review the draft arbitration award, parties would have pointed out the error and the arbitrator would have corrected it. Even if parties fail to point out an error, parties may have difficulty in later complaining of the mistake and ask the court to set aside the award for reason of errors that they had overlooked.

3. Disclosure of findings of disputed facts, reasons and dispositive part of the award

(a) I am still debating whether I should submit also the findings of disputed facts, reasons and dispositive part of the award. The purpose of the disclosure is firstly to avoid a surprise to the parties when they received the final award. The losing party may regret that he would have argued otherwise or provided other evidence if he had known the arbitrator’s opinion or reasoning beforehand. If the dispute is submitted to a national court, the losing party may appeal the case to an upper court rebutting the findings and opinions of the lower court. But, in the case of arbitration, no such opportunity is warranted. In most countries, an arbitration award is final. That is a risk of arbitration.

(b) If an arbitration tribunal shows in advance the draft award that includes findings of disputed facts, the reasons and dispositive part of the award, then, the losing party would realize the shortcomings of his arguments and evidence. Isn’t it fair to give him the opportunity of a recovery shot?

(c) Arbitrators might say that if the final draft of the arbitration award including everything is disclosed to the losing party, it would cause a mess. The losing party would try every tactic to quash or delay the unfavorable award. That is another risk. I am considering a procedure to limit the tactics to remove an unfavorable result. For example, the losing party would be given only one opportunity to file a final brief. Submission of new written evidence will be subject to the permission of the arbitration tribunal. No new witness examination will be allowed. No new motion or plea will be allowed. The other party will be allowed to file a brief to rebut the losing party’s brief.

(d) Or, arbitrators may disclose only the liability of parties. Arbitrators should not disclose reliefs to be granted, such as an order to pay monetary damages, injunctive relief or declaratory relief. Disclosure of the judgment on the liability will promote the settlement negotiation between the parties. If the parties stick to an optimistic expectation of the outcome, the settlement would be difficult. But, if disputing parties come to understand their position accurately regarding the liability, the chance of the settlement would increase because the Zone of Possible Agreement (the range of possible agreement for settlement) increases.

4. Conclusion

I believe that the preliminary thoughts of arbitrators formed during the arbitration procedure should be disclosed openly and without hesitation. Parties will try to correct such thoughts by new briefs, evidence and witnesses. If either party succeeds, arbitrators will simply change their thoughts. If not, it is a pity for that party.

Arbitrators should avoid inadvertent mistakes and surprise reasoning of the award. Parties have substantially no chance to challenge such errors and unexpected reasoning except for in a limited cause. Drafting an award from the early stage and asking parties to review the preliminary draft award would lead to the avoidance of such errors and surprise.
The Recent Court Decisions on the Japanese Arbitration Law

Tatsuya Nakamura*

In the September 2012 issue of this newsletter, Tatsuya Nakamura, The Recent Japanese Court Decisions on Arbitration, 28 JCAA Newsletter (2012) 4-10, we reviewed the court decisions on the Japanese Arbitration Law (Arbitration Law), and since then there are some developments in the Arbitration Law. In this issue, we will further examine the court decisions on some important issues raised in international arbitration.

1. Law Applicable to Arbitration Agreement

KPE Co., Ltd. v. M. Setek Co., Ltd., 2013WLJP-CA08238004, Tokyo District Court, 23 August 2013

KPE Co., Ltd. (KPE), a Korean company sought the repayment of the amount of advanced payment, alleging that KPE terminated the two sales contracts with M. Setek Co., Ltd. (M. Setek), a Japanese company because M. Setek breached the contracts by failing to supply silicon wafers for solar panels. In response, under Article 14(1) of the Arbitration Law, M. Setek requested the Court to dismiss the action, alleging that there is an arbitration agreement between the parties contained in the sales contracts. The arbitration agreement contained in the contracts provides that both parties shall do their best in order to settle any dispute and/or arguments, which may arise upon or in connection with the contract, by means of negotiations. It further provides that any disputes arising upon or in connection with the contract, including disputes concerning the quality of the products should be submitted for recourse and final resolution to the International Commercial Arbitration Court.

