

WASEDA LAW SCHOOL
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Arbitration VS National Legal System

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1. Basic Information

- **ADR:** Alternative Dispute Resolutions.

National legal systems in general provide for two key rules.

- **Effect of arbitration agreement:** Courts must dismiss a lawsuit whose subject matter is covered by an arbitration agreement.
- **Effect of arbitral award:** Arbitral awards have the same effect as a final and binding court judgments.

1. Basic Information

■ Origin of Arbitration

In around twelve century, merchants of Mediterranean trade tried to escape from feudal court system and managed to establish their own reasonable system of dispute resolution, that was, arbitration.

1. Basic Information

- Historical Perspective: **From Hostility to Favorable Treatment**
- In seventeenth century, an English court allowed either party to arbitration agreement to file a lawsuit anytime before arbitral award.

1. Basic Information

- Favorable Treatment by National Legal System
 - In 1923, Geneva Protocol (Protocol on Arbitration Clauses) was adopted and in 1927 Geneva Convention (Convention on the Execution of Foreign Arbitral Awards) was adopted.
 - In 1958, **New York Convention:** Convention on Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, number of whose contracting parties are at present 169.

1. Basic Information

- Favorable Attitude by National Legal System (cont'd)
 - In 1985, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) ordered parties to resolve their dispute regarding antitrust issues by arbitration.
 - In 2020, hearing rooms for arbitration proceedings were built in Tokyo by funding taxpayers' money.

2. Merits and Demerits of Arbitration

■ **Merits of Arbitration in comparison with Court Litigation:**

1. Judgment by person with necessary special knowledge regarding the dispute.
2. Flexible proceedings.
3. Expeditiousness.
4. Confidentiality.
5. Inexpensive.
6. Neutrality.
7. Cross border enforceability.

2. Merits and Demerits of Arbitration

■ **Demerits of Arbitration in comparison with Court Litigation:**

1. Wrong selection of arbitrator would result in a wrong arbitral award.
2. No appeal is admitted to rectify a wrong award.
3. Risk of delay of proceedings because of difficulty in adjustment of schedules of three arbitrators.
4. Fragmentation of related disputes because of just a part of them are to be solved by arbitration and others by litigation.
5. Risk of Expensiveness.

3. Assistance to and Control over Arbitration by National Legal System

3.1 Assistance to Arbitration

Courts play certain roles to have arbitration proceedings go forward when parties cannot reach an agreement:

- Selection arbitrator.
- Determination on challenge of arbitrator.
- Examination of witnesses.

3. Assistance to and Control over Arbitration by National Legal System

3.2 Control over Arbitration

Courts intervene in arbitration for the purpose of keep national legal order:

- Dismissal of arbitrator
- Revocation of Arbitral Awards..
Grounds for revocation are, among others:
 - Arbitration agreement is not valid;
 - Respondent was unable to defense;
 - Arbitral award contains a decision on matters beyond the scope of the arbitration agreement;
 - Composition of the arbitral tribunal or the arbitration procedure is illegal;
 - Dispute was not **arbitrable**; or
 - Content of the Arbitral Award is contrary to **public policy**.

3. Assistance to and Control over Arbitration by National Legal System

3.2 Control over Arbitration

3.2.1 Arbitrability

New York Convention:

Article II.1

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, **concerning a subject matter capable of settlement by arbitration.**

Article V.2 (a)

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) **The subject matter of the difference is not capable of settlement by arbitration under the law of that country;** ...

3. Assistance to and Control over Arbitration by National Legal System

3.2 Control over Arbitration

3.2.1 Arbitrability

New York Convention allows contracting parties to determine arbitrability respectively.

Arbitration Act of Japan:

Article 13(1)

Except as otherwise provided for in laws and regulations, an Arbitration Agreement shall be effective **only when the subject thereof is a civil dispute (...) which can be settled between the parties.**

3. Assistance to and Control over Arbitration by National Legal System

3.2 Control over Arbitration

3.2.1 Arbitrability

Arbitration Act of Japan:

Article 3 of Supplementary Provision

- Consumer may cancel an arbitration agreement regarding dispute over consumer contract with a business entity.

Article 4 of Supplementary Provision

- Arbitration agreement between an individual worker and a business entity regarding dispute over working condition and other labor related matters is null and void.

3. Assistance to and Control over Arbitration by National Legal System

3.2 Control over Arbitration

3.2.2 Public Policy

New York Convention:

Article V.2 (a)

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

...

(b) The recognition or enforcement of the award would be **contrary to the public policy of that country**.

3. Assistance to and Control over Arbitration by National Legal System

3.2 Control over Arbitration

3.2.1 Public Policy

In order for each country to maintain its public order, arbitral award is to be set aside where it is found that the contents and procedure thereof is against its own public policy.

For instance, see, Article 44.1 (viii).

3. Assistance to and Control over Arbitration by National Legal System

3.2 Control over Arbitration

3.2.3 Overriding Mandatory Rules

This term is found in **Article 9 of the EU Regulation on the Law Applicable to Contractual Obligations (Rome I)**.

Article 9 (1) Overriding mandatory provisions are provisions the respect for which is regarded as **crucial by a country for safeguarding its public interests**, such as its political, social or economic organisation, to such an extent that they are **applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract** under this Regulation.

3. Assistance to and Control over Arbitration by National Legal System

3.2 Control over Arbitration

3.2.3 Overriding Mandatory Rules

For instance, in country A, in order to maintain market order and to protect weaker parties, abuse of superior bargaining power is banned and a resulting condition of contract is made null and void between the parties. The aggrieved party (X) may file a lawsuit against the other party (Y) to the contract between them claiming for damages in a court of country A and, if the claim be sustained and if necessary, the judgment is enforced.

3. Assistance to and Control over Arbitration by National Legal System

3.2 Control over Arbitration

3.2.3 Overriding Mandatory Rules

If the contract between X and Y contains an arbitration agreement in country B, is it possible for Y to have the court of country A dismiss the case? Or, the court, admitting X's assertion that the country A's rule on abuse of superior bargaining power is an overriding mandatory rules, may render a judgment ordering the arbitral agreement is null and void?

3. Assistance to and Control over Arbitration by National Legal System

3.2 Control over Arbitration

3.2.3 Overriding Mandatory Rules

- What is the relationship among arbitrability, public policy and overriding mandatory rules?
- Do the overriding mandatory rules have an effect to make arbitration agreement null and void?

4. Conclusion

■ Arbitration vs National Legal System

Even at present, there are two fundamentally different views regarding the position of arbitration in relation to national legal system.

- One is that arbitration should be free from any national legal system as far as possible.
- The other one is that arbitration should be subject to national legal systems.

4. Conclusion

- To be discussed.

Thank you.

If you want to know more about arbitration of Japan, please visit the following website:

<https://www.jcaa.or.jp/en/>

