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Arbitration in Japan: an increased awareness

International arbitration has recently attracted further attention from Japanese businesses as a viable means to resolve complicated international disputes, which was mainly a result of the widely publicised filing by Suzuki Motor Corporation against Volkswagen AG of an arbitration request with the ICC in November of 2011. Following the announcement of such filing by Suzuki Motor Corporation, Japan has seen not just legal practitioners but also business people and media becoming more aware and interested in the resolution of international disputes by means of arbitration, as evidenced by the rise in the number of articles and information on this topic in media, such as business related periodicals and newspapers[1].

International arbitration practitioners in Japan have welcomed this development, although it has taken about eight years since the Japanese Arbitration Act was amended in 2004 to reflect the UNCITRAL Model Law, with the hope of encouraging more arbitration in lieu of litigation. Accordingly, in this article we first discuss the tendencies of Japanese companies with respect to engaging in international arbitration to resolve disputes.

In conducting our research for this article, we contacted the major international arbitration institutions that are relatively frequently chosen by Japanese parties to administer the arbitration of their disputes and learned that for the past five years there have been approximately 500 cases filed with the major international arbitration institutions involving at least one Japanese party (see figure (B) in the table below). It should be noted that the number of cases in which Japanese parties are involved account for only 5 per cent of the total number of international arbitration cases filed each year (see figure (A) in the table below), which is rather small when one considers the substantial volume of international business transactions conducted by Japanese companies.

Total number of international arbitration cases filed between 2007 and 2011 that involve a Japanese party[2]

Name of institution	Total number of international arbitration cases filed between 2007 and 2011 (A)	Total number of international arbitrations involving at least one Japanese party (B)	Ratio of international arbitration cases involving a Japanese party to all arbitration cases (B/A%)
ICC	3,668	92	2.5
AAA[3]	3,048	188	6.2
SIAC	731	24	3.3
HKIAC	877	23	2.6
CIETAC Beijing[4]	1,317	67	5.1
LCIA	823	8	1.0
JCAA	91	86	94.5
Total	**10,555**	**488**	**4.6**

It has been said that Japanese companies tend to prefer the settlement of disputes without resorting to official dispute resolution proceedings, such as litigation and arbitration. The above data confirms this general tendency. However, interestingly, if the figures are examined in more detail the percentage of international arbitration cases involving a Japanese party as a claimant (see figure (c) in the table below) account for more than 60 per cent of the total number of international arbitration cases in which a Japanese party is a participant, as filed with the international arbitration institutions (see figure (b) in the table below).

Total number of international arbitration cases filed between 2007 and 2011 where a Japanese party is a claimant[5]

Name of institution	Total number of international arbitration cases (a)	Total number of international arbitration cases involving a Japanese party (b)	Total number of international arbitration cases involving a Japanese party as claimant (c)	Ratio of international arbitration cases involving a Japanese party as claimant (c/b%)
ICC	3,668	92	48	52.2
SIAC[6]	386	20	13	65.0
HKIAC	877	23	14	60.9
LCIA	823	8	6	75.0
JCAA	91	86	64	74.4
Total	**5,845**	**229**	**145**	**63.3**

It is true that Japanese companies tend to appreciate settling disputes without resorting to litigation or arbitration, because it is believed to be a more cost-effective and efficient way to resolve disputes while also allowing the parties to continue to have an ongoing positive business relationship. At the same time, Japanese companies seem not to hesitate to file an arbitration request if the chances of an amicable resolution or settlement appear unlikely, which is also supported by the above relatively higher ratio of Japanese parties engaging in international arbitrations as claimant rather than respondent.

This also coincides with the statement made by certain arbitration institutions that Japanese parties in international arbitration may arbitrate quite aggressively, which contradicts the general notion that Japanese companies are overly conciliatory and conflict-averse.

As practitioners in Japan, we have the impression that Japanese companies are becoming less reluctant to arbitrate or litigate in situations where an amicable resolution appears unlikely. It is no longer surprising to see news of litigation involving major Japanese companies being widely publicised in the Japanese media.[7] It appears that the trend of Japanese companies utilising arbitration and litigation as a means of resolving disputes will continue into the future, especially when one considers the recent dramatic growth of outbound investment in emerging markets by Japanese companies.

Arbitration-friendly court

The above trend should help Japan develop as a seat of arbitration, in particular with the support of its arbitration-friendly courts. Japanese courts have a long tradition of respecting parties' decisions to settle disputes by way of arbitration. The Tokyo District Court issued a decision on 10 March 2011[8] in line with such tradition, dismissing a plaintiff's tort claim based on the arbitration agreement in place between the plaintiff and one of the defendants.

