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[Articles]
The Nuclear Damage Claim Dispute Resolution Center

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Ⅰ Introduction

The Great East Japan Earthquake hit the Tohoku and Kanto area on March 11, 2011 and brought about immense damages in Japan. The Fukushima Daiichi Nuclear Reactor accident was part of the disaster caused by the earthquake and following tsunami, the scale of which had not been foreseen and thus, justifiable or not, had not been well prepared for by the reactor operator, Tokyo Electric Power Company (TEPCO). The accident necessitated tens of thousands of people living in Fukushima prefecture to seek refuge, evacuating their residences and business places. In many towns and villages, the whole communities were lost, literally.

The Nuclear Damage Compensation Law provides for strict liability of a nuclear reactor operator for damages caused by a nuclear reactor accident, i.e., the operator is liable for the damages without proving the operator's negligence or fault, and the nuclear reactor operator alone is liable for the damage (concentration of liability)[1]. In the Fukushima Daiichi case, the operator TEPCO would be solely liable for the damages vis-à-vis the victims.

The scale of damages was unprecedented. The spread of radioactivity, number of evacuees, both individuals and enterprises, and the scope of damages caused by such radioactive contamination itself as well as rumors of contamination and the damages caused by the evacuation and interruption of daily lives and business operations including indirect damages triggered by such events, were beyond our imagination.

Since the early days following the accident, it had been anticipated that a huge number of damage claims would be filed against TEPCO and it was hotly discussed how to deal with such a huge number and scale of damage claims. It was thought that the courts alone cannot handle all these damage claims. An alternative dispute resolution (ADR) mechanism which can swiftly and effectively resolve the compensation disputes was thus called for.

The Nuclear Damage Claim Dispute Resolution Center (Center) was established in August 2011 to cope with this unprecedented situation. Under the Nuclear Damage Compensation Law, the Council for Nuclear Damage Dispute (Council) was given two important functions, i.e., (1) to provide for general rules governing the resolution of nuclear damage compensation disputes and (2) to conduct mediation of the nuclear damage compensation disputes[2]. The Center's function is derived from the latter function of the Council.

Ⅱ Overview of the Center

The Center is an administrative ADR institution established by government. The Center handles only the nuclear damage compensation claims arising from the Fukushima Daiichi Nuclear Reactor accident. The Center deals with mediation of settlement (*Wakai-no-Chuukai*). It does not have the power to adjudicate or arbitrate the disputes. In this connection, however, it is to be noted that TEPCO announced in November 2011 that it would honor settlement proposals given at the Center.

The mediation is conducted by mediators (*Chuukai-Iin*). There are currently about 200 registered mediators, all of whom are practicing lawyers. The mediators handle the cases alone or by forming a panel of two or three mediators.

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1 Articles 3 and 4 of the Nuclear Damage Compensation Law.

2 Article 18 of the Nuclear Damage Compensation Law.

The activities of the Center are headed by a General Committee (*Soukatsu-Iinkai*), comprised of three committee members[3]. The General Committee oversees the whole activities of the Center and adopts the rules for the mediation as well as various organizational rules.

The Center has a secretariat, which assists the General Committee as well as supports the mediators in conducting each mediation case. The Center has about 40 research clerks (*Chosakan*), who assist the mediators in each mediation case. Currently, all the research clerks are young practicing lawyers with a career in practice of up to 8 years or so.

The Center has its main office in Tokyo and has five branch offices in Fukushima prefecture.

The damage compensation claims are filed with the Center in writing. The Center provides claimants with a simple format for written claims. Once the claim is filed, a mediator and a research clerk in charge are appointed and the claim is forwarded to TEPCO for their response. After receiving a response from TEPCO, the mediator holds hearings, listening to both parties' opinions and receives further submissions and evidence. Thereafter, the mediator makes a settlement proposal. These are the typical process of the mediation conducted at the Center. Although these are the standard, there are many cases where the mediator gives a settlement proposal without holding a hearing. There are also cases where claimants withdraw the claim or the mediator concludes the proceedings without giving a settlement proposal.

The mediation proceedings are private. However, the result of the mediation, i.e., settlements, can be made public[4]. The purpose of the publication is that settlements reached at the Center will be a guidance and reference in direct settlement negotiations between potential claimants and TEPCO.

Ⅲ Characteristics of the Center – Rule Oriented ADR

One of the important features of the Center is that it is a so-called rule-oriented ADR. The Center deals with the nuclear damage claims arising from one accident. The claimants are many, but the respondent is TEPCO alone. Although the results of the mediation cases, i.e., the settlements, can vary, the rules and general standards applied in them should be the same. Otherwise, it may cause disparity among the victims, which will be another cause for dissatisfaction, and it will be difficult for TEPCO to accept. In order to secure the assimilation of the standards applied in each mediation case, the Center provides for the following mechanisms and practices.

