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ARBITRATION IN U.S./JAPANESE SALES DISPUTES

TARO KAWAKAMI* and DAN FENNO HENDERSON**

I. ARBITRATION EXPERIENCE AND FACILITIES

A. Introduction

The operational advantages and the legal efficacy of arbitration are so interrelated1 that lawyers need a grasp of both subjects in order to draft a workable arbitration clause for a U.S./Japanese sales contract. Yet, according to a recent United States survey, most American lawyers as well as businessmen are rather uninformed about arbitration. This is probably because arbitration is largely excluded from "taught law," and "taught business" too apparently, even though it has now emerged in the American dispute settlement process2 as a major technique—especially in the commercial, labor, accident, and investment fields.

Unlike Japanese lawyers who tend to be simply unfamiliar with arbitration, American lawyers have had a long tradition of suspicion toward it, which has been dated back as early as Coke's (1609) pronouncement that an arbitrator's authority was "of its own nature revocable"3 and which has persisted through generations of judicial...
opinions confirming that arbitration cannot "oust the jurisdiction" of the courts. Of this so-called judicial hostility to arbitration, Judge Frank has said, "Perhaps the true explanation is the hypnotic power of the phrase 'oust the jurisdiction.' Give a bad dogma a good name and its bite may become as bad as its bark." Others have said that it all began with the English court's jealousy for fees endangered by competitive arbitrations, and part of the reason could be that arbitration, being consensual in nature, was thought to operate best voluntarily; perhaps legalisms and coercion were considered to be basically antithetical to arbitral advantages. Recently the prejudice against arbitration has largely disappeared, but the reason for such continued suspicion as there may still be in the American legal community may well be found in the overstatements by advocates of arbitration as to its painless potentials. It does indeed have an important role in the process of settling commercial disputes, but rather as an auxiliary to, rather than a substitute for, a legal system. And, of course, the real problem is the proper nexus between the two so that the law will not smother arbitrators and so that arbitrators will not be allowed to circumvent important matters of right, unless the consent of the parties to do so has been clearly established.

On the merits, the American arbitration enthusiasts have argued, comparatively, that arbitration is more informal, flexible, confidential, and expert, as well as quicker and cheaper, than litigation. Generally these things are true. But the price may be less reliable decision makers and more compromise, and also the implications which may underlie these assertions (i.e., lawsuits and lawyers are highly dysfunctional) have not been taken passively by the lawyers, though one lawyer has agreed from a sampling of personal observations that attorneys are not very useful in arbitration proceedings. Other lawyers have pointed out that arbitration has its problems too from the

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4 These words were apparently coined in Kill v. Hollister, 1 Wils. K.B. 129, 95 Eng. Rep. 532 (1746); see also Lord Kenyon's use of the phrase in Thompson v. Charnock, 8 Term Rep. 139, 101 Eng. Rep. 1310 (1789).
5 Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 984 (2d Cir. 1942).
6 E.g., Lord Campbell in Scott v. Avery, 25 L.J. (n.s.) Ex. 308, 313 (Ex. 1855).
8 Mentschikoff, Commercial Arbitration, 61 COLUM. L. REV. 846, 859 (1961): Personal observation at the Association leads me to the reluctant conclusion that in the great majority of the cases observed, lawyer participation not only failed to facilitate decision but was so inadequate as to materially lengthen and complicate the presentation of the cases. Nonetheless, the Association encourages lawyer participation.
legal standpoint: little respect for precedent or consistency of results; fewer safeguards during the hearing, e.g., generally no transcript or evidence rules; uneven competence of lay arbitrators; unreasoned awards, failures to comply with law, thus unpredictable results; and no opportunity for appeal except on narrow grounds of fraud,

11 Lawyers show much dissatisfaction with the performance of arbitrators and vice versa. Lazarus, op. cit. supra note 1, at 115. Professor Warren L. Shattuck is quoted, id. at 187-88:

In my estimation a disservice has been done arbitration by the development in some circles of the notion that this is a service which should be free. I would welcome research into this aspect of the subject and would expect the findings to disclose what seems to me to be the fact, namely, that the kind of special skill and competence in arbitrations which are essential to the long-range success of the method for resolving disputes must be paid for.


13 This American rule that awards are valid even when based on errors of law goes back at least to Fudickar v. Guardian Mut. Life Ins. Co., 62 N.Y. 392, 399 (1875). In England the rule is different and an award can be vacated for errors of law which show on the face of the award. Csarnikow v. Roth, Schmidt & Co., [1922] 2 K.B. 478. See Note, Judicial Review of Arbitration Awards on the Merits, 63 HARV. L. REV. 681, 686 (1950).

The American contrast is well shown in Interinsurance Exch. of Auto. Club v. Bailes, 219 Cal. App. 2d 830, 33 Cal. Rptr. 533 (Dist. Ct. App. 1963), where even though the court reviewing an award recognized that the arbitrator erred because the holding was not only contrary to law but the point was res judicata (contrary earlier decision by the same reviewing court) in the arbitration, the court still upheld the award saying "a decision of an arbitrator is binding, whether or not correct either in law or in fact." Id. at 833, 33 Cal. Rptr. at 536. Other cases upholding awards on errors of law alone are: In re CompuDyne Corp., 255 F. Supp. 1004, 1008 (E.D. Pa. 1966); South East Atl. Shipping Ltd. v. Garnac Grain Co., 356 F.2d 189, 192 (2d Cir. 1966); Raytheon Co. v. Rheem Mfg. Co., 322 F.2d 173, 182 (9th Cir. 1963); Torano v. Motor Vehicle Acc. Indemn. Corp., 15 N.Y.2d 882, 206 N.E.2d 353, 258 N.Y.S. 2d 418 (1965). Pennsylvania is an exception, because there awards may be set aside for errors of law. PA. STAT. ANN. tit. 5, § 4 (1963); Gasparini Excavating Corp. v. Pennysylvania Turnpike Comm'n, 409 Pa. 136, 185 A.2d 320 (1962).

See Collins, Arbitration and the Uniform Commercial Code, 41 N.Y.U.L. REV. 736, 752 (1966), suggesting that the entire Uniform Commercial Code may be undermined by the growing practice of arbitrating sales disputes, since the doctrine of the valid erroneous award may mean that arbitrators cannot be compelled to comply with the code:

In larger perspective, it would be nothing short of scandalous if, by virtue of a common-law rule or a process of statutory harmonization, it were now to be discovered that the great effort that went into creating the Uniform Commercial Code...
misconduct, lack of notice or the like. As noted, lawyers also point out the inconsistency of legally enforcing a voluntary arrangement; besides, if a lawsuit is required to compel arbitration, it loses its other alleged advantages of speed, economy and so on—by adding litigation to arbitration. Others argue that arbitration is a means for a trade group to force those dealing with it to submit to a biased forum.

These dialectics have done much to clarify the issues in the admittedly delicate relationship between arbitral and legal remedies; at the same time they may have had the unfortunate effect of partially obscuring the growing complementary role of arbitration in the modern dispute settlement process in the United States, as reflected in the recent statutes and cases. Rather than "ousting" the courts, arbitration is a useful auxiliary, such as compromise, mediation, conciliation, and other private settlements. But, certainly arbitration is more useful in some circumstances than in others; it works better in resolving factual rather than complex legal issues (i.e., better in trade disputes involving quality and delivery and the like, than in legal disputes over, for example, industrial property rights or corporate finance); it is more satisfactory when the parties voluntarily comply throughout, including final payment of the award, than when court implementation is required. Surely when one party denies that he consented to arbitrate, arbitration should not be compelled until a court first determines that arbitration was, in fact and in law, agreed upon. There is something very fundamental about the right of citizens to access to the courts, and that right should not be diluted by any other means than the actual consent of the citizen himself. The right is, of course, denied by trends which favor allowing the arbitrators to decide such points.

Code produced a statute that was viable only when a commercial agreement did not contain an arbitration clause. Such a discovery would, of course, also have the effect of subverting the Code's stated goal of a uniform commercial law for the United States.

See Mentschikoff, supra note 8, at 861, for the attitude of arbitrators toward the rules of law.


But one area where the usefulness of arbitration is recognized almost universally is international business\textsuperscript{16} such as U.S./Japanese sales under discussion here. On reflection the reasons are not altogether happy ones, for most of the benefits as seen by the proponents of arbitration seem to flow largely from the inadequacies of litigation, which are especially pronounced in the transnational context.

What are some of the difficulties peculiar to transnational litigation? In the U.S./Japanese context they include: differences of jurisdictional requirements;\textsuperscript{17} uncertainty about which law will be found to govern an international contract under current choice-of-law rules;\textsuperscript{18} uncertainty even as to the enforceability in the United States of governing law and prorogation clauses\textsuperscript{19} agreed upon by the parties; and uncertainty about the enforceability of foreign judgments\textsuperscript{20} in both coun-

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\textsuperscript{16} See \textsc{Lazarus, op. cit. supra note 1}, at 167. One hundred top executives engaged in international commerce were sent a questionnaire. Sixty-five per cent of those who answered the questionnaire "believed commercial arbitration to be more suitable internationally than domestically." "One hundred per cent of the responding exporters and importers used the international commercial arbitration clause in their purchase-sale contracts," "One hundred per cent of the responding traders preferred international commercial arbitration to court litigation." \textit{Id.} at 168.


\textsuperscript{18} See \textsc{Lazarus, op. cit. supra note 1}, at 167. One hundred top executives engaged in international commerce were sent a questionnaire. Sixty-five per cent of those who answered the questionnaire "believed commercial arbitration to be more suitable internationally than domestically." "One hundred per cent of the responding exporters and importers used the international commercial arbitration clause in their purchase-sale contracts," "One hundred per cent of the responding traders preferred international commercial arbitration to court litigation.” \textit{Id.} at 168.

\textsuperscript{19} For Japanese rules, see \textsc{Ehrenzweig, Ikehara & Jensen, American-Japanese Private International Law 30-32 (1964). For discussion of United States rules see
tries. These structural inadequacies of the transnational "legal order" are in addition to the usual delay and expense of domestic litigation, and also to the burdens peculiar to foreign lawsuits—lack of familiarity with habits of foreign lawyers, translation of documents, distant and absentee witnesses, vast differences in trial procedures and problems of proving foreign law. The result of all these difficulties, as merchants well know, is that transnational litigation is not only protracted, risky, and tedious, but always poor business because it absorbs executive time and adrenalin, yielding only salvage value discounted by inordinate expense and damaged commercial relations.

The thrust of the foregoing impracticalities of transnational suits, and a failure to remedy those which are curable, has been to cause the structuring of U.S./Japanese trade transactions to avoid disputes and to use methods other than lawsuits to settle those which do occur. For example, the Japanese Government has used its tight foreign exchange controls and import-export licensing powers to standardize delivery and payment terms so that documents-of-title and payment are exchanged for most Japanese export goods on C.I.F. or F.O.B. Japan terms. Buyers in both countries have reduced breach-of-warranty claims by preshipment inspection, insuring that the goods conform to the contract specifications.

Also reducing suits is the well-known reluctance of Japanese trading firms to sue; they tend to settle their differences promptly in order to get on with business, even if it requires a substantial compromise. The disinclination to litigate is, no doubt, one of the major reasons why there have been so few Japanese plaintiffs in the United States contesting U.S./Japanese trade disputes. From a bilateral trade which had reached about $4.5 billion annually in 1965, about twenty-five


23 Hyōjun kessai hōhō ni kansuru shōrei (Ministrial ordinance concerning standard method of settlement) (MOF Ordinance No. 62, 1962), Beppya (Schedule) No. 1, in 28 Genkō hōki 3426. Payment terms complying with this standard require no MITI approval. See Yushutsu hōki kanrire (Export trade control order) art. 1(1) (iii) (Cabinet Order No. 373, 1949), in 28 Genkō hōki 3437.
commercial cases in the past decade (1956-1965) have been found which involved Americans and Japanese suing each other in American courts. The paucity of Japanese defendants in American courts is another matter. Part of the reason is that Japanese businessmen have generally arranged the terms of transaction so that even by American law their sales take place in Japan, or because Japanese sellers have not been doing business, and therefore have usually not been suable, in the United States, until recently at least. Thus, when Americans have sought to sue Japanese sellers or buyers, they have, with very few exceptions, had to sue in Japan.

