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Some practical issues concerning International Arbitration in Japan

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Abstract

This article deals with the current problems concerning international arbitration in Japan. This article overviews some of the cases since Japan's Arbitration Act came into force about a decade ago and reveals practical problems in its application.

Introduction

Arbitration is playing a more and more important role in international transactions. Figure 1 compares the merits/demerits of Litigation and Arbitration. When it comes to international transactions between China and Japan, arbitration becomes especially important and may be the only effective dispute resolution mechanism. According to a recent court case[1)], neither Chinese courts nor Japanese courts can recognize or enforce judgments rendered by the other country's courts, because these foreign judgments lack the reciprocity requirement[2)]. In contrast, Chinese arbitral awards can be enforced in Japan and vice versa. Indeed, there are several court cases in Japan that have allowed enforcement of arbitral awards rendered in China[3)]. This big difference originates

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1) Judgment of Osaka High Court, 9 April, 2003, *Hanrei Jiho*, 1841, p.111

2) Article 118 of Civil Procedural Act of Japan is as follows:
A final and binding judgment rendered by a foreign court shall be effective only where it meets all of the following requirements:
(i) The jurisdiction of the foreign court is recognized under laws or regulations or conventions or treaties.
(ii) The defeated defendant has received a service (excluding a service by publication or any other service similar thereto) of a summons or order necessary for the commencement of the suit, or has appeared without receiving such service.
(iii) The content of the judgment and the court proceedings are not contrary to public policy in Japan.
(iv) A mutual guarantee exists.

from there being a worldwide convention[4] concerning the enforcement of arbitral awards, to which both of China and Japan are member states, but no such convention in the field of court decisions[5]. Although there are no comparably serious problems in international transactions between the other countries, such as South Korea, and Japan, arbitration holds its predominant position, because, as NY convention has 148 contracting parties, most of the countries with which Japan has trade relationships are also signatories to the NY convention.

(Figure 1)

Litigation	**Arbitration**
Judge: parties *cannot* choose	Arbitrator: parties *can* choose
Proceedings are *open*	Proceedings are *closed*
Several chances to appeal	*No chance to* appeal
Difficult to enforce foreign judgments	*Easy* to enforce foreign arbitral awards

The Japanese Arbitration Act was enacted in 2002 and entered into force on March 1st 2003. This enactment was based upon the 1985 UNCITRAL Model Law on International Commercial Arbitration. Before its enactment, we had some provisions for arbitration in the Civil Procedural Code. However, this civil procedural code was drafted in 1890 and has become outdated. Around 2000, the government of Japan decided to reform these provisions on the basis of the

3) For the most recent case, see Judgment of Osaka District Court, 25 March, 2011, Hanrei Taimuzu, 1355, p.249, though this judgment applied not the NY Convention but the Japan-China Trade Agreement, because Bilateral Agreement should be applied in preference to the NY Convention, on the basis of Art.7(1) of NY Convention (The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon). This ruling has been criticised, see Naoshi Takasugi, Case Note, *Shiho Hanrei Rima-kusu 45*, pp.118-121

4) Convention on the Recognition and Enforcement of Foreign Arbitral Awards, herein after referred to as the NY convention

5) There was an attempt to make a worldwide convention concerning international jurisdiction and recognition/enforcement of foreign judgments in the field of international commercial transaction conducted by Hague Conference of Private International Law in the 1990's. However this attempt failed. See, Masato Dogauchi, *Ha-gu Kokusai Saibankankatu Joyaku (The Hague Project on Jurisdiction and Foreign Judgments Convention)*, 2009, Shojihomu

UNCITRAL Model Law.

This article aims to overview the current situation concerning International Commercial Arbitration in Japan since the entering into force of the new Arbitration Act from the point of view of private international law and introduces some recent court cases. Through this overview and introduction, I will cast some light on the practical problems contained in the law.