One of the issues before the Court is which law will apply to the formation, effect and formalities of the arbitration agreement. The Court held that in view of the nature of arbitration as the means of the settlement of the dispute based on the agreement of the parties, it is reasonable to determine the law applicable to the formation and effect of an arbitration agreement in international arbitration in accordance with the intent of the parties. It further held that although no explicit agreement exists between the parties in respect of the law applicable to the arbitration clause, an implied agreement exists between the parties to apply the Japanese Law to the formation and effect of the arbitration agreement and thus the Japanese law can be the law applicable to its formalities under Japanese private international law. Specifically, Articles 7 and 8 of the Act on General Rules for Application of Laws, Act No. 10 of 1898 applies to the arbitration agreement of the first sales agreement because it applies to the formation, effect and formalities of an arbitration agreement executed prior to the date of the effectuation of the Act on General Rules for Application of Laws, Law No. 78 of 2006 and the Act of 2006 applies to the arbitration agreement of the second sales agreement. This is because the respective parties submitted their arguments in respect of the formation and effect of and the formalities for the arbitration agreement based on the Japanese law and therefore there is no dispute in respect of the choice of law from the first.

Azbil Corporation v. Honeywell Japan Inc. and Honeywell Pte. Ltd., 1413 Hanrei Taimuzu 271, Tokyo District Court, 17 October 2014

Azbil Corporation (Azbil), a Japanese company sought the declaratory judgment against Honeywell Japan Inc. (Honeywell Japan), a Japanese company and Honeywell Pte. Ltd. (Honeywell Singapore), a Singapore company that it has no obligation to pay unpaid software license and service fees or loss and damages for such unpaid fees under the software distribution agreement between Azbil and Honeywell Singapore and the individual agreements between the parties, or loss or damages for the tort of Azbil’s sales in a quantity and at a price not approved by Honeywell Singapore and Honeywell Japan. In response, the defendants requested the Court to dismiss the action, alleging that there is an arbitration agreement

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between the parties contained in the software distribution agreement between Azbil and Honeywell Singapore. Subsequently Honeywell Singapore initiated arbitration by submitting a request for arbitration with Azbil to the JCAA in which Honeywell Singapore sought the payment of the unpaid fees and also the damages for breach of the arbitration agreement between the parties.

The dispute resolution clause contained in the software distribution agreement provides that if there arises any dispute between the parties, arising out of or relating to this Agreement the parties shall first endeavor to amicably settle such dispute within a period of three months after either party gives the other party a written request for such amicable settlement and that in the event that the parties fail to amicably settle such dispute within said three month period, either party may request settlement by arbitration. As to the arbitration, it further provides that if arbitration is requested by Azbil then such arbitration shall be held in Phoenix, Arizona U.S.A., and shall be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association; if the arbitration is requested by Honeywell Singapore, it shall be held in Tokyo, Japan and conducted in accordance with the provisions of the Japan Commercial Arbitration Association. In addition, the governing law clause provides that the interpretation of the Agreement shall be governed solely by the laws of the State of Arizona, U.S.A. and by the laws of the United States of America and the provisions of the International Convention on the Sale of Goods shall not apply to the extent it conflicts with the above laws.

Which law will apply to the arbitration agreement was one of the issues before the Court and the Court, making reference to the Supreme Court decision, The Japan Educational Corporation v. Kenneth J. Feld, 51 Minshu 3657, Supreme Court, 4 September 1997, held that the law applicable to the formation and effect of the arbitration agreement in international arbitration should be firstly determined by the intent of the parties under Article 7 of the Act on General Rules for Application of Laws, Act No.10 of 1898 and that even if no explicit agreement exists between the parties in respect of the law applicable to the arbitration agreement, it should be determined by an implied agreement between the parties if it is found in light of the existence and contents of the agreement on the place of arbitration, the contents of the main contract containing the arbitration clause and other circumstances.

So holding, the Court found that in this case there exists an implied agreement between the parties to apply the laws of the State of Arizona, U.S.A. and the laws of the United States of America to the arbitration agreement because it is obvious that there exists an agreement between the parties that those laws apply to the software distribution agreement.

