Due Process as a Limit to Discretion in International Commercial Arbitration

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CHAPTER 12

Country Report: Japan

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§12.01 JAPANESE ARBITRATION LAW IN BRIEF

Japan has been a Contracting State of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as the 'New York Convention') since 1961. Japan has also implemented the 1985 UNCITRAL Model Law on International Commercial Arbitration (hereinafter referred to as the 'Model Law') with some deviations by enacting its arbitration law *Chûsai Hô* (hereinafter referred to as the 'Arbitration Act').[1] The Arbitration Act has been in force since 2004.

When a motion for annulment or enforcement of an arbitral award is filed in Japan, the District Courts serve as the courts of first instance.[2] An appeal may be made as of right to the High Courts.[3] A further appeal to the Supreme Court is subject to permission from the High Court from which the appeal is sought.[4]

In line with the civil law tradition, the primary source of Japanese law is legislation and the primary role of the courts is to shed light on the interpretation of legislation. There is no principle of binding precedents equivalent to that of stare decisis known in the common law jurisdictions. But the judgments of the higher courts are treated with respect and those of the Supreme Court, in particular, are generally followed in subsequent cases. Even the judgments of the District Courts can serve as useful points of reference, especially in areas such as arbitration where there is a scarcity of case law.

1. Law No. 138 of 2003. An unofficial English translation is available at: https://japan.kantei.go.jp/policy/sihou/arbitrationlaw.pdf.
2. Articles 5 and 44(1) of the Arbitration Act.
3. Articles 1 and 44(8) of the Arbitration Act and Art. 16(ii) of the Court Act (*Saibansho Hô*).
4. Article 10 of the Arbitration Act and Art. 337 of the Code of Civil Procedure (*Minji Soshô Hô*).

§12.02 RULES FOR POST-AWARD REVIEW OF ARBITRAL PROCEDURE

Japanese courts review the arbitral procedure when they decide on applications for the recognition and enforcement or the annulment of arbitral awards.

[A] Recognition and Enforcement of Arbitral Awards

Where the recognition or enforcement of an arbitral award is sought before a Japanese court, the grounds for denying recognition or enforcement, including those related to due process, are contained in Article V of the New York Convention as well as in Article 45(2) of the Arbitration Act, which implements Article 36 of the Model Law. While the New York Convention is applicable to foreign arbitral awards, arbitral awards rendered in Japan are subject to the Arbitration Act. Japan has made a declaration pursuant to Article I(3) of the New York Convention that it will limit the application of the Convention to awards made in the territory of other contracting States.[5] Accordingly, the Arbitration Act is applicable, rather than the New York Convention, where the seat of the arbitration is situated in the States or regions such as North Korea or Taiwan which are not parties to the New York Convention. In practice, however, the boundary between the New York Convention and the Arbitration Act is insignificant since the grounds for refusing recognition and enforcement under the two regimes are essentially the same.

[B] Annulment of Arbitral Awards

Implementing Article 34 of the Model Law, Article 44 of the Arbitration Act sets out in paragraph (1) the grounds for annulment, including those related to due process. The following circumstances constitute due process-related grounds:

(1) The party seeking annulment was not given proper notice of the appointment of arbitrators or of the arbitral proceedings (sub-paragraph (iii), implementing Article 34(2)(a)(ii) of the Model Law);
(2) The party seeking annulment was unable to present its case (sub-paragraph (iv), implementing Article 34(2)(a)(ii) of the Model Law);
(3) The award contains decisions on matters beyond the scope of submission to arbitration (sub-paragraph (v), implementing Article 34(2)(a)(iii) of the Model Law);
(4) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or Japanese law (sub-paragraph (vi), implementing Article 34(2)(a)(iv) of the Model Law);
(5) The '*content* of the award is in conflict with the public order or good morals' of Japan (sub-paragraph (viii), implementing Article 34(2)(b)(ii) of the Model Law).

5. *See*, https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2.

Importantly, sub-paragraph (viii) is different in its wording from Article 34(2)(b)(ii) of the Model Law as the latter simply states that 'the award is in conflict with the public policy of this State'. The phrase 'public order or good morals' is merely a standard expression denoting public policy which is used in various Japanese legislation including the Constitution and the Civil Code. It is, however, noteworthy that the word 'content' does not appear in the Model Law counterpart, a point which will be revisited later in this chapter.[6]

§12.03 INTERPRETATION

What follows will examine the case law to see how the due process-related grounds for annulment and those for denying recognition and enforcement have been interpreted by the Japanese courts.

