Due Process and Efficiency in Arbitral Proceedings —From a Swiss Perspective (summary)

Kazuaki NISHIOKA

Specially Appointed Associate Professor, Kobe University

This paper aims to examine recent developments in Swiss international arbitration law as to due process and efficiency in arbitral proceedings. Considering their unique notion and system, it also discusses how Japanese arbitration law approaches due process and efficiency in arbitral proceedings in Japan and puts forward some measures to revitalise international arbitration in Japan. It focuses on the phase of recourse against arbitral awards, dealing with three matters - (a) the notion of "universal or transnational public policy" at the stage of setting aside arbitral awards (Swiss private international law, Article 190(2)(e)); (b) the recently enacted "revision" proceeding for arbitral awards (Swiss private international law, Article 190a); and (c) a waiver of recourse against arbitral awards (Swiss private international law, Article 192).

First, on the public policy requirement at the stage of setting aside arbitral awards, the Swiss Federal (Supreme) Court held that an arbitral award is incompatible with public policy "if it disregards the essential and widely accepted values which, according to the prevailing ideas in Switzerland, should form the foundation of any legal order." This concept is referred to as "universal or transnational public policy". On the question of how Japanese law should deal with this notion, in particular, whether it should adopt such a notion, it is submitted that it is difficult and unnecessary to introduce it into Japanese arbitration law, and it is sufficient to interpret in a flexible manner the public policy requirement under Japanese arbitration law.

Secondly, Swiss law provides "revision" as a secondary and extraordinary remedy against arbitral awards in exceptional circumstances. Revision is a unique remedy from a comparative law perspective. According to Swiss private international law, Article 190a, parties to an international arbitration seated in Switzerland have recourse to the extraordinary remedy of revision. Revision serves to vacate an arbitral award where relevant circumstances that were not considered by the arbitral tribunal emerge after the arbitral award was rendered. There is no provision for revision in Japanese arbitration law. It is submitted that, under the current arbitration law in Japan, revision or *de facto* revision (that is, an application for setting aside after the time limit for it has elapsed) is not available. This is largely because there is no

provision for the revision of arbitral awards, and the time limit for an application for setting aside is mandatory and not extendable. Nevertheless, this paper argues that it is *de lege ferenda* appropriate to provide an additional remedy in exceptional cases, for instance, where a criminal act has influenced an arbitral award and where, despite the exercise of due diligence, a ground for challenge of an arbitrator (for example, lack of independence or impartiality) was discovered only after the arbitral award was rendered and no remedy is available.

Thirdly, Swiss international arbitration law allows the parties to waive any recourse against arbitral awards under certain conditions. Because Japanese arbitration law contains no provision on this point, it is unclear whether such a waiver is permissible under Japanese arbitration law. It is submitted that such a consensual waiver should be respected when the grounds for arbitrability and public policy are not concerned. Furthermore, this paper suggests that introducing a provision for such a waiver system would be worth considering from the standpoint of revitalising international arbitration in Japan.