Polestar Ship Line, S.A. v. The Sanko Steamship Co., Ltd., 2258 Hanrei Jiho 100, Tokyo District Court, 28 January 2015

In a very recent case, Polestar Ship Line, S.A. (Polestar), a Panamanian shipping company delivered its own ship to The Sanko Steamship Co., Ltd. (Sanko), a Japanese company under a time charter party but thereafter during the period of the charter party, the commencement of reorganization proceedings against Sanko was ordered under the Corporate Reorganization Act. Polestar, alleging that the claim for the charterages payable to Polestar constitute common benefit claim under Articles 62(2) and 127(ii) of the Corporate Reorganization Act, sought the payment of charterages against the Trustee of Sanko and also requested the Court to declare that the claim for the charterages constitutes such common benefit claim. In response, the Trustee requested the Court to dismiss the action, alleging that in the charter party, there is an agreement between the parties to refer this dispute to arbitration in London.

The Court held that while the law applicable to an arbitration agreement is firstly determined by the intent of the parties under Article 7 of the Act on General Rules for Application of Laws, Act No. 78 of 2006, it is reasonable to find there is an implied agreement between the parties to apply English Law to the arbitration agreement because the charter party provides that the governing law is English Law and the place of arbitration is designated as London.
The Court also held that Article 7 of English Arbitration Act 1996 provides that unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement and that accordingly the arbitration agreement cannot be cancelled directly by cancellation of the charter party by the Trustee pursuant to Article 61(1) of the Corporate Reorganization Act. So holding, the Court takes the position that the issue of separability of arbitration agreement can be determined by the law applicable to the arbitration agreement.

In those three cases, following the Supreme Court decision, 51 Minshu 3657, Supreme Court, 4 September 1997, the Courts expressed the common views that the law applicable to an arbitration agreement is determined by the intent of the parties under Article 7 of Act on General Rules for Application of Laws, Act No. 78 of 2006 which generally applies to juridical acts. However, in both Azbil Corporation v. Honeywell Japan Inc. and Honeywell Pte. Ltd., Polestar Ship Line, S.A. v. The Sanko Steamship Co., Ltd., unlike the said Supreme Court case, the contract containing the arbitration clause also contains the governing law clause. In the former case, the Court found the implied agreement between the parties to apply the laws of the State of Arizona, U.S.A. and the laws of the United States of America to the arbitration agreement because of the agreement between the parties to apply those laws to the main contract. On the other hand, in the latter case, the Court found the implied agreement between the parties to apply English Law to the arbitration agreement because of the agreement between the parties to designate both London as the place of arbitration and English Law as the law governing the main contract.

Besides those two cases, in X v. Y, 1991 Hanrei Jiho 89, Tokyo District Court, 28 August 2009, the Tokyo District Court also held that the effect of the arbitration agreement designating Seoul as the place of arbitration is determined by Korean Law because the parties provided that Korean Law governs the contract. However, as to what the implied agreement between the parties can be found in the case where the place of arbitration is different from the place of the law governing the main contract, it is still undecided by the Courts.

As to the formalities of an arbitration agreement, as held by the Court in the above KPE Co., Ltd. v. M. Setek Co., Ltd., it is also submitted that if the law applicable to the formation and effect of an arbitration agreement is determined by Article 7 of the Act on General Rules for Application of Laws, Article 8 of this Act also applies to the formalities of an arbitration agreement.

2. Pathological Arbitration Clauses

In the above KPE Co., Ltd. v. M. Setek Co., Ltd., while the Court found that the arbitral institutions the name of which is the International Commercial Arbitration Court were established in Russia, Belgium and the Ukraine, respectively, KPE argued, inter alia, that it is obvious that KPE had no intent to refer the dispute to the International Commercial Arbitration Court in Russia, Belgium and the Ukraine and therefore the arbitration agreement is entirely void because while the choice of arbitral institutions is so important as to influence the fundamentals of dispute resolution and constitutes an essential element of the arbitration agreement, the countries where those arbitral institutions are located have no meaningful connection with the dispute and it has no rationality for the dispute arising between M. Setek, a Japanese company and KPE, a Korean company to be referred to the arbitral institutions located in Russia, Belgium and the Ukraine. KPE also argued that the arbitration agreement was entered into by mistake because KPE had the intent to refer the dispute to the ICC and that the agreement to choose certain arbitral institutions constitutes an essential and important element of an arbitration agreement and therefore the arbitration agreement is entirely void.