[A] Annulment

There have only been four reported cases on the annulment of arbitral awards since the entry into effect of the Arbitration Act in 2004. One of these cases is a decision of the Supreme Court[7] which concerned an arbitrator's duty to disclose circumstances giving rise to doubts as to his independence and impartiality. But the independence and impartiality of an arbitrator are excluded from the scope of survey for this book on the notion that these matters do not concern a limit on the exercise of arbitral discretion with respect to the conduct of the proceedings. This chapter will accordingly focus on the decisions rendered in the other three cases:

(1) The decision of the Tokyo District Court on 28 July 2009[8] (hereinafter referred to as the '2009 Tokyo District Court decision' or the '2009 decision'),
(2) The decision of the Tokyo High Court on 13 March 2012[9] (hereinafter referred to as the '2012 Tokyo High Court decision' or the '2012 decision'),
(3) The decision of the Tokyo High Court on 1 August 2018[10] (hereinafter referred to as the '2018 Tokyo High Court decision' or the '2018 decision').

Among those three decisions, the 2018 Tokyo High Court decision is particularly noteworthy because it spelt out general guidelines as to how the courts should hear and determine motions for annulment. The analysis below will, accordingly, start by

6. *See*, the text accompanying *infra* nn. 23 and 60.
7. The decision of the Supreme Court on 12 December 2017 (reported in *民集 (Minshû)* vol. 71-10, 2106).
8. Reported in *判例タイムズ (Hanrei Times)* vol. 1304, 292. The decision of the appellate court, the Tokyo High Court, on 26 February 2010 is unreported.
9. Reported in D1-Law.com *判例体系 (Hanrei Taikei)* at ID 28211461. It was appealed from the decision of the Tokyo District Court on 13 June 2011 (reported in *判例時報 (Hanrei Jihô)* vol. 2128, 58).
10. Reported in *金融・商事判例 (Kinyû Shôji Hanrei)* vol. 1551, 13. An appeal from this decision was filed to the Supreme Court but it is not known how it was (or is being) handled.

examining these guidelines. It will then look individually at the due process-related grounds for annulment to see how they have been interpreted in those three decisions.

[1] General Guidelines for Handling a Motion for Annulment

In line with the civil law tradition, the judgments and decisions of the Japanese courts do not usually contain an extensive observation in general terms. The 2018 Tokyo High Court decision, however, did spell out general guidelines as to how a motion for annulment should be heard and determined. The following observations are particularly noteworthy:

(A) In view of the fact that the Arbitration Act was enacted to implement the Model Law, the courts interpreting the Act should avoid the temptation to follow the usual analysis they would take when they interpret the elaborate rules applicable to domestic litigation. The courts should rather adopt the interpretations which are commonly adopted in other countries or which would be accepted in the international community (hereinafter referred to as the 'observation (A)').[11]

(B) Arbitrators are expected to conduct hearings with a full appreciation of the features distinguishing arbitration from litigation such as the finality of the decision at first instance, expeditiousness, and a high level of flexibility and expertise. To avoid the protraction of arbitral proceedings and the escalation of costs, the courts should take care not to impose on arbitrators the exacting procedural burdens and obligations which would be required of domestic litigation (hereinafter referred to as the 'observation (B)').[12]

(C) The grounds for annulment should not be read expansively or by analogy but should rather be interpreted within the four corners of the words used in the text (hereinafter referred to as the 'observation (C)').[13]

[2] Inability to Present One's Case

Implementing Article 34(2)(a)(ii) of the Model Law, Article 44(1)(iv) of the Arbitration Act allows the courts to set aside an arbitral award if the party filing the motion for annulment was unable to present its case in the arbitral proceedings. In the above-mentioned 2018 decision, the Tokyo High Court ruled that this ground for annulment covered the situations where the arbitral tribunal took deliberate steps to obstruct a party from presenting its case.[14] In the same decision, the High Court ruled, consistent with its own observation (C), that it would not cover the situation where the party seeking annulment had merely complained about the period fixed by the tribunal for

11. *Id.*, para. 2(1).
12. *Ibid.*
13. *Id.*, para. 2(4).
14. *Ibid.*

presenting its case.[15] Importantly, the court also stressed that arbitrators had no duty to provide the parties with endless opportunities to present their case, emphasizing the need to avoid the protraction of arbitral proceedings and the escalation of costs.[16] The High Court went on to hold, consistent with its own observation (A), that the ground for annulment under Article 44(1)(iv) should be interpreted by reference to international standards. It observed that under the current international standards, the relevant test was whether the parties were treated equally and provided with a sufficient opportunity to present their case.[17]

In the above-mentioned 2009 decision, the Tokyo District Court interpreted this ground for annulment restrictively, holding that it only covered the situations where there was a serious breach of due process.[18] On that reasoning, the court held that this ground for annulment would cover the situations where, for example, the party seeking annulment was provided with virtually no opportunity to present its case and where the award was based on evidence the party could not be aware of. Applying the same reasoning, the court held that this ground for annulment would not cover the situations where the party seeking annulment was merely unaware of the significance of particular issues involved in the case.