1. The Law Governing the Arbitration Agreement

Above all, the argument concerning the law applicable to Arbitration Agreement is one of the most important issues in international commercial arbitration. Let us take an example. For instance, one Japanese company X concludes a contract with a Californian company Y, and this contract contains a so-called arbitration clause, providing that "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 NY". Japanese company X later files a suit against Z, who is the CEO of Californian company Y, before a Japanese court claiming that X suffered damages caused by Z because X was deceived into concluding a contract with Y by Z and that this claim is qualified as tort. Therefore, should this suit be dismissed because of the effect of a valid arbitration clause? Moreover, which law should be applied to this problem?

There is no specific provision regulating applicable law to the Arbitration Agreement in either the Arbitration Act or in 1890 Civil Procedural Code in Japan. Accordingly, many academics and court cases have for many years tried to offer the answer to the question, which law should govern the effect or the validity of an arbitration agreement.

As for court decisions, there is one prominent Supreme Court case[6)] called the Ringling Bros. Circus case in Japan. In this case, the main issue was the substantive and objective scope of the effect of the arbitration agreement. Japan's Supreme Court decided as follows: "Arbitration is a means of dispute resolution without litigation, in which the parties to a dispute agree to submit the resolution of the dispute between them to arbitration by a third party arbitrator, thereby binding themselves to the arbitration decision. Considering the nature of arbitration as a means of dispute resolution based on agreement between the parties, the law applicable to the validity and effect of the arbitration agreement in so-called international arbitration should be determined primarily by the intentions of parties under Article 7(1) of the *Horei* (former act concerning conflict of laws in Japan).

Even if the arbitration agreement does not contain the express agreement as to the applicable law as mentioned above, the court should find and resort to the implied agreement on the applicable law, in light of the possible existence and content of the agreement as to the place of arbitration, the terms and conditions of the main contract, and all other relevant circumstances."

"In this case, the Agreement does not contain the express agreement on the applicable law but it does contain the agreement on the place of arbitration that reads 'any arbitration proceeding initiated by Ringling Inc. shall take place in New York City.' Therefore, regarding the arbitration that Appellant requests, it is appropriate to find that there was the implied agreement to the effect that the applicable law to the arbitration agreement should be the law applicable in the place of arbitration, i.e., New York City."

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6) Judgment of Supreme Court, 4 September 1997, 51 Minshu (8) 3657, English Translation of this Judgment is available at http://www.tomeika.jur.kyushu-u.ac.jp/arbitration/courtcases.html.

According to the introduction of this case (available at http://www.tomeika.jur.kyushu-u.ac.jp/arbitration/courtcases.html), the facts of this case are as follows:

Plaintiff-Appellant Nihon Kyoiku-sha Co., Ltd. (hereinafter referred to as the Plaintiff), is a Japanese corporation and Defendant-Appellee Kenneth J. Feld (hereinafter referred to as the Defendant) is the representative of a corporation of the United States of America (hereinafter referred to as "Ringling Inc."). On October 2, 1987, Plaintiff and Ringling Inc. entered into an Agreement for the performance of the Ringling circus in Japan during 1988 and 1989 (hereinafter referred to as the Show Agreement). At the time of making the Show Agreement, Appellant and Ringling Inc. made an arbitration agreement as follows (hereinafter referred to as the Arbitration Agreement). If a dispute including the interpretation or application of the provisions of the Show Agreement is not settled, that dispute shall be submitted to arbitration, by the request of one of the parties, in accordance with the rules and procedures of the International Chamber of Commerce relating to the arbitration of commercial disputes. Arbitration initiated by Ringling Inc. shall be submitted to arbitration in Tokyo, and arbitration initiated by the Plaintiff shall be submitted to arbitration in New York City.