In response, the Court held, inter alia, that considering that the sales agreements involve a large amount of advanced payment amounting to US$ 5,770,200 and are large-scale international contracts between the enterprises and that the choice of arbitral institutions influences important elements in the settlement
of dispute by arbitration, the parties must have signed the two sales agreements by fully recognizing and reviewing the content of the agreements including the arbitration clause and that it is reasonable to interpret this arbitration clause as meaning that the party can initiate arbitration before any of the International Commercial Arbitration Courts located in Russia, Belgium and the Ukraine and for these reasons it denied KPE’s arguments.

The Court also denied KPE’s argument that KPE mistakenly entered into the arbitration agreements by holding, *inter alia*, that the notation of ICC International Court of Arbitration is largely different from that of the International Commercial Arbitration Court and that considering the large-scale international contracts involving a large amount of advanced payment and the importance of the choice of arbitral institutions as held above, it was not easily agreeable that KPE made a mistake twice in signing the arbitration agreement to refer the dispute to the International Commercial Arbitration Court, on the other hand, having the intent to refer the dispute to ICC. It also held that the choice of the arbitral institutions located in Russia, Belgium and the Ukraine does not constitute the reason supporting the existence of a mistake because, *inter alia*, it is not unusual for the parties to designate the place of arbitration in the third country different from those of the respective parties and like Japan, at least Russia and the Ukraine have an arbitration law based on the UNCITRAL Model Law.

In this case, the parties merely stipulated the International Commercial Arbitration Court as the name of the arbitral institutions in their arbitration clause. As found by the Court, there are three arbitral institutions having the name of the International Commercial Arbitration Court but the official full name of the arbitral institutions are the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, the International Commercial Arbitration Court under the European Arbitration Chamber and the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry. Therefore, the name of the arbitral institutions stipulated by the parties is incomplete and it is a sort of pathological arbitration clause that often occurs in the drafting practice.

Even in an international contract involving a large amount of money, generally, the parties do not always recognize and carefully draft the arbitration clause in their contracts, see Yoshimi Ohara, Japan, Country Chapters, *The Asia-Pacific Arbitration Review 2015* and unlike the Court’s observation, it is not conceivable that in this particular case, the parties paid due consideration to drafting the arbitration clause and as a result it may have caused such a pathological clause. It is also unusual for the parties to have multiple options in choosing arbitral institutions in international contracts, see Ohara, *supra*. In addition, as held by the Court, it is not unusual for the parties to designate the place of arbitration in the third neutral country, nevertheless, in this particular case between a Japanese company and a Korean company, it is not usual for the parties to choose the local arbitral institutions in Russia, Belgium and the Ukraine.

It is therefore questionable whether it can be assumed that the parties had intent to refer the dispute to either of those arbitral institutions without any designation of the Chamber of Commerce and Industry of the Russian Federation, the European Arbitration Chamber and the Ukrainian Chamber of Commerce and Industry.

If the parties did not agree to submit the dispute to the three arbitral institutions, it will be at issue what they have agreed upon in their arbitration agreement. In this respect, it could be assumed that the parties intended to designate ICC as the arbitral institution for the settlement of their dispute but merely provided such a general name as the International Commercial Arbitration Court by mistake because unlike the Court’s view, the International Commercial Arbitration Court provided in the contract looks more similar to the ICC International Court of Arbitration instead and in international contracts between a Japanese company and a foreign company, the parties often choose ICC as the arbitral institution if they choose the neutral place of arbitration. However, in any event, regardless of which institution the parties intended to provide for in their contract or whether the designation is invalid, it is submitted that the parties in this case intended to settle the dispute by arbitration instead of litigation because even if the desig-
nation is invalid, it is not conceivable that the parties intended to invalidate the arbitration agreement entirely and that the defendant’s request for dismissal of the plaintiff’s action should be upheld although there is a different view that when parties agree to an institutional arbitration, the parties have intentionally avoided ad hoc arbitration, and finding an ad hoc arbitration agreement could be a material deviation from parties’ true intent., see Ohara, supra.