The substantive rules governing the mediation conducted at the Center are primarily the Interim Guidelines (*Chuukan-Shishin*) adopted by the Council in August 2011, as supplemented by the Additional Interim Guidelines of December 2011 and March 2012. These Interim Guidelines are adopted by the Council based on its function of providing for general rules governing the resolution of nuclear damage compensation disputes as mentioned above. Also, the General Committee is empowered to adopt General Standards (*Soukatsu-Kijun*), which paraphrase, break down or supplement the Interim Guidelines. Both Interim Guidelines and General Standards are based on tort law[5] and these are a crystallization of the interpretation of tort law applicable to damage claims of such massive scale.

Although the mediators are independent, the research clerks in charge of each case exchange information daily so that the mediators can catch up with the discussions and opinions of other mediation panels. Also, the mediators themselves gather and confer with each other by means of inter-panel conferences as well as informal study groups.

The General Committee has a function of advising a mediator on making a settlement proposal. Through such advice, deviation from the standards is expected to be avoided.

As such, the mediation proceedings tend to be like a mini-arbitration aiming at giving the mediator's non-binding ruling, rather than mediation seeking compromise and agreement among the parties.

Ⅳ *Overview of Activities and Challenges*

The Center started its operation on September 1, 2011. Since then and up to the end of July 2012, the Center has accepted more than 3,000 cases, among which more than 600 cases have come to conclusion either by settlement, withdrawal or discontinuation. (See the monthly table.)

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3 Mr. Yoshio Otani (Chairperson), attorney and ex-judge, Mr. Isomi Suzuki, attorney, and Mr. Kazuhiko Yamamoto, professor of Hitotsubashi University.

4 In order to protect the privacy of the claimants, information by which a claimant can be identified is masked or altered.

5 Article 709 of the Civil Code as well as the Japanese court precedents.

Number of Cases Filed and the Results as of July 31, 2012

	Sep. 2011	Oct. 2011	Nov. 2011	Dec. 2011	Jan. 2012	Feb. 2012	Mar. 2012	Apr. 2012	May 2012	Jun. 2012	Jul. 2012	Total
Cases Filed	38	80	143	260	248	355	466	447	480	409	353	3,298
Cases Completed	0	1	1	4	8	23	49	91	127	160	138	679
Cases Settled	0	0	1	1	2	7	23	44	64	93	82	369
Cases Discontinued	0	0	0	0	1	7	10	11	34	30	28	181
Cases Withdrawn	0	1	0	3	5	9	16	36	29	37	28	164
Backlog	38	117	259	515	755	1,087	1,504	1,860	2,213	2,462	2,719	

Between 70 and 80% of the claims filed are claims by individuals, seeking compensation for damages of evacuation cost, loss of salary, as well as of non-economic damages, i.e., consolation money. Between 20 and 30% of the claims are filed by business enterprises, seeking damages of lost profits. Also, business damages caused by rumors of contamination as well as indirect or secondary damages triggered by the primary victim's evacuation or interruption of the activities.

Less than 30% of the claims filed with the Center are represented by lawyers although recently the percentage of the claims represented by lawyers is increasing.

As shown in the table, the filings have substantially increased and have now reached 400 to 500 cases a month. A backlog is accumulating. It has taken approximately five to six months to finish the proceedings for each case.

Whether or not the Center really can handle such an increasing level of claims is the challenge the Center faces. In response to the challenge, the Center copes with the following agenda.

First, the Center has tried and is trying to substantially simplify the mediation proceedings. The hearing will be held basically only once though there are exceptions. Also, single person mediation is the norm and only in difficult cases is a panel of two or three mediators formed[6].

Second, the Center is studying and developing a method of effectively conducting mass claims, learning from the examples of mass litigation. In one case filed by approximately 130 individuals seeking damages of evacuation cost, consolation money, etc., the panel of mediators first selected representative cases (champion claims), and after making settlement proposals for the representative cases, have the parties negotiate directly applying the standards adopted in the settlement proposal for the representative cases. Such method is called a Champion Method.

Third, human resources should be enhanced. In April and May 2012, the Center, with the cooperation of the bar associations, increased the mediators. The research clerks also need to be increased. As of April 2012, there are 40 research clerks. The Center is now in the process of increasing the research clerks, again with the cooperation of the bar associations. Also, clerical staff should be increased.

Fourth, the fact that a relatively small number of claims are represented by lawyers is a drawback, as the self-represented claims generally exhaust the resources of the Center, especially of research clerks. The Center has been asking the bar associations and the Japan Judicial Support Center (*Hoterasu*) to cooperate in ameliorating this situation. In this connection, the National Diet promulgated in March 2012 the special law to ease the requirements for legal aid provided by *Hoterasu*. Also, in March 2012, the General Committee adopted the General Standard to add lawyers' fees to the damages compensated by TEPCO[7]. These are expected to increase representation by lawyers of the claims filed with the Center. As reported above, the ratio of cases represented by lawyers has recently increased up to 40%.

Fifth, the Center has been suggesting that TEPCO should change its attitude in the direct negotiations. So far, TEPCO has been basically taking a rather formalistic approach, rejecting direct claims if they are not within the standards TEPCO has adopted internally. Such attitude is attributed to the increase of filing of claims with the Center.

6 In the beginning of the operation of the Center in 2011, a three-mediator panel was the norm. However, in response to the rapid increase of claims filings, the Center changed its policy in 2012. Now a single mediator is the norm.