No attempt has been made to check the Japanese judicial statistics for American litigants; nevertheless, it is certain that American businessmen have used the Japanese courts considerably more than the Japanese have used United States courts. Even so, the trade litigation in both countries is nominal compared to the volume of trade and the number of actual disputes which have presumably arisen from it. At the outset we have reviewed briefly the growth of arbitration in the United States. Has arbitration been useful in making up some of the deficiencies of international litigation with Japanese parties?

B. Use of Arbitration in Japan

Modern Japanese arbitration has not been saddled with an adverse judicial attitude against enforcing arbitral agreements such as is found in the common law. In 1891, a modern arbitration system, rather similar to that found in our modern statutes beginning with the New

24 To find the U.S./Japanese cases, Eugene Lee of the Washington State Bar checked some four thousand pages of the General Digest covering the past decade (1956-1965). Of course, the General Digest does not cover suits of first instance in the state courts, but it does cover reported federal district court cases of first instance, and presumably, since a U.S./Japanese trade dispute would usually involve diversity of citizenship jurisdiction, most trade suits would be filed in the federal courts. Also, since the cases could only be identified by their Japanese name, possibly some were missed because the Japanese interests litigated under an English-language business title.

25 The Japanese Commercial Arbitration Association recently published the results of an extensive survey of the experiences of Japanese importers and exporters with international commercial disputes. Out of 5,338 firms polled, answers were received from 1,329 (25.9%), and 75.8% of those who answered said that they had had claims experience, 88% of which was from exports (12% from imports). Eight hundred ninety-seven of these export claims were settled between the parties by direct negotiations, and only 6% involved an informal mediator or formal conciliation or arbitration. They reported that lawsuits were filed in only five cases (0.6%). Kokusai Shōji Chūsai Kyōkai, Bōeki Kōrēmu Ni Jōnen Kuji No Kansuru Ankei (Poll concerning trade claims), April, 1966. Note that Lazarus, op. cit. supra note 1, at 26, says the AAA handles about 1200 commercial arbitrations annually including both domestic and international. The volume is increasing about 10% annually. Also, the relative infrequency of business disputes which require arbitration is noted. Id. at 35.
York Arbitration Act of 1920, was first enforced in Japan by enactment of the Civil Procedure Code of which the arbitral system was the final part. 26 This enactment of arbitration provisions as a part of the Civil Procedure Code pre-dated enforceable arbitral contracts covering future disputes in the United States by three decades. It was, however, not a response to demands from the business community, but a part of a larger, superimposed, codification process wherein largely German procedural law was inducted into Japan in response to foreign demands that the legal system be modernized. At that time, the chief methods of indigenous dispute settlement were conciliatory and based upon mutual agreements and concessions of the parties themselves. 27 In contrast both litigation and arbitration, which are based upon third-party decisions, were largely alien to the culture. Consequently, arbitration was little used for decades, 28 especially because the usual trade associations and other institutional framework, which have been prominent in the development of commercial law and arbitration facilities in the Western World, were not developed yet in Japan. Likewise Japanese business had not developed standard contract forms with arbitration clauses for use in their trade associations. 29 One authority has stated that, in the first nearly half century of Japanese arbitration up to 1938, only 209 cases of arbitration had been filed, 30 and it is estimated that not more than another 200 cases of arbitration were handled between 1938 and 1950.

26 Civil Procedure Code arts. 786-805.
27 Henderson, CONCILIATION AND JAPANESE LAW 1-3 (1965).
28 Nakata, Shōji chūsai seido no gakan (General survey of the commercial arbitration system), Hōkei gakai zasshi (No. 3) 2 (1952). See Ishimoto, Mei-ji ni akeru chūsai saiban no senrei (pt. 2) (Precedents of international arbitration in the Meiji era), 8 Hōgaku zasshi 73 (1961).
29 Matsuda, Doitsu shōji chūsai seido no ikkōsatsu (An inquiry into the German commercial arbitration system), 9 Hōgaku zasshi (No. 11) 73 (1931); Matsuda, Hamburgu ni okeru ōsetsu chūsai saibansho (The Standing Arbitration Court in Hamburg), 74 Shihō shiryō 62 (1925).
Actual examples of incorporation of arbitration provisions in contract forms in preparation for future disputes in certain Japanese trades are: wool yarn, ship, and crude petroleum sales contracts, Joint Business (kyōdō eigyo) contracts, and Wage Agreements (hōshū no torikime) in the 1911 employment contracts. However, the parties in all these were foreign firms.
30 Muramoto, Wagakuni chūsai seido no jitsujo (The actual state of affairs in the Japanese arbitration system), 28 Shihō kenkyū hōkokusho (No. 6) 108 (1938).
The types of cases were: shipping, 83 (or 40%); Building Evacuation (kaoku akewatashi) and Rent (yachin), 42; rice fertilizer transactions, 27; electrical industry,
It was not until after World War II that the use of arbitration facilities began to increase rapidly, no doubt gaining momentum from the encouragement of the Allied occupation authorities.\textsuperscript{31} The Japan Commercial Arbitration Association (hereinafter JCAA) was established by 1950, and in the past fifteen years it has concluded agreements with its counterparts in the United States (1952), India (1955), Russia (1956), Pakistan (1956), Czechoslovakia (1957), Poland (1957), Rumania (1957), the Inter-American Commercial Arbitration Commission (1958), West Germany (1959), Western Canada (1961), Bulgaria (1961), Hungary (1961), Sweden (1962), and the Netherlands (1962).\textsuperscript{32}

Besides administering arbitration and conciliation services, the JCAA conducts an extensive preliminary "consultation" and "adjustment" service. The scope of these entire dispute settlement activities may be understood from the following statistics on disputes (domestic and foreign) filed with the JCAA covering a typical three-month period (July-September, 1965):\textsuperscript{33}

\begin{table}[h]
\begin{tabular}{lrr}
\hline
Consultation & ........................................ & 432 \\
Adjustments on complaints (Import or Export) & ............ & 206 \\
Conciliation & ........................................ & 7 \\
Arbitration & ........................................ & 9 \\
\hline
\end{tabular}
\end{table}

\textsuperscript{4; and all others, 53. These figures do not represent the entire number of arbitrations conducted, but we can conclude that arbitration was particularly common in shipping disputes.}

\textsuperscript{31} For example, in connection with the disposition of claims concerning building construction for the American military authorities in Japan, see Watanabe, \textit{Ukei Koji ni Okeru funso to kurumu}. (Disputes in contract construction and claims) (1955), which is primarily based on materials concerning construction of American Air Force bases in Japan during 1950. The International Commercial Arbitration Committee was established (February 1, 1950) in order to manage the affairs in Japan of the Japan-American Arbitration Committee (\textit{Nichibei chūsai linikai}) established by an agreement dated November 25, 1949, between the Japanese Chamber of Commerce and Industry (\textit{Nihon Shōkō Kaigisha}), the American Arbitration Association, and the American Chamber of Commerce in Japan (\textit{Zai-Nichi Amerika Shōkō Gaigisha}). The Japan-American Arbitration Committee became an agency for the disposition of claims arising out of Japan-American trade during the occupation; it was reorganized and incorporated (December 3, 1953) and became the present-day "Japan Commercial Arbitration Association" (\textit{Kokusai Shōji Chūsai Kyōkai}). The English title is that used by the JCAA itself. Its Japanese title translates "International Commercial Arbitration Association."

\textsuperscript{32} The generous assistance of Mr. K. Kurata, Chief, Arbitration Department, Japan Commercial Arbitration Association in Tokyo, is gratefully acknowledged. Copies of the arbitration agreements with the various countries and information concerning JCAA operations was obtained in Tokyo by Henderson in the summer of 1966.

\textsuperscript{33} \textit{Quarterly of J.C.A.A.} (No. 15) 8 (1965).
In its consultation and adjustment services the JCAA acts informally as mediator and tries to induce a settlement between the parties. From the huge gap between the figures for consultation and those for the disputes actually submitted to conciliation or arbitration, it is clear that only two or three per cent of the disputes which are brought to the JCAA actually go to arbitration or formal conciliation.

From Japanese exports for the year ending October 1965, the JCAA received 317 complaints. The major causes for the claims were: failure to ship (94), inferior quality (50), and different contents (25). In the same period the JCAA had 71 complaints regarding Japanese imports, and the chief cause was cancellation of orders (15). Yet from this volume of complaints, formal arbitrations were commenced only at the rate of less than thirty per year.

Actually, international disputes that have been decided by an arbitration award in Japan have been even scarcer. Since 1957 only nineteen international arbitrations have been formally concluded by the JCAA, three of which were settled by Withdrawals (tori-sage) and sixteen by awards. The average time required to complete the arbitration was 28.6 months. Americans were involved in only eight of these cases, five as plaintiffs and three as defendants. All but one case involved over $10,000, and ten of the cases involved over $100,000 each.

Arbitration is most useful when it operates voluntarily throughout—from contract to payment of the award. Legal problems appear only after voluntary arbitration breaks down. Arbitration at that point depends on the law for enforcement, and the chief enforcement problems are: (1) whether arbitration clauses will be supported by the courts, either by requiring participation from a party who has agreed to arbitrate or by enjoining, staying, or dismissing a lawsuit in favor of the agreed arbitration; and (2) whether the courts will recognize and enforce an arbitration award against a party who does not voluntarily comply with it, especially when the opponent has willfully refused to even participate in the proceeding, as agreed. In the usual case, the parties had never foreseen the host of legal difficulties which then appear. Rather with their usual meager understanding of the process they had doubtless thought that they had avoided such problems by their general provisions for arbitration. For example, the losing party may question the validity of the main contract or the arbitration agreement itself, the arbitrability of the issues in dispute
either under the applicable law or under the agreement, the propriety of the arbitration procedures, or he might attempt to challenge the award because of misconduct of the arbitrator. Unfortunately, arbitration is, therefore, not as free of legal problems as businessmen often think or wish, unless both parties voluntarily accept what it yields, and when legal enforcement is required arbitration loses much of its advantages in speed and economy. This insight leads one to the conclusion that if arbitration is to fulfill its role, courts should limit their review at all points, except at the threshold to insure that the parties did in law and in fact agree to arbitrate the dispute in question.

Also, where the parties to an international sales contract fail to specify precisely the law applicable to the main contract and to the arbitration, a complex of conflict-of-laws questions may arise, which are rarely foreseen at the contracting stage but which can be highly practical to the arbitrator during the proceeding or later at the point of enforcement, particularly in Japan. For example, which law is applicable to the main sales contract or to the arbitration clause itself (for they may in some cases be different laws)? Which law applies to the arbitration proceeding34 (since arbitration is not “in court,” it does not necessarily, at least in Japanese theory, apply the local court rules or even the local arbitration procedures35)? Which law does the court, asked to enforce an award, apply to determine whether the award has the legal validity required for local recognition? Does the procedure for executing domestic awards apply in granting execution on a foreign award, once it is recognized as a valid foreign award? Below, we will only refer to these problems in passing, but we will discuss in detail the legal structure to enforce arbitration contracts and awards in Japan and the United States.


