acquired a new nationality, and enjoys the protection of the country of his new nationality", he can no longer be deemed an Indo-Chinese refugee entitled to enjoy the benefits of reception (which include absolution from punishment on account of illegal stay) equivalent to those of the Convention refugee.

Although the act *per se* of the accused was committed prior to Japan's accession to the Convention or the effective date for enforcement of the Immigration Control and Refugee Recognition Act, Article 31, Paragraph 1 of the Convention does not require that such acts should occur after the Convention enters into force for the state concerned. In other words, a refugee who has committed the crimes of illegal entry and/or illegal stay prior to the Convention's coming into force must not be punished if he has not been subject to a final and conclusive judgment by then. This interpretation concurs with the intent of Article 6 of the Criminal Law of Japan concerning changes of penalties. Therefore, the Court's attitude in examining the applicability of Article 31, Paragraph 1 of the Refugee Convention to the accused's deed appears most reasonable.

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b. Private International Law

A case in which the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards was applied.

Decision by the 18th Civil Affairs Division of the Osaka District Court on April 22, 1983. Case No. (*wa*) 4919 of 1981. Application for execution judgment. 1090 *Hanrei Jihō* 146; 501 *Hanrei Taimuzu* 182.

[Reference: The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Article 3 and Article 5, Para-

graph 1(b)]

[Facts]

The plaintiff, X Company (a British corporation), and the defendant, Y Company (a Japanese corporation), executed a charter party for a vessel owned by Y Company on April 10, 1970. The charter party included an arbitral clause that any dispute arising out of the charter party should be submitted to arbitration by three arbitrators in New York City, USA. Two of these were to be appointed by the ship owner and the charterer respectively, and the third was to be chosen by the first two arbitrators so appointed. Further, either party could request arbitration by sending the other a notice listing the address and name of the arbitrator it had selected and describing the gist of the dispute for which it was requesting arbitration. The party applying for arbitration could appoint the second arbitrator without further notice if the other party failed to select an arbitrator within 20 days after dispatch of such notice.

On March 16, 1977, X demanded arbitration seeking indemnity for reasons of Y's non-fulfillment of obligations under the charter party; at the same time, X notified Y of the address and name of arbitrator A who was appointed by X. In the absence of any response by Y concerning the arbitrator to be appointed by Y within the term extended at Y's request, X appointed B as the second arbitrator, and notified Y of the same. A and B appointed the third arbitrator, C. None of these arbitrators had any other connection with the case. The three arbitrators, A, B and C, rendered an arbitral award in New York City on July 20, 1979, in the absence of Y, ordering Y to pay damages, interest, and attorneys' and arbitrators' fees.

X then requested execution judgment for this arbitral award under Article 3 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Convention had been adopted in New York on June 10, 1958. In opposition, Y asserted its right of refusal under Article 5, Paragraph 1(b) of the Convention, arguing that the arbitral award in this case had

been rendered without giving Y the opportunity of defense, and hence that the judgment could not be enforced.

[Opinions of the Court]

Application accepted.

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards "entered into force for Japan on September 18, 1961 with the reservation that Japan would apply the Convention to the recognition and enforcement of foreign arbitral awards made only in the territory of another Contracting State,.....and entered into force for the United States of America on December 29, 1970"; "there is no dispute that the present arbitral award was rendered in the United States of America on July 20, 1979"; and "the execution judgment for this arbitral award can be sought under Article 3 of the New York Convention, with the requirements provided by the Convention".

Since X submitted "the duly authenticated original arbitral award, the original arbitration agreement, and translations of the above certified by an English consular agent", the positive requirements for recognition and enforcement as provided by Article 4 of the Convention were fulfilled.

"The assertion and the burden of proof on the refusal of recognition and enforcement as provided in Article 5 of the New York Convention and on the adjournment of the decision on the enforcement as provided in Article 6 thereof, should both be understood as assumed by Y. However, Y asserts that facts exist corresponding to those provided in Article 5, Paragraph 1(b) of the Convention, i.e., that the present arbitral award was rendered unilaterally without giving the opportunity of defense to Y. The present judgment must turn on this point".

"As D. Law Office (which had no other relation to the case) was the attorney for the defendant from around July 5, 1977 up to the time they filed a notice of resignation, i.e. at least up to the hearing held on November 29, 1978, and as opportunities for hearing were offered to the defendant and his attorney twice on

July 18, 1977 and November 29, 1978, it cannot be held that the defendant was unreasonably deprived of the opportunity to defend its interests in the present arbitration proceedings".