In the above Azbil Corporation v. Honeywell Japan Inc. and Honeywell Pte. Ltd., the arbitration clause is provided in the two-step dispute resolution clause by which the parties should first endeavor to amicably settle the dispute before initiating the arbitration. However, the dispute resolution clause provides that if the parties fail to amicably settle the dispute within the three month period, either party may request settlement by arbitration and therefore Azbil, the Plaintiff argued that under the laws of the State of Arizona, the arbitration clause providing “may request settlement by arbitration” instead of “shall request settlement by arbitration” is non-mandatory and does not exclude the settlement by litigation or is invalid. In response, the Court held that in light of the entire content of this clause, the word “may” is related to the time to move to the settlement by arbitration from negotiation and that it does not mean that arbitration is selective in relation to the settlement by litigation.

It further held that as the dispute resolution clause also uses the word “shall” in the arbitration provision, providing that either party “may” request settlement by arbitration does neither directly leave ambiguity in the clause and nor can it conclude that the arbitration agreement cannot be mandatory and exclusive. So holding, the Court concluded that in the light of the court decisions by the Federal Courts of the United States of America, such an interpretation cannot constitute the ground for violation of the laws of the United States of America or the laws of the State of Arizona, U.S.A.

As to the exclusivity of the arbitration clause, it is pointed out as drafting tips that the parties should avoid the trap of rendering arbitration permissive, not mandatory, see the IBA Guidelines for Drafting International Arbitration Clauses (2010) 31. In the case of a two-step dispute resolution clause consisting of negotiation followed by arbitration, even if the mandatory arbitration is drafted as the optional arbitration as found in this case, the parties’ intent to provide for mandatory arbitration will usually be clear but to avoid any possible unnecessary expense and delay arising from the use of the word “may”, the parties should use the word “shall” instead and draft clearly the mandatory arbitration clause, see Paul D. Friedland, Arbitration Clauses for International Contracts 123 (Juris Publishing 2nd ed. 2007).

3. Arbitration Agreement in Assignment and Subrogation

It is generally accepted that the arbitration clause will automatically pass to the assignee together with the transfer of rights and obligations from the main contract regardless of whether such transfer takes place in the context of singular or universal succession., see Ivan Chuprunov, Chapter I: The Arbitration Agreement and Arbitrability: Effects of Contractual Assignment on an Arbitration Clause – Substantive and Private International Law Perspectives in Christian Klausegger, Peter Klein, et al. (eds), Austrian Yearbook on International Arbitration 2012, (Manz’sche Verlags- und Universitätsbuchhandlung 2012) 31.

As to the assignment of the arbitration agreement by assignment of contractual status, in the above Azbil Corporation v. Honeywell Japan Inc. and Honeywell Pte. Ltd., the Court found that the Azbil sought against Honeywell Japan the declaratory judgment that it has no obligation to pay unpaid software distribution and service fees or loss and damages for such unpaid fees under the software distribution agreement between Azbil and Honeywell Singapore and the individual agreements between Azbil and Honeywell Japan on the premise that the Honeywell Japan succeeded to the contractual status of Honeywell Singapore of the software distribution agreement and Honeywell Japan sought the said payment and that the arbitration agreement of the software distribution agreement clearly covers the dispute on the right under the software distribution agreement. So holding, the Court affirmed the extension of the effect of the arbitration agreement to Honeywell Japan and dismissed the Azbil’s action against Honeywell Japan.
As to the reason why the effect of the arbitration agreement is extended to the assignee of the software distribution agreement, the Court, without showing any particular reason including which law will apply to this issue, takes the position that the arbitration clause contained in a contract will be automatically passed to the assignee of the contractual status.