There are several sources of law and arbitral procedure in U.S./Japanese trade relations. First, there is the Treaty of Friendship, Commerce and Navigation between the United States and Japan (1953)


35 See A. D. Rarande v. Oriental Hotel, Ltd., 24 Minroku 865, 875 (Gr. Ct. Cass., April 15, 1918). The case seems to permit an arbitration in Japan under foreign law. It also supports the characterization of arbitral agreements as essentially "procedural."
(hereinafter FCN Treaty),\textsuperscript{36} which insofar as it applies to arbitration is effective law in both countries.\textsuperscript{37} Second, there are the arbitration provisions of the Japanese Civil Procedure Code,\textsuperscript{38} and the arbitration statutes in the United States (federal\textsuperscript{39} and state\textsuperscript{40}). Of particular importance to conflicts problems in sales is the Uniform Commercial Code (hereinafter UCC) section 1-105.\textsuperscript{41} Third, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter the 1958 U.N. Convention)\textsuperscript{42} should be noted in passing, although it is not presently applicable to U.S./Japanese transactions because the United States has not yet chosen to join.\textsuperscript{43} (Japan is a member.\textsuperscript{44}) Finally, there is the Japan-American Trade Arbitra-

\footnotesize{\textsuperscript{36} April 2, 1953, [1954] 4 U.S.T. & O.I.A. 2063, T.I.A.S. No. 2863.\textsuperscript{37} \textit{JAPANESE CONST.} art. 98 (2): "The treaties concluded by Japan and established laws of nations shall be faithfully observed." See 2(2) \textit{CEKAI NIHONKOKU KEMPO} (Commentaries on the Japanese Constitution) 1484 (Hôgaku Kyokai ed. 1953), for a view that treaties are superior to even the Constitution in Japan. \textit{Contra}, Kiyomiya, \textit{Kempo} I (Constitution 1), 3 \textit{HÔRITSUGAKU ZENSHU} 60 (1960). Compare \textit{Byrd, Treaties and Executive Agreements in the United States} 83 (Nijhoff 1960). See Reid v. Covert, 354 U.S. 1, 17 (1957), for the proposition that the United States Supreme Court "has regularly and uniformly recognized the supremacy of the Constitution over a treaty." See generally Anforicht, \textit{Suppression of Treaties in International Law}, 37 \textit{CORNELL L.Q.} 655 (1952); Green, \textit{The Treaty Making Power and Extraterritorial Effect of the Constitution}, 42 \textit{MINN. L. REV.} 825 (1958); Bishop, \textit{Unconstitutional Treaties}, 42 \textit{MINN. L. REV.} 773 (1958).\textsuperscript{38} \textit{CIVIL PROCEDURE CODE} arts. 786-805.\textsuperscript{39} \textit{9 U.S.C.} §§ 1-14 (1964), enacted 1925.\textsuperscript{40} For citations to all general arbitration statutes in the various states of the United States see \textit{Domke, COMMERCIAL ARBITRATION} 108-10 (1965). Texas and Maryland have just enacted modern arbitration statutes in 1965, bringing the total to twenty-two states. But note that the new Texas statute places severe requirements on the conclusion of arbitral agreements; see note 73 infra.\textsuperscript{41} References to the UCC are to the \textit{UNIFORM COMMERCIAL CODE 1962 OFFICIAL TEXT WITH COMMENTS}.\textsuperscript{42} \textit{U.N., Final Act and Convention on the Recognition and Enforcement of Foreign Arbitral Awards}, E/Conf.26/81 Rev. 1 (1958). Copies of the Geneva Protocol on Arbitration Clauses (Sept. 24, 1923) and the Geneva Convention on the Execution of Foreign Arbitral Awards (Sept. 26, 1927) may be found conveniently in \textit{INTERNATIONAL TRADE ARBITRATION} 283, 285 (Domke ed. 1958).\textsuperscript{43} One reason the United States has not joined is that our bilateral treaties are considered adequate by some authorities. Other reasons are: conflicts between state statutes and the United Nations Convention as well as deficiencies in the federal act; probably a cautious lack of confidence in arbitral tribunals in less developed countries with little experience with arbitration. See \textit{Lazarus, op. cit. supra} note 1, at 160-64.\textsuperscript{44} See also Czyzak & Sullivan, \textit{American Arbitration Law and the U.N. Convention}, 13 \textit{ARB. J.} 197 (1958). Cf. Hyning & Haight, \textit{International Commercial Arbitration}, 48 A.B.A.J. 236 (1962), urging accession and amendments to the Federal Arbitration Act as suggested by the American Bar Association resolution recommending United States accession to the United Nations Convention.\textsuperscript{44} For a full discussion see Agawa, \textit{Gaikoku chûsai handan no shômîn oyobi shihkô ni kansuru jôyaku ni tsuite} (pts. 1-2) (Concerning convention on the recognition and enforcement of foreign arbitral awards), \textit{JURISUTO} (Nos. 231, 232) 18, 42 (1961); Kawakami, \textit{Gaikoku chûsai handan no shômîn oyobi shihkô ni kansuru koburen jôyaku to Nipponkokku no kanyû}, 45 \textit{MISHÔ-HÔ ZASSHI} 591 (1962),}
tion Agreement, entered into by the American Arbitration Association (AAA) and the Japanese Commercial Arbitration Association (JCAA). Though this agreement is a private arrangement and does not have the force of law, it provides rules of procedure for arbitration in either country, if the parties include in their contracts the standard clause which incorporates the association rules.

D. Private Arbitration Rules

An examination of arbitration agreements actually used in U.S./Japanese transactions reveals that they ordinarily are brief boiler-plate clauses, which are usually too general and which follow a certain pattern that fails to deal with most of the common legal problems. The clause recommended by the Japan-American Trade Arbitration Agreement (1952) is as follows:

All disputes, controversies, or differences which may arise between the parties, out of or in relation to or in connection with this contract, or for the breach thereof, shall be finally settled by arbitration pursuant to the Japan-American Trade Arbitration Agreement, of September 16, 1952, by which each party hereto is bound.

Although other international facilities may be used (e.g., post-war marine charter parties in Japan often provided for London arbitration; also the International Chamber of Commerce has facilities), the AAA/JCAA facilities are overall probably the best suited for U.S./Japanese trade, but as discussed hereafter the standard clause should usually be supplemented to fit the particular needs of the parties to negotiated contracts. The following discussion will, therefore, center around the legal problems of arbitration as structured by the Japan-American Trade Arbitration Agreement, with only occasional reference to less structured arrangements.

The AAA and the JCAA agreed in 1952 that the foregoing clause incorporates the terms of the Japan-American Trade Arbitration Agreement into any contract containing the clause. The agreement thus incorporated into the contract in turn provides that arbitration in Japan will be conducted under the rules of the JCAA and that arbitration conducted in the United States will be conducted under the rules of the AAA. Once invoked by a party, these rules then

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45 For text see Appendix infra.
provide most of the necessary organizational and procedural machinery required for the arbitration to get under way and proceed to an award. Without incorporating by references such supplemental rules—to determine where the arbitration will take place, the qualifications of arbitrators, how they are selected, and by what procedural rules the hearing will be held and the award reported and enforced—the usual brief arbitral agreement would be troublesome, indeed, in practice. Nor is it ordinarily practicable to provide this technical detail by ad hoc provisions in each contract, particularly since most trade contracts are negotiated under pressure by businessmen, not lawyers. And, neither lawyers nor businessmen know much about arbitration—though international specialists probably are the best informed class within their respective professions.47

It is important for lawyers and businessmen to understand exactly what the foregoing U.S./Japanese arrangement means on three points in particular: (1) the place of arbitration, (2) selection of arbitrators, and (3) choice-of-law. This understanding is important because the contracting parties may want to provide a different arrangement than that which will automatically ensue if they simply use the standard clause.

Where the place is not designated by the contracting parties, the Japan-American Trade Arbitration Agreement will fix the place for arbitration in any given case through a joint arbitration committee in the following manner:

2) If the place where the arbitration is to be held is not designated in the contract, or the parties fail to agree in writing on such place, the party demanding arbitration shall give notice to the Arbitration Association of the country in which the party resides. That Association shall notify the parties that they have a period of about 14 days to submit their arguments and reasons for preference regarding the place to a Joint Arbitration Committee of three members, two appointed by the respective Associations, and the third, to act as Chairman, to be chosen by the other two. The third member shall not be a member of either Association. The seats of the two Committees shall be in Tokyo and in New York. The determination of the place of arbitration by the Joint Arbitration Committee shall be final and binding upon both parties to the controversy.

In lieu of a place stipulated by the parties, this provision is designed to pick the most convenient place for arbitration of a dispute, after

the dispute has actually arisen. But, of course, if the parties want all arbitration to be held in a specific place, they will have to so provide in their contract. Although Tokyo or Osaka is the logical place for most international arbitration in Japan, business is not so centralized in the United States, and parties from various parts of the United States will want to designate a certain convenient city. Indeed, the concentration of AAA arbitration in New York (2,522 out of 3,858 cases between 1961-1964) may be a factor inhibiting the wider use of domestic arbitration in the United States. Note below that by usage the designation of a place for arbitration often in fact implies the applicable law as well, although by applicable conflicts principles such a result does not necessarily follow without implying intent.

Nothing could make the contract more meaningless as a standard for predicting the legal rights and duties of the parties than these rules for choosing the arbitral place (and therefore the law applicable). Until the complaint is filed and the site selected, it cannot be known which law (United States or Japanese) applies. This symposium shows enough critical differences between the UCC and Japanese sales law to indicate that this eleventh-hour decision will often mean the difference between liability or not for parties who cannot possibly know in advance what their obligations will turn out to be.

In cases where the parties have made no provisions in the contract for the selection of arbitrators, the Japan-American Trade Arbitration Agreement leaves the choice to the specific rules of either the AAA or the JCAA, depending on where the arbitration is held. There is a difference in the selection methods of the two associations. Under the AAA rules (section 16) the association ordinarily selects but one arbitrator, unless the AAA in its discretion decides to appoint more. In Japan under JCAA rule 15, the usual number of arbitrators used, unless the parties provide otherwise, is three. The selection in both countries is made from an international panel of arbitrators, which the Japan-American Trade Arbitration Agreement (paragraph 3) requires each association to maintain. The AAA, for example, appoints from its international panel as follows:

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48 The court held in Rose Int'l Corp. v. Japan Commercial Arbitration Ass'n, 13 Kakyū minshū 338 (Tokyo High Ct., Mar. 5, 1962), that Osaka was a proper place despite the American corporation's contention it should be in Tokyo.

49 LAZARUS, op. cit. supra note 1, at 31.

50 JAPAN COMMERCIAL ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES (Rev. June 14, 1963); AMERICAN ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION (as amended June 1, 1964).
Section 12. Appointment from Panel — If the parties have not appointed an Arbitrator and have not provided any other method of appointment, the Arbitrator shall be appointed in the following manner: Immediately after the filing of the Demand or Submission, the AAA shall submit simultaneously to each party to the dispute an identical list of names of persons chosen from the Panel. Each party to the dispute shall have seven days from the mailing date in which to cross off any names to which he objects, number the remaining names indicating the order of his preference, and return the list to the AAA. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an Arbitrator to serve. If the parties fail to agree upon any of the persons named, or if acceptable Arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from other members of the Panel without the submission of any additional lists.

The JCAA rule is substantially the same, except that normally three arbitrators are appointed in Japan. Thus, if the parties want more than one arbitrator in the United States and want the arbitrators selected by other means in either country, they must so provide in their agreement. A very common practice in arbitration, although not necessarily a good one, is to have two arbitrators selected, one by each of the parties and a third "umpire" selected by the first two. When this is done, it is important to stipulate that once the moving party appoints an arbitrator, the opposing party must appoint an arbitrator within a fixed period of time. Section 13 of both the AAA and the JCAA rules is well devised to take care of this situation. For example, AAA section 13:

If the agreement specifies a period of time within which an Arbitrator shall be appointed, and any party fails to make such appointment within

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10. Any claims by Buyer of whatever nature arising under this contract shall be made by cable within thirty (30) days after arrival of the merchandise at the destination specified in the bills of lading.

... Settlement of such claim or any disputes will be effected by agreement of the parties as promptly as possible, but, failing amicable settlement, will be submitted to two arbitrators, one appointed by each of the parties hereto, and the two arbitrators so chosen shall, if unable to agree, choose a third arbitrator as umpire without unnecessary delay. The decision in writing signed by those assenting thereto of any two of the arbitrators shall be final and binding on the parties hereto. Arbitration under this provision shall be carried out in Japan, and the costs thereof, including compensation to the arbitrators, will be borne by the party against whom the award is made.
that period, the AAA shall make the appointment.

If no period of time is specified in the agreement, the AAA shall notify the parties to make the appointment and if within seven days thereafter such Arbitrator has not been so appointed, the AAA shall make the appointment.