[3] Decisions Beyond the Scope of Submission

Implementing Article 34(2)(a)(iii) of the Model Law, Article 44(1)(v) of the Arbitration Act allows the courts to set aside an arbitral award if it contains decisions on matters beyond the scope of submission to arbitration. This ground, too, may be seen as safeguarding due process.

In the above-mentioned 2018 decision, the Tokyo High Court ruled, consistent with its own observations (A) and (B), that the scope of a party's submission should not be determined by the rigid legal theory for domestic litigation but rather by viewing the dispute from a socio-economic perspective.[19] In this case, the party who filed the motion for annulment argued that the arbitral tribunal had gone beyond the scope of submission as it had based its award on the restitution of unjust enrichment, whereas in fact what had been sought was compensation for damages, a distinction which would be important in domestic litigation. The court, however, rejected this argument, holding that the dispute in this case, when viewed from a socio-economic perspective, concerned the repayment of prepaid money and accordingly, the precise legal basis for the return – whether compensation for damages or the restitution of unjust enrichment – was immaterial.[20]

15. *Ibid*.
16. *Ibid*.
17. *Id*., para. 2(5).
18. 2009 Tokyo District Court decision, *supra* n. 8, para. 1(4).
19. 2018 Tokyo High Court decision, *supra* n. 10, para. 3(2)a.
20. *Ibid*.

[4] Breach of Procedural Rules for Arbitration

Implementing Article 34(2)(a)(iv) of the Model Law, Article 44(1)(vi) of the Arbitration Act allows the courts to set aside an arbitral award if the arbitral procedure was in breach of Japanese law.

In the above-mentioned 2018 decision, the Tokyo High Court held, consistent with its own observation (B), that a deviation of the arbitral procedure from the procedural rules for domestic litigation would not in and of itself constitute a ground for annulment.[21] The court confirmed that what mattered was the breach of the Arbitration Act rather than the Code of Civil Procedure, a statute which is applicable to domestic litigation. To emphasize this point, the court noted a change in the Japanese arbitration law. Prior to the enactment of the Arbitration Act, the provision stipulating that the 'arbitral procedure shall be subject to the statutory rules for civil litigation to the extent not incompatible with its nature' had been contained in the statute[22] which was the predecessor of the Arbitration Act. This provision was removed when the Arbitration Act was enacted.

[5] Violation of 'Public Order or Good Morals'

Article 44(1)(viii) of the Arbitration Act allows the courts to set aside an arbitral award if 'the *content* of the award is in conflict with the public order or good morals' of Japan. As noted above, the word 'content' does not appear in the corresponding provision of the Model Law.[23] Despite this textual focus on the 'content' of the arbitral award, the Japanese case law takes the position that the arbitral procedure is also subject to public policy scrutiny.

Thus, in the above-mentioned 2012 decision, the Tokyo High Court ruled that the words 'public order or good morals' could not be interpreted as excluding the procedural dimension of public policy.[24] It further held that the specific components of the 'public order or good morals' could not be determined by international public policy but should be determined in line with the language of Article 44(1)(viii) by reference to the Japanese legal order.[25]

In the above-mentioned 2018 decision, the Tokyo High Court ruled that the infringement of the due process requirement which the lower court had considered to constitute a violation of the 'public order or good morals' was not, in fact, sufficiently grave to be considered as such. The High Court, however, did not go as far as denying that arbitral procedure should be subject to public policy scrutiny.[26]

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21. *Id.*, para. 2(3).
22. Article 1 of the Act on Public Notification Procedure and Arbitral Procedure (*Kôjisaikoku Tetsuzuki oyobi Chùsai Tetsuzuki ni kansuru Hôritsu*).
23. Article 34(2)(b)(ii) of the Model Law.
24. 2012 Tokyo High Court decision, *supra* n. 9, para. 2(1).
25. *Id.*, para. 2(2).
26. 2018 Tokyo High Court decision, *supra* n. 9, para. 3(2)c.