7 The General Standard provided that, as a rule, 3% of the settlement amount can be recovered from TEPCO.

V *Looking Forward*

Nobody can accurately quantify the total scope of damages caused by the Fukushima Daiichi Nuclear Reactor accident and nobody can tell how many claims will be filed with the Center. This is the challenge the Japanese society, particularly the judicial system, faces.

There are three methods of legally resolving the nuclear damage claim disputes: direct negotiation, adjudication and ADR. Ideally, 80 to 90% of the claims will be settled through direct negotiation. The court system and the ADR, i.e., the Center, do not have the capacity to cope with such a huge number of claims.

From a broad and long-term perspective, what is expected of the Center is to set the standards of settlement, applying actual damage claim cases. Then, the victims and TEPCO make efforts to settle through direct negotiation applying the standards adopted by the Center. This will be the ideal development.

Whether or not such development will be brought about depends partially on the effective functioning and survival of the Center.

The Recent Japanese Court Decisions on Arbitration

Tatsuya Nakamura*

The Japanese Arbitration Law ("Arbitration Law") came into force on 1 March 2004. The Arbitration Law is based on the UNCITRAL Model Law on International Commercial Arbitration ("Model Law") prior to its revision in 2006. Although since then more than eight years have elapsed, there are only a small number of court decisions applying the Arbitration Law published in law reports, however it seems that there are some developments in the Arbitration Law. Among them, here we will examine the decisions considered as rather significant. Specifically, they are the ones dealing with the issues such as the writing requirement of an arbitration agreement, the law applicable to an arbitration agreement and the grounds for setting aside of an arbitral award. In addition, even though it is not directly related to arbitration, the court decision dealing with the enforcement of multi-tiered dispute resolution clauses will also be examined because it is the first Japanese court decision which determined on this issue.

1. Writing Requirement of Arbitration Agreements

NIPPONKOA Insurance Co., Ltd. v. Camellia Line Co., Ltd., Westlaw Japan, 2008WLJPCA03268009, Tokyo District Court, 26 March 2008

Unlike the Model Law, the Arbitration Law provides in Article 13(2) that "the arbitration agreement shall be in the form of a document signed by all the parties, letters or telegrams exchanged between the parties (including those sent by facsimile device or other communication device for parties at a distance which provides the recipient with a written record of the transmitted content), or other written instrument," (emphasis added) and the "*other written instrument*" is not provided in the Model Law. In this case, the Tokyo District Court first determined on this point.

In this case, the dispute arose out of the contract of carriage by sea in which an insurance company paid to the shipper its loss caused in the transit and by subrogation on the payment for the loss the insurance company took an action against the carrier before the Tokyo District Court to seek the 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 which is contained in the bill of lading issued by the carrier, requested the Court to dismiss the action. On the other hand, the insurance company disputed the valid existence of the arbitration agreement and one of the issues to be determined by the Court was whether the arbitration agreement contained in the bill of lading can cover the writing requirement of an arbitration agreement under Article 13(2) of the Arbitration Law.

The Court held that because Article 13(2) of the Arbitration Law intends to ascertain the intention of the parties to make an arbitration agreement and to record it as evidence to prove its existence and content for the subsequent dispute, "other written instrument" as provided here can be found if there is a

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written instrument which records the arbitration agreement and can be used subsequently as evidence. So holding, the Court determined that the bill of lading containing the arbitration agreement satisfies the requirements for the "other written instrument."

The bill of lading containing the arbitration clause is not in the form of a document signed by the parties nor letters, telegrams or other means of telecommunication such as facsimile which were exchanged between the parties and thus it is at issue whether the arbitration agreement contained in the bill of lading can meet the writing requirement under the Arbitration Law. In this respect, the Court decision is significant in that "other written instrument" can broadly cover the arbitration agreement as long as it is recorded in a written instrument and can be used subsequently as evidence while "other written instrument" itself is not defied by the Arbitration Law. If "other written instrument" can be so broadly interpreted as held by the Court, the Arbitration Law would not need be amended along with Option I of Article 7 of the Model Law revised in 2006 which provides that "An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means."

2. Law Applicable to Arbitration Agreement

The law applicable to the formation and effect of an arbitration agreement may be at issue when the defendant requests the court to dismiss the action, alleging that the dispute in respect of which an action is brought is the subject of the arbitration agreement in an international contract between the parties and in response, the plaintiff alleges that the arbitration agreement does not validly exist between the parties or the said dispute falls outside the scope of the arbitration agreement under the said applicable law. In this respect, the Arbitration law, like the Model Law, does not have any specific provisions on the law applicable to an arbitration agreement.

The Japan Educational Corporation v. Kenneth J. Feld, 51 Minshu 3657, English excerpt in 4 JCA Newsletter 1999, Supreme Court, 4 September 1997

Under the old Japanese arbitration law, in this case, the Supreme Court held that Article 7 of *Horei*, Law No. 10 of 1898, private international law then applicable applies to the formation and effect of an arbitration agreement and that in the present case, there is no express agreement between the parties to designate law applicable to the arbitration agreement and therefore the implied agreement of the parties must be explored. So holding, it determined that in the present case, it is the law of the place of arbitration, even though the parties provide in the arbitration clause in their contract that the arbitration takes place in the place where the respondent is located.