This, of course, avoids the inconvenience of requesting a court appointment as in the United States federal statute⁵² and in the Japanese procedure.⁵³ Also, section 14 of both the AAA and JCAA rules anticipates the problem when the first two arbitrators are unable to agree on a neutral third arbitrator. The AAA simply appoints one when the stipulated period expires, or after seven days if there is no stipulated period. Also AAA section 16 (and JCAA section 15) solves a sensitive nationalistic problem by affording either party to a U.S./Japanese dispute arbitrated in the United States an opportunity to require that the sole arbitrator, or the neutral arbitrator, be appointed from among the nationals of a country other than the United States or Japan.

If incorporated into their contract by the parties, the foregoing JCAA and AAA rules will handle most of the problems which a draftsman might overlook, or squander considerable time solving in an ad hoc fashion. On the other hand, if a fixed place, a different number of arbitrators, or a specific method of selection are desired, they must be written into the contract, because the rules provide otherwise as indicated.

It is also imperative to explicitly set forth the parties' choice of governing law on all phases of the contract and arbitration, for it is quite possible that the simplicities of assuming that the law of the place of arbitration will turn out to be the governing law will become, instead, a costly complication in the enforcement phases, especially since the place of arbitration remains indeterminable under the standard clause. The clause recommended by the AAA and JCAA does not adequately deal with this problem, nor does the FCN Treaty provision (article IV(2)).

II. ENFORCEMENT OF THE ARBITRATION AGREEMENT

A. Court Assistance in Requiring Arbitration

To carry through on the specific legal structuring of U.S./Japanese arbitration, suppose that the AAA/JCAA clause has been included in

⁵³ Civil Procedure Code art. 789(2).
a sales contract between United States Company and Nippon K.K. and that a dispute has arisen. One of the commonest problems is that the defendant refuses to appear or to appoint an arbitrator.

To enforce arbitration agreements in this situation, the U.S./Japan FCN Treaty is helpful generally, but its protection is not positive.\(^5\) It provides\(^6\) only that arbitral contracts shall not be unenforceable merely on grounds that the arbitrators or place of arbitration are foreign. It is left to the Japanese law, or the federal or state law in the United States, to determine first which law governs the arbitration agreement and secondly, whether it is enforceable, either by an order to arbitrate, dismissal of a local lawsuit, a stay of such litigation,\(^7\) or enjoining a suit in another court.\(^8\) Thus, in the United States the treaty does little to make arbitration contracts more enforceable than they would be under existing federal or state law in the United States.\(^9\) An arbitration clause is, however, more secure legally in some

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\(^6\) FCN Treaty art. IV (2):

Contracts entered into between nationals and companies of either Party and nationals and companies of the other Party, that provide for the settlement by arbitration of controversies, shall not be deemed unenforceable within the territories of such other Party merely on the grounds that the place designated for the arbitration proceedings is outside such territories or that the nationality of the one or more of the arbitrators is not that of such other Party. Awards duly rendered pursuant to any such contracts, which are final and enforceable under the laws of the place where rendered, shall be deemed conclusive in enforcement proceedings brought before the courts of competent jurisdiction of either Party, and shall be entitled to be declared enforceable by such courts, except where found contrary to public policy. When so declared, such awards shall be entitled to privileges and measures of enforcement appertaining to awards rendered locally. It is understood, however, that awards rendered outside the United States of America shall be entitled in any court in any State thereof only to the same measure of recognition as awards rendered in other States thereof.

\(^7\) See, e.g., Compania de Transportes de ma S.A. v. Mataichi K.K., 4 Kakyū minshū 502 (Tokyo Dist. Ct., Apr. 10, 1953), where the Japanese court rejected defendant's argument that since the contract was made in New York the United States federal rule (i.e., a suit should only be stayed) should apply. The court followed the Japanese rule and dismissed, holding that the question concerned procedure; so, on the choice-of-law point, the law of the forum applies to the question of what remedy is available to enforce an arbitration clause in case of a violative Japanese suit.


\(^9\) For United States discussion, see Corbin, Enforceability of Contractual Agreements for Dispute Settlement Abroad, in International Trade Arbitration 251 (Domke ed. 1958).
of the United States than are prorogation clauses specifying a foreign court.\(^5^0\)

In looking to the local "American\(^6^0\)" law on enforcement of arbitration agreements, the United States has inherited the long, adverse,


On the United States preference for foreign arbitral contracts and awards, see Corbin, *supra* note 58, at 252; and for reciprocity problems of enforcing United States judgments in Japan, see Ehrenzweig, Ikehara & Jensen, *op. cit. supra* note 20, at 31.


It is quite clear under the Japanese law that no requirement of "mutual guarantee" (reciprocity), as required to enforce a foreign judgment, is needed to enforce an arbitral agreement. See Kaneko, *Mintō soshōhō tairai* (Study of the law of civil procedure) 90 (1956); Mikazuki, *Mintō soshōhō* (Law of civil procedure) 254, in 3 Hōritsu gaku zenshū (1960); Bōeki to hōritsu (Trade and Law) 515, 536, in 8 Bōeki jitsumon kōza (1962). For the Japanese rule of party autonomy generally, see Hōrei (Law concerning the application of laws in general) art. 7 (Law No. 10, 1898) in 1 EHS No. 1001.

For comparative coverage see Lenhoff, *The Parties' Choice of Forum*: "Prorogation Agreement," 15 Rutgers L. Rev. 414 (1961). This exhaustive study of prorogation in the United States and most European countries unfortunately has no discussion of the Japanese law. It is said that clauses excluding domestic jurisdiction are upheld generally in Austria, Belgium, Brazil, Denmark, France, Germany, Greece, Norway, Poland, Sweden and Switzerland, and in the Netherlands and Italy they are upheld with some qualifications; while in Spain, Portugal, and Hungary derogations of domestic courts are generally denied enforcement, as they usually are in all but the most progressive courts in the United States (e.g., Second Circuit Court of Appeals, New York, and Massachusetts). *Id.* at 419-20.

Of course, unless only federal law clearly applies, there is no single actually applicable "American" arbitration law until the problem can be limited by an actual case with its "American" terminus fixed in one of the fifty-one American jurisdictions (fifty states plus federal). For the practitioner actual cases are often conveniently narrowed in "American" law by the facts of the transaction. But, often he too has to grapple with the multiple possibilities of governing law, because prospectively no one can predict where his multi-state client may sue or be sued on the contract he is drafting. Of course, even the federal jurisdiction in its substantive law aspects is sometimes not a singular unit because of the frequent splits among the circuits as yet unresolved by the Supreme Court. For example, in arbitral law it is not known whether the Second Circuit doctrine of "separability" (see text accompanying notes 96-100, *infra*) will spread (or even persist after Supreme Court
common law history which is now giving way to a strong trend toward general enforceability under modern statutes. During the transition, however, there is much diversity; and here we can only refer to the extensive "American" law literature and set forth the basic principles of interest in U.S./Japanese trade arbitration.

Because of recent uniform legislative patterns, "American" law fortunately is not as multi-headed as it might be in the arbitration field. Fifty jurisdictions have split rather evenly into two groups: one (currently 27 states) with weak arbitration facilities following common law doctrine to the effect that general arbitral agreements covering future disputes are revocable by the parties and unenforceable scrutiny on appeal). So there are even more than fifty-one potential jurisdictions.

Except for the initial general classifications of the statutes of all of the fifty-one jurisdictions (see notes 63-67 infra and accompanying text), we have used the federal law, the Restatements and, where appropriate, citation to the law of several key states (e.g., New York, California, or Washington) as an approximation of "American" law.

Though outdated now and undergoing re-drafting, Restatement, Contracts § 550 (1932), reflects the common law history:

Bargain for Arbitration.

Except as stated in § 558, a bargain to arbitrate either an existing or a possible future dispute is not illegal, unless the agreed terms of arbitration are unfair, but will not be specifically enforced, and only nominal damages are recoverable for its breach. Nor is any bargain to arbitrate a bar to an action on the claim to which the bargain relates.

The new section corresponding to the old § 550 has not yet been released.

Except as stated in § 558, a bargain to arbitrate either an existing or a possible STURGES, COMMERCIAL ARBITRATIONS AND AWARDS (1930), has not been up-dated or displaced as the most comprehensive text on American commercial arbitration, though much has been added to the statutory and case law since (e.g., there were but eleven states with modern statutes enforcing arbitral clauses covering future disputes in 1930; now there are twenty-two). 6A CORBIN, CONTRACTS §§1431-1444B (1962), with supplements, is a useful recent coverage of the American case law on contractual points. DOMKE, COMMERCIAL ARBITRATION (1965), is a brief up-to-date description mainly for non-lawyers; and LAZARUS, op. cit. supra note 1, is a very well done empirical study of the United States arbitration process, which gives a quantified picture of the uses of arbitration in various contexts (labor, trade, accidents), its efficiency in operation, and attitudes of both businessmen and lawyers toward it.


For articles on international commercial arbitration, some dealing with American phases, see INTERNATIONAL TRADE ARBITRATION (Domke ed. 1958).

Alabama, Alaska, Arkansas, Colorado, Delaware, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, and West Virginia.
in court;64 the other (22 states65 and the federal jurisdiction66), by modern statutes,67 have made arbitral clauses enforceable including foreign arbitration.68 Furthermore, the latter group, where arbitral clauses are enforceable, is growing and already includes all of the states with substantial commercial relations with Japan, as well as the federal courts, in which most U.S./Japanese commercial suits may be filed and handled under the federal act, because they deal with "commerce" as defined therein.69 Significant to uniformity is the holding, as yet not approved by the United States Supreme Court, that such questions as the validity and interpretation of an arbitral clause affecting "com-


66 Note that Hill v. Mercury Record Corp., 26 Ill. App. 2d 350, 168 N.E.2d 461 (1960), and Huntington Corp. v. Inwood Constr. Co., 348 S.W.2d 442 (Tex. Civ. App. 1961), refused enforcement of an arbitral clause, which would be enforced now since the passage of new statutes in 1961 and 1965, respectively.

67 The twenty-two states include most of those important in U.S. Japanese business: Arizona (1962); California (1925, revised 1961); Connecticut (1958); Florida (1957); Hawaii (1955); Illinois (1961); Louisiana (1951); Maryland (1965); Massachusetts (1961); Michigan (court rules 1963); Minnesota (1961); New Hampshire (1953); New Jersey (1923); New York (1920, revised, 1962 and 1963); Ohio (1955); Oregon (1955); Pennsylvania (1926); Rhode Island (1960); Texas (1966); Washington (1943); Wisconsin (1938); and Wyoming (1961). Of the twenty-three states, Nevada, has made arbitral clauses (including foreign arbitration) enforceable, though not by statute. United Ass'n of Journeymen & Apprentices of Plumbing v. Stine, 76 Nev. 189, 351 P.2d 965 (1960).


merce" are questions of federal substantive law, not local state law, and *quaere* whether this federal "substantive" law must be applied even by the state, as well as federal, courts. However, under the *Erie* doctrine in a federal diversity case, *state* substantive law would govern the question of the validity and enforceability of arbitral clauses not related to "maritime transactions" or in "commerce," but such a case would be rare in U.S./Japanese trade relations.

"American" law will thus serve reasonably well the American and Japanese businessmen who stipulate for arbitration, except in the infrequent cases where enforcement can only be sought in the state courts of one of the twenty-seven jurisdictions still operating under common law principles. The statutory trend strengthening arbitration in some of the state systems includes Maryland (1965), Illinois (1961), and Texas (1965), which were about the last of the major trading states with no modern arbitration statute. Nevada, Colorado, and Minnesota enforced arbitral clauses covering future disputes without the support of a modern statute; Minnesota has since enacted (1957) the Uniform Arbitration Act. California and New York have had modern statutes since 1920 and 1927 respectively, but both have recently further modernized their statutes; Arkansas, Nevada, Oklahoma, and Maine have new statutes under consideration. The overall effect of the trend in the past two or three decades has been to change not only the laws but also the courts' attitudes at most of the major

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71 The refinements of this problem are fascinating, and many of them are not yet resolved. For a recent survey of problems see Symposium, *Scope of the U.S. Arbitration Act in Commercial Arbitration*, 58 Nw. U.L. Rxv. 469 (1963).


commercial centers in the United States from a rather negative attitude to an approach generally favoring arbitration.\textsuperscript{70}

Under the Japanese law, there is adequate legal support to enforce contracts obligating the parties to arbitrate either in Japan\textsuperscript{77} or in the United States.\textsuperscript{78} There are several postwar Japanese cases enforcing arbitration contracts.\textsuperscript{79} In the Kobayashi\textsuperscript{80} case the seller failed to ship goods from Australia, and therefore the Japanese buyer cancelled the contract and sought damages through a clause in the contract calling for arbitration in Japan. Defendant refused to appoint an arbitrator or otherwise participate. Plaintiff went to court, and the court granted an order appointing an arbitrator on defendant's behalf and rejected defendant's \textit{force majeur} defense for nonperformance,\textsuperscript{81}

\textsuperscript{70} For judicial statements to this effect see, \textit{e.g.}, Necchi v. Necchi Sewing Mach. Sales Corp., 348 F.2d 693, 696 (2d Cir. 1965); Miller v. Allstate Ins. Co., 238 F. Supp. 565, 567 (W.D. Pa. 1965).

