Legislation

Military Attack Contingency Legislation

[Law No. 79, 13 June 2003 ; Buryoku-kōgeki-jitai-taisho hō]

Fifty-three years after the end of the Second World War, three emergency bills designed to deal with a military attack from abroad were finally passed in the Japanese Diet. At least one of these, the Military Attack Contingency Legislation, is familiar to many people. The Japan Defense Agency (JDA) considered the necessity of, and examined the details for, a number of military emergency laws for a considerable period of time following the Second World War, however, this delay in developing the legislation was fundamental. Japan could not have had this legislation until now, despite the expectation in all other nations that there be a legislative framework to prepare for military emergency situations. Evidently, the absence of such legislation is 'abnormal' for a "normal nation (Futsu-no-Kuni)," as discussed by Ozawa Ichiro, however Japan did not have this legislation for historical reasons.

During the Pacific War, Japan invaded parts of Asia and was ultimately defeated by the Allies, specifically the United States. Subsequently, the United States completely disassembled the Japanese army and then promoted the democratization of all parts of Japanese society. The most drastic change was the enshrinement of the concept of pacifism in Article 9 of the new Constitution, which sets forth the renunciation of war, the non-possession of war potential and the denial of the right of belligerency of the state. It is because of this that it is known as the "Peace Constitution (Heiwa-Kenpō)." Nonetheless, as long as Japan remains an independent nation and a sovereign state, it is recognized to possess an inherent right to self-defense. Thus, Japan maintains an army known as the Japan Self-Defense-Forces (JSDF). This discrepancy between the text of the constitution and the military reality is somewhat unclear and perplexing. However, the JSDF are now clearly accepted by the government, by legislation, and by the majority of Japanese citizens, despite some conflicting views surrounding the interpretation of the constitutionality of their existence. So far, the JSDF have continued with their activities in various fields, such as dispatch to disaster relief areas, projects in aid of civilian welfare, and Peace Keeping Operation (PKO) activities, while simultaneously carrying out their primary responsibility to protect against an invasion from other countries, in order to protect Japan's independence, the lives of its citizens, and its national assets. The JSDF have gradually come to win the trust of the Japanese people through these activities which come under the provision of Article 9. However, until now, previous governments had been indecisive in drafting emergency legislation due to reasonable fears of considerable opposition from a number of Japanese citizens.

The question therefore is of why the military emergency bills have been passed at this time. Principally, these bills were able to be passed due to a change in the international situation as well as a change of viewpoint within Japan with regard to war. Although I can indicate several concrete reasons for this change in attitude, two important points in particular need to be emphasized : first, the danger of Japan's involvement in a full-scale war, such as the "hot war" that was feared throughout the world, during the American-Soviet Cold War, has decreased due to the termination of these antagonistic relations, although this factor seems contradictory to a sense of need for such legislation. However, for this reason, many people who were previously anxious that a law concerning wartime, might cause Japan to be drawn into a war during the Cold War period, later came to accept such legislation, as the possibility of a large-scale war has almost disappeared in the post-Cold War scenario. Secondly, in contrast to this, at the same time, various regional disputes are occurring frequently in around the world, such as the North-Korean threat surrounding Japan since the 1990s, including the test-firing of the Taepo-dong missile, incidents of spy ship intrusion into Japanese territorial waters, and suspected nuclear weapons possession. Moreover, following the September 11 terrorist attacks in the United States, the threat of terrorism has become more prominent. It is clear that the support for the formation of the legislation to prepare for a national crisis is backed by a perception of "clear and present danger" by many people.

My personal thoughts on this subject are as follows. Although Japan could come from the post-War period through to the 21st century without experiencing a significant war such as a Third World War, it is undesirable to lack any legal basis in preparation for the possibility of war. There were situations that could have resulted in war, but did not, hence the non-occurrence of war was merely a result of good fortune. Governments should always be prepared for various unpredictable factors and worst-case scenarios, and should consider the preservation of peace and the security of the lives of its citizens. This should not be managed on the basis of good fortune and wishful thinking. If Japan, in the absence of any legislative backing, were to be attacked by a foreign army or guerrillas, the JSDF would not be able to perform their duty of protecting the Japanese people any more in practice than they would be able to in the legal sense.