[Comment]

The Japanese legal system recognizes the domestic effect of "treaties concluded by Japan and established laws of nations" in Article 98, Paragraph 2 of the Japanese Constitution. Treaties concerning private international law are often self-executing, and therefore such treaties are directly applicable by the Japanese courts once they are promulgated, without any special legislative measures. The present case just raised the question of domestic application of treaties.

Although none of the domestic laws of Japan makes special provision for execution of foreign arbitral awards, Articles 801 and 802 of the Code of Civil Procedure set out the requirements for execution of domestic arbitral awards. The established cases take the position that these provisions are applicable *mutatis mutandis* to foreign arbitral awards. However, they also hold that in a case when a treaty directly provides specific requirements for the execution of foreign arbitral awards, the requirements for execution should be those provided by the Convention irrespective of any domestic regulations, and nothing more. (Decision by the Tokyo District Court dated August 20, 1959, 10 *Kaminshū*, 1711; Decision by the Osaka District Court dated November 27, 1961, 6 *Kaiji Hanrei*, 118.)

In this situation, the New York Convention may be directly applied by the Japanese courts without the special intervention of any specific domestic law, and takes priority over the Code of Civil Procedure of Japan.

Where the recognition and enforcement of a foreign arbitral award is concerned, there exist numerous multilateral treaties besides the New York Convention; i.e., 1923 Geneva Protocol on Arbitration Clause and 1927 Geneva Convention on the Execution of Foreign Arbitral Awards. Japan accedes to all these Conventions. In addition, bilateral treaties of commerce and

navigation concluded by Japan often contain provisions on the recognition and enforcement of arbitral awards. Therefore, the potentially-conflicting application of these treaties presents a problem.

According to Article 7, Paragraph 2 of the New York Convention, the Geneva Convention and the Geneva Protocol shall cease to be in effect among states which are parties to the New York Convention. That is, the New York Convention clearly takes precedence over prior treaties. One possible interpretation of Article 7, Paragraph 1 of the New York Convention suggests that bilateral treaties and domestic laws shall not be allowed to provide more restrictive requirements for recognition and enforcement than does the New York Convention. The application of such bilateral treaties and domestic laws is recognizable only to the extent that they contain less restrictive requirements than the New York Convention. In other words, bilateral treaties such as treaties of commerce and navigation take precedence over the New York Convention only when their provisions are less restrictive.

In the present case, two bilateral treaties which might have applied are the Treaty of Friendship, Commerce and Navigation between Japan and the United States of America (Japan-U.S. Treaty) and the Treaty of Commerce, Establishment and Navigation between Japan and the United Kingdom (Japan-U.K. Treaty). As it turns out, however, the New York Convention applies rather than either of these two treaties. First, Article 4 of the Japan-U.S. Treaty limits its application to arbitral awards conducted under an arbitration agreement between a national or company of one contracting state and a national or company of the other. But here, one of the parties was a British corporation, so the Japan-U.S. Treaty does not apply by its own terms even though the arbitration award was handed down in the United States. Second, Article 24 of the Japan-U.K. Treaty merely requires observance of obligations of the parties under other multilateral treaties concerning recognition and enforcement of foreign arbitral awards. Therefore, this treaty also does not

impose substantive or procedural requirements in lieu of the New York Convention. Thus, the New York Convention alone is applicable to the present case, causing no conflict between treaties.

Article 5, Paragraph 1 of the New York Convention provides that recognition and enforcement may be refused for reasons of private interest; Paragraph 2 similarly provides for refusal based on reasons of public interest. In the case at hand, defendant Y sought to assert his right to refusal based on Paragraph 1(b) of Article 5, which allows refusal if "the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case". This rule is understood to ensure due process or a right to a hearing. Paragraph 1 of Article 5 provides that the court can refuse execution only after the assertions and proof of the defendant, whereas Paragraph 2 provides that the court may examine the case *ex officio*. Here, pursuant to Paragraph 1, the court judged the presence or absence of requirements for refusal based on the facts asserted by Y. Since Y had been notified by X of the demand for arbitration, and the address and name of the arbitrator appointed by X, and had received the notice for the hearing in a manner which provided Y with a sufficient preparatory period, it is difficult to find that Y's right to demand a hearing was infringed in this case. This appears true even when comparison is made with arbitration procedures used in Japan. Therefore, the judgment of the court seems reasonable.

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