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論　　説

Arbitration and the State:
A Japanese Perspective

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Introduction

This paper will reflect on the relationship between arbitration and the state with reference to discussions in Japan.

In Japan, the tendency is for the debate on arbitration to focus on discussing the appropriate solutions to concrete issues arising out of disputes.[1)] In contrast, theoretical reflections on the relationship between arbitration and the state has become more lively in other countries, based on the idea that solutions to concrete issues can be different according to varying understandings about this relationship.[2)] This paper will examine how the differences in views about this relationship might influence the solutions to concrete issues, referring to discussions in Japan.

The following sections will, first, describe the different views on this relation and discussions in Japan (I), and then, reflect on the possible impact of the differences of the view about this relation on concrete issues, taking the

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1) As an exception, Masato Dōgauchi, "Kokusai Shōji Chūsai: Kokka-Hō Chitsujo tono Kankei"[International Commercial Arbitration: the Relation with State Legal Orders], in Kokusai-Hō Gakkai (ed.), *Nihon to Kokusai-Hō no Hyakunen, 9, Funsō no Kaiketsu* [100 Years of Japan and Public International Law, Vol. 9, Dispute Resolution] (Sanseidō, 2001), 79.

2) See, in particular, E. Gaillard, *Aspects philosophiques du droit de l'arbitrage international* (ADI- Poche, 2008).

recognition and enforcement of annulled foreign awards as an example and referring to discussions in Japan (II). This paper will argue that, whereas the differences of the view on the relation between the arbitration and the states do not necessarily lead to a certain solution to a concrete issue with regard to international arbitration, they may have some indirect impact on the direction of the arguments.

I. Relationship between arbitration and the state

1. Different Views

As regards the relation between arbitration and the state, there are three main views: that arbitration belongs to the legal state order of the place of arbitration, that arbitration belongs to a non-state legal order, and that arbitration is a private act or a legal fact.

(1) The First View: Arbitration belonging to a State Legal Order

According to the first view, arbitration belongs to a specific state legal order, namely, the state legal order of the place of arbitration.[3] Arbitrators are inevitably subject to the legislative jurisdiction of the state in which the arbitral tribunal is placed. Regardless of the intention of the parties, the legislative and judicial authorities of the place of arbitration control the existence, constitution and activities of the arbitral tribunal, and the law of the place of arbitration determines primarily whether and under what conditions the arbitration is allowed.[4] State judges and arbitrators have a pronounced similarity in the sense that both of them are subject to territorial sovereignty.[5]

This view is criticized based on the difference between national judges and arbitrators: while the judicial function can be delegated by the forum legal order

3） F. A. Mann, "Lex Facit Arbitrum", in Pieter Sanders (ed.), *International Arbitration Liber Amicorum For Martin Domke* (Martinus Nijhoff, 1967), 157, 159.
4） Ibid 161.
5） Ibid 162. As an example supporting this view, see, Roy Goode, "The Role of the Lex Loci Arbitri in International Commcercial Arbitration" (2001) 17 (1) Arbitration International 19, 29-30.

to the court in an institutional way even if it has no jurisdiction over a specific case, the arbitrators have no power if they have no jurisdiction over a specific case, and, hence, the judicial function cannot be delegated by the state legal order of the place of arbitration to the arbitrators in an institutional way.[6] The adjudicative function is delegated to arbitrators by an arbitration agreement and not by a state legal order. Thus, it is impossible to incorporate an arbitral award into the state legal order of the place of arbitration.[7]

(2) The Second View: Arbitration belonging to a Non-State Legal Order

The second view considers arbitration to belong to a non-state legal order. This view is divided into two: the first one claims the existence of the *lex mercatoria* as a legal order and considers an arbitral award as a decision within it.[8] However, this view has been harshly criticized in that commercial customs or arbitration centers are established individually in each profession or each legal hierarchy and that they do not form a single legal order in their entirety.[9] In contrast, the second one claims that arbitration forms a particular legal order, the arbitral legal order.[10] The supporters of this view claim that, considering the facts that states recognize and enforce arbitral awards without review of the merits according to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention),[11] states are willing to be subject to arbitral proceedings and to arbitral awards, and that some judgments declare that an arbitral award is

6） S. Bollée, *Les méthode du droit international privé à l'épreuve des sentences arbitrales* (Economica, 2004), 23-24.