The emergency laws enacted in the Diet in 2003, particularly the Military Attack Contingency Legislation, are the fundamental laws for national military emergency situations, and they prescribe the basic concepts of emergency response, the obligations of the government and local public bodies, and the cooperation of citizens. There is also a key point to be made in regard to the provision regarding the democratic procedure that government decisions during wartime be subjected to Diet approval. This is just as important as the enactment of the legislation itself, as it involves retaining civilian control over the JSDF even during wartime, and also refers to compensation for damage suffered by people. In addition to this, the content of the measures dealing with military

emergency situations comprises of three categories : the actions of the JSDF, the actions of US military forces as an ally of Japan, and the protection of the lives of civilians and national assets. A number of provisions in the legislation, prescribe the promotion of concrete law-making with regard to each category in the future, and in last year's Diet, citizen protection bills were passed, including bills for civilian evacuation and rescue of victims, which were passed in the Diet last year. Such measures taken in advance, while aiding to deter an invasion from abroad, will also enable better responses to any emergency situation to be carried out more swiftly and efficiently.

Criticism was naturally anticipated from a number of people including the opposition parties, with the exception of the Democratic Party, which agreed with the ruling parties, the Liberal Democratic Party and the New Komei Party. These criticisms highlighted concerns such as the anxiety related to possible infringements of the fundamental human rights specified in the Constitution, the ambiguous fact that Japan can legally go to war despite the existence of Article 9, and the fear that Japan might be forced into war against its will by US military action, due to the legislation dealing with the military crisis already in existence in Japan since 1999. Great importance is attached to the nightmarish memory of the previous war experienced by Japan, and people are willing to obey the Constitution on account of considerable reflection on the past.

The only correct thing to do is to protect the rights and guarantees enshrined in the constitution. We hope that the government would never again go to war and would at all times respect our human rights. Its primary mission, however, is to protect the lives of citizens, national assets, and Japan's independence from all internal and external disturbances. There is an inviolable rule in crisis management that those people entrusted with certain responsibilities prepare for the worst situations. Even in the absence of military emergency legislative frameworks it is still possible that war may break out. Considering this, it is clearly superior to have a legislative framework than to have none. However, when dealing with military emergency legislation, it is most important that we take into account both the human rights of citzens and the anxiety felt in Asian countries towards a militarily active Japan. Above all, the highest consideration should be given to avoiding the outbreak of war.

While it is necessary for Japan to possess military emergency legislation, it is important to remember that the wrongful application of these will lead to the downfall of Japan. To avoid such an outcome, Japanese citizens should always be alert and ensure the legislations' democratic application, especially as these have has been framed by the national representatives elected by the citizens. This is our duty in the democratic country constructed by us after the war. We must be aware that our future depends on ourselves.

(IWAMOTO Shoko)

Partial Revision of the Copyright Act

[Law No. 85, June 18, 2003 ; Chosakukenhō no ichibu wo Kaiseisuru Hōritsu]

I. Background

The Japanese government established the "Strategic Council on Intellectual Property" in February 2002. Since then, the Council has developed and promoted strategies for intellectual property, such as the "Comprehensive Strategy on Intellectual Property" and enforcement of the "Basic Law on Intellectual Property." In addition, due to consultations with concerned parties, the Council was able to make more advanced investigations than in the past, based on the development of information and communication technology and the recent global trends in the field of copyright. With this background, the partial revision to the Copyright Act was passed and approved during an ordinary session of the 156th National Diet and implemented from January 1, 2004.

This paper will present the framework for extending the terms of protection for "cinematographic works" (II), the expansion of the limitation on rights in education (III), and the improvement of judicial remedies against infringement of copyright (IV), which were amended by this law.

II. Extension of the Terms of Protection for "Cinematographic Works" (Article 54(1))

Under the current Copyright Act, the term of protection of a work shall begin "upon the creation of the work" and remains in force "for fifty years following the death of the author" (Article 51). In contrast, the term of protection for "cinematographic works" under the former Copyright Act provisions, which included images from theatrical films, animated cartoons, videos, and video-game software, remained in force "for fifty years following the making public of the work" (Article 54). This led to a substantially shorter term of protection for cinematographic works than for other categories of works, with the remaining lifetime of the author becoming the difference in the period of protection.

Moreover, from an international perspective, the recent trend in other developed countries has been to provide a term of protection for "cinematographic works" which is longer than that set by Article 7(2) of the Berne Convention for the Protection of Literary and Artistic Works. This article provides that the term of protection for "cinematographic works" shall expire "fifty years after the work has been made available to the public." The convention also provided for the principle of reciprocity, stating that, as a rule, "the term of protection shall not exceed the term fixed in the country of origin of the work." As a result, there was a manifest injustice in the treatment of Japanese cinematographic works with regard to the term of protection in European and other developed countries.

Accordingly, because cinematographic works in particular are expected to grow into an important industrial field in Japan in the future, a revision was made whereby the term of protection for cinematographic works was extended until "seventy years following the

making public of the work", compared to the former provision which was for "fifty years following the making public of the work".