[B] Recognition and Enforcement

The cases concerning the recognition and enforcement of arbitral awards date back further than the enactment of the Arbitration Act as Japan has been a Contracting State of the New York Convention since 1961. Still, there is not a significant number of reported cases and these decisions were primarily based on factual findings. They are accordingly not particularly illuminating on how the Japanese courts will interpret the grounds for recognition and enforcement.

Thus, in a recent decision rendered on 25 March 2011,[27] the Osaka District Court simply held that none of the grounds for resisting recognition or enforcement had been proven, without shedding light on how they were to be interpreted. Earlier, in a decision rendered on 20 June 2001, the Tokyo District Court rejected the defendant's assertion under Article V(1)(b) of the New York Convention that it had been unable to present its case.[28] The court based its decision on the finding that the defendant had abstained from participating in the proceedings notwithstanding that it had received proper notices.

More interesting issues were addressed by the decision of the Yokohama District Court on 25 August 1999.[29] In this case, the defendant asserted under Article V(1)(b) of the New York Convention that it had not been given proper notice of the appointment of the arbitrator or of the arbitral proceedings as the notice it had received had been written in Chinese language without any Japanese translation attached. The court rejected the assertion, finding that the defendant had agreed, through the choice of the Chinese institutional arbitration, to arbitration conducted in Chinese language.[30] The defendant also asserted under Article V(2)(b) of the New York Convention that the recognition and enforcement of the award was contrary to the public policy of Japan as the plaintiff had adduced falsified evidence in the arbitral proceedings. The court rejected this assertion, finding that the defendant's allegation was not substantiated.[31] It added that had the defendant's allegation been true, it would still not have resulted in the violation of the public policy of Japan. The court, however, did not clarify whether adducing falsified evidence would ever constitute a violation of the public policy of Japan.

The public policy ground was also addressed in a judgment of the Tokyo District Court of 19 June 1995.[32] The defendant asserted under Article V(2)(b) of the New York Convention that the recognition and enforcement of the award was contrary to the public policy of Japan because a fair decision could not have been expected from the arbitrators who were all members of the Chinese communist party while the plaintiff was a state-owned company of China and because the arbitrators had dismissed all of the defendant's submissions and had based their arbitral award on findings of fact which were unilaterally and erroneously made. The court rejected the defendant's

27. Reported in *判例タイムズ (Hanrei Times)* vol. 1355, 249.
28. Reported in the Westlaw Japan as the case 2001WLJPCA06200008.
29. Reported in *判例タイムズ (Hanrei Times)* vol. 1053, 266.
30. *Id.*, para. 2.
31. *Id.*, para. 3.
32. Reported in *判例タイムズ (Hanrei Times)* vol. 919, 252.

assertion, finding first that the appointment of the arbitrators was orderly in view of the fact that the defendant had failed to participate in the constitution of the tribunal and second that the arbitral award did take into account the defendant's submissions.

Finally, in an older case of the judgment of the Osaka District Court of 22 April 1983,[33] the defendant asserted under Article V(1)(b) of the New York Convention that it had been unable to present its case because it had not been properly represented in the arbitral proceedings. The court held that this assertion was not supported on the facts of the case.

All five of the decisions and judgments outlined above have disposed of the case through the finding of facts without articulating the interpretation of the grounds for the refusal of recognition and enforcement. It is, however, noteworthy that two of these judgments, namely the judgment of the Yokohama District Court of 25 August 1999 and the judgment of the Tokyo District Court of 19 June 1995, proceeded on the assumption that the arbitral procedure was subject to public policy scrutiny under Article V(2)(b) of the New York Convention.

§12.04 THRESHOLD AND STANDARD OF REVIEW

There is support for the proposition that Japanese courts are entitled to apply a threshold in the administration of the grounds for annulment. Such a threshold entails that not every minor due process violation automatically results in the annulment of the arbitral award. This proposition rests on the language of Article 44(6) of the Arbitration Act, which implements the opening words of Article 34(2) of the Model Law. It provides that upon a motion for annulment, the court 'may' set aside the award if it finds that there are any grounds for annulment set forth in Article 44(1). The word 'may' (*dekiru* in Japanese) could be interpreted as implying that the courts have discretion to dismiss a motion for annulment even if a ground for annulment is shown to exist. Arguably, a similar threshold may be applied in the administration of the grounds for refusal of recognition and enforcement under the New York Convention. In a case dealing with the duty to disclose circumstances giving rise to doubts about the impartiality and independence of arbitrators, both the Osaka District Court at first instance and the Osaka High Court which heard the appeal[34] proceeded on the assumption that they did have discretion to dismiss a motion for annulment, though the Osaka High Court ultimately did not resort to the discretion because the procedural flaw involved in the case was found to be grave.[35] It has indeed been suggested by commentators that the discretionary dismissal is impermissible where the deficiency is determinative of the outcome of the award or grave in its own right.[36]