X Co. v. Y Co., 2112 Hanrei Jiho 36, Tokyo High Court, 21 December 2010

Recently in the case where the Arbitration Law applies to an arbitration agreement between the parties to an international charter-party, the Tokyo High Court affirmed the Tokyo District Court judgment, by holding that the law applicable to formation and effect of as well as formalities for an arbitration agreement in international arbitration should be determined by Articles 7 and 8 of *Horei*, by which as a general rule, they should be determined by the intention of the parties, and if there is neither express nor implied agreement between the parties, it is determined to be the law of the place of arbitration in light of the purport of Articles 44(1)(ii) and 45(2)(ii) of the Arbitration Law instead by application of Article 7(2) of *Horei* which designates the law of the place where a juridical act was done.

As referred to by the Court, it is possible to interpret that the Arbitration Law itself has conflict of law rules for an arbitration agreement in Articles 44(1)(ii) and 45(2)(ii). Specifically, with respect to the setting aside of an arbitral award, Article 44(1)(ii) provides as one of the grounds for the setting aside that "the arbitration agreement is not valid for a reason other than limits to a party's capacity under the law to which the parties have agreed to subject it (or failing any indication thereon, under the law of Japan)." Similarly, with respect to the recognition of an arbitral award, Article 45(2)(ii) provides as one of the grounds for the recognition that "the arbitration agreement is not valid for a reason other than limits to a party's capacity under the law to which the parties have agreed to subject it (or failing any indication thereon, the law of the country under which the place of arbitration falls)."

The conflict of law rules contained in these provisions can be generalized to understand that the applicable law to an arbitration agreement is determined by the agreement of the parties and failing such agreement, by the law of the place of arbitration and these conflict of law rules should also be applied to the case where the defendant, alleging that the arbitration agreement validly exists between the parties, requests the court to dismiss the action and the court has to determine the law applicable to the arbitration agreement. This is because the same conflict of law rules can avoid conflict of results whether an

arbitration agreement validly exists between the parties in the two cases of the court proceedings on merits and the setting aside or recognition and enforcement of an arbitral award.

This view is addressed by Japanese influential scholars and if it applies, the applicable law to an arbitration agreement will be determined by the Arbitration Law itself instead of the application of *Horei*. In this respect, the Court maintained to apply *Horei* to the determination of the law applicable to an arbitration agreement but it determined that if there is no arbitration agreement implicitly or explicitly between the parties, the law of the place of arbitration should apply in light of the purport of Articles 44(1)(ii) and 45(2)(ii) instead of the application of Article 7(2) of *Horei*. However, it is submitted that applying the law of the place of arbitration in light of the purport of 44(1)(ii) and 45(2)(ii) is not necessarily clear and instead the court should have directly applied the conflict of law rules contained in the Arbitration Law.

X Co. v. Y Co., 1358 Hanrei Taimuzu 236, Tokyo District Court, 10 March 2011

Subsequently in the most recent decision, the dispute arose between the parties arising out of an exclusive distributorship agreement and the Japanese distributor took an action before Tokyo District Court. In response, the Monaco manufacturer requested the Court to dismiss the action, alleging that the arbitration agreement exists between the parties and the applicable law to an arbitration agreement was at issue. The following arbitration clause was provided in the distributorship agreement:

"Any and all controversies or claims arising out of or relating to the breach of this Agreement shall be settled by arbitration in Monaco in accordance with the rules of International Chamber of Commerce where meaning, performance, operation, rights and remedies relating to, and the legal effect of this Agreement including its termination or canceling, shall be construed pursuant to the laws of Monaco, the if requested by Distributor, and in Tokyo, Japan in accordance with the rules of the Japan Commercial Arbitration Association, meaning, performance, operation, rights and remedies relating to, and the legal effect of this Agreement including its termination or canceling, shall be construed pursuant to the laws of Japan, if requested by Principal."

Thus, the above arbitration clause provides that the place of arbitration is where the respondent is located. With respect to the applicable law to an arbitration agreement, in holding, the Tokyo District Court applied the same rule as determined by the above Supreme Court and determined pursuant to Article 7 of the Act on General Rules for Application of Laws, Law No. 78 of 2006 which has replaced *Horei*, that the parties implicitly agree to designate the law of the place of arbitration as the law of the formation and effect of the arbitration agreement.

3. Application of Articles 3 and 4 of the Supplementary Provisions of the Arbitration Law for Consumer Arbitration Agreement and Individual Employment Arbitration Agreement

X v. Y Asian Inc., et al., 1350 Hanrei Taimuzu 189, Tokyo District Court, 15 February 2011

There is an issue in which an arbitration agreement is governed by Article 4 of the Supplementary Provisions of the Arbitration Law which provides that for the time being until otherwise enacted that an individual employment arbitration agreement for a dispute in the future is null and void if it was concluded following the enforcement of the Arbitration Law.