III. Expansion of the Limitation on Rights in Education

The extensive changes in the manner in which works are used for educational purposes, caused, for example, by advancements in information technology and changes in learning methods, led to the expansion of the limitation on rights concerning the use of works for educational purposes.

A. Reproduction by Pupils/Students etc. in Educational Institutions (Article 35(1))

Under Article 35 of the former Copyright Act, reproduction of teaching materials and so on, was allowed by exception without authorization, for the purpose of using the work for teaching in educational institutions, such as schools and community centers. This exception was limited to "a person responsible for education" (for example, teachers) at educational institutions established for non-profit-making purposes. However, in recent years, within the general learning in one's lifetime, including both school and social education, there has been an emphasis on the voluntariness and independence of "children/pupils" and "learners", as well as training in information utilization skills. It is therefore now essential that "children/pupils" and "learners" are able to reproduce teaching materials autonomously.

Hence, not only "a person who is in charge of teaching" but also "children/pupils" or "those persons who are taught" may, by exception, reproduce materials without authorization, although subject to certain conditions.

B. Public Transmission of Teaching Materials by Simultaneous Relay of Lessons (Article 35(2))

Under Article 35 of the former Copyright Act, the manner in which the works could be exceptionally used as teaching materials without authorization was limited to "reproduction" and "assignment". However, there are a number of educational activities that are continually developed by educational institutions and that make use of various types of information and communication technology. Therefore, it is sometimes necessary that teaching materials are reproduced, distributed, notified, and so on from a main location to be transmitted to students, etc. (the public) in separate locations, by means of communication such as satellite and the internet.

Therefore, in non-profit educational institutions, where a lesson at a "main location" is relayed (public transmission) to persons taught simultaneously at "subsidiary lesson locations", the teaching materials may, by exception, be relayed without authorization by means of public transmission to the persons who are taught in other lesson locations, though subject to certain conditions.

C. Examination Questions resulting in Public Transmission (Article 36)

Under Article 36 of the former Copyright Act, an existing work could be

exceptionally "reproduced" or "assigned" without permission where it was necessary to utilize these in questions for entrance examinations, qualifying tests, and the like. However, in the case of distance education, it is now possible to conduct examinations via the internet and other means. Therefore, in such cases, it is necessary to utilize the existing work via "public transmission."

Accordingly, by the new Copyright Act, where an existing work is required to be utilized as a question for an examination, via public transmission such as the internet, the work may, by exception, be utilized without authorization, although subject to certain conditions.

D. Reproduction for Making "Magnified Versions of School Textbooks" (Article 33-2)

The "magnified versions of school textbooks (including handouts for teaching)" are magnified print versions of the existing school textbooks, and are presently used by students in schools for the visually impaired and in special classes for children with learning disabilities in elementary and junior high schools. Previously, however, it was necessary to obtain the consent of the copyright owner for producing "the magnified version of school textbooks." However, since "magnified version of school textbooks" are largely produced by volunteers individually and by hand, it is extremely difficult for a small group of volunteers in the short-term to obtain the consent to reproduce from all copyright owners.

Therefore, under the new Copyright Act, whether the existing school textbooks are used either in "whole" or in "part," the "magnified versions of school textbooks" may be exceptionally produced without the consent of the copyright owner.

If a person reproduces the "whole" or substantial part of the school textbooks as a magnified print version, he/she is obliged to give notice to the textbook publisher, regardless of whether or not the purpose of reproduction is profit-making. Furthermore, where the magnified print textbooks are distributed for "profit-making purposes," the reproducing party shall pay compensation to the copyright owner, the amount of which will be fixed by the Commissioner of the Agency for Cultural Affairs.

IV. Improvement of Judicial Remedies against Infringement of Copyright

Measures to ease the burden of proof on the copyright owner were previously addressed in the Patent Law, etc. However regulations were specified by this new legal reform for instances of literary piracy, including special rules to ease the burden of proof on the copyright owner with regard to the "infringing act" and the "amount of damages." Since the special provision for easing the burden of proof was not provided with any temporal measures, the new provisions are applicable not only to suits filed after January 1, 2004, when this law came into force, but also to continuing suits which were filed prior to the date on which this law became effective.

A. Easing the Burden of Proof of the "Infringing Act" (Article 114-2)

Where the copyright owner demands discontinuance of the infringing act or files a claim for damages, the copyright owner must first claim the existence of "the infringing act," and provide proof of this if the other party (defendant) denies the infringement, before presenting the claim and proof of the damage.

However, on certain occasions, proving the infringement is sometimes difficult for the copyright owner. Therefore, in cases where the defendant denies the claim of the copyright owner with regards to the determination of the infringing act, the defendant must disclose the concrete situation of his/her act to ease the burden of proof on the owner of the right, and in order to expedite the trial.

