

JAPAN

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**Re: IBA Sub-Committee on Recognition and Enforcement of Awards
Country Report - Japan**

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Country Reporters:

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I. Legal framework regarding public policy in the context of the setting aside, recognition, and enforcement of arbitral awards

a. Statutory provisions under the Japanese Arbitration Law

1. The Japanese Arbitration Law (Law No. 138 of 2003, the “Law”), which came into force on 1st of March 2004, is based on the 1985 UNCITRAL Model Law, with very few and limited deviations.
2. In relation to the setting aside, recognition, and enforcement of an arbitral award, the Law provides that an arbitral award may be set aside or refused recognition or enforcement if “the content of the arbitral award is in conflict with the public policy or good morals of Japan.” (Articles 44(1)(viii), 45(2)(ix), and 46(8) of the Law).¹

b. Definition of “public policy”

3. There are no published Supreme Court cases defining the term “public policy” under Articles 44, 45, and 46 of the Law pertaining to the setting aside, recognition, or enforcement of arbitral awards.
4. However, the lower courts, in the context of the setting aside of an arbitral award, have provided the following opinions in connection with the definition of “public policy or good morals,” and the approach to applying “public policy or good morals” as a ground for setting aside an arbitral award.²
 - i. The Tokyo District Court, in *X K.K. v. American International Underwriters, Ltd.*, Hanrei-times No. 1304 (Tokyo Dist. Ct. 28 July 2009), opined that: (a) an arbitral proceeding is an out-of-court procedure for resolving disputes, that is based on the parties’ agreement; (b) appeal procedures are not anticipated; (c) the award is positioned to be final; (d) Article 4 of the Arbitration Law provides that, with respect to arbitral proceedings, the court may exercise its

¹ The wording of the provisions in the Law relating to public policy is slightly different from the 1985 UNCITRAL Model Law (*See* fn. 6)

² There are no published court cases where a public policy argument was made by the parties in the context of recognition or enforcement of an arbitral award under the Law.

authority only as provided in the Arbitration Law; and (e) as such, it goes without saying that an arbitral award must be respected to the greatest extent possible.

The Court also held that the Law does not permit a court to set aside an arbitral award on the grounds of violation of public policy “if it is merely the arbitral tribunal’s fact finding or decision on law that is found to be unreasonable,” and the court is permitted to set aside an arbitral award “only when the legal result achieved by the arbitral award is incompatible with the public policy or good morals of Japan.”

- ii. The Tokyo District Court in *K.K. Kouno v. Y Inc.*, LEX/DB No. 25473502, the Blast Furnace Slag Case (Tokyo Dist. Ct. 13 June 2011), opined that the Law provides for a violation of public policy as a ground to set aside an arbitral award when “the content of the arbitral award is incompatible with the fundamental legal system of our country.”
- iii. The Tokyo High Court in *Y Inc. v. K.K. Kouno*, LLI/DB No. L06720791, (Tokyo High Ct. 13 March 2012), opined that “whether there is a violation of public policy must be specifically determined based on the fundamental legal system of our country in each individual case.”

5. As a reference, the Japanese Supreme Court has defined “public policy” in the context of enforcement of foreign judgments as follows:

Even if the judgment of the foreign court includes content based on a system that is not adopted by our country, this by itself will not automatically mean that the condition [for enforcement, i.e., that the foreign judgment does not violate public policy] is not satisfied; but if it is incompatible with the basic principles or basic ideas of the legal system of our country, the foreign judgment shall be in violation of public policy...³

c. Distinction between setting aside and recognition or enforcement of an arbitral award

6. There are no published cases where a court has said that a distinction should be drawn between the setting aside and the recognition or enforcement of an arbitral award when making a determination of whether there is a public policy violation.

d. International public policy rules

7. The Law does not differentiate between domestic arbitral awards and international arbitral awards with respect to recognition or enforcement of arbitral awards – the provisions in the Law pertaining to the recognition and enforcement of arbitral awards specifically state “the public policy or good morals **of Japan** [emphasis added].”
8. Given the express wording under the Law, the Japanese courts have not adopted international public policy rules, nor decided that different rules should apply in

³ *Northcon I, Oregon Partnership v. Mansei Kōgyō Co Ltd.*, 51 Minshu 2573 (Sup. Ct. 11 July 1997).

international awards and domestic awards when determining whether there is a violation of public policy.