7） Ibid 24-25. Also, Gaillaird criticizes this view in pointing out that it is just a belief that the state of the place of arbitration controls arbitration most entirely and effectively. *Gaillard* (n 2) 43.

8） B. Goldman, "Frontières du droit et 'lex mercatoria'" (1964) 9 Archives de philosophie du droit 177, 187-192; B. Goldman, "La lex mercatoria dans les contrats et l'arbitrage intetrnationaux: réalité et perspectives" (1979) Journal du droit international [Clunet] 471.

9） P. Lagarde "Approche critique de la *lex mercatoria*", in *Le droit des relations économiques internationales – études offertes à Berthold Goldman* (Litec, 1982), 125, 135-139.

10） *Gaillard* (n 2) 60-100; J.-B. Racine, "Réflexions sur l'autonomie de l'arbitrage commercial international" (2005) 2 Revue de l'arbitrage 305; L. Chedly, "L'exécution des sentences internationales annulées dans leur pays d'origine: cohérences en droit comparé et incohérence du droit tunisien" (2009) Clunet 1139.

11） Article 5 of the New York Convention.

not connected with any state legal order, the community of states gives the international arbitration a true autonomy and acknowledges the existence of the arbitral legal order.[12] Against this view, it is pointed out that the definition of the arbitral legal order is unclear,[13] that the proof of its existence is insufficient,[14] and that the adjudicative function is delegated to arbitrators by an arbitration agreement and not by any legal order.[15]

(3) The Third View: Arbitral Award as a Private Act or a Legal Fact

The third view considers an arbitral award as just a private act or a legal fact.[16] According to this view, an arbitral award is not a concrete legal norm, and legal relations in arbitration arise not out of an arbitral award itself but out of rules applying to it. Thus, arbitration does not belong to any legal order and exists outside it.[17] Based on this idea, this view reflects on the question of what kind of coordination among state legal orders are appropriate to regulate international arbitration. We should seek international harmony in solutions and assurance of parties' predictability, and in order to achieve these goals, it is necessary to assign a central role to a certain state legal order instead of accepting the situation that each state legal order intervenes with international arbitration independently. In practice, it is only the state legal order of the place of arbitration that can play such a role. Then, the true question is to what extent we should give a central role to that state's legal order. It should be examined concretely.[18]

In response it can be pointed out that the privileged position of the state legal order of the place of arbitration is not the only logical conclusion one can reach

12）*Gaillard* (n 2) 92-100.
13）S. Bollée (translated by S. Haguimura), "Kokusai Chūsai no Jiritsu to 'Kōritsusei' no Kōryo" [Autonomie de l'arbitrage international et considérations d'efficacité], in K. Yoshida/M. Mekki (eds.), *Kōritsusei to Hō: Songaigainen no Hen'yō* [L'efficacité et le droit, les transformations de la notion de prejudice] (Yūhikaku, 2010), 143, 152.
14）Ibid 152-153.
15）*Bollée* (n 6) 84.
16）*Bollée* (n 6) 37-38 ; P. Mayer, "L'autonomie de l'arbitra international dans l'appréciation de sa propre compétence" (1989) 217 Recueil des cours de l'académie de droit international 319, 392.
17）*Bollée* (n 6) 38. See also, J. Guillaumé, *L'affaiblissement de l'État-Nation et le droit international privé* (L. G. D. J., 2011), 58.
18）*Bollée* (n 13) 154.

from the view that an arbitral award is just a private act or a legal fact. It is possible that each state regulates arbitration in its own way, and that, as a result, the international harmonization of solutions cannot be achieved.[19] In fact, one author criticizes this view on efficiency grounds by mentioning that, under this view, the evaluation of the state legal order of the enforcement should be decisive and that it is possible that contradictory judgments on the effect of an arbitral award are rendered from state to state.[20]

(4) Summary

The criticism against the first view that the adjudicative function is delegated to arbitrators by an arbitration agreement and not by a state legal order is convincing. Thus, it seems theoretically difficult to consider an arbitral award as a judgment of the state of the place of arbitration.

As for the second view that an arbitral award belongs to a non-state legal order, it seems difficult to justify the existence of such an order. In addition, this view doesn't seem compatible with the New York Convention which applies to "the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought".[21]

Thus, this author finds the third view convincing and it seems appropriate to deal with arbitral awards as private acts or legal facts like contracts or torts.[22] However, the criticism against this view that the privileged position of the state legal order of the place of arbitration is not the only logical conclusion under this view seems appropriate. As a result, it is up to each state legal order to decide

19） D. Yokomizo, "Kōritsusei to Teishokuhō: Remy, Bollée Hōkoku eno Komento [Efficiency and Conflict of Laws: Comments on Prof. Remy's and Prof. Bollée's Presentations], in *Yoshida/Mekki* (n 13) 275, 292.