B. Easing the Burden of Proof of the "Amount of Damages" (Article 114(1))

The copyright owner, etc. may demand damages from a person who has intentionally or negligently infringed their copyright under Article 709 of the Civil Code. However, if the Civil Code is the only legal foundation for the claim, it is difficult to accurately prove the amount of damages. Therefore, in order to make compensation more easily obtainable for the copyright owner, a provision was created in the Copyright Act that presumes that the amount of damages or the amount of loss suffered by the copyright owner, etc is the "profits obtained through the infringement" by the infringing person.

However, this is limited in those cases where the infringer distributes a fixed amount gratuitously or where the profits from the infringement are small, since the profit that would accrue to the owner of the right if there had been no infringement may not be sufficiently compensated. In addition, there are cases in which the infringing party would have all the materials which directly prove their profits, and there may be insufficient materials in the copyright owner to prove the profits gained.

Accordingly, by this revision, where the copyright owner etc. has the ability to sell their own works, the amount of damages is calculated by multiplying the "quantity assigned by the infringing person" and the "amount of profit per unit of the legitimate object which the copyright owner, would have sold in the absence of the infringement". This is a further attempt to ease the burden of proof on the copyright owner with regard to the "amount of damages", taking into account the monopolistic nature of copyright. However, in the applicable circumstances, this shall be reduced by an equivalent amount of money if the infringer could prove that "the copyright owner, etc. is unable to sell the quantity assigned in whole or in part."

In the Patent Act and other laws, the calculation of damages is based on the quantity of tangible property assigned, however, in the revised Copyright Act, the amount of damages for the use of the works, in addition to the unauthorized assignment of tangible property, shall be calculated from "the quantity of downloads of pirate editions via illegal internet distribution" (the quantity of "copies made by

reception"), since unauthorized transmissions are typically made by means of the internet.

(KATAOKA Masayo)

Law for Actions Relating to Personal Status

[Law No. 109, July 16, 2003 ; Jinji-Soshō hō]

This law aims to simplify the use of the civil justice system by improving the Law of Actions Relating to Personal Status through an expansion of the functions of the Family Court. The former law, entitled the Law of Procedure in Actions Relating to Personal Status (Law No.13, Jun. 21, 1898), was established in 1898. This law was enforced along with the Civil Code in Japan and no radical amendment of its provisions had been considered since the time of its enforcement. This law was created based on indications that the legal processes were difficult to understand, since mediation was within the jurisdiction of the Family Court, while legal actions were within the jurisdiction of the District Court ; and indications that the procedures for personal status litigation needed to be made more reasonable and expeditious.

"Actions Relating to Personal Status" refer, in particular, to civil actions that pertain to relations based on social positions such as those between a couple or between a parent and child. The following, as determined in Article 2, may be the subject of a personal status suit : Procedures in matters of marriage as described in Article 2(1) (actions relating to the invalidity or cancellation of a marriage, divorce or to the invalidity or cancellation of a divorce by agreement ; the confirmation of existence or nonexistence of the marriage relation), procedures in the case of relations between a parent and child as described in Article 2(2) (actions relating to the contestation of the legitimacy of a child, requesting such an acknowledgement declared invalid or cancelled ; or the determination of paternity of a child under Article 773 of the Civil Code, to the confirmation of existence or nonexistence of a biological relationship between child and parent), and procedures in matters of adoption as described in Article 2(3) (actions relating to the invalidity or cancellation of an adoption ; the dissolution of the adoptive relation ; the invalidation or cancellation of the dissolution of adoption by agreement ; and the confirmation of existence or nonexistence of a relation between the adopted child and the adoptive parent).

The main features of this law are as follows :

① Transfer of control to the Family Court for actions relating to personal status

Prior to this amendment, all actions relating to personal status were under the jurisdiction of the District Court, while those concerning domestic relations conciliation and decree came under the jurisdiction of the Family Court. However, by

the new law, actions relating to personal status were transferred to the jurisdiction of the Family Court, thus allowing for both personal status actions and domestic affairs conciliation/decrees to be dealt with at a single court. Under the Law for Adjudgment of Domestic Relations (Law No.152, Dec. 6, 1947), personal status actions cannot be resolved suddenly. In accordance with the primary doctrine of conciliation, the goal of domestic relations conciliation is to reach a solution by agreement between the parties concerned. Previously, a person who brought a personal status suit first had to apply for conciliation in the Family Court, and where the conciliation was unsuccessful the suit had to be filed yet again in the District Court. Thus, there was a problem of cases being divided up over different courts.