\textsuperscript{77} K.K. Kobayashi Shōten v. Kenlick Far East K.K., 9 Kakyū minshū 111 (Tokyo Dist. Ct., Jan. 25, 1958). Note that only Japanese Supreme Court cases can be cited with something like the authority of American case law. However, since there are so few Japanese Supreme Court cases reported in the field of arbitration, we have cited certain lower court cases which we have found related to points discussed, not because they are binding authority but because they illustrate what the Japanese lower courts have done in a certain concrete instance and because they would probably be followed in the same court. Also they may be in some degree persuasive in future cases in other courts, where they are consulted. See also Texas Co. v. Gōshi Kaisha Taiheiō Shōkai, Hōritsu shimbun (No. 2168) 13 (Tokyo Dist. Ct., Jan. 25, 1958); Towa Kogyō K.K. v. Mitsui Sempaku K.K., 1 Kakyū, minshū 1913 (Yokohama Dist. Ct., Nov. 1950).

The Japanese code provisions are: \textsc{Civil Procedure} Code arts. 786-805; and see interpretive treatise, Koyama, Chōteihō, Chūsaihō (Consiliation law, Arbitration law), in 38 Hōritsu shimbun 51-106 (1958), on Japanese domestic arbitration.

\textsuperscript{78} Compania de Transportes de ma S.A. v. Mataichi K.K., 4 Kakyū minshū 502 (Tokyo Dist. Ct., April 10, 1953).

\textsuperscript{79} In K.K. Kobayashi Shōten v. Kenlick Far East K.K., 9 Kakyū minshū 111 (Tokyo Dist. Ct., Jan. 25, 1958), the court appointed an arbitrator under \textsc{Civil Procedure} Code art. 789(2) when the defendant failed to do so. Several cases so hold, citing Hōrei art. 7: A.D. Rarande v. The Oriental Hotel, Ltd., 24 Minroku 865 (Gr. Ct. Cass., Apr. 15, 1918); Compania de Transportes de ma S.A. v. Mataichi K.K., supra note 78.

There is no specific rule in Japan covering prorogation such as Hōrei art. 7, supporting the parties' choice-of-law. However, a party's choice-of-forum among domestic courts is valid (\textsc{Civil Procedure} Code art. 25), and similarly the commentators state that prorogation of a foreign tribunal, judicial or arbitral, is valid. Kakeko, Saibanbō (Law of trials) 71, in 34 Hōritsugakushimushū (1959); Kawai, Kobusai shōji chūsai no shōrai (The future of international commercial arbitration), 7 Bōeki kuremu to chūsai (No. 3) 121 (1960).

The only treatment in English seems to be a paragraph in Ehrenzweig, Ikehara & Jensen, \textit{American-Japanese Private International Law} 29 (1964); and Gardiner, \textit{Japanese Arbitration Law}, 8 Ariz. J. 89 (1953). The latter article is outdated, and note that it seems to assume erroneously that the arbitration law of Japan effective from 1891 (\textsc{CivilProcedure} Code arts. 786-805) was enacted after World War II.

holding that it went to the merits and was to be presented only to the arbitrator later.

A little different kind of support was lent to an arbitration clause in Rose Int’l Corp v. Japan Commercial Arbitration Ass’n.\textsuperscript{81} There appellant Rose, an American motion picture company, chartered a ship from the complainant. Under the charter, disputes over the charter hire were to be settled by arbitration in Japan. Rose refused to pay the charter hire, so the shipowner commenced the arbitration proceeding. Rose, refusing to participate, sought a court injunction against the arbitration association to prevent it from administering the arbitration proceeding. Finding Rose’s court action without merit, the court refused the injunction, and presumably the association appointed an arbitrator and proceeded with the arbitration ending in an award or settlement.

Perhaps even more specifically useful, however, is the enforcement procedure built into the AAA and JCAA rules incorporated into the Arbitration Agreement. These rules provide that when a party fails to perform his duty to appoint an arbitrator and to arbitrate, the competent association in either country will automatically, after due notice and lapse of a proper period of time, appoint an arbitrator for him. This is a convenient and generally effective method of insuring that when a dispute arises the arbitration will progress efficiently to an award, despite the bad faith of an opponent. Once such an award is rendered, the scope of challenge is quite restricted. For example, in \textit{G. M. Casaregi Compagnia di Navigazione e Commercio, S.P.A. v. Nishi Shōji K.K.}\textsuperscript{82} plaintiff Casaregi, an Italian shipowner, contracted to sell a ship to Nishi, a Japanese buyer, for $162,000 (U.S.), and Nishi agreed to use its best efforts to obtain an approval from the Japanese Government; such approval was required before Nishi could make foreign exchange payment in dollars. The approval was not obtained, and Casaregi sought London arbitration under English law, as provided in the contract, to recover for the loss occasioned by failure of the sale. Nishi refused to appoint an arbitrator; thus, under the English Arbitration Act of 1950 Casaregi’s arbitrator became legally the sole arbitrator. Defendant failed to appear on the appointed date, though he had been given adequate notice; therefore under the English law the arbitrator was empowered to proceed to an award without Nishi’s presence. Casaregi was awarded damages (£20,966),

\textsuperscript{81} 13 Kakyū minshū 338 (Tokyo High Ct., Mar. 5, 1962).
\textsuperscript{82} 10 Kakyū minshū 1711 (Tokyo Dist. Ct., Aug. 20, 1959).
based on a finding by the arbitrator that Nishi breached its duty to use its best efforts to obtain government approval. When the award was presented to the Tokyo District Court for enforcement, the court enforced it, despite the fact that Nishi had not been represented at the London arbitration proceedings.

These holdings will, of course, go a long way toward establishing the point that in Japan failure to participate in an agreed arbitration, for various make-weight reasons, can be done only at one's own peril.

B. Dismissal of Litigation

The second problem in enforcing arbitral clauses is presented when either U.S. Company or Nippon K.K. files a suit in the United States or Japan instead of resorting to arbitration as agreed. Will the courts in the United States or Japan dismiss the suit, stay the litigation, or enjoin a suit in another court pending arbitration?

In the United States, despite its negative common law history, the federal courts can be expected to stay a suit which has been brought in violation of an agreement to arbitrate in Japan. Similar support is becoming the rule in United States state courts as well. Dismissal of Japanese suits in violation of an agreement to arbitrate in London, New York, and elsewhere may also be expected.

1-5 See also WASH. REV. CODE ch. 7.04 (1956); Uniform Arbitration Act §2(c), which reads:

If an issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending in a court having jurisdiction to hear applications under subdivision (a) of this Section, the application shall be made therein. Otherwise and subject to Section 18, the application may be made in any court of competent jurisdiction.

This act has been adopted with varying modifications in Arizona, Florida, Illinois, Minnesota, Maryland, Massachusetts, Michigan, New York, Texas, and Wyoming.


In an early postwar case, a Panama shipowner, Compania, agreed to carry 8280 tons of wheat from the Columbia River to Japan for defendant, Mataichi, which failed to deliver the cargo. Plaintiff sued in Tokyo for lost freight, and Mataichi defended with a clause calling for New York arbitration. Despite plaintiff’s plea that a foreign arbitration clause could not prevent a suit against a Japanese in Japan because a foreign award would not be enforceable, the court dismissed. The Japanese lower courts have been true to this holding ever since, although there has been no postwar Supreme Court holding on the point.

In Hinode Kagaku Kōgyō K.K. v. Sanko Kisen K.K., plaintiff Hinode, an importer of phosphorus for fertilizer, contracted for defendant to transport 8000 tons of raw phosphorus material from Egypt to Japan. Leakage caused loss to the cargo in transit, and plaintiff sued in Osaka despite a clause for London arbitration. The court dismissed in favor of arbitration, rejecting plaintiff’s argument that a clause for arbitration in a place foreign to both parties, and all phases of the contract as well, was void and that an award resulting from such an arbitration would be unenforceable in Japan. Note that the law of the forum (Japan), not the law of the contract (New York), has been held to govern the method of relief to be granted where an arbitration clause was asserted as a defense to a Japanese suit requesting dismissal.

Reference to local law to provide the remedy is the general rule in the United States too, and it means that some state courts, applying their own law in this regard, will still refuse to stay or dismiss a suit brought by a party violating his agreement to arbitrate, even though the agreement is valid by the proper law of the contract and even though it “may not be deemed unenforceable” merely because of the place of arbitration or nationality of arbitrators under the FCN Treaty art. IV(2). Still the party requesting arbitration may be able to prevail in such a state court if he can persuade the court that the
issue of enforcement is "substantive" and federal law applies to matters of federal "commerce" even in the state court.\textsuperscript{92}

\textbf{C. Threshold Legal Questions for the Courts}

Even where arbitration is enforceable under modern legislation, the enforcing courts must first decide whether there is an arbitral contract between the parties and, if so, what its scope is. In Japan the authorities\textsuperscript{93} are clear that these questions are legal questions for the court. In a very recent case, the Tokyo District Court\textsuperscript{94} routinely, in the course of ordering enforcement of an award, reviewed a foreign trade transaction to confirm that an arbitral contract existed to support the arbitration proceeding, in response to the loser's challenge on the point.

In the United States, the established rule has generally been the same,\textsuperscript{65} but in recent years the New York courts, both state and federal, have decided several cases which, if followed in the future, will enlarge arbitrators' powers substantially. The leading federal case\textsuperscript{66} establishing the "separability" doctrine holds that where an issue of fraud in the inducement of a principal contract containing an arbitration clause is raised in an action to enforce the arbitration clause, the arbitration clause may be severed from the main contract; the arbitral clause will be enforced separately unless the plaintiff alleges and proves fraud in inducing the arbitral clause itself. If the court finds no fraud in the clause, then arbitration is enforced, and the arbitrators decide the fraud issue in the principal contract, if that issue is within the agreed scope of the arbitral clause; presumably this is a court question.\textsuperscript{97} The federal courts (Second Circuit) have followed this decision in several cases since,\textsuperscript{98} but the doctrine has

\textsuperscript{92}See citations in notes 70 and 71, supra.
\textsuperscript{93}Koyama, op. cit. supra note 77, at 93.
\textsuperscript{94}In MacDonald, Ltd. & I. H. MacDonald v. Tomoi Trade Yugen-Kaisha, unreported case (Tokyo Dist. Ct., May 6, 1966) (consolidated cases: 1959 (wa) No. 9286; 1962 (wa) No. 4868; 1964 (wa) No. 2836), the court determined, against the challenge of the losing party, that an arbitral contract was created between the parties.
\textsuperscript{65}See 6A CoRbin, Contracts §§ 1444, 1444A (1962).
\textsuperscript{97}Note that Necchi v. Necchi Sewing Mach. Sales Corp., 348 F.2d 693, 695 (2d Cir. 1965), implies in dictum that the scope of the clause might be made an arbitrable point.
drawn scholarly fire, and some doubt has been cast upon it by the Supreme Court. Also, faced with a similar threshold legal question (condition precedent to a contract with an arbitral clause), the Second Circuit did not find the clause separable and enforced arbitration. It decided the threshold issue itself—a holding which is difficult to square with the fraud cases, except on a narrow factual basis. In practice the separability doctrine means a presumption in favor of separability, in a situation where it seems highly unlikely, in most cases at least, that the parties intended a severable clause or that the arbitrators should decide initial questions of fraud and the like. The presumption should be just the opposite—against separability—because that more likely reflects the parties’ actual intent.

