Arbitration between Parties from Developed and Developing Countries — under Japanese Arbitration Law*

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I. Introduction

The socioeconomic advances of recent decades have given a large number of the globe’s population and a greater chance for human benefit. For the industrial societies, the question for energy resources and raw materials has become global in scale on the one hand, and for the developing countries, autarkic economic policies have proven to be not satisfactory on the other hand. A tremendous variation exists among the countries in both categories in regard to this economic situation, culture, religion, history and geo-

* This paper is based on the gist of a briefing the writer gave at the session on International Commercial Arbitration of International Law Association Montreal Conference on August 31, 1982.

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graphic situation. People of developed countries and those of developing countries looking at the same world see a substantially different picture.*1

It must be recognized that there is a conflict in commercial relations between the developing countries on one side and the developed countries on the other side.

Importing raw materials and energy and exporting industrial products are a sort of respiration for Japan. Japan, with no significant natural resources, should expand exports, by winning the understanding of foreign trade partners for Japan’s position. Japanese technological exports are mostly directed to Asian countries. Trading companies may contribute to revitalizing the world economic activity by engaging in helping expand not only Japan’s export but also those of other countries.

Conflicts also arise from the application of national laws to foreign business activities. Some domestic laws when applied to commercial transactions are becoming an increasing source of irritation to transnational trade. For example, Japan antitrust law and regulatory laws related to commercial activities in Asia and Europe have caused frequent problems.*2

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*1 e. g. The sharing of technology between those who posses it and those who would like to obtain it is subject to the rules and stipulations of the patent system, for example, the Paris Convention of Industrial Property (the revision of this convention: 21 UST 1583, 24 UST 2140 and TIAS 6923, 7727). In the view of Representatives of developing countries, technology is a part of the universal human heritage and all countries have the right of access to technology in order to improve the standards of living of their people. On the contrary, representatives of Western developed countries to this analysis insist that the transfer of technology is a commercial operation which occurs, or fails to occur, in line with the economic laws of the market place.

II. Role of transnational arbitration in dispute settlement

The paradox with which we must wrestle lies in the settlement of disputes in commercial relations between parties from developing countries and parties from developed countries.

In developing countries the state itself appears as a contractual partner of an arbitration. The involvement of the state leads the question of immunity.*3 The parties should seek a limited transnational agreement in writing that the state-owned enterprises operating in market economies shall not be immune with relate to arbitral proceedings and awards.

Commercial transactions between parties from developing countries and parties from developed countries include usually large and long-term contracts, contracts on the transfer of technology, and contracts on the erection of specific factories and joint venture agreements and so forth. One finds mostly arbitration clause in the transnational commercial transaction.

Arbitration regarding such as large and long-term contracts is more difficult than other arbitration procedure.

The search for an acceptable alternative to the self-help for settling disputes has led to the development of a variety of arbitration schemes for this purpose. The first type is ad-hoc arbitration where the parties regulate all details of the arbitration. Secondly, an alternative to ad-hoc arbitration which is becoming increasingly popular is institutionalized arbitration. In commercial relations, arbitration agreements and arbitration cases mostly are dealt with on the basis of International Commercial

*3 The two working sessions, the session on Commercial Arbitration and the session on the State Immunity could combine their efforts to find acceptable conclusions, with regard to the submission to the arbitration procedure and an eventual enforcement of the arbitral award. See Appendix A, Draft, Arts, III, A, 2 (b); VIII, A. See also, Koshikawa, the Multinational Enterprise and Arbitration of Disputes, CHUKYO HOGAKU, Vol. 13, No. 2 (1978) 17, The Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2892, codified at 28 U.S.C. §§1330, 1332 (a), 1391 (f), 1441 (d), 1602-1611 (1977 supp.).
Arbitration Association and the rule of this association in Japan.

Transnational arbitration is the best schemes for the settlement of dispute between developed and developing countries. Both parties can choose for themselves arbitrators which have a knowledge of the facts and usages of transnational transactions. We cannot usually except such a knowledge from the judges of states courts. In Japan, the procedure of transnational arbitration is often more flexible, faster and cheaper than three instances of court litigation. Therefore, one considers transnational arbitration as the best method for the settlement of transnational disputes.*4

Since 1976, Japan was sending 40 percent of its technology and other licensing exports to Asian nations. Japan has achieved as the foremost supplier of technology to the developing nations of East Asia. Profits earned through licensing technology becomes a more important for Japanese transnational business practice. Arbitration concerning technology and industrial property rights must be considered as an instrument for the settlement of disputes in Japan’s technology trade.*5

III. Attitude of Japan regarding international arbitration conventions

It is in Japan’s national interest to accept the transnational arbitration connected to a convention.*6

Japan ratified the New York Convention of 1958 on the recognition and enforcement of foreign arbitral awards*6 and the Convention of 18

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*4 One criterion for a good dispute settlement procedure is the process to avoid a lot of cost and to provide acceptable outcomes. Koshikawa, ibid., Legal Study of Transnational Joint Venture, 9 ff.