20） *Gaillard* (n 2) 55-57 (who expresses this third view as the one that arbitration is based on several state legal orders).

21） *Goode* (n 5) 23 (which denies the applicability of the New York Convention to non-state arbitral awards).

22） D. Yokomizo, "Funsō Shori niokeru Tōjisha Jichi" [Party Autonomy in Dispute Settlement](2014) 15 Kokusai Shihō Nenpō [Japanese Yearbook of Private International Law] 111, 119.

what treatment would be desirable with regard to the effect of arbitral awards.[23] Under this view, it is possible that the international harmonization of solutions cannot be achieved. However, this is a general problem which concerns the objective of the conflict of laws and hence is not limited to arbitration. Having said that, at least it can be pointed out that a desirable regulation should be examined from the viewpoint of the assurance of the parties' legitimate expectations.[24]

2. Discussions in Japan

How is the current debate in Japan? While this author has written an article in support of the above-mentioned third view,[25] the first view has been the one

23）In contrast, the application of the arbitration law in the state of the place of arbitration to the arbitration proceedings and the arbitral award can be explained from the viewpoint of the unilateralism. Each state offers its arbitration law to the parties and is ready to apply it unilaterally whenever the parties choose that state as the place of arbitration. Once the parties choose a state as the place of arbitration, what the other states can do is to recognize or refuse the effect of the award. One author claims this process convincingly in analogy to the unilateral application of a company law of the state of incorporation following the party's choice about the place of incorporation. See, S. Billarant, "Regard d' un internationalist sur l'ordre juridique arbitral", in R. Chaaban (dir.), *L'arbitrage détaché des lois étatiques* (Editions L'epitoge, 2012), 105, 114-123. Based on the above-mentioned idea, the author supports the first view, criticizing the third view in pointing out that the arbitral award is not a private act or a legal fact but a legal norm since it can be invalidated. *Ibid*., p. 118. However, the unilateral application of the arbitration law of the place of arbitration does not necessarily lead to the first view and is perfectly compatible with the third view as well since it can be said that legal relations by arbitration arise not out of an arbitral award in itself but out of rules applying to it. Considering that the adjudicative function is delegated to arbitrators by an arbitration agreement and not in an institutional way, it seems preferable to consider it as a private act like a contract or the incorporation of a company, which may be invalidated by the applicable law.

24）Cf. Y. Derains, "Attente légitime des parties et droit applicable au fond en matière d' arbitrage commercial international" (1987) Travaux du comité de droit international privé, Année 1984-1985 81, 88 (claiming that the arbitrators' interest in arbitration lies in the justification of the application of a law by showing that the applicable law corresponds to the parties' legitimate expectation). See also, T. Nakamura, "Torikesareta Chūsai Handan no Kokusaiteki Kōryoku"[International Effect of An Annulled Arbitral Award] in K. Yazaki (ed.), *Tajima Hiroshi Kyōju Kinen: Gendai Sentan Hōgaku no Tenkai* [In honor of Prof. Hiroshi Tagima: The Developments of Contemporary Advanced Jurisprudence] (Shinzansha, 2001), 551, 579 (claiming the respect for the parties' legitimate expectation in the possibility of the recognition of a judgment setting aside an arbitral award which is rendered by the court of the state of the place of arbitration).

25）*Yokomizo* (n 22).

generally accepted in Japan.[26] For example, one author claims as follows: arbitration can bring out the effective dispute resolution since it is incorporated into a state legal order and the effect of an arbitral award is recognized by the state's law,[27] and the factor connecting the arbitration to a state legal order is the place of arbitration.[28] However, this author's view is slightly different from the above-mentioned first view in the sense that the reason why the connecting factor is the place of arbitration does not lie in the legislative jurisdiction of the state of the place of arbitration but in Japanese legislative policy.[29] Then, there seems no great difference between this view and the third view in that both views attach importance to the state of the place of arbitration from the viewpoint of the legislative policy.[30]

II. Impact on concrete issues

1. Reflections: annulled foreign awards as an example

How much impact do differences between the views on the relation between arbitration and the state have on solutions to concrete issues? One issue will be discussed here as an example: the recognition and enforcement of an arbitral award annulled by a state court of the place of arbitration. States are divided as to whether such an award should be recognized and enforced or not.[31]