Facts

The plaintiff, a company incorporated in Japan for the purpose of importing and distributing cosmetics in Japan (the distributor), and the defendant, a company incorporated in Monaco for the purpose of manufacturing and selling cosmetics (the Monaco Company), entered into an exclusive distributorship agreement on 1 March 2006, whereby the distributor agreed to purchase and distribute the cosmetics of the Monaco Company exclusively in Japan. The agreement contained an arbitration clause, which provided that:

> *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 the International Chamber of Commerce where meaning [sic] performance, operation, rights and remedies relating to and the legal effect of this Agreement including its termination or cancelling shall be construed pursuant to the laws of Monaco, the [sic] if requested by Distributor, and in Tokyo, Japan in accordance with the rules of the Japan Commercial Arbitration Association, [sic] meaning, performance, operation, rights and remedies relating to, and the legal effect of this Agreement including its termination or cancelling, shall be construed pursuant to the laws of Japan, if requested by Principle [being the Monaco Company].*

The distributor hired a person to assist in the business development of the Monaco Company's cosmetics in Japan (the individual). However, the sales of the Monaco Company's cosmetics were not as successful as originally expected, and the distributor dismissed the individual. Shortly after such dismissal, the Monaco Company terminated the exclusive distributorship agreement with the distributor and established its own subsidiary in Japan for the purpose of importing and selling its cosmetics and appointed the individual as the representative director of the new subsidiary. The distributor filed a lawsuit against the Monaco Company, its representative, its Japanese subsidiary and the individual who was the representative of the subsidiary, alleging that all the defendants conspired to jointly disrupt and interfere with the distributor's business.

Issues

There were two major issues in the lawsuit: firstly, which law should govern in determining whether the tort claim was encompassed by the arbitration clause; and, secondly, which law should govern in determining whether the Monaco Company's motion to dismiss, pursuant to the arbitration clause, was abusive.

Governing law of the arbitration clause

The court held that the arbitration clause covered the tort claim of undue business interference and dismissed the distributor's claim. In construing the arbitration clause, the court applied the Act on General Rules for Application of Laws,[9] a Japanese law regarding conflict of laws, and took the position that the court should first search for an explicit agreement on the governing law applicable to the arbitration agreement and, absent an explicit agreement, look for an implied agreement with respect to the governing law applicable to the arbitration agreement. In determining an implied agreement, the court also took the position that it should take into account various factors, such as, among others, an agreement as to the seat of arbitration. The court, in applying such rule, held that in this instance the lawsuit was brought by the distributor and, therefore, if such claim had been brought in arbitration, the seat would have been in Monaco. Accordingly, the governing law was held to be the laws of Monaco. Under the laws of Monaco, arbitration clauses may be applied to disputes and controversies arising out of or in connection with the underlying contract but may not be applied if the underlying contract is void or not applicable. On this point the distributor argued that the defendants' conspired interference with the distributor's business was extremely malicious and beyond the type of dispute that was anticipated under the agreement and hence neither arose out of or in connection with the underlying agreement. However, the Tokyo District Court dismissed the distributor's claims and in finding that the disputes were in connection with the underlying agreement held that the essence of the disputes was whether or not the Monaco Company breached its obligation to exclusively supply the cosmetics to the distributor and whether or not the Monaco Company effectively terminated the distributorship agreement.

The approach of the court in the aforementioned case to apply the law of the seat of arbitration in interpreting the arbitration clause, absent the parties' explicit agreement on the governing law of the arbitration clause, is consistent with a Supreme Court of Japan decision that also dismissed a Japanese party's tort claim against the representative of a US party by applying the law of New York state, which was the seat of the arbitration under the arbitration agreement between the two parties.[10] In principle, motions to dismiss claims based on the existence of an arbitration agreement should be granted when such claims are covered by the arbitration agreement. On this point it could be said that the Japanese court's approach to apply the law of the seat of arbitration in construing the scope of an arbitration clause is consistent with the New York Convention, which obligates the contracting state to apply the law of the country where the award was made in determining whether an arbitration agreement is valid absent an agreement between the parties as to the governing law (article V, section 1, paragraph (a)).

Governing law in determining whether motion to dismiss based on existence of arbitration clause was abusive

The second issue was which law should apply in determining whether or not the Monaco Company's motion to dismiss was abusive. On this point the court applied Japanese law and dismissed the distributor's claim due to a lack of evidence supporting the alleged abusive nature of the Monaco Company's motion. The court applied the law of Japan in this instance because the question of whether the motion to dismiss based on the existence of the arbitration clause is abusive or not is a question of legal proceeding and, therefore, such issue should be determined under the law of the seat of the legal proceeding, which was Japan in this instance.

This decision of the Tokyo District Court sent yet another strong message to the international arbitration community that Japanese courts will respect parties' arbitration agreements, and parties may not easily evade arbitration clauses by formulating non contractual claims so long as the essence of such non-contractual claims are in connection with or arising out the underlying contracts.[11]

Cross-arbitration clauses

Lastly, we briefly discuss the arbitration clause that was at the center of the above dispute in the Tokyo District Court as well as the Supreme Court decision in the *Ringling Circus* case.[12] The disputed arbitration clauses in these two cases provided that the seat of arbitration was the location of the respondent. This type of arbitration clause, sometimes called a 'cross arbitration clause', is relatively common where at least one of the parties is a Japanese company. Generally, parties agree to such arbitration clauses as a concession and with the hope that this type of arbitration clause will give the potential claimant pause before commencing arbitration proceedings, as it will then be required to attend such arbitration in a foreign jurisdiction.