However, in the new law, actions relating to personal status belong to the exclusive jurisdiction of the Family Court where the social position-related party, who is concerned with the suit, is domiciled, or was domiciled at the time of death (Article 4). In this manner, it aims to simplify the use of the system by unifying conciliation proceedings and legal actions in the Family Court.

② Expansion of the Family Court investigator system

When there are a number of coincident matters that should be settled in a divorce suit, such as the designation of parental rights, the division of child-rearing expenses, and the distribution of property, the Family Court may investigate the facts (Article 33) and employ the investigations of a Family Court investigator, which can be based on various professional areas of knowledge including psychology and sociology (Article 34).

Moreover, when a party petitions for leave to inspect or for a copy of a part of the investigation of the facts, the Family Court must allow this in accordance with the provisions contained in Article 35(2). However, regarding the protection of secrets, there are certain limitations to an inspection in cases where : the interests of the children may be hurt (Article 35(2)(i)), where peace in the private life or business of a party or a third person may be damaged (Article 35(2)(ii)), or where revealing a secret about a person's private life would seriously hamper their social life or honor (Article 35(2)(iii)).

Where an application to inspect is rejected, an immediate Kokoku appeal may be filed (Article 35(4)).

③ Expansion in the Family Court councilor system

Since the nature of personal status suits is that they involve matters related to the family, the system of councilors was expanded, as it was seen as desirable from the viewpoint of reflecting the good sense of everyday people in the trial and judgment.

According to this new law, the Family Court shall, if it deems necessary, seek a

councilor's opinion in an action relating to personal status (Article 9(1)). The number of councilors assigned to each case shall be one or more (Article 9(2)), and these councilors shall be elected for each case from among persons appointed in advance by the Family Court each year (Article 9(3)).

Moreover, the provisions of Article 23 to 25 of the Code of Civil Procedure concerning exclusion and rejection of judges shall apply mutatis mutandis to councilors (Article 10(1)) ; a duty of non-disclosure and penalties for breach of this duty are included in the personal status legislation based on the concept of protection of personal information and an awareness of the extreme necessity for councilors to protect the secrets that they deal with in the course of their duties during the proceedings (Article 11 : punishment includes penal servitude for not more than one year, or a fine not exceeding five hundred thousand yen).

④ Reviews of Procedure in Actions Relating to Personal Status

• Stay in public questioning of the parties (Article 22)

A fundamental principle under Article 82(1) of the Constitution, states that trials are to be open to the public. However, provisions to stay the opening of a trial to the public are permitted for certain actions, the nature of which can be interpreted as falling under Article 82(2) of the Constitution "where a court unanimously determines publicity to be dangerous to public order or morals." Therefore, to prevent a publicly open trial it is necessary to fulfill the requirements of a "unanimous court" decision that one's "social life could be seriously hampered by a public declaration."

• Judicial compromise (Article 37)

Under the old law, even if an agreement to divorce had been reached by the parties, a divorce by judicial compromise was not recognized as such where one party withdrew from the suit and arbitrarily instigated a divorce by consent or where a divorce by conciliation was made in the Family Court.

However, under the new law, it has become possible to effect a divorce by means of judicial compromise. Judicial compromise is also possible in dissolution of adoption matters (Article 44).

• Careful consideration of the interests of children

When a party involved a marital suit has children who are minors, the Family Court shall consider the domicile or the ordinary forum of the child (Article 31) by application of the jurisdictional provisions (the discretion of the Family Court to which the conciliation case has been brought : Article 6 ; transfer to another jurisdictional court to avoid unreasonable delay : Article 7). Moreover, when the court provides judgments such as those relating to the custody of the child, or to the assignment of parental rights, the court shall hear the opinions of the child if the child is over 15 years of age (Article 32(4)). This places the court in a position to collect information

that is indispensable to the judgment and deal with cases as a competent court from the standpoint of the child's welfare.

⑤ Full-scale revision of the former law in modern language.

This law was revised from the old legislation by a complete modernization of the language used in the text.

(SASAKI Takeshi)

Arbitration Law

[Law No. 138, August 1, 2003 ; Chūsai hō]

The process of enactment of the Arbitration Law

The Arbitration Law was concluded in the 156th session of the Diet (July 25, 2003) and was promulgated on August 1, 2003, and came into effect on March 1, 2004.

Arbitration is a dispute resolution system whereby the resolution of a civil dispute is entrusted to a third party—the arbitrator—and is premised on the agreement that the parties will abide by the judgment (arbitral award). In other words, this system is based on the autonomy of the parties, and is one example of ADR (Alternative Dispute Resolution).