X v. Y1 and Y2, 2015WLJPCA01239003, Miyazaki District Court, 23 January 2015 also published at the website of the Supreme Court of Japan

The ship owned by a shipping company in the Hong Kong Special Administrative Region became stranded off the coast of Miyazaki city in stormy weather but has been left abandoned there and as a result, a fisheries cooperative association established under the Fisheries Industry Cooperative Association Act having the common fishery right where the ship was stranded claimed for damages caused by this tortious act. The shipping company entered into a third party liability insurance contract to cover the damages caused by the operation of the ship with an insurance company in Russia and therefore the fisheries cooperative association subrogated the insurance claim that the shipping company has against the insurance company and sought the payment of this amount from the insurance company. The service by publication was properly made to the shipping company under Article 111 of the Code of Civil Procedure but the shipping company did not appear on the date for oral arguments and subsequently the fisheries cooperative association's claim against the shipping company was upheld. On the other hand, the insurance company, alleging that there is an arbitration agreement between the shipping company and the insurance company to refer the dispute under the insurance contract to Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation in Moscow, requested the Court to dismiss the action under Article 14(1) of the Arbitration Law.

Accordingly, in this case as well, the Court did not show any reason why the arbitration agreement is assigned to the fisheries cooperative association including which law will apply to the issue and it merely takes the position that the effect of the arbitration agreement covering the substantive right vested in the obligor is automatically extended to the obligee under Article 423(1) of the Civil Code.


The dispute arose out of the contract of carriage by sea in which a Japanese insurance company paid to a Japanese consignee damages caused in the transit from Busan in Korea to Hakata in Japan under an insurance contract and under Article 622 of the Commercial Code then applicable, presently under Article 25 of the Insurance Act, by subrogation on the payment for the loss, it took action against the carrier before the Tokyo District Court to seek damages. In response, under Article 14(1) of the Arbitration Law, the carrier, alleging that there is an arbitration agreement between the parties because of the arbitration clause referring the dispute to arbitration in Tokyo by Tokyo Maritime Arbitration Commission of Japan Shipping Exchange contained in the surrendered bill of lading issued by the carrier, requested the Court to dismiss the action.

The Tokyo District Court found the valid existence of the arbitration agreement between the parties and dismissed the action., NIPPONKOA Insurance Co., Ltd. v. Camellia Line Co., Ltd., Westlaw Japan, 2008WLJPCA03268009, Tokyo District Court, 26 March 2008., see Tatsuya Nakamura, The Recent Japanese Court Decisions on Arbitration, 28 JCAA Newsletter (2012) 4-5. The insurance company then
appealed to the Tokyo High Court.

The Tokyo High Court also dismissed the appeal by the insurance company and as to whether the effect of the arbitration agreement entered into between the carrier and the consignor is extended to the consignee, the Court held, *inter alia* that because the consignee acquires the rights of the consignor arising under the carriage contract, the content of the rights acquired by the consignee is determined by what rights the consignor has under the carriage contract and that the defense that the carrier can assert against the consignor can be asserted against the consignee, otherwise the rights acquired by the consignee will exceed those of the consignor, which is questionable in the light of the meaning of Article 583(1) of the Commercial Code.

So holding, the Court has the position that while the consignee acquires the rights of the consignor arising under the carriage contract, when the consignee exercises the rights against the carrier, the defense that the carrier can assert against the consignor can also be asserted against the consignee and such defense includes the arbitration agreement.

In this respect, however, it is submitted that similarly in the case of the assignment of a substantive right under Article 468 of Civil Code, the ground that the carrier can assert as a defense against the consignee that accrues *vis-à-vis* the consignor cannot include the arbitration agreement. This is because in the case of the assignment of the substantive right, it is generally accepted that the ground that the obligor can raise as a defense against the assignee that accrues *vis-à-vis* the assignor is extended to that preventing the formation, continuation and exercise of the substantive right and therefore the arbitration agreement should be excluded as it does not affect the substantive right under the carriage contract and instead it is the agreement of the settlement of the disputes arising from the carriage contract.

As to the issue of whether the effect of the arbitration agreement is also assigned from the insured to the insurer.

On the other hand, as to the reason why the arbitration agreement is assigned together with the substantive right under the contract containing the arbitration clause if the substantive right is assigned to the assignee, although it is the case where the agreement on the court jurisdiction is provided in the contract, the Court reasoned that while such an agreement is one that the parties intend a legal effect on the court proceedings, substantially, it has an indivisible link with the substantive right as the condition of exercising it and is, as it were, the modality of the substantive right and that its modality and content can be determined freely by the parties and when assigned, its modality and content should be assigned to the assignee as they are. *1136 Hanrei Taimuzu 259, Tokyo High Court, 22 May 2003*.