*5 Arbitration concerning technology and industrial property rights was dealt with at International Arbitration Congress in Moscow 1972 and in Mexico City 1978 as well as at the interim meeting of the International Council for Commercial Arbitration in Vien 1976.

March 1965 on the settlement of investment disputes between states and nationals of other states.*7

Japan has been actively supporting the new international rules of the sea, which had been discussed at the Third U.N. law of the Sea Conference since December 1973, and adopted in April 1982. The Law of the Sea Convention, provides for arbitration in case the parties do not agree to any other method of dispute settlement.*8

IV. Japanese national arbitration law

The acceptance of principles of the Western Arbitration law dates early in the context of the introduction of the Code of Civil Procedure*9, which provides Arbitration Proceeding in Book VIII. One may find a certain influence of German law in Japan.

(1) The Japanese codal provisions on arbitration matters provide that the likelihood of court intervention in the arbitral proceedings is minimal.*10 Arbitration agreements and arbitral awards have been consistently upheld and enforced by Japanese courts.

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*7 Koshikawa, ibid. The Multinational Enterprise and Arbitration of Disputes, 10 ff.


(2) Under Japanese domestic law, the parties can give arbitrators to adapt the contract. Since, Article 786 of Japanese Civil Procedure Law provides that an agreement for the submission of a controversy to one or more arbitrators is valid insofar only as the parties are entitled to conclude a compromise with reference to the subject-matter in dispute.

Does there exist a legal system which gives the arbitrator the power to adapt the contract?

In Japan, the special statute gives the parties the power to adapt the contract, even in the absence of a specific contractual provision to this effect. (e.g. the Rented House Law; The Leased Land Law). In the absence of such statute, theoretically speaking, the arbitrator may adapt the long-term contracts, because in the case of long-term contracts, great changes which parties could not prospect at the conclusion of the contract and result to unreasonable effects will be occurred.

(3) Arbitration agreements are permitted in civil cases. Foreigners may act as arbitrators.

(4) The arbitrators, before making their award shall hear the parties.

(5) The arbitrators may continue the procedure and make the award everywhere a party asserts that arbitration procedure is inadmissible. The Japanese law establishes the Separability Doctrine that the arbitration clause has a fully autonomous judicial character and, hence, is separable from the principal contract.

(6) Execution in virtue of an award can only take place where the admissibility thereof has been pronounced by way of a judgment of execution.

*11 In case of leases, the principle of trustworthiness would become applicable to clarify change in circumstances. Koshikawa, Strict Law and Principles of Equity in the Japanese Civil Law, Meiho Hogaku (Meiho University Law Review), Vol. 27, No. 102, 9 ff. cf. clausula nebus sic stantibus.


*13 C.P.L. Arts. 794, 801. Koshikawa, ibid. Arbitral Award, 23

*14 C.P.L. Art. 797.

*15 See, Koshikawa, ibid. Transnational Arbitration, 189 ff.

(7) Agreeing to arbitration outside Japan and recognizing and enforcing foreign awards are both assured.*17

Those matters are also applicable to the arbitration between developing countries and developed countries.

V. Arbitration Institutions in Japan

Tokyo is the headquarters of the Chamber of Commerce and Industry, which has extensive facilities for holding arbitral proceedings.

For thirty two years, the Japan Commercial Arbitration Association has adopted a constructive approach towards the resolution of transnational trade problems. The association has maintained relations with arbitral bodies, and has cooperate with such bodies. The association is publishing the monthly JCA Journal. The Japan Commercial Arbitration Association has entered into agreements with arbitration bodies in other countries, for example the American Arbitration Association on Sep. 16, 1952.

Special attention is being paid to relations with developing countries and especially with Asia and Africa. The association entered into agreement with Commercial Arbitration Chambers, Ghana on Oct. 16, 1980. The text of the agreement is as follows:

"All disputes, controversies or differences which may arise between the parties out of or relating to this contract, shall be finally settled by arbitration. The place of arbitration shall be, unless otherwise agreed between the parties, the country in which the respondent resides.