33. Reported in *下民集 (Kaminshû)* vol. 34 (1–4), 169.
34. The decision of the Osaka District Court on 17 March 2015 (reported in *民集 (Minshû)* vol. 71-10, 2146) and the decision of the Osaka High Court on 28 June 2016 (reported in *民集 (Minshû)* vol. 71-10, 2166).
35. The case was further appealed to the Supreme Court but the latter did not rule on the point in its decision on 12 December 2017 (*supra* n. 7).
36. *See, e.g.*, Kouichi Miki & Kazuhiko Yamamoto (eds) *新仲裁法の理論と実務 (Theory and Practice under the new Arbitration Act)* (Yûhikaku, 2006) 352 (Remarks by Naoki Idei).

As far as the standard of review is concerned, the Japanese courts have some leeway in assessing under Article 44(1)(vi) whether the arbitral procedure was in accordance with Japanese law. Such leeway exists where the provision of the Arbitration Act alleged to be infringed gives the courts a margin of appreciation. The courts have such a margin in assessing, for example, whether the arbitral tribunal has provided the parties with an 'adequate' (*jûbun na* in Japanese) opportunity to present their case (Article 25(2), implementing Article 18 of the Model Law[37]), whether the tribunal was right to refuse to allow a party to amend its claim or defence having regard to the delay in making the amendment (Article 31(3), implementing Article 23(2) of the Model Law), or whether the tribunal was correct in concluding that the party had shown no sufficient cause for failing to appear at a hearing or to produce documentary evidence (Article 33(3), implementing Article 25(c) of the Model Law). The courts may rely on such broadly phrased provisions to show deference to the arbitral tribunal's determinations. Thus, in applying Article 25, the 2018 Tokyo High Court decision accepted the arbitral tribunal's determinations on the conduct of proceedings, describing it as belonging to the domain of the tribunal's prerogative.[38]

§12.05 DUE PROCESS PARANOIA

The expression 'due process paranoia' is a recent buzz phrase in arbitration circles. It refers to arbitrators who have an exaggerated anxiety or suspicion that they may be criticized by national courts for failing to comply with due process requirements. Out of fear that their arbitral award may be challenged in courts, these arbitrators may become reluctant to act decisively in the conduct of arbitral proceedings.[39] Such a paranoia is problematic because it may result in the protraction of proceedings and the escalation of costs.

In Japan, 'due process paranoia' has so far scarcely been on the lips of arbitral practitioners or discussed in literature.[40] There is, however, no reason to believe that arbitrators seated in Japan are any less susceptible to such a paranoia than those seated in other countries. Accordingly, the remainder of this chapter will focus on this phenomenon, beginning with the evaluation of the Japanese case law to see whether it has the effect of causing or curbing due process paranoia.

[A] Evaluation of the Case Law

Due process paranoia is caused by the lack of certainty as to how the grounds for annulment and for the refusal of recognition and enforcement are to be interpreted. If

37. The expression used in the Model Law is 'full opportunity'. It is, however, not sensible to take it literally to mean an endless opportunity.
38. 2018 Tokyo High Court decision, *supra* n. 10, para. 3(2)a.
39. Queen Mary University of London, White & Case, '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration' 10.
40. However, *see* Koji Takahashi, '日本法から見た「適正手続パラノイア」('Due Process Paranoia' from the Viewpoint of Japanese Law)' JCA Journal vol. 746 13–18 (August 2019).

there is a dearth of case law shedding light on interpretation, risk-averse arbitrators would be motivated to stay within the safe zone. The dearth of case law will then be perpetuated, resulting in a vicious circle.