Under the first view, such an award has no room to be recognized in other

26） S. Nakano, "Kokusai Chūsai niokeru Chūsai Handan no Torikeshi" [Setting Aside of an Arbitral Award in International Arbitration] in M. Itō et al. (eds.), *Minji Tetsuzuki-hōgaku no Aratana Chihei* [New Horizon of Jurisprudence on Civil Procedure Law], (Yūhikaku, 2009), 1139; S. Nakano, "Kokusai Chūsai to Kokkahō Chitsujo tono Kankei" [Relation between International Arbitration and State Legal Orders] (2011) 110 (1) Kokusaihō Gaikō Zassi [The Journal of International Law and Diplomacy] 53, 63; *Dōgauchi* (n 1).

27） *Dōgauchi* (n 1) 82.

28） Ibid 84.

29） Ibid 84-85.

30） The author supporting the third view attaches the importance to the state legal order of the place of arbitration in order to achieve the international harmony of solution. See (n 17) and its accompanying text.

31） See generally, C. Alfons, *Recognition and Enforcement of Annulled Foreign Arbitral Awards: An Analysis of the Legal Framework and Its Interpretation in Case Law and Literature* (Peter Lang, 2010).

countries once it has been nullified by the state court of the place of arbitration.[32] This is the same as the case in which a judgement is quashed by an appeal court.

Under the second view, in theory it is up to each state legal order to decide how to deal with such an award.[33] In addition, this view does not give any indication about relevant questions such as whether to prioritize the arbitral award or the court decision setting it aside.[34] However, it is pointed out that, in reality, this view tends to be a grounds for justifying ignoring a court decision in the state of the place of arbitration.[35]

Also, under the third view (with accepting the above-mentioned criticism), it is up to each state legal order to decide how to deal with such an award.[36] However, since this view considers arbitration to be a private act, like a contract, it emphasizes the objective of the conflict of laws: the coordination among different state legal orders when each state evaluates an arbitral award.[37] For example, one author claims that the recognition of a decision setting aside an arbitral award should be examined under the ordinary framework of the recognition of foreign judgements.[38]

Thus, differences between the views on the relation between arbitration and the state do not necessarily lead to a certain solution to a concrete issue with regard to international arbitration. However, it can at least be said that they have some indirect impact on the direction of the arguments.

32）*Gaillard* (n 2) 188.
33）Ibid 189.
34）*Yokomizo* (n 19) 275, 293.
35）Cf. *Bollée*, (n 13) 156.
36）*Yokomizo* (n 34) 292.
37）Cf. P. Mayer, "Le phénomène de la coordination des ordres juridiques étatiques en droit privé" (2007) 327 Recueil des cours de l'académie de droit international 9, 23 (which claims that the objective of conflict of laws is the cordination among different state legal orders).
38）*Bollée* (n 13) 160-164; *id.*, (n 6) 259-278.

2. Discussions in Japan

How is the impact of the first view on concrete issues in Japan?

(1) Impact on Choice of Law

In this author's view, one impact of the debate exists with regard to the choice of law. Article 36 (1) of the Japanese Arbitration Law provides that "[t]he arbitral tribunal shall decide the dispute in accordance with such rules of law as are agreed by the parties as applicable to the substance of the dispute".[39] This provision was inspired by Article 28 (1) of the UNCITRAL Model Law on International Commercial Arbitration.[40] In the drafting process of Article 28 of the Model Law, there was an agreement among members that the parties should have complete autonomy to choose any rules to govern the substance of the dispute,[41] thus it is considered that conformity with the particular conflict-of-laws rules must not be sought.[42] "The dispute" in Article 28 that the arbitral tribunal decides in accordance with the rules of law chosen by the parties covers not only contractual matters but also non-contractual matters such as torts.[43] The only limitation is set

39） Law No. 138 of 2003. The translation of Japanese Arbitration Law can be found in M. Kondo/T. Goto/K. Uchibori/H. Maeda, T. Kataoka, *Arbitration Law of Japan* (Shōjihōmu, 2004). It is also available at "Japanese Law Translation", <http://www.japaneselawtranslation.go.jp/law/detail/?id=2784&vm=04&re=01&new=1> accessed 8 July 2021.