In case the respondent is a Ghana enterprise, the arbitration shall be held at the Commercial Arbitration Chambers in Ghana under the Commercial Arbitration Rules thereof.

In case the respondent is a Japanese enterprise, the arbitration shall be held at the Japan Commercial Arbitration Association under the Commercial Arbitration Rules thereof."*18

*17 Judgement of April 18, 1953, Tokyo District Court, 4 Kakyu Minji Saiban Reishu, (A Collection of Civil Cases in the Inferior Court) 502, Koshikawa, ibid., Arbitral Awards in Japanese Law, 21, 22
The Japan Commercial Arbitration Association in Japan and the arbitration rules of this association is available for the settlement of disputes in transnational commerce between parties from developing countries and parties from developed countries including Japan. The UNCITRAL Arbitration Rules have been available in Japan.

VI. Conclusion

The law governing the arbitration agreement and the arbitral proceeding is the law that has been freely chosen by the parties. This is dictated not only by Article 7 of Horei (Law concerning the Application of Laws)*19, but also by the principle that the will of the parties is autonomous in contractual matters.*20

We live in a transitional period with respect transnational relations. We should study the measures for transnational cooperation on the settlement of disputes.

It is clear that the establishment of a New Arbitration Law could only result from a general consensus and requires effective cooperation between developing and developed countries. The UNCITRAL Arbitration Rules also is one of examples of such rules.

In 1980, I wrote a Model-Law of Arbitration as a guideline for modifying the internal law of countries.*21

It is of primary importance first of all to promote arbitration agreement and to develop parties autonomy.


*20 Koshikawa, ibid. Legal Study of Transnational Joint Venture, 7 ff; Transnational Arbitration, 183 ff.

Appendix A: INTERNATIONAL LAW ASSOCIATION
STATE IMMUNITY
RESOLUTION

Session 8
Resolution

The 60th Conference of the International Law Association held in Montreal 29 August – 4 September 1982:

1. Commends the Committee on State Immunity and its chairman/rapporteur on their thorough work and the excellent draft convention on State Immunity.

2. Requests the Executive Council to transmit the draft convention annexed to this resolution, with the report and, when available, a record of the discussion at the Montreal session, to governments and to the United Nations, informing them that the International Law Association recommends the draft — to be referred to as the ILA Montreal Draft Convention on State Immunity — for the consideration of the Special Rapporteur and the International Law Commission as a whole in their work on the topic of State Immunity.

3. Recommends to the Executive Council the dissolution of the Committee on State Immunity, its work having been successfully completed.
DRAFT ARTICLES FOR A CONVENTION ON STATE IMMUNITY BY INTERNATIONAL COMMITTEE ON STATE IMMUNITY, ILA MONTREAL CONFERENCE (1982)

ARTICLE I
Definitions
A. Tribunal
The term "tribunal" includes any court and any administrative body acting in an adjudicative capacity.

B. Foreign State
The term "foreign State" includes:
1. The government of the State;
2. Any other State organs;
3. Agencies and instrumentalities of the State not possessing legal personality distinct from the State;
4. The constituent units of a federal State.
An agency or instrumentality of a foreign State which possess legal personality distinct from the State shall be treated as a foreign State only for acts or omissions performed in the exercise of sovereign authority, i.e. jure imperii.

C. Commercial Activity
The term "commercial activity" refers either to a regular course of commercial conduct or a particular commercial transaction or act. It shall include any activity or transaction into which a foreign State enters or in which it engages otherwise than in the exercise of sovereign authority and in particular:
1. Any arrangement for the supply of goods or services;
2. Any financial transaction involving lending or borrowing or guaranteeing financial obligations.
In applying this definition, the commercial character of a particular act shall be determined by reference to the nature of the act, rather than by reference to its purpose.

ARTICLE II
Immunity of a Foreign State from Adjudication
In general, a foreign State shall be immune from the adjudicatory jurisdiction of a forum State for acts performed by it in the exercise of its
sovereign authority, i.e. *jure imperii*. It shall not be immune in the circumstances provided in Article III.

**ARTICLE III**

**Exceptions to Immunity from Adjudication**

A foreign State shall not be immune from the jurisdiction of the forum State to adjudicate in the following instances:

A. Where the foreign State has waived its immunity from the jurisdiction of the forum State either expressly or by implication. A waiver may not be withdrawn except in accordance with its terms.