In Japan, as outlined above, there are only a small number of decisions in which the courts have interpreted the grounds for annulment or those for the refusal of recognition and enforcement. Against this backdrop, any remarks of the courts, even if made obiter dicta or as general observations, can be helpful to curb due process paranoia. As noted above, such remarks are to be found in the 2009 Tokyo District Court decision[41] and the 2018 Tokyo High Court decision.[42]

The 2018 Tokyo High Court decision, in particular, contains a number of remarks which would have the direct effect of curbing due process paranoia. Those include the above-mentioned general observation (B) which acknowledged the differences between arbitration and court proceedings[43] as well as the statement that arbitrators have no duty to provide the parties with endless opportunities to present their cases.[44] Significantly, the latter statement was made with an emphasis on the need to avoid the prolongation of proceedings and the escalation of costs.

Due process paranoia will also be curbed by the restrictive interpretation of the grounds for annulment and those for the refusal of recognition and enforcement. The above-mentioned general observation (C) made in the 2018 Tokyo High Court decision which acknowledged the need to avoid expansive interpretation of the grounds for annulment[45] would accordingly be helpful. In terms of individual grounds for annulment, the court in the same decision avoided an expansive interpretation with respect to the ground for annulment based on inability to present one's case (sub-paragraph (iv) of Article 44(1)).[46] The 2009 Tokyo District Court decision adopted a restrictive interpretation with respect to the same ground.[47] With respect to the ground for annulment based on the violation of 'public order or good morals' (sub-paragraph (viii) of Article 44(1)), however, due process paranoia may be caused by the above-mentioned 2012 decision in which the Tokyo High Court interpreted it expansively as covering the procedural dimension of public policy[48] and by the 2018 decision in which the Tokyo High Court ruled on the same assumption.[49] In the context of recognition and enforcement, too, the Yokohama District Court and the Tokyo District Court proceeded on the assumption that the procedural dimension of public policy was covered by the 'public policy' within the meaning of Article V(2)(b) of the New York Convention.[50]

Due process paranoia will be curbed by permitting arbitrators to conduct proceedings in accordance with the international standard of arbitration. In this

41. *Supra* n. 8.
42. *Supra* n. 10.
43. *Supra* n. 12.
44. *Supra* n. 16.
45. *Supra* n. 13.
46. *Supra* nn. 14 and 15.
47. *Supra* n. 18.
48. *Supra* n. 24.
49. *Supra* n. 26.
50. *Supra* nn. 31 and 32.

respect, the above-mentioned general observations (A)[51] and (B)[52] in the 2018 Tokyo High Court decision would be helpful. The court in the same case also deferred to the arbitral tribunal's determinations on the conduct of the proceedings, describing it as belonging to the domain of the arbitrators' prerogative.[53] Such a deferential stance, too, should have the effect of curbing due process paranoia. In terms of individual grounds for annulment, the court in the same decision helpfully confirmed, with respect to the ground for annulment based on the arbitral procedure being contrary to Japanese law (sub-paragraph (vi) of Article 44(1)), that what mattered was the breach of the Arbitration Act rather than the Code of Civil Procedure.[54] It is equally helpful that the court in the same decision ruled, with respect to the ground for annulment based on the award going beyond the scope of submission to arbitration (sub-paragraph (v) of Article 44(1)), that the 'scope of submission' should be determined by looking at the dispute from a socio-economic perspective rather than by the rigid legal theory for domestic litigation.[55] On the other hand, on the understanding that the arbitral procedure was subject to public policy scrutiny (sub-paragraph (viii) of Article 44(1)), the 2012 Tokyo High Court decision confirmed that the components of 'public order or good morals' were to be determined by reference to the domestic legal order.[56] This confirmation may exacerbate due process paranoia on the part of arbitrators who are not familiar with the Japanese legal system.

In summary, one can identify two countervailing factors with respect to due process paranoia in the current case law of Japan. On the one hand, there are not many cases in which the courts have illuminated the interpretation of the grounds for annulment and those for the refusal of recognition and enforcement. This factor may cause due process paranoia, which may be exacerbated by the assumption of the case law that the arbitral procedure is subject to public policy scrutiny. There are, on the other hand, a number of remarks and rulings which will have the effect of curbing due process paranoia.

[B] Public Policy Scrutiny of Arbitral Procedure

In the light of the above analysis, this chapter concludes with a reflection on whether or not there is a solid reason to maintain the current position of Japanese case law that the arbitral procedure is subject to public policy scrutiny.