Like the agreement on court jurisdiction, the arbitration agreement cannot exist without the existence of the main contract and it may constitute an accessory for the main contract. Accordingly it is obvious that the arbitration agreement has a close connection with the substantive right under the main contract. However, the assignment of the arbitration agreement contained in the main contract cannot be indispensable for the substantive right to be assigned and even without the assignment of the arbitration agreement the substantive right can be assigned itself to the assignee. It is therefore submitted that unless otherwise agreed by the parties, the arbitration agreement does not always have an indivisible link with the substantive right under the main contract and it could not constitute the reason why the arbitration agreement is automatically assigned to the assignee.

If so interpreted, it will remain unsolved why the arbitration agreement is assigned to the assignee together with the substantive right under the main contract and it is submitted that this question could only be solved by balancing the respective interests in the right to arbitrate or litigate of the assignor, the obligor and the assignee. When the substantive right is assigned to the assignee, we do not need to consider the assignor’s interest anymore because the assignor has no interest in the assigned substantive right and
then we should consider balancing the interests of the two parties, that is, the obligor and the assignee.

As to the interest of obligor, it is obvious that if the effect of the arbitration agreement is not extended to the assignee, the interest of the obligor to choose the arbitration for the settlement of the dispute arising from the right under the main contract may be impaired. Conversely, if the effect of the arbitration agreement is extended to the assignee, the assignee’s right of the access to the courts may be impaired. However, the assignee has the option whether to accept the assignment of the substantive right to which the arbitration agreement is attached while the obligor has no option whether to accept the assignment of the substantive right to which the arbitration agreement is not attached. Considering the respective interests, it is submitted that balancing the interest of the obligor should prevail over that of the assignee.

It is submitted that solving the question by balancing the interests of the parties concerned can also apply to other cases such as where the insurer subrogates in the rights of the insured and the rights under the carriage contract are assigned to the consignee and if the insurer exercises to subrogate in the rights of the insured and the arbitration agreement is not assigned to the insurer, the interest of the obligor in choosing arbitration for the settlement of dispute arising from the main contract with the insured will be impaired and therefore it should be prioritized over the interest of the insurer in access to the national courts. In the same way, if the consignee acquires the rights of the consignor under the carriage contract containing the arbitration clause, the interest of the carrier in choosing arbitration should be prioritized over the interest of the consignee in access to the courts. However, in the case of the assignment of a contract containing the arbitration clause as in the above Azbil Corporation v. Honeywell Japan Inc. and Honeywell Pte. Ltd., the assignment of a contract is based on the agreement between the tripartite, that is, the parties to the contract and the third party, the assignee and it is submitted that if one of the contractual statuses is assigned to the third party, the triparty usually intend to assign the arbitration agreement together with the substantive rights and obligations under the main contract.

4. Arbitration Agreement in Bankruptcy

The commencement of bankruptcy proceedings is, generally, not considered to entail invalidity of the arbitration agreement concluded by the debtor in bonis and in the prevailing view in Germany, the Netherlands and France is that the trustee is bound by an arbitration agreement entered into by the debtor prior to bankruptcy, see Vesna Lazić, 188-189 Insolvency Proceedings and Commercial Arbitration (Kluwer Law International 1998) and in Japan, this view is generally accepted.

In the above Polestar Ship Line, S.A. v. The Sanko Steamship Co., Ltd., the parties disputes whether the scope of the arbitration agreement can cover the issues whether the claim for the charterages payable to Polestar constitute the common benefit claim under Article 62(2) and 127(ii) of the Corporate Reorganization Act and whether Polestar can set-off the claim for the charterages payable to Polestar against the payment claim for the fuel oil payable to Sanko under Article 49(1)(i) of this Act. In this respect, the Court enumerated the circumstances, inter alia, that while the arbitration agreement provides that the arbitrators must be commercial men, on this point in the arbitration practice in London, practitioners experienced in the maritime industry are appointed as the commercial men while scholars and persons experienced as a judge are not to be appointed, that the arbitrators in London will face difficulties to properly determine the issues because the central issues in this action are whether the claim for the charterages constitute the common benefit claim and whether the set off is prohibited under this Act and entail the questions specific to the interpretation of the Japanese Corporate Reorganization Act and that under English law, except for a special case such as where permitted by courts, the arbitration cannot proceed against the company that filed a petition for commencement of bankruptcy proceedings against itself. It then concluded that in the light of those circumstances, the intent of the parties cannot be interpreted as meaning that the disputes even about the merits in this action are referred to the arbitration in London.