In this case the dispute arose from the employment agreement between an American company and an American residing in Japan and working as a managing director in its branch office in Japan and the American took an action before Tokyo District Court. In response, the American company requested the Court to dismiss the action, relying on the arbitration agreement referring the dispute to the arbitration in Atlanta by American Arbitration Association and one of the issues was whether Article 4 of the Supplementary Provisions governs the present arbitration agreement.

The Tokyo District Court held that Article 4 does not apply to the present arbitration agreement because it was concluded before the enforcement of the Arbitration Law. In addition, the Court held that because the place of arbitration and all the arbitral proceedings to be conducted are in the United States, the present arbitration agreement is not governed by Article 4 of the Supplementary Provisions.

Like the Model Law, based on territoriality principle provided in Article 3 of the Arbitration Law, as a general rule, the Arbitration Law applies as long as the place of arbitration is located in Japan. However, it can be argued that in light of the purport of Article 4 to protect the fundamental right of an individual employee to take an action before courts, Article 4 should also be applied to any employees who work in Japan. In the same way, while Article 3 of Supplemental Provisions provides that a consumer can unilaterally cancel the arbitration agreement with a business for the settlement of the future dispute, it can

also be argued that Article 3 should also be applied to a consumer whose habitual residence is in Japan.

4. Grounds for Setting Aside of Arbitral Award

X Co. v. American International Underwriters Ltd., 1304 Hanrei Taimuzu 292, Tokyo District Court, 28 July 2009

There are two court decisions published so far dealing with setting aside of an arbitral award under the Arbitration Law. In this case, the Tokyo District Court dismissed an application for setting aside the arbitral award from arbitration administered by the AAA International Centre for Dispute Resolution (ICDR). With respect to Article 44(1)(iv) corresponding to Article 34(2)(a)(ii) of the Model Law, the Court held that:

"...Article 44(1)(iv) of the Arbitration Law sets forth the grounds for setting aside an arbitral award where the party making the application was unable to present its case in the arbitral proceedings. The arbitral procedure is an alternative dispute resolution process based on the agreement of the parties. It does not contemplate an appeal procedure and the arbitral award is 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) as meaning that the courts should set aside an arbitral award only in cases where a serious violation of due process exists in arbitral proceedings by which the party was entirely unable to present its case. Examples include a case where the party was unable to appear in certain arbitral proceedings, or the arbitral award was made relying on materials of which the party was unaware. Therefore, circumstances merely amounting to a party failing to recognize that an issue in dispute is important does not constitute a ground for setting aside an arbitral award provided under Article 44(1)(iv)."

With respect to Article 44(1)(viii) corresponding to Article 34(2)(b)(ii) of the Model Law, the Court went on to hold that:

"...the Court should respect the arbitral award as much as possible. Therefore it is reasonable to understand the purport of Article 44(1)(viii) as meaning not that the court may set aside an arbitral award in cases where it merely finds the factual findings and legal reasoning by the arbitral tribunal to be unreasonable. Rather, it means that the court may set it aside only where it finds that the legal outcome achieved by an arbitral award is in conflict with the public policy or good morals of Japan."

In addition, with respect to the time limitation of the application for setting aside an arbitral award set forth in Article 44(2) corresponding to Article 34(3) of the Model Law, the Court rejected an additional allegation of a new ground for setting aside that was presented after the time limit but during the setting-aside proceedings. It held that:

"...in order to promptly make clear the effect of an arbitral award, Article 44(2) limits the time to apply for setting 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 the Defendant to foresee whether the arbitral award will be set aside and prompt determination of the effect of an arbitral award will be hindered."

The Court confirmed that an arbitral award is set aside under Article 44(1)(iv) if a serious violation of due process exists in arbitral proceedings by which the party was entirely unable to present its case and that even if the factual findings and legal reasoning by the arbitral tribunal is merely found unreasonable, the arbitral award may not be set aside under Article 44(1)(viii). It is considered that these rulings are reasonable and consistent with the interpretation of Articles 34(2)(a)(ii) and 34(2)(b)(ii) of the Model Law and thus they can be sustainable. In addition, the latter implies that although Article 44(1)(viii) provides that "the content of the arbitral award is in conflict with the public policy or good morals of Japan," it also includes procedural public policy.

With respect to the time limitation of the application for setting aside of an arbitral award under Article 44(2), as with its corresponding provision of Article 34(3) of the Model Law which strictly sets forth the time limitation in light of the certainty and expediency, the Court confirmed the unbreakability of this time limit by which the party is prohibited from additionally alleging any grounds for setting aside of an arbitral award even during the setting aside proceedings after this time limit has expired.

X Co v. Y Inc., 2128 Hanrei Jiho 58, Tokyo District Court, 13 June 2011

In this case, the Tokyo District Court set aside the arbitral award from arbitration administered by JCAA on the ground that the arbitrator had violated the

"procedural" public policy under Article 44(1)(viii) of the Arbitration Law.

In this case, in 1979, an American company entered into a manufacturing license and technical assistance agreement with a Japanese company by which the American company licensed its blast furnace slag technology including its Japanese patents to the Japanese company to manufacture the slag in Japan. In addition, the two companies established a joint venture company for the sale of the slag in Japan to be manufactured by the Japanese company. This agreement provided that the duration is 15 years and it is automatically renewed for further 5 years. In 1994, the Japanese patents expired but the Japanese company continued to pay the royalty to the American company.