The majority of commentators[57] believes that the procedural dimension of public policy is covered by the words 'public policy' under Article 34(2)(b)(ii) of the Model

51. *Supra* n. 11.
52. *Supra* n. 12.
53. *Supra* n. 38.
54. *Supra* n. 21.
55. *Supra* n. 19.
56. *Supra* n. 25.
57. *See, e.g.*, Takeshi Kojima & Takashi Inomata, *仲裁法 (Arbitration Law)* 520–522 (Nihon Hyôron Sha, 2014); Nobumichi Teramura '手続的公序違反による国際仲裁判断の取消し (The Annulment of an International Arbitral Award for Violation of Procedural Public Policy)' (2014) 66-3 Doshisha Law Review 308–312; and Kazuhiko Yamamoto & Aya Yamada, *ADR 仲裁法 (ADR and Arbitration Law)* 368 (2nd ed., Nihon Hyôron Sha, 2015).

Law and argues that the same interpretation should be given to the corresponding words 'public order or good morals' under Article 44(1)(viii) of the Arbitration Act. For the interpretation of the Model Law, they rely on the UNCITRAL Report, which says:

> It was understood that the term 'public policy', which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside. It was noted, in that connection, that the wording 'the award is in conflict with the public policy of this State' was not to be interpreted as excluding instances or events relating to the manner in which an award was arrived at.[58]

Among the first to form what was to become the majority opinion in Japan was the commentary on the Arbitration Act written at the time of its enactment by a group of authors who had served the secretariat of a governmental body in charge of drafting the Act. The English version of the commentary states (in verbatim):

> In addition to content of an arbitral award, the case where arbitral proceedings are in conflict with the public policy and good morals is included in the Model Law. As examples of this, perjury by a witness, and acceptance of a bribe by an arbitrator (receipt from one of the parties for its own convenience) can be contemplated.
>
> The present item uses the wording 'content of an arbitral award', in the foundation to this; there is no intent to change the Model Law. Accordingly, even where it is a case that does not correspond to the grounds for setting aside in items (iii), (iv), or (vi), where a situation exists with respect to the arbitral proceedings which is conflict with the public policy and good morals, there is probably room for the interpretation that it corresponds to the grounds for setting aside in this present item.[59]

If, as stated here, no deviation from the Model Law was intended, it is hard to see why the word 'content' was added to the Arbitration Act. Whatever the legislative intent, it is not fruitful to dwell on it since what is more important is to take the most convincing interpretation in the present-day environment.

The author of the present chapter wishes to take the side of the minority of commentators[60] who favour a literal reading of the word 'content' and argue that the arbitral procedure is not covered. If, notwithstanding the language, the Japanese courts invoke the violation of 'procedural' public policy as a ground for setting aside arbitral awards, it would risk taking unsuspecting parties by unpleasant surprise.

The minority of commentators also argue that excluding the arbitral procedure from public policy scrutiny would not entail sacrificing due process. This is because if an arbitral tribunal takes any procedural step repugnant to the 'public order or good

58. Report of the United Nations Commission on International Trade Law on the work of its eighteenth session (Vienna, 3–21 June 1985) (A/40/17) para. 297.
59. Masaaki Kondo, *et al.*, *Arbitration law of Japan* (Shojihomu, 2004) 245.
60. *See, e.g.*, Kouichi Miki & Kazuhiko Yamamoto (eds) *新仲裁法の理論と実務 supra* n. 36, 341–342 (Remarks by Kouichi Miki); Keiichi Karatsu, '日本における国際商事仲裁判断が手続的公序に反するとして取り消された事件について (On the Case in which an International Commercial Arbitral Award in Japan was Set Aside for Violation of Procedural Public Policy)' (2012) 990 NBL 96-97.

morals' of Japan, this would usually trigger other grounds for annulment. If, for example, an arbitral tribunal has infringed the principle of equal treatment between the parties which is guaranteed under Article 25 of the Arbitration Act, it would fall foul of sub-paragraph (vi) of Article 44(1), a ground for annulment which may be invoked where the procedure was not in accordance with the Arbitration Act. Should there be any procedural step which is repugnant to the 'public order or good morals' of Japan and yet is not contrary to any specific provisions of the Arbitration Act, the case could be covered by sub-paragraph (iv) of Article 44(1), a ground for annulment which may be invoked where the party filing the motion was unable to present its case. Thus, in the cases of the 2012 Tokyo High Court decision and the 2018 Tokyo High Court decision, it was alleged that the tribunal had in its award omitted to deal with an important argument presented to it and a question was raised whether that omission constituted a violation of the procedural dimension of public policy. Such an omission may not qualify as an infringement of any specific provision of the Arbitration Act.[61] But if the omission means that the tribunal has ignored an important argument presented to it by treating the argument as if it were never presented, the situation would arguably be covered by sub-paragraph (iv) of Article 44(1).