9. In published cases relating to the setting aside of arbitral awards on the ground of violation of public policy, the Japanese courts have referred to the “public policy or good morals *of Japan*,” even in cases where one of the parties was a foreign entity.⁴

e. Procedural Public Policy

10. In *K.K. Kouno v. Y Inc.*, LEX/DB No. 25473502, (Tokyo Dist. Ct. 13 June 2011), the Tokyo District Court opined that:

if the arbitral proceedings violate the procedural public policy of our country, the arbitral award that was rendered based on those proceedings will be in violation of our country’s fundamental legal system because the content [of the arbitral award] will not be supported by a procedure in accordance with procedural public policy.

The court further found that if arbitral proceedings violated the public policy of Japan, this would mean that “the content of the arbitral award is in conflict with the public policy or good morals of Japan,” which is a ground for setting aside an arbitral award under the Law.

11. The appellate court, in *Y Inc. v. K.K. Kouno*, LLI/DB No. L06720791, (Tokyo High Ct. 13 March 2012) upheld the Tokyo District Court’s judgment that a violation of procedural public policy is a ground for setting aside an arbitral award.
12. In these cases, the violation of procedural public policy in question was the arbitral tribunal’s error in deeming, in the arbitral award, that a certain fact which the court found was disputed by the parties was undisputed.
13. In this regard, the Tokyo District Court stated that:

an arbitral award...is made by applying certain law to the matters that are submitted by the parties...[For the arbitral tribunal] to render an arbitral award without deciding on an important matter that affects the determination of the relief and remedy sought where that matter was duly submitted by a party under the proceedings...would be equivalent to not receiving a decision for the party seeking resolution of the dispute...and also deteriorates trust in arbitration, and thus, it is proper to interpret that such circumstance is a violation of our country’s procedural public policy...

The Court also stated that:

to [deem] that a fact disputed by the parties is an undisputed fact is the same as not making any decision on such fact, and accordingly, if the fact is an important matter that would affect the determination on the relief and remedy sought, rendering an

⁴ “the legal result achieved by the arbitral award is in violation of the public policy or good morals **of Japan** [emphasis added]” (*X K.K. v. American International Underwriters, Ltd.*, Haneri-times No. 1304 (Tokyo Dist. Ct. 28 July 2009)); “the content of the arbitral award is incompatible with the fundamental legal system of **our country** [emphasis added]” (*K.K. Kouno v. Y Inc.*, LEX/DB No. 25473502, (Tokyo Dist. Ct. 13 June 2011))

award [in which] a fact disputed by the parties [is deemed] undisputed is a violation of the procedural public policy of our country.

14. Although the Tokyo District Court and the Tokyo High Court have held that a violation of procedural public policy is a ground for setting aside an arbitral award, there is still much debate on whether procedural public policy is a ground for the setting aside or refusal of recognition or enforcement of an arbitral award under the Law.⁵
15. One reason for the debate stems from the wording of the Law relating to the setting aside, recognition, and enforcement of the arbitral award: the Law specifically provides that “*the content* of the arbitral award is in conflict with the public policy or good morals of Japan. [emphasis added],” and, consequently, a straightforward interpretation of the provision excludes “procedural” public policy.⁶
16. Another reason is that the requirement of due process is considered to be sufficiently covered by the other expressly stated grounds for the setting aside and refusal of recognition or enforcement of the arbitral award, such as “a party was unable to present its case in the arbitral proceedings,” “the arbitral award contains decisions on matters beyond the scope of the arbitration agreement or claims in the arbitral proceedings,” and “the composition of the arbitral tribunal or the arbitral proceedings were not in accordance with the provisions of the laws of Japan.”
17. Thus, it should be noted that whether procedural public policy is a ground for setting aside or refusing recognition or enforcement of an arbitral award under the Law is still under debate. Moreover, due to the uniqueness of *K.K. Kouno v. Y Inc.*, LEX/DB No. 25473502, (Tokyo Dist. Ct. 13 June 2011) and *Y Inc. v. K.K. Kouno*, LLI/DB No. L06720791, (Tokyo High Ct. 13 March 2012), even if procedural public policy is a ground for setting aside or refusing recognition or enforcement of an arbitral award under Japanese law, the specific circumstances where a violation of procedural public policy exists are not settled.