A cross arbitration clause can sometimes create serious problems in the operation of arbitration if the clause is not properly drafted. As a matter of principle, absent an agreement between the parties as to the governing law, the parties will not definitively know which country's laws will govern the arbitration and, therefore, there will be uncertainty as to the validity and the scope of the arbitration agreement itself because such terms would be determined by the applicable laws of the seat of the arbitration. This issue can be even more problematic under an arbitration clause, such as those disputed in Tokyo District Court, where not only the seat of the arbitration, but also the applicable administering rules and governing law itself vary depending on which party initiates the arbitration. This type of arbitration clause can give rise to serious issues as the parties would not know the governing law of the underlying contract until, and unless, either party initiates arbitration proceedings. In other words, in the case discussed above, in the absence of any arbitration requests, it could be said that there was no agreement between the parties as to the governing law of their agreement, except that it would be either Monaco or Japan in the instant case.

As a matter of practice, a cross arbitration clause could also allow a respondent to threaten to file claims against the claimant by commencing parallel arbitration procedure in the jurisdiction of the claimant, instead of filing counterclaims in the already pending proceeding at the location of the respondent. Even where the arbitration clause provides to the parties the right to 'initiate' an arbitration in the location of the respondent, as opposed to 'file claims' in the location of the respondent, the respondent may still attempt to derail the proceedings and threaten the claimant by asserting its right to initiate arbitration proceedings in the location of the claimant, in accordance with the cross arbitration clause. Such cross arbitration clauses can complicate the situation even further where a particular project is governed by multiple agreements and each arbitration clause in each agreement is independently set forth. In principle, it is most efficient to resolve all related disputes in a single proceeding, rather than multiple arbitrations, at least if the parties in such multiple disputes are the same. This is, in fact, one of the key benefits of arbitration (ie, the ability to resolve multi-jurisdictional disputes in a single proceeding). If the use of a cross arbitration clause is unavoidable, such provision must be carefully drafted to ensure that it cannot be misused to impede or prejudice the arbitration process.

Conclusion

Increased interest in international arbitration, coupled with judicial support for arbitration, could set the ground for further development of international arbitration involving Japanese parties. In fact, the Japan Commercial Arbitration Association has launched a project to revise its international arbitration rules to keep pace with the rapid developments in this field, which has been greatly welcomed by the international arbitration committee in Japan.

Notes

1 For example, a mock arbitration organised by the Japan Arbitration Association in Tokyo May 2012 was reported on the front page of the evening edition of the *Nikkei Newspaper* (one of the most widely circulated Japanese business newspapers in Japan, similar to *The Wall Street Journal*).

2 The figures included in this chart are based on information collected from each institution, and not all the figures have been published.

We note that each institution has a slightly different means of calculating the number of international arbitration cases involving Japanese parties. Some institutions collect the data with respect to parties incorporated in Japan, while others include overseas subsidiaries of Japanese companies in addition to companies incorporated in Japan. In addition, each institution uses a different definition of 'international arbitration'. We give special thanks to Mr Lijun Cao of Zhong Lun Law firm, Beijing office, who kindly collected the figures from CIETAC.

3 For the AAA, this figure is the total number of international arbitration cases filed between 2007 and 2010.

4 The number shown in this table relating to CIETAC is the number of cases administered by CIETAC, Beijing. This information was collected from Mr Lijun Cao. According to Mr Cao, each year approximately 10 to 20 international arbitration cases that involve a Japanese party are filed at CIETAC, Shanghai. However, detailed statistical data based on the nationality of the parties were not readily available for CIETAC, Shanghai.

5 See note 2. For the AAA and CIETAC, information with respect to the number of cases where a Japanese party was a claimant was not readily available.

6 Figures with respect to SIAC reflect the total data collected from 2010 and 2011. Information with respect to the number of cases where a Japanese party was a claimant is not available for previous years.

7 The 25 April 2012 headline of the evening edition of *Nikkei Newspaper* was the filing by Nippon Steel Corporation, Japan's largest steel producing company, against POSCO, Korea's largest steel producing company, of a lawsuit for POSCO's alleged misappropriation of Nippon Steel's 'crown jewel' trade secrets.

8 Tokyo District Court Decision, 10 March, 2011, No. 1358 *Hanrei Times* pp 236-240.

9 Article 7 of the Act on General Rules for Application of Laws provides that 'the formation and the effect of a judicial act shall be governed by the law of the place chosen by the parties at the time of the act'. An English translation of the entire act is available at http://www.japaneselawtranslation.go.jp/law/detail/?ft=1&re=01&dn=1&co=01&ky=%E6%B3%95%E3%81%AE%E9%81%A9%E7%94%A8%E3%81%AB%E9%96%A2%E3%81%99%E3%82%8B%E9%80%9A%E5%89%87%E6%B3%95&page=1.

10 *Nippon Kyoiku Co Ltd v Kenneth Feld*, 51-8 Minshu 3657 (Supreme Court, 4 September, 1997, the so-called *Ringling Circus* case.

11 The court came to this conclusion by applying the law of Monaco this time. However, the court would come to the same conclusion had the law of Japan been applied.

12 See note 10. In both cases the scope of the arbitration clause was at issue.

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