The Plaintiff filed this action in the Tokyo District Court against the Defendant seeking for damages based on a tort on the part of the Defendant. In addition to the assertion that the performance by Ringling Inc., was not as contemplated in the Show Agreement, it is alleged that the Defendant deceived the Plaintiff regarding the share of the profits from the sale of such products as featured the circus and the duty to pay for tents used to house animals. The Defendant moved to dismiss the action, asserting that the Arbitration Agreement between the appellant and Ringling Inc. has an effect on the present action.

The Tokyo District Court granted the Defendant's motion and dismissed the action. On the appeal by the Plaintiff, the Tokyo High Court affirmed the judgment of dismissal. The Plaintiff then appealed to the Supreme Court.

According to the Supreme Court, an applicable law to the effect of the arbitration agreement is decided by art.7(1) of *Horei* (Japanese former conflict of laws act, now, art.7 of *Ho no tekiyo ni kansuru Tsusokuho*[7] (Act on General Rules for Application of Laws), herein after referred to as *Tsusokuho*), and if parties agree on the applicable law to the arbitration agreement, then this law should be applied. However, if parties do not agree on the applicable law but do agree on the place of arbitration, then the law of the place of arbitration should be applied as the parties' implied choice of law.

Even though this judgment was delivered before the Arbitration Act was enacted, lower courts have basically followed this deliverance of the Supreme Court since this act entered into force. In its judgment on 21 December 2010[8], the Tokyo High Court applied art.7(1) of *Horei* to the effect of the arbitration agreement and admitted the parties to choose the governing law of the arbitration agreement, but derived the application of the law of the place of arbitration from art.44(1)(ii)[9] and 45(2)(ii)[10] of the Arbitration Act not from art.7(1) of *Horei*. The Tokyo District Court rendered a judgment on 10 March 2011[11] admitting the application of art.7 of *Tsusokuho* to the conflict of laws issue concerning the effect of arbitration agreement. In this judgment, the Tokyo District Court followed Ringling Bros. Circus Decision of the Supreme Court and ruled that when parties agree on the place of the arbitration (in this case, an arbitration clause provided

7) Article 7 The formation and effect of a juridical act shall be governed by the law of the place chosen by the parties at the time of the act.

8) Judgment of Tokyo High Court, 21 December 2010, *Hanrei Jiho* 2112, p.36

9) Article 44(1)(ii) of Arbitration Act provides as follows:
Article 44(1)
A party may apply to a court to set aside the arbitral award when any of the following grounds are present:
(ii) 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)

10) Article 45(2)(ii) provides as follows:
Article 45. (Recognition of Arbitral Award)
(2) The provisions of the preceding paragraph do not apply in the case where any of the following grounds are present (with respect to the grounds described in items (i) through (vii), this shall be limited to where either of the parties has proven the existence of the ground in question):
(ii) 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)

11) Hanrei Taimuzu, 1358, p.236

that the place of arbitration is where the respondent is located), it should be deemed that parties impliedly agree that the law of the place of arbitration should be applied. Some academics also take the same position as the Supreme Court's decision[12] after the enactment of the Arbitration Act.

However, even if we allow parties to choose the applicable law to the arbitration agreement under a new legal scheme[13], there are doubts whether the reasoning of the Supreme Court in Ringling Bros. Circus Case is still appropriate under the Arbitration Act and *Tsusokuho*. First, under *Horei*, it was admitted that implied parties' choice of law played a broad role, though under *Tsusokuho* this role of implied parties' choice of law is very limited. Under *Horei*, the objective connecting factor, which was applied when parties did not choose the applicable law to their contract, was the place of contract, and there was a general tendency to avoid using this objective connecting factor. Accordingly, academics and courts tried to expand the concept of implied parties' agreement so as to include parties' presumed intention[14]. On the other hand, under *Tsusokuho*, the objective connecting factor is the place most relevant to the contract and there is no need to avoid this objective connecting factor. The role of implied parties' choice was decreased. Therefore, it is very difficult to derive parties' agreement if they did not really state any agreement on the governing law of the arbitration agreement, as the Tokyo District Court did, in the *Tsusokuho* regime.