⁵ Koichi Miki and Kazuhiko Yamamoto Ed. “*Shinchi-saiho-no-riron-to-jitsumu*,” Yuhikaku (2006), at p. 341, Keiichi Karatsu, “*Chu-sai-handan-ga-tetsuzuki-koujo-ni-hansuru-toshite-torikesaretarei*,” Jurist No. 1447, at p. 107.

⁶ Compare Article 34(2)(b) (ii) “the award is in conflict with the public policy of this State,” and Article 36(1)(b)(ii) “the recognition or enforcement of the award would be contrary to the public policy of this State” of the 1985 UNCITRAL Model Law. Compare also Article 118(iii) of the Japanese Civil Procedure Code setting forth a condition for enforcement of a foreign court judgment, “the content of the judgment *and the court proceedings* are not contrary to public policy of Japan” (emphasis added).

II. Catalogue of Japanese court decisions concerning public policy in the context of the setting aside, recognition, and enforcement of arbitral awards (Setting Aside Only)

18. There are no published court cases where a party has sought refusal of recognition or enforcement of an arbitral award on the ground of violation of public policy under the Law.
19. There are three published court cases where a party has sought to set aside an arbitral award on the ground of violation of public policy under the Law.
 - a. **X K.K. v. American International Underwriters, Ltd., Haneri-times No. 1304 (Tokyo Dist. Ct. 28 July 2009) -- Substantive Public Policy Case**
20. In this case, the arbitration was between X K.K. (“X”) and American International Underwriters, Ltd. (“AIU”) under the AAA/ICDR Rules, whereby the arbitral tribunal awarded AIU approximately 10 billion yen in damages and legal fees. X sought to set aside the arbitral award before the Tokyo District Court on the ground of public policy violation. According to the judgment, X asserted that the arbitral award’s content was in violation of the public policy or good morals of Japan because: (a) the arbitral tribunal found that X was obligated to alert United Integrated Circuits (i.e., the insured), but it is impossible to find such obligation under the governing law of the substance (Taiwanese Law) under the factual circumstances relating to the dispute; (b) the arbitral tribunal found that there was an adequate causation between the breach of the obligation to alert and the fire accident, but it was impossible to do so under the factual circumstances relating to the dispute and the governing law of the substance (Taiwanese Law); and (c) the arbitral tribunal awarded an enormous amount of damages (approximately 10 billion yen) based on such unreasonable findings.
21. The Tokyo District Court refused to set aside the arbitral award, by saying that: (a) an arbitral proceeding is an out-of-court procedure for resolving disputes that is based on the parties’ agreement; (b) appeal procedures are not anticipated; (c) the award is positioned to be final; (d) Article 4 of the Arbitration Law provides that, with respect to arbitral proceedings, the court may exercise its authority only as provided in the Arbitration Law; and (e) as such, it goes without saying that an arbitral award must be respected to the greatest extent possible.
22. The Court also held that the Law does not permit a court to set aside an arbitral award on the grounds of violation of public policy “if it is merely the arbitral tribunal’s fact-finding or decision on law that is found to be unreasonable” and the court is permitted to set aside an arbitral award “only when the legal result achieved by the arbitral award is incompatible with the public policy or good morals of Japan.”
23. With respect to X’s assertions regarding the arbitral tribunal’s finding of the existence of the obligation, breach, and causation, the Tokyo District Court decided that these were “merely assertions that the arbitral tribunal’s fact-finding or decision on law is unreasonable,” and thus, the court found that the content of the arbitral award did not violate the public policy or good morals of Japan.