As held above, the Court determined that relying on the intent of the parties, disputes about issues specific
to the interpretation of the Corporate Reorganization Act do not fall within the scope of the arbitration clause contained in the time charter party entered into between Polestar and Sanko. However, it is submitted that the issues of whether the claim for the charterages constitutes the common benefit claim under Article 62(2) and 127(iii) of the Corporate Reorganization Act and whether the Polestar's set-off is prohibited under Article 49(1)(i) of this Act cannot fall within the scope of the arbitration agreement Polestar and Sanko entered into prior to the commencement of the reorganization proceedings because they originate in the Corporate Reorganization Act and do not arise under the time charter party and they could not have been asserted had no reorganization proceedings been instituted. If so interpreted, disputes arising from issues specific to the Corporate Reorganization Act will be settled by litigation instead of arbitration.

In addition, while the Court determined the law applicable to the arbitration agreement in order to find whether the arbitration agreement was validly entered into between Polestar and Sanko before the commencement of reorganization proceedings, like the other cases above, the Court did not determine on the issue of whether the Trustee of Sanko is bound by the arbitration agreement including which law will apply to this issue.

5. Law Applicable to Assignment of Arbitration Agreement

As seen above, the Courts did not determine the law applicable to the issue such as whether the arbitration agreement is assigned to the assignee when the right or the contract is assigned to the assignee and whether the arbitration agreement is assigned to the insurer when the insurer subrogates in the rights of the insured.

As to the law applicable to whether the arbitration agreement is assigned to the assignee together with the substantive right under the main contract containing the arbitration clause, no internationally accepted rule on the conflict of laws has been developed and on the other hand, no internationally accepted substantive rule has been established, either, see Daniel Girsberger, The Law Applicable to the Assignment of Claims subject to an Arbitration Agreement in Franco Ferrari and Stefan Kröll (eds), Conflict of Laws in International Arbitration (European law publishers 2011) 392-394. For the former, there are different views and in particular, as the law applicable to this issue, lex arbitri (the law of the seat of arbitration), lex compromissi (the law governing the arbitration agreement) and lex contractus (the law of the main contract between the assignor and the debtor) have been proposed, see Chuprunov, supra, 54.

According to Chuprunov, supra, 55-59, the two rules, that is, lex compromissi rule and lex contractus rule are currently most supported in the scholarly writings. The latter view, in line with the functional understanding of the autonomy principle of the arbitration agreement, treats the arbitration clause and the other provisions of the main contract in exactly the same manner as under the private international law perspective and argues it will uphold the principles of legal certainty and predictability as well as best address the expectations of the assignor and the debtor while the former view, based on traditional private international law, which subjects the questions of assignment of a right to the law governing such right, takes the position that the assignment of the arbitration agreement should also be governed by its own law.

As mentioned above, the arbitration clause is contained together with the other clauses for the substantive rights and obligations in the contract but it does not necessarily have an indivisible link with them. In addition, even if the law applicable to the arbitration agreement applies to this issue, it will not necessarily impair the legal certainty and predictability as well as the expectations of the assignor and the debtor. It is therefore submitted that the assignment of the arbitration agreement should be governed by its own law, lex compromissi. If so interpreted, in the other case such as subrogation, the assignment of the arbitration agreement is also governed by lex compromissi.

On the other hand, as to the law applicable to the issue of whether the trustee of bankruptcy is bound by the arbitration agreement entered into prior to the commencement of the bankruptcy proceedings, while there are also different views including lex con-
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: arbitration@jcaa.or.jp