Thereafter the economic circumstances surrounding the slag business became worse and in 2001, the two companies entered into an agreement by which the joint venture company is dissolved and the Japanese company manufactures and sells the slag on condition that it pays a technical service fee to the American company. After 2005, the Japanese company refused to pay this fee and then the American company initiated arbitration with JCAA to seek, *inter alia*, such payment. In 2009, an arbitrator rendered an arbitral award to order the Japanese company to pay the unpaid technical service fee to the American company and then the Japanese company applied to Tokyo District Court to set aside the arbitral award.

The crucial issue in the setting aside proceedings is whether the arbitrator's finding that the technical service fee is the division of profits from the joint venture which is stated as undisputed facts in the arbitral award constitutes the ground for setting aside of an arbitral award set forth in Article 44(1)(viii).

In this respect, the Court held that if an arbitral tribunal makes an arbitral award without deciding on the parties' allegations and evidence which the parties lawfully submitted in the proceedings so as to affect the outcome of the award, it amounts to violating the principle of the Japanese procedural public policy as also envisaged in Article 338(1)(ix) of the Code of Civil Procedure which provides that the omission of finding of a material fact in the final judgment constitutes a ground for retrial when it would have affected the conclusion while retrial is an extraordinary relief available even after the period for appeal has expired. It continued to hold that if an arbitral tribunal finds a disputed fact as undisputed, it will lead to the arbitral tribunal not deciding on that fact and thus it constitutes a violation of the Japanese procedural public policy as long as that fact is so important as to possibly affect the outcome of the award.

The Court found that the arbitral tribunal had found that as an undisputed fact, the technical service fee is the division of profits from the joint venture.

The Court also found that in the arbitral proceedings the Japanese company disputed the characteristic of the technical service fee by alleging that this fee is the license fee for the expired patents. It held that while if the licensor restricts the licensee to use the patent or imposes on the licensee obligation to pay the royalty for the patent after its expiration, it is highly likely to violate the Japanese Antimonopoly Act as constituting an unfair trade practice under this Japanese Act, an act violating this Act will possibly be null and void because it is conflict with the public policy or good morals of Japan. Accordingly the Court held that the characteristic of the technical service fee is the matter so important as to possibly affect the outcome of the award.

With respect to the time limitation of the application for setting aside an arbitral award, the Court held that even if an additional allegation based on new grounds for setting aside set forth in Articles 44(1)(i) through 44(1)(vi) is not allowed after the application period has elapsed because it is in conflict with the provision set forth in Article 44(2), as to the grounds set forth in Articles 44(1)(vii) and 44(1)(viii), it should be allowed because those grounds are matters which the court examines *ex officio*.

Firstly, the Court clearly states that the public policy or good morals of Japan set forth in Article 44(1)(viii) includes procedural public policy and it is reasonable to so interpret this provision because its corresponding provision of Article 34(2)(b)(ii) of the Model Law covers both substantive and procedural public policy. Secondly, as to the meaning of procedural public policy, the Court held that if an arbitral tribunal finds a disputed fact as undisputed which is so important as to possibly affect the outcome of the award, it constitutes a violation of the Japanese procedural public policy.

In this respect, the Final Report on Public Policy as a bar to Enforcement of International Arbitral Awards issued by International Law Association(ILA) in 2002 provides in Recommendation 1(a) that "the finality of awards rendered in the context of international commercial arbitration should be respected save in exceptional circumstances." It also states in Recommendation 1(e) that it is widely accepted that procedural public policy should not include manifest disregard of the law of the facts.

In the United States, as regards manifest disregard of the law, an arbitral award can be set aside if the arbitral tribunal was aware of controlling legal authority and deliberately chose to disregard it; *see* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION VOLUME II (2009) 2641. On the other hand, as regards manifest disregard of the facts, it is not an independent ground for setting aside of an arbitral award but because facts and law are often intertwined, an arbitrator's failure to recognize undisputed, legally dispositive facts may properly be deemed a manifest disregard for the law; *see Coutee v. Barington Capital Group, L.P.*, 336 F.3d 1128, 1133 (2003).

Therefore, it is understood that according to the above ILA view, even if an arbitral tribunal finds a disputed fact as undisputed which is so important as to possibly affect the outcome of the award, it would not constitute a violation of procedural public policy. However, it is submitted that if an arbitral tribunal deliberately conducts such incorrect fact finding, it must be contrary to the fundamental principles of fairness and justice required in arbitral proceedings and thus the arbitral award should be set aside. In this respect, the Court did not take into consideration in ruling on procedural public policy whether an arbitral tribunal did so deliberately or not, and thus it is questionable that this position could be sustainable.

In addition, the Court found that the arbitral tribunal has found as an undisputed fact that the technical service fee is the division of profits from the joint venture and it concluded that this finding constitutes procedural public policy because the Japanese company disputed the characteristic of the technical service fee whether it is the license fee for the expired patent. In this respect, it is submitted that the division of profits from the joint venture could be interpreted to merely infer that the Japanese company pays to the American company a part of the profits to be gained from the manufacture and sale of the slag in the reorganized joint venture scheme agreed by the parties in 2001 and that the arbitral tribunal did not make any determination on the characteristic of the technical service fee whether this fee constitutes a license fee for the expired patents or otherwise.