Lawyers opposing arbitration in a fraudulent contract will want to observe two important points in presenting this issue in the federal courts of New York. First, because fraud in the inducement only makes the contract voidable, plaintiff must seek rescission of the contract rather than sue for damages on it; second, even this will not avoid arbitration by way of the separability doctrine, unless plaintiff alleges fraud in inducing the arbitration clause itself.

The New York state courts have not embraced the separability doctrine, but in two recent cases they have rendered decisions which have allowed arbitrators to decide threshold questions (condition pre-


102 But see Sturges, Comment, Fraudulent Inducement as a Defense to the Enforcement of Arbitration Contracts, 36 Yale L.J. 866, 873 (1927), where it is suggested that the presumption be for separability. This comment is perhaps the earliest source of this questionable doctrine.

103 6A CORBIN, CONTRACTS § 1444 (1962), criticizes several decisions which fail to observe this point. See Walker v. Maged, 154 N.Y.L.J. (No. 97) 15, col. 7 (Sup. Ct. 1965), where plaintiffs were compelled to arbitrate because they were found to have affirmed the allegedly fraudulent contract by relying on the existence of the contract, rather than seeking rescission.

But note that in Prima Paint Corp. v. Flood & Conklin Mfg. Co., 360 F.2d 315 (2d Cir.), cert. granted, 87 Sup. Ct. 202 (1966), the plaintiff did seek rescission, but the court found the arbitral clause separable and compelled arbitration of the question of fraud in the inducement of the container contract. Though the court noted the importance of rescission of the container contract, still it found the arbitral contract to be separable (not rescinded) because the plaintiff did not allege fraud in the inducement of the arbitral clause as such. Perhaps there was none, but presumably there often would be in such cases, and where there is it is critical to raise the point properly.

cedent\textsuperscript{105} and lack of mutuality\textsuperscript{106}), which, it is submitted, should have been decided by the court.\textsuperscript{107} Perhaps this shifting of the balance between the powers of courts and commercial arbitrators in New York by allowing arbitrators, in a sense, to determine their own authority has been improperly influenced by the Supreme Court's recent expansive approach to arbitration in the labor field.\textsuperscript{108} Or, perhaps, the judges see arbitration as a solution to New York court congestion.\textsuperscript{109} These legal precedents in labor cases and the ulterior goal of reducing court congestion seem to be producing an unsound relaxation of judicial control over commercial arbitration in New York—and at precisely the very point where even friends of arbitration should see the need for close court scrutiny in order to insure the consensual nature of arbitration.

The New York trend is important in U.S./Japanese arbitration because of the volume of trade through New York—and two-thirds of all AAA arbitrations. Indeed already two Japanese firms have been involved in cases involving these points. In a federal case involving the Japanese firm Kinoshita & Co.,\textsuperscript{110} Judge Medina followed the separability doctrine, his own creation, but he then found the separable arbitral clause too narrow to cover the issue of fraudulent inducement; so the court itself found no fraud in favor of Kinoshita. In a state case,\textsuperscript{111} the New York Court of Appeals reversed the Appellate Division, which

\begin{footnotesize}


\textsuperscript{107} See the concurring and dissenting opinions in Exercycle, supra note 106.

\textsuperscript{108} See Necchi v. Necchi Sewing Mach. Sales Corp., 348 F.2d 693, 696 (2d Cir. 1965), where United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1963), is cited to support dictum that the parties might empower arbitrators to determine the scope of the arbitral clause. See Hays, Labor Arbitration: A Dissenting View 9-10 (1964 Storrs Lectures, Yale, 1966), for the view that even in labor the Supreme Court's expansive concept of the role of arbitration as reflected in Justice Douglas' opinions in United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960), is unsound and inconsistent with the major authorities. Whether or not one agrees with Hays as to labor arbitration, there is surely enough difference between commercial and labor arbitration to counsel care in cross citing authorities, lest the admitted consensual foundations of commercial arbitration be undermined. See Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1490-91 (1959). Id. at 1498: "[T]here was some truth to the saying that arbitration was a substitute not for a lawsuit but for a strike." This itself expresses a major difference (inter-dependence). In commercial transactions arbitration is largely only a substitute for a lawsuit.

\textsuperscript{109} This reason is given in the case which originated the separability doctrine, Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 410 (2d Cir. 1959).

\textsuperscript{110} Matter of Kinoshita & Co., 287 F.2d 951 (2d Cir. 1961).

\end{footnotesize}
had found that there was no valid arbitral agreement because the agreed condition precedent to the entire contract had failed. Thus the reversal left the question to the arbitrators who found, agreeing with both lower courts, that the condition precedent had not been fulfilled; petitioner was relieved from performing.

From a comparative point of view, this New York trend to relax threshold review of arbitration agreements is extreme, especially when coupled with other laxities of judicial control of arbitration in the United States, once the arbitration has commenced.\(^\text{112}\) The United States arbitration system, as it has developed in recent decades, does rather generally operate outside the substantive law, presumably justified by its consensual character. If this is the rationale, it is appropriate for the courts to maintain a stricter review of the precise question of whether in fact there was consent to arbitrate, especially since, in the "battle of form" characterizing much of the commercial contracting process, the negotiated and bargained for arbitral clauses are greatly outnumbered by their "adherent" cousins.\(^\text{113}\)

III. Arbitration Awards: Enforcement in Japan or the United States

Though at American common law an arbitral agreement is revocable and not entitled to specific enforcement, domestic awards are enforced without a court review on the merits, once arbitration is voluntarily concluded by an award; errors of law or fact are usually not fatal to enforcement;\(^\text{114}\) common law awards are thus in theory, at least, subject to less court review than either inferior court judgments or decisions of administrative tribunals.\(^\text{115}\) Note that common law arbitrations still


\(^{113}\) See the rather typical exchanges of boiler plate in Oregon-Pac. Forest Prods. Corp. v. Welsh Panel Co., 248 F. Supp. 903 (D. Ore. 1965) (considering Mitsui & Co.'s form, court preliminarily determined that an arbitration clause was a part of the contract); S. M. Wolff Co., v. Tulkoff, 9 N.Y.2d 356, 174 N.E.2d 478, 214 N.Y.S.2d 374 (1961) (telephonic exchange followed by "Bought Note" including arbitral clause); Matter of Arbitration between Doughboy Indus., Inc. & Pantasote Co., 17 App. Div. 2d 216, 233 N.Y.S.2d 488 (1962) (Appellate Division reversed the New York Supreme Court's denial of a stay of arbitration, finding the arbitration clause in the form last mailed was not a part of the contract.) Note the drastic solution to inadvertent agreement found in the new Texas statute. An arbitral clause is only enforceable if "concluded upon the advice of counsel to both parties as evidenced by counsels' signatures thereto"), Texas Laws 1965, ch. 689, art. 224.

\(^{114}\) STURGES, COMMERCIAL ARBITRATION AND AWARDS 520 (1930).

\(^{115}\) But see Jalet, Judicial Review of Arbitration: The Judicial Attitude, 45 CORNELL L.Q. 519, 532 (1960), stating that although courts "pledge allegiance" to awards, this, in practice, is often lip service only.
co-exist with statutory arbitration in some states. The modern American statutes have further facilitated award enforcement by routine procedures leading to a confirming judgment, not only supporting local compulsory execution but also entitling it to federal “full faith and credit” in sister states. In Japan, after the arbitration provisions became law in 1891 as a part of the Civil Procedure Code, domestic awards have been routinely enforced as provided in the code. We need only review here the special problems of enforcing a foreign award, that is, enforcing an American award in Japan or vice versa.

Since domestic awards in both the United States and Japan can be confirmed routinely by a court judgment, the winner of a local award in either country has an option: (1) he can enforce the local award in the other country as a foreign award there, or (2) he can reduce it to a judgment locally and then try to enforce it as a foreign judgment in the other country. In the U.S./Japanese context, there is some reason to conclude that direct enforcement of the award will be more effective than enforcing it indirectly by first reducing it to a local judgment. On the other hand in order to prove finality under the FCN Treaty it is easier to reduce the award to a judgment and let all periods for appeal run, thus foreclosing most legal challenges; since Japan and New York do not follow the “merger” doctrine, the award will prevail anyway over infirmities that might eventuate in the judg-


118 JAPANESE CIVIL PROCEDURE CODE art. 802 [in 2 EHS No. 2300 (1955)]: (1) Execution to be undertaken by virtue of an award shall be made only when an execution judgment has been rendered for the admissibility thereof. (2) The foregoing judgment shall not be rendered in case there exists a reason under which cancellation of award may be moved.


Compare Domke, On the Enforcement Abroad of American Arbitration Awards,
We are concerned below, however, only with direct enforcement of Japanese awards in the United States or vice versa. Foreign awards, like domestic awards, cannot be enforced directly in either Japan or the United States; the foreign award must be first reduced to a judgment in the enforcing country. But in neither country are there any legal provisions specifically authorizing a confirmation judgment for foreign awards, as there are for example in Germany and Sweden; such procedures as there are for judgments on awards are in their terms concerned only with domestic awards. But procedures, precedents, and practices for domestic awards will generally be applied, in enforcing foreign awards in the U.S./Japanese context, in accordance with the FCN Treaty provision dealing with arbitration awards.

The FCN provisions require two steps in determining the enforceability of foreign awards in the United States or Japan: (1) is the award entitled to recognition (i.e., is it valid?); (2) what procedural remedies are foreign awards, once recognized as valid, entitled to in enforcement proceedings? Unfortunately, contracts which use the AAA/JCAA-recommended clause leave the selection of the place for arbitration indeterminable between the United States and Japan until...
a dispute has arisen. The governing law as well is often indeterminable since the law of the place of arbitration is usually applied, in the absence of a contrary stipulation by the parties. Such an ostrich-like approach, which leaves the entire legal meaning of the contract largely unpredictable, is often tolerated even by parties who are aware of the situation (no doubt many are not!) because it allows them to bury in ambiguity a point that might be difficult to resolve in negotiations. The result is that potentially both United States law and Japanese law control because no one can guess the nationality of the award in advance.

A. Foreign Awards: Recognition of Validity

The analysis starts then with the FCN Treaty provision on recognition of foreign awards: 123

Awards duly rendered pursuant to any such contract, which are final and enforceable under the laws of the place where rendered, shall be deemed conclusive in enforcement proceedings brought before the courts of competent jurisdiction of either Party, except where found contrary to public policy.

An award rendered in Japan against a United States firm will be valid in the state and federal courts, provided it is (1) “duly rendered pursuant to” the recommended U.S./Japan clause under discussion here; (2) final and enforceable in Japan; and (3) not against public policy in the particular United States jurisdiction where enforcement is sought.

In the United States, there have been no cases indicating specifically how the three treaty criteria would be applied to a Japanese award, 124 but the treaty criteria are not much different than the standards for interstate 125 or foreign 126 awards in the United States in cases where

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124 No cases have been found construing similar provisions in other FCN treaties, c.g., the U.S./Germany treaty art. VI(2), Oct. 29, 1954, [1956] 7 U.S.T. & O.I.A. 1839, T.I.A.S. No. 3593.
125 RESTATEMENT (SECOND), CONFLICT OF LAWS §354(j), p. 223 (Tent. Draft No. 6, 1960) provides:
Enforcement of Foreign Arbitration Award
A foreign arbitration award will be enforced in other states provided:
(1) the award is enforceable in the state of rendition and was rendered in accordance with the terms of the arbitration agreement by an arbitration tribunal which had personal jurisdiction over the defendant and afforded him reasonable notice of the proceeding and a reasonable opportunity to be heard, and
(2) the forum has judicial jurisdiction over either the defendant or his property and the cause of action on which the award was based is not contrary to the strong public policy of the forum.
126 The leading New York cases enforcing foreign awards are Gilbert v. Burnstine, 255 N.Y. 348, 174 N.E. 706 (1931) (ex parte award enforced), and Sargant v.
no special provisions are applicable, such as the treaty provides in the U.S./Japanese situations.