Second, as mentioned above, the Arbitration Act does not contain any provision concerning this matter. However, art. 44(1)(ii) and 45(2)(ii) provides that the validity and the effect of an arbitration agreement is governed by the law that parties choose, and if they do not choose any law, the law of the place of arbitration governs. Although these provisions are provided for the enforcement, some academics find a general principle of conflict of laws in these provisions[15].

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12) Remarks of Prof. Miki at round-table talk on Jurisuto, Koichi Miki=Kazuhiko Yamamoto eds., *Shin Chusaiho no Riron to Jitumu (The Doctrine and Practice on the new Arbitration Act)*, p.120, though it is not clear whether he maintains his opinion under *Tsusokuho* as well.

13) Some academics do not allow party autonomy and insist that the law of the place of arbitration should be applied. See e.g., Akira Takakuwa, *Aratana Chusaiho to Shogaiteki Chusai* (New Arbitration Act and International Arbitration), *Hoso Jiho* 56-7, p.11

14) "Parties' presumed intention" denotes that the intention that a reasonable person in the same situation as the parties may have. This is not the real intention of the parties. A good example of the parties' presumed intention is found in the decision of the Supreme Court in Ringling Bros. Circus Case.

15) See e.g. T. Kojima=A. Takakuwa eds., "*Chushaku to Ronten Chusaiho (Commentary and Issues on Arbitration Act)*", p.59 [Shun'ichiro Nakano]

Doubtless, it is convincing that we should apply the same governing law to the effect and validity of the arbitration agreement through arbitral proceedings and the enforcement of arbitral awards. Because if the applicable law to the effect and validity of arbitration agreement differs in the arbitral proceeding from at the enforcement, it could happen that although the validity and effect of the arbitration agreement was affirmed and X's suit against Z was dismissed in accordance with the law of country α and X won an arbitral award against Z, when X goes to a Japanese court to enforce this arbitral award, the Japanese court denies this enforcement because the validity and effect of this arbitration agreement cannot be admitted in accordance with the law of country β[16]. Apparently, this result is practically not permissible.

Therefore, the analogous application of art.44 (1)(ii) and 45 (2)(ii) of the Arbitration Act, when the applicable law to the validity or effect of an arbitration agreement is at issue, is the most appropriate. From this point of view, the decision of the Tokyo High Court would be misleading, because it firstly applied art.7 of *Tsusokuho*, and in the absence of parties' choice of law, it admitted to apply the law of the place of arbitration in the light of art.44 (1)(ii) and 45 (2)(ii) of the Arbitration Act[17].

Note that these arguments are based on the doctrine that the governing law of the principal contract and the arbitration agreement should be different. This doctrine is called as "separability" or "severability". A criticism of this issue has recently been published[18]. According to this opinion, this doctrine of separability/ severability only means that an arbitration agreement is binding even though the underlying contract is void or has not come into existence[19]. However this applies to all other kinds of contract clauses as well, i.e., not all clauses of a contract automatically become void when the contract is void. Therefore, the separability/ severability of an arbitration agreement does not need to be taken as given[20]. Based upon these examinations, this opinion makes the point that the law

16) See Koji Takahashi, case note, *Shiho Hanrei Rima-kusu*, 45, pp.123-124

17) This mixed application of *Tsusokuho* and the Arbitration Act has been criticized by the academics who favour application of *Tsusokuho*.

18) Takahashi, *supra* note 16, p.124

19) C.f., art.13(6) of the Arbitration Act provides as follows;
Even if in a particular contract containing an arbitration agreement, any or all of the contractual provisions, excluding the arbitration agreement, are found to be null and void, cancelled or for other reasons invalid, the validity of the arbitration agreement shall not necessarily be affected.