24. With respect to the assertion regarding the amount of damages, the Tokyo District Court decided that there were no special circumstances other than the fact that the amount awarded as damages was huge; and therefore concluded that the legal result of the arbitral award does not violate the public policy or good morals of Japan.

b. K.K. Kouno v. Y Inc., LEX/DB No. 25473502, (Tokyo Dist. Ct. 13 June 2011) -- Procedural Public Policy Case

25. In this case, the party seeking to set aside the arbitral award asserted that the arbitral tribunal's error in deeming, in the arbitral award, that a certain fact disputed by the parties was undisputed was a violation of procedural public policy. The Tokyo District Court upheld the losing party's application to set aside the arbitral award.

26. In its decision, the Tokyo District Court stated that:

an arbitral award...is made by applying certain law to the matters that are submitted by the parties...[For the arbitral tribunal] to render an arbitral award without deciding on an important matter that affects the determination of the relief and remedy sought where that matter was duly submitted by a party under the proceedings...would be equivalent to not receiving a decision for the party seeking resolution of the dispute...and also deteriorates trust in arbitration, and thus, it is proper to interpret that such circumstance is a violation of our country's procedural public policy...

27. The Court also stated that:

to [deem] that a fact disputed by the parties is an undisputed fact is the same as not making any decision on such fact, and accordingly, if the fact is an important matter that would affect the determination on the relief and remedy sought, rendering an award [in which] a fact disputed by the parties [is deemed] undisputed is a violation of the procedural public policy of our country.

c. Y Inc. v. K.K. Kouno, LLI/DB No. L06720791, (Tokyo High Ct. 13 March 2012) -- Procedural Public Policy Case

28. This case is the appellate court case of *K.K. Kouno v. Y Inc.*, LEX/DB No. 25473502, (Tokyo Dist. Ct. 13 June 2011). The Tokyo High Court upheld the Tokyo District Court's decision to set aside the arbitral award.

29. At the appellate stage, Y Inc., the appellant, argued, *inter alia*, that even if a violation of procedural public policy is a ground for setting aside an arbitral award under the Law, the arbitral tribunal deeming in its arbitral award that a fact disputed by the parties was undisputed is not an issue of procedural public policy, because procedural public policy should be narrowly interpreted in light of fact that violations of procedural public policy under the Model Law are only found when there are serious issues of fairness of the arbitral proceedings, such as bribery or fraud.

30. However, the Tokyo High Court rejected Y Inc.'s argument by saying that the Model Law does not adopt "international public policy," and "whether there is a violation of public policy must be specifically determined based on the fundamental legal system of our country in each individual case."

III. Catalogue of Japanese court decisions concerning public policy in the context of the setting aside, recognition, and enforcement of arbitral awards (Setting Aside Only)

Identification of the decision	Summary of the public policy argument	Substantive	Procedural	Award Set Aside	Award Not Set Aside
<i>X K.K. v. American International Underwriters, Ltd.</i> , Haneritimes No. 1304 (Tokyo Dist. Ct. 28 July 2009)	The arbitral award's content was in violation of the public policy or good morals of Japan because: (a) the arbitral tribunal found that X was obligated to alert United Integrated Circuits (i.e., the insured), but it is impossible to find such obligation under the governing law of the substance (Taiwanese Law) under the factual circumstances relating to the dispute; (b) the arbitral tribunal found that there was an adequate causation between the breach of the obligation to alert and the fire accident, but it was impossible to do so under the factual circumstances relating to the dispute and the governing law of the substance (Taiwanese Law); and (c) the arbitral tribunal awarded an enormous amount of damages (approximately 10 billion yen) based on such unreasonable findings.	X			X
<i>K.K. Kouno v. Y Inc.</i> , LEX/DB No. 25473502, (Tokyo Dist. Ct. 13 June 2011)	The arbitral tribunal did not render a decision on a fact that was disputed between the parties and was an important matter that, by being deemed undisputed, would affect the determination of the relief and remedy sought.		X	X	
<i>Y Inc. v. K.K. Kouno</i> , LLI/DB No. L06720791, (Tokyo High Ct. 13 March 2012)	The arbitral tribunal did not render a decision on a fact that was disputed between the parties and was an important matter that, by being deemed undisputed, would affect the determination of the relief and remedy sought.		X	X	