A preliminary question must be answered by the United States court in enforcing a Japanese award: which law governs the review under each criterion? For the second criterion (final and enforceable) the treaty provides that the law of the place of arbitration governs (Japan), which is the general American rule anyway. For the third criterion (not contrary to public policy), of course, United States law would apply. The only troublesome treaty test is the first: "duly rendered pursuant to" an arbitration contract. The American court would apply its own law to determine the scope of review authorized by this phrase.

As a second step, the court would apply the governing law of the contract to issues contesting the validity or scope of the arbitral contract, but only if such points are found to be covered by the review defined in the first step. Detailed analysis of these conflicts problems must be passed over here, but note the capriciousness of the answers produced in simply trying to fix the law governing the contract. Unless the parties have stipulated the governing law, the various issues found by interpretation to be subsumed under this first phrase would be governed by the law of the arbitration contract as indicated by the conflicts rules. In the first place, under some circumstances the United States court and the arbitrator might quite properly apply different conflicts rules to determine the law governing the contract, but assuming United States conflicts rules (state or federal rules in a sales contract?) are applied, an anomaly will often arise from the fact


A Norwegian award rendered ex parte (even without a court order, see 9 U.S.C. § 4) after defendants refused to participate was enforced in Oklahoma. Standard Magnesium Corp. v. Fuchs, 251 F.2d 455 (10th Cir. 1957). The general conflicts rule is stated in Moyer v. Van-Dye-Way Corp., 126 F.2d 339, 340 (3d Cir. 1942): "The general authority is to the effect that the validity of an arbitration award is determined by the place of its rendition."

127 See generally, Kawakami, Chūsai (arbitration), 3 KOKUSAI SHIHŌ KOZA 848 (1963); and Kawakami, Kokusai shōji chūsai ni kansuru kokusai shihō riron (Theory of private international law concerning international commercial arbitration), 1 KOBE HOGAKU ZASSHī (No. 3) 577, 604 (1951).


128 This is a difficult question still not fully resolved. Compare Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198 (1956), with Robert Lawrence Co. v. Devon-
that in applying, for example, the place-of-contracting rule to a U.S./Japanese contract, the United States and Japanese answers would always be different on the same facts where the contract is concluded by mail. So the contingencies of how and where the dispute is eventually arbitrated will determine which law governs and then who wins in certain cases, all of which is of course no more rational than flipping a coin.

Governing-law niceties aside, an American court's review under this first treaty criterion (duly rendered pursuant to a contract) would in fact vary greatly with the jurisdiction, its statutes, and the court precedents. Generally, however, American review of awards does not go to the merits; errors of law or fact in an award are not
grounds to vacate; after the award, courts only consider questions of procedural compliance or fairness and the validity or scope of the contract. But some states' statutes allow appeals from awards on questions of law, much like the review of inferior court judgments. But there is a trend to restrict the review of awards, and the AAA practice of discouraging reasoned opinion in awards makes it more difficult to ascertain legal or factual errors therein. This would suggest that parties might prefer to agree to omit reasons in their Japanese awards to lessen the chance of review in the United States. In enforcing an award, ordinarily the United States court would review challenges to the validity and scope of the arbitration contract (i.e., duly rendered pursuant to a contract), but only if these contract questions had not been at issue in the Japanese courts already and if they had not been waived by participation or lost by laches. Cases where such issues would still be timely would be rare, but conceivably challenges to the “contract” could be made in a proceeding to enforce, for example, an ex parte Japanese award, where the United States defendant had not appeared because he denied the contract. Except in such unusual cases with legitimate threshold issues still unresolved, the review under this first treaty criterion would be limited to procedural challenges asserting that the arbitration has not been conducted by agreed procedures for appointing arbitrators and the like (i.e., duly rendered pursuant to a contract). To read any more meaning into this first phrase would cause an overlap with the next treaty criterion.

When a United States court is asked to enforce a Japanese award under the second treaty criterion (“final and enforceable ... where

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125 Note that the American Arbitration Association, which handles all U.S./Japanese arbitration in the United States, where its recommended clause has been incorporated into U.S./Japanese contracts, has advised against stating reasons, or if stated, to state them in a document separate from the award. A.A.A., A MANUAL FOR COMMERCIAL ARBITRATORS 31 (1959).

126 CIVIL PROCEDURE CODE art. 801:  
(1) Motion for cancellation of an award shall be made in the following cases: ... In case the award is not accompanied by reasons ....  
(2) Cancellation of an award shall not be made by the reasons as mentioned ... in case parties have otherwise agreed.
rendered"), the court must look to the Japanese Civil Procedure Code to determine when the award is final. Under that code a domestic award has the effect of a final judgment, and it can be enforced immediately by an execution judgment, subject only, at the time of the application for execution, to specified objections:

Motion for cancellation of an award shall be made in the following cases:

1. In case an arbitration procedure should not be allowed [i.e., the issue is not legally arbitrable];
2. In case an award condemns a party to perform an act the performance of which is prohibited by law;
3. In case the parties were not represented in accordance with the provisions of law;
4. In case the parties were not examined in the arbitration procedure.
5. In case the award is not accompanied by reasons;
6. In the case of Article 420 items (4) to (8) inclusive, there exist conditions allowing a suit for retrial (saishin) such as false evidence, etc.

(2) Cancellation of an award shall not be made for reasons mentioned in items (4) and (5) of this Article in case parties have otherwise agreed.

Notably a Japanese award is “final and enforceable” even though a Revision Action (saishin) may be brought (article 803) for certain very special reasons (article 801(6)) for as long as five years after the execution judgment (article 804).

Regarding the third treaty standard (public policy), there are no American cases involving Japanese awards, but the cases where domestic awards have been set aside as against public policy will give an idea of the standard which American courts would use in applying the public policy criterion in the treaty. Generally “public policy” in

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137 Civil Procedure Code art. 802.
138 Civil Procedure Code art. 801.

the United States courts has meant a modicum of review of points of law, despite generalizations disclaiming any power to do so. Courts have, therefore, been criticized for its use, but actually few awards have been set aside on public policy grounds; most of them have been in labor cases.

B. United States Awards in Japan

Of course in Japanese courts the three treaty standards similarly control the recognition of American awards. There are three cases which shed some light on the Japanese courts' application of the treaty, although only one of them dealt specifically with an American award under the treaty.

Concerning the first treaty criterion, a recent case in the Tokyo District Court is interesting. The challenged award was a domestic award rendered ex parte in Tokyo, and the court enforced it against allegations that there had been no arbitration contract between the parties and that defendant had not been served with proper notice. The court, as a matter of course, passed on the issue challenging the existence of an arbitral contract, and there is no reason to believe it would not do so where the point is properly raised in enforcing an American award.

Under the second treaty criterion, a Japanese court must look to the American law to determine finality and enforceability when asked to enforce an American award. "American" law has its usual multiplicities, but taking the United States Federal Arbitration Act as an example, section 9 provides that a party may within one year obtain a confirmation judgment, unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11. On the question of finality section 12 provides that all motions to vacate, modify, or correct an award must be served upon the adverse party within three months after the award is filed or delivered to the parties. The grounds


141 Blumrosen, Public Policy Considerations in Labor Arbitration Cases, 14 Rutgers L. Rev. 217 (1960).


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for vacation are set out in section 10,144 and grounds for modification or correction are found in section 11.145

The case of American President Lines v. C. Subra K.K.146 is the only precedent where the Japanese court has enforced an American award under the FCN Treaty (1954). The award was obtained in New York under the United States Arbitration Act on a claim for demurrage on a ship chartered by APL to a Japanese corporation, C. Subra K.K. (correctly romanized from Japanese “Subura,” and actually spelled by the defendant “Soubra”147). The award was confirmed by the New York federal district court in a judgment, which added interest at six per cent from the date of the award until payment. APL then sought

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144 9 U.S.C. § 10 (1964): 
Same; vacation; grounds; rehearing
In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
(a) Where the award was procured by corruption, fraud, or undue means.
(b) Where there was evident partiality or corruption in the arbitrators, or either of them.
(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
(d) Where the arbitrators exceed their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

Same; modification or correction; grounds; order
In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—
(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.


147 The court’s transliteration of the defendant’s name from Soubra to Subura in the Japanese syllabary (kata-ka na) and erroneously back to Subra in “English” is a good example of one major “minor problem” of U.S./Japanese litigation requiring the English language charter parties and the like to be translated into Japanese. Note here, though, that the defendant was Subura Kabushiki Kaisha, a Japanese corporation which came into existence only on registration in Japan, which can only be done in the Japanese language. Consequently, the legal name of Soubra’s Japanese corporation was Subura (in kata-ka na) K.K. One of the authors (Henderson) advised the defendant Soubra (Lebanese) in Tokyo during the pre-arbitration stages of this dispute.
enforcement of the judgment in the Tokyo District Court, which recognized the award and granted an execution judgment in an opinion which sheds little light on the application of the treaty.

The case is interesting on three collateral points. First, since it enforced the award rather than the judgment (defective because of interest added illegally), the court indicated that the doctrine of merger is not accepted in Japanese law; hence, even though the confirming judgment may be defective, the underlying award can be enforced. Second, from the standpoint of tactics, the facts of the case show the advantage of having first obtained a United States judgment confirming the award, even though such judgment may be unenforceable in Japan. This advantage is that the United States court hearings and the running of formal appeal periods, necessarily entailed in obtaining the United States judgment, will foreclose for practical purposes most legal challenges against the underlying award in Japanese enforcement proceedings. Third, the opinion shows a difficulty in proving the foreign law and its effect on award (and judgment) enforcement abroad.148

Significantly, regarding the third treaty criterion (public policy), the recent Japanese case Casaregi149 involving Japanese court enforcement of an English award, indicates that Japanese courts will probably make very limited use of public policy arguments to defeat foreign awards. In that case, the Japanese defendant, who was the buyer

148 10 Kakyū minshū 2232 (Tokyo Dist. Ct., Oct. 23, 1959), English translation in 6 JAPANESE ANNUAL OF INTERNATIONAL LAW 203 (1962). The Japanese court seemed uncertain of the legality, in American law, of the interest ordered by the United States judgment, but in any event it chose not to include it in its Japanese judgment, limiting it to the amount of the award, which included interest only prior to the award date. Domke, COMMERCIAL ARBITRATION 92 (1965), says on this point: "Courts have no authority to add any interest for the time prior to award. This would amount to a review of the award on its merits, which is excluded in the prevailing court practice in the United States." But note that 28 U.S.C. §1961 (1964) authorizes the court to award interest from the judgment to payment in "civil cases." Compare In the Matter of John J. Kennedy Bldg., Corp. v. Longworth, N.Y.L.J. Aug. 30, 1927 (City Court, Bronx County, Spec. Term), where the court stated:

It was brought to my attention that one of the arbitrators made their findings that defendants were not to pay any interest. I cannot pay any attention to what an arbitrator said or the interpretation he gave to his report. The award itself must govern the court. The arbitrators would have no right to exclude interest from their award, and even if they did so exclude it the court would add proper interest to the award.

under a contract to purchase a ship from an Italian seller, lost an arbitration conducted in London under "third country" law (English) as specified in the contract. In fact he refused to appoint an arbitrator and refused, though properly notified, to attend or be represented at the hearing. Notwithstanding, he was found by a sole arbitrator, acting properly under the English Arbitration Act,\textsuperscript{1} to have breached his duty to obtain the required Japanese Government approval for his purchase, thus causing the sale to fail and the plaintiff damages (£20,966). Against defendant's argument that such an award was against Japanese public policy on a number of grounds including defendant's absence from the hearing, the court enforced the award and held that it did not violate Japanese public policy, because defendant was absent by choice. Also, the court held that the criteria for enforceability were not to be sought in Japanese Civil Procedure Code article 801 but in the treaty (here the 1958 U.N. Convention). One would expect Japanese courts to treat public policy challenges to American awards similarly under the FCN Treaty.