20) Takahashi, *supra* note 16, p.124

governing the principal contract should be "the law to which the parties have agreed to subject it" in the meaning of art.44(1)(ii)/45(2)(ii) of the Arbitration Act when parties agree on the applicable law to the principal contract. If the parties explicitly agree on a law applicable to the arbitration agreement different from the applicable law to the main contract, then this agreement is also valid as *dépeçage*[21].

However, from my point of view, the effect of the principal contract and the arbitration agreement ancillary to the principal contract is totally different. Besides, although all clauses other than dispute resolution clauses are conductive to the accomplishment of the principal contract, the arbitration clause is mainly aimed at handling disputes irrelevant to the accomplishment of the principal contract. Hence, the arbitration agreement should be treated as a discrete contract, and the applicable law to it should be determined differently from the principal contract.

2. The Law Governing the Arbitrability

Neither the Arbitration Act nor *Tsusokuho* contains any provisions concerning the applicable law to the arbitrability, while the Arbitration Act provides that when "the claims in the arbitral proceedings relate to a dispute that cannot constitute the subject of an arbitration agreement under the laws of Japan", the arbitral award may be set aside or not be enforced in Japan[22]. In this regard, the Arbitration Act stipulates that the law of the country where the claim for setting aside or enforcement of the arbitral award is alleged should determine the arbitrability.

Academics are divided in many ways. One insists that when the arbitrability is at issue in the arbitral proceedings, the law of the place of arbitration shall be applied, but when the arbitrability is at issue on its recognition/enforcement, the law of the country of recognition/enforcement shall be applied, on the basis of Art.44(1)(vii) and 45(2)(viii) of the Arbitration Act and the strong relationship between an arbitration and the place of the arbitration[23]. There is also a different opinion, which asserts that *Lex fori* shall be applied[24]. Moreover, some insist on

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21) *ibid.*

22) Art.44(1)(vii) and 45(2)(viii) of the Arbitration Act.

23) Akira Takakuwa, *supra* note 13, p.15

24) Although prof. Dogauchi insisted on the application of the law of the place of arbitration before the enactment of the Arbitration Act as well, it seems that he agrees on the application of *lex fori*. See Masato Dogauchi, *Shin Chusaiho no Motodeno Kokusai Shoji Chusai (International Commercial Arbitration under Arbitration Act of 2003)*, Nihon Kokusaikeizaiho Gakkai Nenpo (International Economic Law), 13, p.132

cumulative application of *Lex fori* and the law of the place of arbitration[25]. Nevertheless, the most supported opinion is the one that insists the application the place of the arbitration on the grounds that art.3(1) of the Arbitration Act provides: "the provisions of Chapters II through VII and Chapters IX and X, except the provisions specified in the following paragraph and article 8, apply only if the place of arbitration is in the territory of Japan"[26].

No court case has directly dealt with the issue of the arbitrability in Japan. However, there are two court decisions concerning an employment agreement. In the Arbitration Act, there is a supplementary provision, which prohibits prospective arbitration agreements concerning individual labor-related disputes in general[27]. Although these two judgments did not apply the Arbitration Act, because the agreement was concluded before the Arbitration Act entered into force, it is still interesting to overview these court cases.

The Tokyo District Court rendered its decision on 26 January 2004[28], in the case where the dispute arose from the employment agreement between an American company Y and X residing in California at the time of agreement. According to this agreement, X works in Singapore as a vice president of the Asia-Pacific region. X took an action before the Tokyo District Court in spite of the fact that this employment agreement contains an arbitration agreement, which refers the dispute to arbitration in Santa Clara, California, by the American Arbitration Association. The Tokyo District Court took the position that the issue of whether an arbitration agreement in an employment agreement is valid is the matter of the effect of the arbitration agreement. Since the parties agreed the place of the arbitration to be California, the law of the State of California should be applied to the arbitration agreement, when parties did not explicitly agree on the applicable law to the arbitration agreement. X claimed that if this arbitration agreement were deemed as valid, it would contravene the purport of Art.4 of the Supplementary Provisions of the Arbitration Act. However, the Tokyo District

25) Kazuhiko Yamamoto=Aya Yamada, *ADR Chusaiho (ADR & Arbitration Act)*, (2008), p.352

26) Shun'ichiro Nakano, *Chusai Keiyaku no Junkyoho to Chusaiho (The Governing Law of Arbitration Agreement and Arbitration Act)*, JCA ja-naru, 51(11), p.71.