1. An express waiver may be made *inter alia*:
   (a) by unilateral declaration; or
   (b) by international agreement; or
   (c) by a provision in a contract; or
   (d) by an explicit agreement.

2. An implied waiver may be made *inter alia*:
   (a) by participating in proceedings before a tribunal of the forum State.
      
      (i) Subsection 2 (a) above shall not apply if a foreign State intervenes or takes steps in the proceedings for the purpose of:
      (A) claiming immunity; or
      (B) asserting an interest in the proceedings in circumstances such that it would have been entitled to immunity if the proceedings had been brought against it;
      
      (ii) In any action in which a foreign State participates in a proceeding before a tribunal in the forum State, the foreign State shall not be immune with respect to any counterclaim or setoff (irrespective of the amount thereof):
      (A) for which a foreign State would not be entitled to immunity under other provisions of this Convention had such a claim been brought in a separate action against the foreign State; or
      (B) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign State;
(iii) In any action not within the scope of subsection 2 (a) (ii) above in which a foreign State participates in a proceeding before a tribunal in the forum State, the foreign State shall not be immune with respect to claims arising between the parties from unrelated transactions up to the amount of its adverse claim.

(b) by agreeing in writing to submit a dispute which has arisen, or may arise, to arbitration in the forum State or in a number of States which may include the forum State. In such an instance a foreign State shall not be immune with respect to proceedings in a tribunal of the forum State which relate to:
(i) the constitution or appointment of the arbitral tribunal; or
(ii) the validity or interpretation of the arbitration agreement or the award; or
(iii) the arbitration procedure; or
(iv) the setting aside of the award.

B. Where the cause of action arises out of:

1. A commercial activity carried on wholly or partly in the forum State* by the foreign State; or

2. An obligation of the foreign State arising out of a contract (whether or not a commercial transaction but excluding a contract of employment) which falls to be performed wholly or partly in the forum State, unless the parties have otherwise agreed in writing.

C. Where the foreign State enters into a contract for employment in the forum State, or where work under such a contract is to be performed wholly or partly in the forum State and the proceedings relate to the contract. This provision shall not apply if:

1. At the time proceedings are brought the employee is a national of the foreign State; or

2. At the time the contract for employment was made the employee was neither a national nor a permanent resident of the forum State; or

3. The employer and employee have otherwise agreed in writing.

D. Where the cause of action relates to:
1. The foreign State’s rights or interests in, or its possession or use of, immovable property in the forum State; or
2. Obligations of the foreign State arising out of its rights or interests in, or its possession or use of, immovable property in the forum State; or
3. Rights or interests of the foreign State in movable or immovable property in the forum State arising by way of succession, gift or *bona vacantia*.

E. Where the cause of action relates to:
1. Intellectual or industrial property rights (patent, industrial design, trademark, copyright, or other similar rights) belonging to the foreign State in the forum State or for which the foreign State has applied in the forum State; or
2. A claim for infringement by the foreign State of any patent, industrial design, trademark, copyright or other similar right; or
3. The right to use a trade or business name in the forum State.

F. Where the cause of action relates to:
1. Death or personal injury; or
2. Damage to or loss of property.
Subsections 1 and 2 shall not apply unless the act or omission which caused the death, injury or damage occurred wholly or partly in the forum State.

G. Where the cause of action relates to rights in property taken in violation of international law and that property or property exchanged for that property is:
1. In the forum State in connection with a commercial activity carried on in the forum State by the foreign State; or
2. Owned or operated by an agency or instrumentality of the foreign State and that agency or instrumentality is engaged in a commercial activity in the forum State.

* One member of the committee would prefer to delete “wholly or partly in the forum state.”
ARTICLE IV
Service of Process

In proceedings against a foreign State under these articles the following rules shall apply:

A. Service shall be made upon a foreign State:
   1. By transmittal of a copy of the summons, notice of suit, and complaint in accordance with any special arrangement for service between the plaintiff and the foreign State; or
   2. By transmittal of a copy of the summons, notice of suit, and complaint in accordance with any applicable international agreement on service of judicial documents; or
   3. By transmittal of a copy of the summons, notice of suit, and complaint through diplomatic channels to the ministry of foreign affairs of the foreign State; or
   4. By transmittal of a copy of the summons, notice of suit, and complaint in any other manner agreed between the foreign State and the forum State.

B. Service of documents shall be deemed to have been effected upon their receipt by the ministry of foreign affairs unless some other time of service has been prescribed in an applicable international convention or arrangement.