Unfortunately, the FCN Treaty does not solve a practical lawyer's problem of proof by specifying the methods of proving\textsuperscript{151} validity abroad, nor does it distribute the burden of proof\textsuperscript{152} to favor the winner of an award, as is done in the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (1958). The latter, of course, is inapplicable in U.S./Japanese trade because the United States has not acceded to it.\textsuperscript{153}

C. Foreign Awards: Procedures for Execution Thereon

On the question of execution, the FCN Treaty provides that, "such awards [i.e., those which are recognized as valid] shall be entitled to the privileges and measures of enforcement appertaining to awards rendered locally." In the United States, "locally" has its usual federalistic complications. So, the treaty provides further that Japanese awards are entitled in state courts "to the same measure of recognition as awards rendered in other states," meaning sister states of the United States. We have noted that, unlike some foreign countries,\textsuperscript{154} neither

\textsuperscript{151} 14 Geo. 6, c. 27 (1950).
\textsuperscript{153} Id. at Art V.
\textsuperscript{154} See notes 42-44 supra, and accompanying text.
\textsuperscript{155} E.g., Sweden and Germany. See notes 121 and 122 supra.
Japan nor the United States will enforce even a domestic award directly; nor does either country have any rules applicable to foreign awards as such. But actions for an execution judgment on a foreign award are generally brought under the procedures for domestic awards in the competent domestic court. All states will apparently grant a judgment on an award, although the scope of judicial review practiced in various states at this stage is actually quite varied, despite common generalizations to the effect that awards are not reviewable on the merits, either on issues of fact or law.157

The FCN Treaty does not mean that a prior confirmation action under Japanese procedure would strengthen the award by entitling it to "full faith and credit" in an enforcement proceeding in those state courts where such an award would otherwise be more strictly reviewed. It is a local question whether such a Japanese judgment would receive more favorable treatment than an award.168 But, where an American defendant's property located in a progressive state is insufficient to satisfy a Japanese award, perhaps the award could be reduced to judgment there, and then that sister state's judgment would be entitled to full faith and credit in a state which otherwise practices strict legal review of all awards.

In Japan, a very recent decision of the Tokyo District Court upheld, and granted under Civil Procedure Code article 802, an execution judgment on a domestic award against the defendant, a foreign party. After the adverse award, the defendant in the arbitration brought two court actions seeking to nullify the award by voiding the arbitration contract. In one action he sued as an individual, and in the other as a firm. His defense was that he acted only as an agent for a foreign company. Then the winner in the arbitration brought a court action under Civil Procedure Code article 802 for an execution judgment on the award. The court consolidated these three actions and dismissed the attack against the arbitral contract and granted an execution judgment on the award. This most recent case enforcing

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155 Civil Procedure Code art. 802(1): "Execution to be undertaken by virtue of an award shall be made only when an execution judgment has been rendered for the admissibility thereof."
156 Murray Oil Prods. Co. v. Mitsui & Co., 146 F.2d 381 (2d Cir. 1944); Domke, International Arbitration of Commercial Disputes, in SOUTHWESTERN LEGAL FOUNDATION, INSTITUTE OF PRIVATE INVESTMENT ABROAD 131, 151 (1960).
157 See notes 130-134 supra and accompanying text.
158 See Georgia and other statutes cited supra note 134.
159 MacDonald, Ltd. & I. H. MacDonald v. Tomoi Trade Yugen-Kaisha, unreported case (Tokyo Dist. Ct., May 6, 1966) consolidated cases: 1959 (wa) No. 9287; 1962 (wa) No. 4868; 1964 (wa) No. 2836.
a domestic award against legal attack adds to the growing body of Japanese precedent indicating that arbitration awards will be upheld.

In Japan, the Civil Procedure Code provides only for domestic awards in article 800:

As between the parties the award has the effect of a final and conclusive judgment of a court of justice.

Then article 801 provides the grounds for annulling an award, and article 802 provides for an execution judgment:

Execution to be undertaken by virtue of an award shall be made only when an execution judgment has been rendered for the admissibility thereof.

2. The foregoing judgment shall not be rendered in case there exists a reason under which cancellation of award may be moved.

In a recent case involving an English award, the court held that, lacking separate procedures in Japan for the enforcement of foreign awards, the usual procedure for enforcing domestic awards would be applied to avoid rendering the applicable Geneva Convention nugatory. This same domestic procedure should be applied by analogy to executions on American awards except that the grounds for nullification in article 801 are not applicable, for, as noted above, the FCN Treaty sets different standards for recognition of the validity of an award.

IV. Conclusion

In U.S./Japanese trade there is an increasing use of arbitration. Its popularity is based on its own merits, and also on the fact that there is a better legal framework for transpacific arbitration than there is for U.S./Japanese litigation. For example, in Japan the arbitration proceeding can and probably should be in English because the transactions are handled in English, and English is understood by both parties. This is not legally possible in the courts where the proceeding and evidence must be in Japanese.

As has been seen, the FCN Treaty solution to the transpacific legal vacuum has been to neutralize the stigma of foreignness and to rely on domestic remedies in both countries to enforce arbitral contracts and awards. The domestic provisions are quite adequate in Japan,

and the same is true in all major United States jurisdictions. Indeed, recent case law trends may even extend the coverage of the United States federal act to disputes in U.S./Japanese "commerce" handled by those state courts which can not now enforce arbitration under their own law. But this will depend on future United States Supreme Court decisions to clarify the constitutional rationale of the federal act. For example, can the United States Federal Arbitration Act Section 2 be an independent basis (without diversity) for federal subject matter jurisdiction over disputes in "commerce"? Must section 2 then be applied in enforcement of arbitral agreements in state courts?

Whatever the United States Supreme Court may eventually decide, it is clear that the basic formulae for integrating arbitration into the legal systems of the Unites States and Japan are sufficiently different to require specific attention in drafting arbitral clauses. The most important differences are (1) the federalistic pattern (and gaps) in "American" arbitration law and (2) the degree of reliance on substantive law in Japanese arbitration results as opposed to the relative independence from law of American awards. This latter difference arises from the fact that, in American practice, judicial control only goes to review of threshold questions (validity and scope) to insure that the parties have agreed to arbitrate; thereafter, such an agreement means, in enforcement proceedings, that the parties have bargained away their substantive law rights to the extent that they are not observed voluntarily by the arbitrators. The Japanese law shows the same concern for threshold agreement, but it is also concerned, to a degree, with observance of substantive law rights in the award.

No doubt, arbitrators, though often not legally trained, intend in most cases to render an award consistent with the legal rights of the parties. To the extent that this is true, there is much to be said for a choice-of-law clause so that the arbitrator knows which law to apply. There is also much to be said for restricting court review to threshold consent, because further control would tend to cancel out the benefits of arbitration by adding litigation on top of arbitration. This theory underlies American arbitration, and it is also authorized in Japanese law, but its effectiveness in Japan depends on drafting it into arbitral agreements.

Given these different methods of integrating arbitral and judicial remedies in the American and Japanese legal systems, arbitration clauses must be tailored to fit the U.S./Japanese context. Specifically,
there are four points which might better be handled specially in the arbitral clause rather than waiting for the eventuation of prospectively unpredictable results imbedded in the procedures of the general clause recommended by the AAA/JCAA agreement. First, the place of arbitration should be specified, if at all possible. Second, the law governing the container contract, the arbitration clause, and all phases of the arbitration proceeding and award should be specified and in most cases should be the same law. Third, arbitrators should be specifically freed from the Japanese law requirement of reasoning in their awards. Reasoned results are important in most methods of settling disputes; but the point here is that the enforcement of reasoned results tends to suffocate arbitration with legal action, causing its alleged advantages to disappear. The parties might better litigate from the beginning.

Fourth, rather than a general catch-all clause, parties should draft a provision expressive of their own needs. For example, if the place of arbitration is New York, they should, in our opinion, reserve threshold questions for the court and specify that the arbitral clause is not separable. We suspect that very few buyers or sellers ever dreamed of "separability" so that arbitrators could determine questions of fraud in the container contract.

No boiler-plate clause will fit all purposes; nor will it fit any individual contract relationship perfectly. Complex long-term sales relationships, particularly, will benefit from specially drafted arbitral clauses. Nevertheless, all or part of the following provisions, which we have built around the AAA/JCAA clause, may prove helpful in solving the four problems mentioned above:

**Settlement of Disputes:**

(1) This clause is an integral part of this contract and is not separable and has no independent validity.

(2) Questions of the validity of this contract and the scope of this arbitral clause are reserved for the court, but if such questions are raised and decided in court, the loser shall pay all cost including a reasonable fee for the winner's attorney.

(3) All other disputes, controversies, or differences which may arise between the parties, out of or in relation to or in connection with this contract, or for the breach thereof, shall be finally settled by arbitration pursuant to the Japan-American Trade Arbitration Agreement, of September 16, 1952, by which each party hereto is bound except as modified by these provisions.

(4) All arbitrations will be held in ______(city)______and this sales
contract (including this arbitral clause), and all arbitral proceedings and awards hereunder will be governed by the internal law of [usually the place of arbitration].

(5) The parties hereto also agree that they will instruct the arbitrator in any proceeding hereunder not to specify his reasoning in his award.

Such a clause would integrate litigation and arbitration only on the critical issue of consent. Parties, wishing the efficiencies of arbitration, can therefore have them by conscious choice; however, at the same time they must give up certain judicial protections which are inconsistent with arbitral efficacy. Finally, the courts must continue to scrutinize the legality and factual basis for consent whenever a party raises the issue, for the policy of both Japanese and United States law is to allow the parties to choose arbitration as a substitute for a lawsuit—not as a substitute for the legal system itself.

APPENDIX

AGREEMENT BETWEEN THE
JAPAN COMMERCIAL ARBITRATION ASSOCIATION
AND THE
AMERICAN ARBITRATION ASSOCIATION
TO FACILITATE THE USE OF COMMERCIAL
ARBITRATION IN TRADE BETWEEN
JAPAN AND THE UNITED STATES OF AMERICA

Being convinced that a wider use of commercial arbitration would lend confidence and stability to commercial transactions between firms in Japan and in the United States of America, the Japan Commercial Arbitration Association and the American Arbitration Association are agreed henceforth to recommend that firms engaged in such trade should insert in their contracts the following clause:

“All disputes, controversies, or differences which may arise between the parties, out of or in relation to or in connection with this contract, or for the breach thereof, shall be finally settled by arbitration pursuant to the Japan-American Trade Arbitration Agreement, of September 16, 1952, by which each party hereto is bound.”
The terms of the agreement referred to in this clause are as follows:

1) Arbitration to be held in Japan shall be conducted under the rules of the Japan Commercial Arbitration Association; arbitration to be held in the United States of America shall be conducted in accordance with the rules of the American Arbitration Association.

2) If the place where the arbitration is to be held is not designated in the contract, or the parties fail to agree in writing on such place, the party demanding arbitration shall give notice to the Arbitration Association of the country in which the party resides. That Association shall notify the parties that they have a period of about 14 days to submit their arguments and reasons for preference regarding the place to a Joint Arbitration Committee of three members, two appointed by the respective Associations, and the third, to act as Chairman, to be chosen by the other two. The third member shall not be a member of either Association. The seats of the two Committees shall be in Tokyo and in New York. The determination of the place of arbitration by the Joint Arbitration Committee shall be final and binding upon both parties to the controversy.

3) The Associations each agree to establish such International Panels of Arbitrators as may be necessary to carry out the provisions of this agreement and to advise each other of the personnel of these panels.

4) Both Associations will cooperate in advancing international commercial arbitration, through increased use of the facilities of their organization, and will advise each other concerning mutual policies and progress in the interests of Japanese-American trade.

The foregoing shall be known as the Japan-American Trade Arbitration Agreement and shall be deemed to be incorporated in any contract containing the following clause:

"All disputes, controversies, or differences which may arise between the parties, out of or in relation to or in connection with this contract, or for the breach thereof, shall be finally settled by arbitration pursuant to the Japan-American Trade Arbi-
tration Agreement, of September 16, 1952, by which each party hereto is bound.”

Dated: September 16, 1952

THE JAPANESE COMMERCIAL ARBITRATION ASSOCIATION
By: Aiichiro Fujiyama

THE AMERICAN ARBITRATION ASSOCIATION
By: A. C. Croft