Until now, in Japan, arbitration was governed by the "Act concerning the proceedings of public peremptory notice and the arbitration proceedings (Law No. 29, April 21, 1890 ; Kōji Saikoku Tetsuzuki oyobi Chūsai Tetsuzuki ni kansuru Hōritsu)." The previous law was a partial adoption of the content of the German Code of Civil Procedure (enacted in 1877), and was adopted with almost no amendments. In practice, therefore, the German law was merely translated into Japanese and then adopted as a law in Japan. When the Japanese Code of Civil Procedure was revised in 1996, this Act was separated from the Code, as was the portion dealing with public peremptory notice proceedings. Accordingly, this Act had continued for 110 years from its enactment without substantial revision.

During this time, in 1985, the United Nations Commission on International Trade Law (UNCITRAL), developed the "UNCITRAL Model Law on International Commercial Arbitration." Motivated by the development of the Model Law, a number of other countries promptly revised their arbitration laws. However, due to the changing social and economic circumstances in Japan, amendments to the bankruptcy laws were prioritized higher than the revision of arbitration laws.

Subsequently, a revision of the laws and ordinances regarding arbitration was identified as a future judiciary reform in Japan. As a result, the Arbitration Law Follow-Up Research Group was formed within the Secretariat of the Promotion of Justice System Reforms. This research group held detailed discussions regarding the contents of the new Arbitration Law, from February 2002 to March 2003.

Based on these discussions, the conventional arbitration procedures were improved for the new "Arbitration Law." In other words, certain basic matters regarding arbitration were reformulated from the point of view of establishing a convenient and effective arbitration system. The contents of this Act conform to the international standard.

Outline of the Arbitration Law

(The basic policy of the Act)

The basic policy is that the content of the Arbitration Law should, as much as possible, follow that of the "UNCITRAL Model Law on International Commercial Arbitration". Incidentally, the primary object of this "Model Law" is international commercial arbitration. However, the Model Law contains a rational content which is also applicable to domestic arbitration and non-commercial arbitration. Accordingly, the "Arbitration Law" is relevant for both international and domestic arbitration as well as for commercial and non-commercial arbitration. However, this Act takes into account the balance between a variety of circumstances in Japan and its system of law. Consequently, the Act can be thought of as partially assembling the contents of the Model Law or as establishing the special rules of the Model Law.

Hereinafter, I shall introduce a few important points concerning the outline of the new Arbitration Law.

(General provisions ; Arbitration Law, Chapter 1 Articles 1～12)

A key feature of the general provisions of the Arbitration Law is that it adopts the principle of judicial territorialism in almost the same way as the Model Law (Arbitration Law, Article 3). In other words, when the place of arbitration is Japan, the provisions of this Act are applied as a general rule. Previously, conflicts arose regarding the appropriateness of the choice of the governing law of arbitration proceedings. However, this article resolves this problem.

There are two additional points that should be introduced with regards to the general provisions. First, regarding territorial competence, the former "Act concerning the proceedings of public peremptory notice and the arbitration proceedings" specified that the Summary Court and District Court possessed concurrent competence. However, the new Act altered this view of territorial competence, and specifies the exclusive jurisdiction of the District Court (Arbitration Law, Article 5(1)). Secondly when a notice of arbitration proceedings is provided in writing, this Act specifies that the notice shall be effective when the addressee receives the document directly or when the document is delivered to the address of that party. However, if the parties arrive at another agreement, the contents of that agreement shall assume priority (Article 12(1)). The contents of this article are very similar to that of the Model Law. Moreover, a system was established whereby the court fixes the date of delivery under set requirements (Article 12(2)). The establishment of this system has been demanded for some time for the sake of practicality.

(Arbitration agreements ; Chapter 2, Articles 13～15)

All systems of arbitration are based on the autonomy of parties. Therefore, similar to the previous Act, in principle, the new Arbitration Law specifies the range of disputes that can be solved by arbitration (arbitrational competence) : the parties must be able to attempt a compromise regarding the dispute (Article 13(1)). However, the new Act is different to the previous law in that it declares that the range of arbitrational competence shall expand or reduce according to applicable laws. Incidentally, disputes regarding divorce and dissolution of adoption are excluded from the object of the arbitration agreement because such disputes should ultimately be dependent the intention of the parties.

In contrast to the old Act, the arbitration agreement must be provided in writing (Article 13(2)). The contents of this article are the same as that of the Model Law. However, as the means of communication have developed considerably in recent times, arbitration agreements are often concluded via e-mail. In such cases also, the arbitration agreement shall be considered as having been accomplished in writing (Article 13(4)).