27) Art.4 of Supplementary Provisions of Arbitration Act provides as follows:
For the time being until otherwise enacted, any arbitration agreements concluded following the enforcement of this Law, the subject of which constitutes individual labor-related disputes (which means individual labor-related disputes as described in article 1 of the Law on Promoting the Resolution of Individual Labor Disputes [Law No.112 of 2001]) that may arise in the future, shall be null and void.

28) *Rodo Hanrei* 868, p.90 (Digest)

Court held that the purpose of this provision is to protect employees who work in Japan, where arbitration is not well recognized as a tool for dispute resolution, and that therefore it is not necessary to protect employees in the USA, where the arbitration is often used as a tool for dispute resolution. These are the reasons the Tokyo District Court admitted that the arbitration agreement in this employment agreement is valid and this claim should be dismissed.

The other decision was also rendered by the Tokyo District Court on 15 February 2011[29]. This case was concerned with a dispute arising from the employment agreement between an American company M and an American N residing in Japan. According to this employment agreement, N works in Japan as a managing director in the American company's branch in Japan, and the disputes arising from this agreement should be referred to the arbitration in Atlanta, Georgia by the American Arbitration Association. N took an action before the Tokyo District Court, and M asked the Court to dismiss the action because of the arbitration agreement, though N claimed that the said arbitration agreement is not valid because it is against public policy and the provision of Art.4 of the Supplementary Provisions of the Arbitration Act.

The Tokyo District Court held that since this employment agreement was concluded before the Arbitration Act entered into force, Art.4 of the Supplementary Provisions of the Arbitration Act could not be applied, and besides this article should not govern this arbitration agreement, because the place of arbitration and all the arbitral proceedings is the United States, and that even though N has resided in Japan for many years, since N graduated from a university in United States and had received a high salary, participating in the arbitration in the State of Georgia for N is not contrary to public policy.

In this case, the reasons the Tokyo District Court denied the application of Art.4 of the Supplementary Provisions of the Arbitration Act are not obvious except for the reason of the temporal scope of application. However, it seems that the Tokyo District Court took the position that whether an arbitration agreement in an employment agreement is valid is determined by the law of the place of arbitration.

In the meantime, there is an argument between academics concerning the application of Art.4 of the Supplementary Provisions of the Arbitration Act. One asserts that this article shall be applied when the place of arbitration is Japan, because this article is a special provision to art.13(1) of the Arbitration Act[30] and

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29) Hanrei Taimuzu 1350, p.189

art.13 of the Arbitration Act shall be applied to the case where the place of arbitration is Japan in accordance with art.3(1) of the Arbitration Act[31]. It seems that this opinion takes the position that Art.4 of the Supplementary Provisions of the Arbitration Act provides the rule of arbitrabililty and the issue of arbitrability is governed by the law of the place of arbitration. The other opinion insists that Art.4 of the Supplementary Provisions of the Arbitration Act shall be applied to the case where the place of arbitration is Japan and where the arbitration agreements concerning individual labor-related disputes are concluded between a company and an employee who usually works in Japan. This is because (i) this article is a special provision to art.13(1) of the Arbitration Act and art.13 of the Arbitration Act shall be applied to the case where the place of arbitration is Japan according to art.3(1) of the Arbitration Act and (ii) the legal order of Japan has a strong interest in regulating the employment agreement when the place of usual work is Japan[32]. Although this opinion admits that Art.4 of the Supplementary Provisions of the Arbitration Act is a special rule to art. 13(1) of the said act, according to this opinion, the application of Art.4 of the Supplementary Provisions of the Arbitration Act only in the case where the place of arbitration is Japan does not answer the purpose of Art.4 of the Supplementary Provisions of the Arbitration Act. Another opinion argues the analogous application of art.12 of *Tsusokuho*[33][34], i.e., an employee of an individual labor contract can refer to the application of governing law of the arbitration and, at the same time, he/she can claim on the application of Art.4 of the Supplementary Provisions of the Arbitration Act on the recourse to art.12(1) of *Tsusokuho*, if the place where the work should be provided under the labor contract is Japan. This opinion comes from the point of view that whether an arbitration agreement in an employment agreement is valid is the determined by the effect or validity of an arbitration agreement, which coincides with the decision of the Tokyo District Court on 26 January 2004.