40） "(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules."
The text is available at < https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf > accessed 8 July 2021.
As for the influence of Article 28 of the Model Law on this provision, see, K. Miki/K. Yamamoto (eds.), *Shin Chûsai-hô no Riron to Jitsumu* [Theory and Practice of the New Arbitration Law], Jurisuto Zôkan [Jurist, Special Edition] (2006) 105 [M. Kondoh].

41） H. M. Holtzmann/J. E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer, 1989), 765.

42） P. Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (3rd, Sweet & Maxwell, 2010), 6-009.

43） S. Greenberg/C. Kee/J. R. Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge, 2011), 114-115.

by public policy concerns.[44] However, as for the Japanese law, not a few authors argue for a restrictive interpretation of Article 36 so that it applies only to contractual matters.[45] According to their view, the parties should not be free to choose applicable law relating to matters such as the capacity of executives of a company or rights *in rem* as mortgages since the Japanese choice-of-law rules, the Act on the General Rules of Application of Laws (*Hō no Tekiyō nikansuru Tsūsoku-hō [Tsūsoku-hō]*),[46] do not allow party autonomy on these legal relations. Otherwise arbitral awards would bring unjust conclusions with the applicable law being different from the one designated under the *Tsūsoku-hō* and confuse the transaction order. Therefore, Article 36 should narrowly be interpreted to cover only contractual matters.[47] We can discern the impact of the first view in this argument which considers litigation and arbitration in the same manner.

(2) Impact on an Annulled Foreign Award?

In contrast, with regard to the recognition and enforcement of an annulled foreign award, the majority of academic opinions argue that recognition and enforcement should be refused by the effect of such a court decision if it is to be recognized in Japan.[48] However, it should be noted that they do not support the

44） A. Broches, *Commentary on the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer, 1990), 145.

45） T. Kojima/A. Takakuwa (eds.), *Chūshaku to Ronten Chūsai-hō* [Commentary and Issues on Arbitration law] (Seirin-shoin, 2007), 212-213 [M. Dōgauchi]; T. Sawaki/M. Dōgauchi, *Kokusai-shihō Nyūmon* [Introduction to Private International Law] (8th ed., Yūhikaku, 2018), 377-379; S. Nakano, "International Commercial Arbitration Under the New Arbitration Law of Japan" (2004) 47 The Japanese Annual of International Law 96, 111; A. Takakuwa, "Aratana Chûsai-hô to Shôgai-Chûsai" [The New Arbitration Law and International Arbitration] (2004) 56 (7) Hōsō Jihō [Bar review] 1598, 1608-1609; S. Niibori/N. Kashiwagi, *Gurōbaru Shō-torihiki to Hunsōkaiketsu* [Global Commercial Transactions and Dispute Resolutions] (Dōbunkan, 2006), 167 [T. Nakamura].

46） No. 78 of 2006.

47） *Sawaki/Dōgauchi* (n 45) 377-379.

48） T. Nakamura, "Torikesareta Chūsai Handan no Kokusaiteki Kōryoku"[International Effect of An Annulled Arbitral Award] in K. Yazaki (ed.), *Tajima Hiroshi Kyōju Kinen: Gendai Sentan Hōgaku no Tenkai* [In honor of Prof. Hiroshi Tagima: The Developments of Contemporary Advanced Jurisprudence] (Shinzansha, 2001), 551, 575; *Miki/Yamamoto* (n 40) 384 [Nakamura], 386 [Yamamoto, Taniguchi] ; K. Yamamoto/A. Yamada, *ADR Chūsai-hō* [ADR Arbitration Law] (Nihon Hyōron-sha, 2008), 354 [K. Yamamoto]. See also, S. Nakano, "Kokusai Chūsai niokeru Chūsai Handan no Torikeshi"[Setting Aside of An Arbitral Award in International Arbitration], in M. Itō/H. Takahashi/H. Takada/H.

conclusion from the first view that the annulled award automatically has no effect in Japan. Instead, they consider it necessary that the foreign decision setting aside the award would meet the conditions provided by Article 118 of the Code of Civil Procedure[49] and be recognized. Why?

In this regard, one author supporting the first view suggests that "it is theoretically possible to make a certain *ex post* review on an annulled award from the recognizing state's viewpoint if the arbitration proceedings and the setting-aside procedure by the court can be considered separately".[50] However, under the first view which considers an arbitral award as a court decision of the state of the place of arbitration, it seems difficult to distinguish an award from the court decision setting it aside since the relation between them should be similar to the one between a judgment in the first instance and the one in a court of appeal.