When an arbitration agreement is inserted as a part of a main clause of a business contract or other such contract, the arbitration agreement is unaffected and remains effective even if the main contract is nullified or revoked (Article 13(6)). This principle has been formerly supported by both judicial precedent and academic theory.

If a court action is filed, and the subject matter of this dispute is the same as that of the arbitration agreement, the court must dismiss the suit upon a motion by the defendant (Article 14(1)). In the past, this "arbitration agreement defense" was allowed via legal interpretation, however this has been clarified by the new regulations.

(Arbitrators ; Chapter 3, Articles 16～22)

The parties shall decide the number of arbitrators by agreement (Article 16(1)). Previously, where such an agreement was absent, the old Act set the number of arbitrators at two. However, in the new Act this number is revised to three (Article 16(2)) to enable the arbitrators to arrive at a decision by majority. Further, in cases of "multiple party arbitrations," where more than two parties exist, the disputes are becoming increasingly more complicated, and are also increasing in number. In such cases, it is difficult for the parties to reach an agreement due to the complication of their respective interests. In order to resolve this weakness, the new Act admits the participation of court concerning the number and selection of arbitrators (Article 16(3) ; Article 17(4)).

The Act does not particularly specify the qualification requirements of arbitrators, but the parties themselves can decide upon these requirements. If the conditions specified by them are not satisfied, they can challenge the appointment of the arbitrator (Article 18(1)(i)). In principle, the parties shall specify by agreement the procedures for the selection and challenging of arbitrators (Article 17(1) ; Article 19(1)). In the absence of such an agreement, the new Act specifies the standard procedures. The Model Law was

referred to for these provisions (Articles 17(2)～(6) ; Articles 19(2)～(5)). The court may participate in the procedures for the selection and challenging of arbitrators. As regards this participation, according to the old Act, the proceedings in the court were judgment procedures. However, the new Arbitration Law is amended on this point. According to the new Act, the proceedings in the court shall be ruling procedures and furthermore, a motion of appeal against a ruling is not admitted in principle. However, a motion of appeal will be admitted only where there are special provisions in the Act (Article 7.).

(The special power of the arbitral tribunal ; Chapter 4, Articles 23 and 24)

An arbitral tribunal consists of one arbitrator or a consultation system with more than one arbitrator. An arbitral tribunal has the power to try the dispute in the arbitration proceedings and to make an arbitral award. These powers are referred to as "arbitration powers" (Article 23(1)). When the existence or non-existence of the arbitration power of the arbitral tribunal is disputed during the arbitration proceedings, the arbitral tribunal can judge whether or not it possesses arbitration power in preference to that of the court (Article 23(1)). The purpose of this provision is to prevent a delay in the arbitration proceedings. If the arbitral tribunal determines that it does not have arbitrational power, it must give a ruling stating that the arbitration proceedings have been terminated (Article 23(4)(ii)). A system for the motion of appeal to such a ruling has not been established. If the arbitral tribunal judges that it possesses arbitration power, it has to indicate the reasons in an independent ruling or an arbitral award (Article 23(4)(i)). However, when the existence or non-existence of the power continues to be asserted by the parties, the court shall judge the existence or non-existence of that power (Article 23(5) ; Article 44).

By motion of a party, the arbitral tribunal can order the parties to adopt interim measures, as are deemed to be necessary by the arbitral tribunal. However, this is not applicable where the parties arrive at a separate agreement (Article 24).

(The commencement and conduct of arbitral proceedings ; Chapter 5, Articles 25～35)

The rules of the arbitration proceedings are primarily stipulated by party agreement. In the absence of such an agreement, the arbitral tribunal can effectuate the arbitration proceedings in the manner it sees fit, to the extent that it does not violate the public policy provisions of this Act (Articles 26(1)～(2)). Moreover, the arbitral tribunal cannot violate the optional provisions.

The arbitration proceedings commence at the moment a notice reaches the respondent to the dispute, stating that the resolution of specific civil dispute shall take place via the proceedings. However, if the parties reach a special agreement, the proceedings commence as decided in the said agreement (Article 29(1)). However, when the parties make use of a permanent arbitral organizations the proceedings often commence at the time when the application for arbitration is filed with the arbitral organization. This is due to the fact that these permanent arbitral organizations stipulate the time of commencement of proceedings by their rules of procedure and so on. Further, "special agreements" come

under the procedural rules. An application made within arbitration proceedings results in an interruption in the statute of limitations (Article 29(2)). Incidentally, this Act does not clarify the relationship between the time of the commencement of proceedings and the time of the interruption of the statute of limitations. Divided opinions exist with regard to this issue.