Admittedly, the ground for annulment based on the violation of 'public order or good morals' under sub-paragraph (viii) of Article 44(1) differs from the other due process-related grounds for annulment under sub-paragraphs (iii) through to (vi) of Article 44(1) in that the former needs to be ascertained by the courts sua sponte (of its own accord), whereas the latter can only be invoked if the party filing the motion furnishes proof (Article 44(6), which implements the chapeau of Article 34(2)(a) of the Model Law). Arguably, however, it is the private interests of the parties which the due process requirements purport to protect. For the sake of the sua sponte review of public policy, it should be considered sufficient to submit the content of arbitral awards to public policy scrutiny. In any event, it will be difficult in practice to ascertain sua sponte the violation of procedural public policy.

In support of the view that the arbitral procedure should be shielded from public policy scrutiny, the author of the present chapter wishes to put forward an additional argument which ought to be given weight in the present-day climate of arbitration. Arbitration was once commended for its expediency and cost-effectiveness. With the tendency of 'judicialization', however, arbitration today is plagued by increasing delays and costs. Now, there is a heightened awareness of due process paranoia as a factor contributing to the protraction of proceedings and the escalation of costs. In these circumstances, it is important to stress that shielding the arbitral procedure from public policy scrutiny would be effective to curb such a paranoia. Since 'public policy' is an opaque concept, the public policy scrutiny of arbitral procedure could breed such a paranoia. The expression 'public order or good morals of Japan' is particularly prone to raise suspicions in the mind of foreign arbitrators that it may be something insularly

61. Where, on the other hand, a claim is omitted from an award, the Arbitration Act allows a party to request the tribunal to make an additional award (Art. 43, implementing Art. 33(3) of the Model Law).

unique to Japan.[62] Legal certainty and transparency will be enhanced by excluding the arbitral procedure from public policy scrutiny.

For the foregoing reasons, it is submitted that the Japanese courts should depart from the current case law and hold that the arbitral procedure is not subject to public policy scrutiny. By taking this initiative, the Japanese courts could further strengthen their stance for curbing due process paranoia and would also be able to help enhance the attractiveness of Japan as a seat of arbitration.

[C] Concluding Remarks

It must be acknowledged that due process paranoia is not the only factor that has contributed to the increasing duration and costs of arbitral proceedings. There are indeed multiple factors, including excessively long submissions made by counsels and the status of arbitrators: unlike judges, they have contractually agreed to provide a dispute resolution service. In order to obtain customer satisfaction, arbitrators naturally become more inclined than would judges to provide the parties with opportunities to thoroughly present their case, conscious also of the finality of their decision. Accordingly, curbing due process paranoia is not a panacea for the protraction of proceedings. It should also be mentioned that there are steps that may be taken to relieve the symptoms of due process paranoia. Thus, where additional costs have resulted, it may be possible to distribute them fairly among the parties.

That having been said, every effort should be made to curb due process paranoia as it is an important factor which risks undermining the appeal of arbitration. Generally, an effective prescription for paranoia is to remove the cause of unfounded anxiety. For due process paranoia, an effective prescription would be to shield the arbitral procedure from public policy scrutiny. That prescription, moreover, comes without negative side effects because due process can be sufficiently safeguarded by other grounds for annulment.

While this chapter has focused on Japanese law, it will also be useful to examine the law of other jurisdictions to see whether the term 'public policy' under the Model Law is interpreted as covering the procedural dimension of public policy. For those jurisdictions which, adhering to the UNCITRAL Report,[63] adopt such interpretation, the heightened awareness of due process paranoia and the problems caused by it should serve as an impetus to reconsider whether it is appropriate to maintain the same interpretation.

62. Yasuhei Taniguchi, '仲裁判断取消事由としての手続的公序違反 (Violation of Procedural Public Policy as a Ground for the Annulment of Arbitral Awards)' in Kouichi Miki et al. (ed.), *国際仲裁と企業戦略 (International Arbitration and Corporate Strategy)* (Yûhikaku, 2014) at 305 argues for the removal of the words 'good morals'. As the Japanese legal system has received much influence from German law, the standard legislative expression 'public order or good morals' can be traced to the German phrase 'öffentliche Ordnung und gute Sitten.' But only the words 'öffentlichen Ordnung (ordre public)' are used in the German arbitration law on the annulment of arbitral awards (Zivilprozessordnung § 1059).
63. *Supra* n. 58.