Yamamoto/J. Matsushita (eds.), *Minji Tetsuzuki Hōgaku no Aratana Chihei* [A New Horizon of the Jurisprudence of Civil Procedure Law] (Yūhikaku, 2009), 1139, 1159. However, some authors criticize this view in claiming that the decision setting aside an arbitral award is an adjudication on procedural matters and cannot be considered as the one within the scope of Article 118 of the Code of Civil Procedure relating to the recognition of foreign judgments. Y. Hayakawa, "ICAA Conference 2000" (2000) 47 (5) JCA Journal 9 (in Japanese); K. Ogawa, "Chūsaichikoku Saibansho niyori Torikesareta Chūsai Handan no Wagakuni niokeru Shōnin oyobi Shikkō no Kahi (Ge)"[Possibility of the Recognition and Enforcement of An Arbitral Award Set Aside by the Court of the Place of Arbitration in Japan, Second Part] (2003) 50 (7) JCA Journal 28, 30; id., "Torikesareta Chūsai Handan no Shōnin Shikkō: Kinji no Kokusai Shōji Chūsai wo torimaku Jōkyō no Henka no Naka deno Sai-kentō" [Recognition and Enforcement of A Set-Aside Arbitral Award: Reexamination in Line with the Recent Change of the Situation Surrounding the International Commercial Arbitration] (2007) 16 Nihon Kokusai Keizai-hō Gakkai Nenpō [International Economic Law (Published Annually by the Japan Association of International Economic Law] 172, 176.

49） Article 118 of the Code of Civil Procedure is as follows:
"A final and binding judgment rendered by a foreign court shall be effective only where it meets all of the following requirements:
(i) The jurisdiction of the foreign court is recognized under laws or regulations or conventions or treaties.
(ii) The defeated defendant has received a service (excluding a service by publication or any other service similar thereto) of a summons or order necessary for the commencement of the suit, or has appeared without receiving such service.
(iii) The content of the judgment and the court proceedings are not contrary to public policy in Japan.
(iv) Reciprocity exists."

50） *Nakano* (n 48) 1154. Cf. E.-M. Bajons, "Über Grenzen und Freiräume der New Yorker Schiedskonvention im Lichte der EMRK", in *Festgabe zum 80. Geburtstag von Rudolf Machacek und Franz Matscher,*(NWV Verlag, 2008), 703, 705.

In this author's view, this derogation of the discussion in Japan from the first view may result from the fact that, as has above been mentioned, the Japanese legislative policy is emphasized as the reason supporting the first view.[51] From the policy viewpoint, it is possible to submit the effect of an annulled foreign award in Japan to the question as to whether the court decision setting the award aside is to be recognized in Japan or not. However, even in that case, the question still remains as to why the recognition of the court decision should be prioritized instead of the recognition of the foreign award.

(3) Summary

The above-mentioned difficulties will be solved under the third view, which considers an arbitral award as a private act or a legal fact. In the conflict of laws, private acts and court decisions have been dealt with differently. Thus, it is completely thinkable to deal with an annulled award and a court decision setting it aside separately. Under the current framework of the conflict of laws in Japan which prioritizes the recognition of foreign judgments to the choice of law, it seems appropriate to examine the recognition of a foreign decision first instead of the effect of an award which is a private act.[52]

Concluding Remarks

The reflections on the relation between arbitration and the state are important in the sense that they may have certain impact on the direction of the debate over concrete issues. Thus, the theoretical aspects of international arbitration should further be examined, in particular in Japan where no great interest has been shown to these aspects.

Finally, the Tokyo High court recently held in setting aside proceedings that the

51） See (n 29) and its accompanying text.

52） It is also possible under the third view to consider a court decision setting aside an arbitral award as the adjudication on the substantive matter, not on the procedural matter, since the award is a private act. This would reinforce the majorities' view against the criticism that such a court decision does not fall within the scope of Article 118 since it is an adjudication on the procedural matter (See (n 48)).

Japanese Arbitration Law should be interpreted in the common way as the arbitration law in foreign jurisdictions and in a way that would be accepted internationally, rather than influenced by the tendency of the interpretation of detailed provisions of domestic civil procedure.[53] Is this decision a sign of a change of the view on the relationship between arbitration and the state in Japan? It remains to be seen in the future.

53） Tokyo High Court, Ruling, August 1, 2018, 1551 Kinyū Shōji Hanrei [The financial and business law precedents] 13.