The arbitral tribunal or the parties can make a motion to the court to request an examination of the evidence. However, the parties must obtain the consent of the arbitral tribunal in order to make such a motion (Articles 35(1) and (2)). The reason for the establishment of such a system was to sufficiently secure the opportunity to clarify a case. This is because if the parties reach an arbitration agreement, it is then not permitted to file a lawsuit. The scope of the examination of evidence possible in the court is clarified by Article 35(1).

(Arbitral award and the termination of the arbitration proceedings ; Chapter 6, Articles 36～43)

The parties are free to agree on the governing law that should be instituted in an arbitral award. The "governing law" refers to the substantive laws and ordinances that should be applied to the dispute. The arbitral tribunal shall then apply these laws and ordinances when in its deliberations. If there is no agreement between the parties, the arbitral tribunal must apply the laws and ordinances of the State that is most closely related to the dispute (Article 36(1)～(2)). The German and Korean legal systems also adopt this practice.

A settlement can also be attempted during the arbitration proceedings. However, the consent of both parties is necessary. Further, in principle this acceptance must be delivered in writing (Articles 38(4)～(5)). In practice, settlement is reached comparatively often in Japan and these provisions take this reality into consideration.

The items to be included in the arbitral award document were amended for the new Act (Articles 39(1)～(3)). The system in the old Act, which required the arbitrator to leave the original arbitral award document with the court, was subsequently repealed.

(Setting aside the arbitral award ; acknowledgment of the arbitral award ; enforcement of the arbitral award ; Chapters. 7 and 8, Articles 44～46)

The contents of the articles regarding the grounds for setting aside the award, the grounds for acknowledgment of the award, and the grounds for protest against the enforcement in this Act are almost the same as that of the Model Law (Article 44(1)(i～viii) ; Article 45(2)(i～ix) ; Article 46(8)).

The arbitral award has the same effect as a final and binding judgment (Article 45(1)).

Under the old Act, decisions to set aside the arbitral award or permission to enforce an arbitral award were conducted as court proceedings. However, these were amended in the new Act, to be ruling procedures in the court (Article 44(5) ; Article 46(7)). These articles allow for a simple and expeditious decision-making process. However, parties are

also guaranteed an opportunity for defense. By these articles, it is necessary to securely set the dates for oral arguments, as well as set the dates for questioning at a time when both parties are able to be present (Article 44(5) ; Article 46(10)).

(Miscellaneous provisions ; Chapter. 9, Articles 47～49)

The parties shall specify by agreement the remuneration for the arbitrators as well as the cost of the arbitration. Where there is no such agreement, the remuneration for arbitrators shall be determined by the arbitral tribunal. However, this must be a reasonable amount (Article 47(2)). Such a provision exists neither in the old Act nor in the Model Law, However, this article is of considerable practical importance.

(Penal provisions ; Chapter 10, Articles 50～55)

There are specific penal provisions relating to bribery or corruption of the arbitrators (Articles 50～54). Moreover, extra-territorial penal provisions are established relating to the crime of bribery of an arbitrator (Article 55).

(Supplementary provisions)

Special temporary rules were established relating to an arbitration agreement between businesses and consumers, which was concluded after the enforcement of this Act (Supplementary provisions, Article 3). Additionally, the object of this agreement must be with regards to civil disputes likely to occur in the near future (Supplementary provisions, Article 3). Similar special rules also exist for an arbitration agreement regarding individual labor relations disputes, which are likely to occur in the near future (Supplementary provisions, Article 4).

More concretely, in the former case, as a rule the consumer can always rescind the consumer arbitration agreement "for the time being" without providing any reason (Supplementary provisions, Article 3(2)). In case of disputes concerning individual labor relationships, the agreement is null and void "for the time being" (Supplementary provisions, Article 4). Incidentally, at present the arbitration system in Japan is scarcely used. Therefore, these arbitration agreements can be rescinded or be null and void "for the time being", or in other words, until this arbitration system gains popularity and the use of it demonstrates some results.

As regards the consumer arbitration agreement, a rescission system is adopted by the new Act and a nullity system is adopted by the new Act for arbitration agreements for disputes concerning individual labor relationships. The reason for such a difference is that in the former case, effective arbitral organizations in Japan are already used by consumers, and the nullity of an arbitration agreement may be disadvantageous to consumers. Subsequently, in labor relations agreements, even if a right of rescission is granted to the laborers, they will not likely be able to exercise this right effectively owing to a "long relationship with the employer."

Conclusion

Arbitration in Japan is likely to become even more popular with the implementation of the new Arbitration Law. I believe that arbitration will become a convenient system for Japanese citizens. Furthermore, as this Act is also applicable to international transactions, arbitration as dispute resolution will be of increasing importance.

(FUKUMOTO Shinobu)