This inference can also be drawn by the fact that the arbitral award expressly stated that the Japanese company claims that the agreement entered into by the parties in 2001 was void from inception because the patent owned by the American company expired in 1992 by which it is presumed that the arbitral tribunal has well recognized such allegation. Therefore it is also questionable that the Court rightly found the facts related to the fact findings by the arbitral tribunal on this point and thus it is submitted that the Court should have more carefully examined the facts by which the Japanese procedural public policy has been violated. Nonetheless, it cannot be denied that the arbitral tribunal so poorly drafted the arbitral award that it did not clearly determine on the characteristic of the technical service fee, which might affect the fact finding by the Court.

5. Enforcement of Multi-tiered Dispute Resolution Clauses

X Co. and Y., et al., 2116 Hanrei Jiho 64, Tokyo High Court, 22 June 2011

With respect to the enforceability of multi-tiered dispute resolution clauses, in this case, the Tokyo High Court reversed the Tokyo District Court judgment and did not enforce the multi-tiered dispute resolution clauses as stipulated below. It did not dismiss the action although the defendant so requested by alleging that mediation as a condition precedent to the court proceedings precludes the jurisdiction of the court.

"This Agreement is governed in all respects by and shall be construed in accordance with laws of Japan. To the extent that any party disagrees about how to allocate a Shared Resolution Amount (an "Allocation Dispute") under this Agreement, the Parties shall conduct good faith negotiations concerning any such dispute. If such negotiations do not fully resolve the dispute within sixty (60) days of the commencement of such good faith negotiations, any party may then submit the matter to a neutral Japanese mediator. The mediator shall be chosen by agreement of the Parties. If the Parties cannot agree on the selection of a mediator within thirty (30) days of the initiation of the mediation process, any Party may submit a written request to the Japan Commercial Arbitration Association ("JCAA") requesting the appointment of a mediator, who shall be a native speaker of Japanese and shall be experienced in Japanese business matters. The selection of a mediator by the JCAA shall be binding on the Parties. Following the selection of a mediator, the Parties shall conduct a non-binding mediation pursuant to principles of Japanese business practice. If mediation does not fully resolve the dispute, the Parties agree that any legal action to resolve any remaining issues shall be commenced in the courts of Japan."

The Tokyo District Court interpreted the above provisions to mean that the parties have the obligation to take the dispute resolution proceedings prior to the initiation of the court proceedings and the parties restrict their right to take an action before courts until

the parties carry out such proceedings and that if no circumstances exist in conflict with the public policy and good morals of Japan, it should be enforced.

On the other hand, the Court denied the procedural effect of the above dispute resolution clauses, by holding, *inter alia*, that in determining on whether the agreement of the parties on the court proceedings can be given a procedural effect, we must take into account that such effect will forfeit the people's right to access to courts guaranteed by Article 32 of the Japanese Constitution and as the reason to deny the procedural effect, it pointed, *inter alia*, that unlike arbitration, negotiation and mediation prior to litigation provided in the present contract neither necessarily lead to the final settlement of the dispute between the parties nor interrupt prescription and that the dismissal of the action by reason of failure of negotiation and mediation prior to litigation is not consistent with the provision of Article 26(1) of Act on Promotion of Use of Alternative Dispute Resolution which provides that the court may, upon the joint request of the parties, suspend the proceedings if there is an agreement of the parties to refer the dispute to the certified dispute resolution under the said Act.

The Court also stated that in the present case, the dismissal of the action will put the plaintiff at a disadvantage that the plaintiff is not able to take measures to interrupt the prescription concerning the plaintiff's claim in the present action and that the filing fee will be required twice if the plaintiff takes an action again, which the plaintiff has difficulty to foresee, and this will lead to entail severe consequences for the plaintiff and that the dismissal of the action not expressly provided in the positive law is not appropriate.

It is now widely recognized that multi-tiered dispute resolution clauses are commonly provided in international contracts in particular in complex construction contracts and in both common law and civil law jurisdictions, multi-tiered dispute resolution clauses are generally enforced according to the said provisions, *see, e.g.*, James H. Carter, "Part I - Issues Arising from Integrated Dispute Resolution Clauses," 12 *ICC Congress Series* (2005) 446, 459. However, an agreement to negotiate can be unenforceable by the court if the court takes the position that it is too uncertain to decide whether the party is in compliance or breach of such a provision, *see, e.g., Cable & Wireless v. IBM UK Ltd.*, [2002] C.L.C. 1319, 1326. On the other hand, an agreement to mediate may also be unenforceable due to uncertainty that the mediation cannot proceed without the additional agreement of the parties, *see, e.g., Aiton Australia Pty Ltd v. Transfield Pty Ltd*, [1999] NSWSC 996, 153 FLR 236, 252.