From my point of view, Art.4 of the Supplementary Provisions of the

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30) Art.13(1) of the Arbitration Act provides as follows:
Article 13. (Effect of Arbitration Agreement)
(1) Unless otherwise provided by law, an arbitration agreement shall be valid only when its subject matter is a civil dispute that may be resolved by settlement between the parties (excluding that of divorce or separation).

31) T. Kojima=A. Takakuwa eds., "*Chushaku to Ronten Chusaiho* (Commentary and Issues on the Arbitration Act)", p.305 [Ryuichi Yamakawa]

32) Masato Dogauchi, *Kokusai Keiyaku ni okeru Boiler Plate Joukou wo meguru Jakkan no Ryuiten(6) (Some Problems on Boiler Plate Clauses in International Commercial Contracts (6))*, NBL 875, p.49

Arbitration Act is a special rule to art.13(1) of the said act and Art.4 of the Supplementary Provisions of the Arbitration Act shall be applied to the case where the place of arbitration is Japan in accordance with art.3(1) of the Arbitration Act. This applies to the issue of arbitrability in general. Although art.3(1) provides the unilateral application of some articles of the Arbitration Act, it could be derived from this article that art.3(1) implies that the arbitrability should be governed by the law of the place of arbitration.

Conclusion

I overviewed some issues concerning international commercial arbitration from the point of view of an academic of Private International Law. Although the enactment of the Arbitration Act has resolved many practical problems, many issues concerning conflict of laws in international arbitration remain unsolved. Unfortunately, we have not had enough court cases to deduce the doctrine on which Japan's courts rely in these issues. I hope that a sufficient number of court cases will be piled up for filling the gaps in the today's legal regime in international commercial arbitrations and clarifying at least the standpoint of Japan's courts in the next decade, so that international commercial arbitration in Japan can be utilized more often.

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33) Art.12 of *Tsusokuho* provides as follows:

Art.12 (Special Provisions for Labor Contracts)

(1) Even where the applicable law to the formation and effect of a labor contract as a result of a choice or change under Article 7 or Article 9 is a law other than the law of the place with which the labor contract is most closely connected, if a worker has manifested his/her intention to an employer that a specific mandatory provision from within the law of the place with which the labor contract is most closely connected should be applied, such mandatory provision shall also apply to the matters stipulated in the mandatory provision with regard to the formation and effect of the labor contract.

(2) For the purpose of the application of the preceding paragraph, the law of the place where the work should be provided under the labor contract (in cases where such place cannot be identified, the law of the place of business at which the worker was employed; the same shall apply in paragraph (3)) shall be presumed to be the law of the place with which the labor contract is most closely connected.

(3) In the absence of a choice of law under Article 7 with regard to the formation and effect of a labor contract, notwithstanding Article 8, paragraph (2), the law of the place where the work should be provided under the labor contract shall be presumed to be the law of the place with which the labor contract is most closely connected with regard to the formation and effect of the labor contract.

34) Yasunori Honma=Shun'ichiro Nakano=Hajime Sakai, *Kokusai Minji Tetsuzuki Ho (International Civil Procedure)*, 2nd ed., p.243 [Shun'ichiro Nakano]