C. The time limit within which a State must enter an appearance or appeal against any judgment or order shall begin to run sixty days after the date on which the summons or notice of suit or complaint is deemed to have been effectively received in accordance with this article.

ARTICLE V
Default Judgments

No default judgment may be entered by a tribunal in a forum State against a foreign State, unless service has been effected in accordance with Article IV and a claim or right to relief is established to the satisfaction of the tribunal.
ARTICLE VI
Extent of Liability
A. As to any claim with respect to which a foreign State is not entitled to immunity under this Convention, the foreign State shall be liable as to amount to the same extent as a private individual under like circumstances; but a foreign State shall not be liable for punitive damages. If, however, in any case wherein death or other loss has occurred, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign State shall be liable for actual or compensatory damages measured by the primary loss incurred by the persons for whose benefit the suit was brought.
B. Judgments enforcing maritime liens against a foreign State may not exceed the value of the vessel or cargo, with value assessed as of the date notice of suit was served.

ARTICLE VII
Immunity from Attachment and Execution
A foreign State’s property in the forum State shall be immune from attachment, arrest, and execution, except as provided in Article VIII.

ARTICLE VIII
Exceptions to Immunity from Attachment and Execution
A. A foreign State’s property in the forum State, shall not be immune from any measure for the enforcement of a judgment or an arbitration award if:
1. The foreign State has waived its immunity either expressly or by implication from such measures. A waiver may not be withdrawn except in accordance with its terms; or
2. The property is in use for the purposes of commercial activity or was in use for the commercial activity upon which the claim is based; or
3. Execution is against property which has been taken in violation of international law, or which has been exchanged for property taken in violation of international law and is pursuant to a judgment or an arbitral award establishing rights in such property.
B. In the case of mixed financial accounts that proportion duly identified of the account used for non-commercial activity shall be entitled to immunity.

C. Attachment or execution shall not be permitted, if:
   1. The property against which execution is sought to be had is used for diplomatic or consular purposes; or
   2. The property is of a military character or is used or intended for use for military purposes; or
   3. The property is that of a State central bank held by it for central banking purposes; or
   4. The property is that of a State monetary authority held by it for momentary purposes; unless the foreign State has made an explicit waiver with respect to such property.

D. In exceptional circumstances, a tribunal of the forum State may order interim measures against the property of a foreign State, including prejudgment attachment of assets and injunctive relief, if a party presents a prima facie case that such assets within the territorial limits of the forum State may be removed, dissipated or otherwise dealt with by the foreign State before the tribunal renders judgment and there is a reasonable probability that such action will frustrate execution of any such judgment.

ARTICLE IX
Miscellaneous Provisions

A. This convention is without prejudice to:
   1. Other applicable international agreements;
   2. The rules of international law relating to diplomatic and consular privileges and immunities, to the immunities of foreign public ships and to the immunities of international organizations.

B. Nothing in this Convention shall be interpreted as conferring on tribunals in the forum State any additional competence with respect to subject matter, in particular with respect to Article III.C.
Appendix B: Bibliography

(1)  [U.K. Arbitration Act]


(2)  [Analysis of the French Decree]

Vincent et Guinchard Précis Dalloz de procedure civil 20 ème edition 1981, (also see, Rev. 1980 No. 4, No. 2).
Blanc et Viatte, Nouveau Code de Procédure Civile commenté dans l'ordre des articles, mise à jour 7 decembre 1981.

(3)  Koshikawa’s Articles referring to Japanese Law.

Arbitral Awards in Commercial Arbitration Law in the United States of America, SHAKAI KAGAKU KENKYU (Social Science Research), (1981), 85 ff.

The preliminary program of ILA Montreal Conference (p. 8) said that arbitration between contracting parties from the industrialized and developing nations would be on the agenda; other topics might be added, such as the recent United Kingdom and French legislation dealing with commercial arbitration. Professor KARL-HEINZ BOCKSTIEGEL prepared a useful REPORT OF THE COMMITTEE ON INTERNATIONAL COMMERCIAL ARBITRATION named “ARBITRATION BETWEEN PARTIES FROM INDUSTRIALIZED AND LESS DEVELOPED COUNTRIES.” I reported the Japanese Arbitration Law. I hope the above-mentioned materials facilitate reference to the recent U.K. Arbitration Act, the new French Decree and Japanese Arbitration Law.

Addendum:
I touched up the report and prepared footnotes and appendices on September 8, 1980.