The Court did not address uncertainty of the clauses but denied the procedural effect due to the nature of negotiation and mediation that it will not necessarily bring an end to the dispute between the parties and inconsistency with the provision of Article 26(1) of the Act on Promotion of Use of Alternative Dispute Resolution which merely allow courts to suspend the proceedings not to dismiss the action.

However, it is generally understood in Japan that if the parties clearly agree not to take an action for certain dispute before a court for limited or unlimited period of time, the court should respect the party autonomy as much as possible and dismiss the action in accordance with such agreement and if so understood, such agreement should be enforced, whatever purpose and reason such agreement intends, such as to attempt the settlement negotiation by ADR or to keep a cooling off period so as to consult each other amicably for the settlement, as long as it is not in conflict with the public policy.

In addition, the provision of Article 26(1) of the Act on Promotion of Use of Alternative Dispute Resolution deals with the case where the parties initiate ADR proceedings during the pendency of the court proceedings and thus the situation is different from the case where prior to the court proceedings, the parties try to settle the dispute by negotiation or ADR process. Thus it is also questionable for the Court to rely on the provision of Article 26(1) of the said Act in order to deny dismissing the action by the multi-tiered dispute resolution clauses in which mediation is provided as a condition precedent to the court proceedings.

[JCAA Activities]

International Commercial Arbitration Seminar

In Tokyo on July 20, 2012, JCAA hosted the International Commercial Arbitration Seminar titled "Recent Court Decisions and Developments in UNCITRAL Model Law Jurisdictions - Trends and Issues", with Japan Association of Arbitrators, Japan Chamber of Commerce and Industry, and Tokyo Chamber of Commerce and Industry as sponsors. After Mr. Hiroshi Yokokawa, President of the JCAA, made opening remarks, a presentation session on three Jurisdictions (Australia, Hong Kong and Japan) and discussion session were held. The first speaker was Dr. Luke Nottage, Professor of Comparative and Transnational Business Law at the University of Sydney. The title of his presentation was "Recent Court Decisions and Developments in UNCITRAL Model Law Jurisdictions: Australia". The second speaker was Dr. Romesh Weeramantry, Associate Professor of Law at the City University of Hong Kong. The title of his presentation was "Hong Kong – Recent Court Decisions Concerning Arbitration". The final speaker was Prof. Tatsuya Nakamura, Professor of Law at Kokushikan University and General Manager of the Arbitration Department of the JCAA. The title of his presentation was "The Recent Japanese Court Decisions on Arbitration". In the discussion session, the three speakers deepened the discussion of Arb-Med based on the court decision (*Gao Haiyan v Keeneye Holdings Ltd.*) in Hong Kong with the moderator, Mr. Shinji Kusakabe, who is a partner at the Japanese law firm Anderson Mōri & Tomotsune. The detail of Prof. Nakamura's presentation appears in this Newsletter (No.28) and the articles of Dr. Nottage, Dr. Weeramantry and Mr. Kusakabe in relation to the presentations and discussion in the International Commercial Arbitration Seminar will appear in the next issue (No. 29) of the Newsletter.

Support for the 5th Vis Japan Moot Competition 2012

The 5th Vis Japan Moot Competition 2012, was held on 26-27 February 2012 in Kyoto, sponsored by the Academy for International Business Transactions and co-supported by the JCAA Osaka Office and Japan Association of Arbitrators (JAA) Kansai Branch. This intercollegiate competition is held with the purpose of promoting international arbitration and improving the skills of arbitrators. Mr. Onuki, the executive director of the JCAA, served as the chairman of the steering committee for this competition and also acted as an arbitrator for oral arguments. The JCAA Osaka Office, together with the JAA Kansai Branch, selected many of the arbitrators, who consisted of professors, lawyers, and staff from the legal departments of companies based from both inside and outside of Japan. A total of six teams from five universities participated, including from Hokkaido University, Otaru University of Commerce, Waseda University, Doshisha University, and Kobe University. Twelve matches were held in the elimination round, with the team from Waseda University winning in the end.

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

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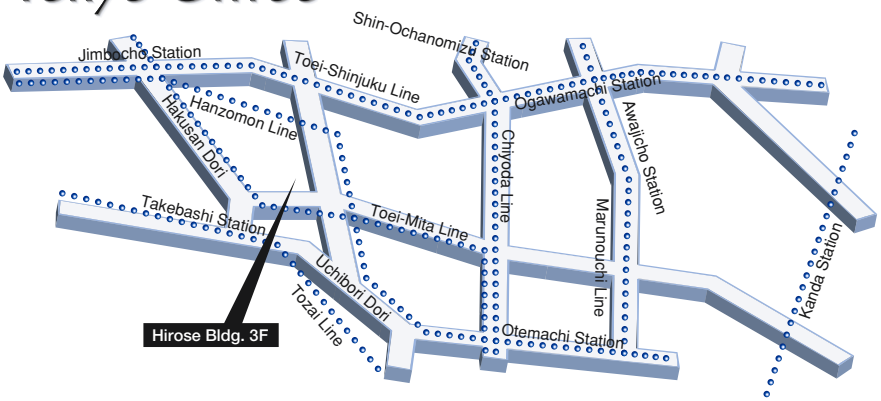

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