“Japan is Back” – for International Dispute Resolution Services?

Kluwer Arbitration Blog
January 29, 2018

Luke Nottage (University of Sydney Law School) and James Claxton (Kobe University)

Please refer tot his post as: Luke Nottage and James Claxton, ‘“Japan is Back” – for International Dispute Resolution Services?’, Kluwer Arbitration Blog, January 29 2018, http://arbitrationblog.kluwerarbitration.com/2018/01/29/japan-back-international-dispute-resolution-services/

“Japan is Back”?

Prime Minister Shinzo Abe himself is certainly back – having led the Liberal Democratic Party (LDP) to a fifth consecutive election in October 2017. If Abe remains in power for another three years, he will become the longest serving Japanese prime minister since World War II. Although the electorate probably responded mostly to his government’s hawkish security policy, given the recent sabre-rattling from North Korea, voters also seem to be giving the government the benefit of the doubt on his “Abenomics” economic policy. Introduced after the LDP regained power in 2012, Abenomics involves shooting “three arrows” – for monetary, fiscal and structural reform – to try to jumpstart the Japanese economy out of its lethargic performance since the “bubble economy” burst in 1991.

Against this political backdrop, and Abe’s ambitious announcement in 2013 that “Japan is back” on the world stage, some LDP policy-makers recently have proposed enhancing Japan as regional hub for international dispute resolution services. On 18 May 2017 the Nikkei Asian Review announced: “Japan to Open Center for International Business Arbitration.”

Beyond the JCAA?

However, the wheels of government turn slowly in Japan. The Cabinet Office (*naikaku kanbo*) has established an inter-departmental committee to investigate options in more detail. One key player remains METI. Its jurisdiction ranges from sectors where Japanese firms have long become globally competitive (such as the automotive and electronics industries) to sectors dominated by small- and medium-sized enterprises (SMEs). The latter have traditionally been more domestically oriented but since the 1990s have increasingly engaged in exports and even investments abroad. METI has long supported the JCAA, notably by providing former senior officials to serve as JCAA President. The latest such “descent from heaven” (*amakudari*) is Mr Hiromichi Aoki, who had a career primarily in METI and the associated SME Agency.

Unfortunately, the JCAA has largely missed out on the boom in international commercial arbitration across the wider Asian region particularly over the last 10-15 years. Despite good Rules (last updated in late 2015), fee structures and personnel, the JCAA has attracted only 12-27 new case filings annually over 2007-2016. This caseload is very low compared to its counterparts in China, Hong Kong, Singapore and even recently Malaysia (KLRCA) and Korea (the KCAB). The JCAA might gain more critical mass and visibility if it merged with the Tokyo Arbitration Maritime Commission (TOMAC), but that has its own history and shipping comes under the jurisdiction of the Transport Ministry. JCAA also struggles to shake off a reputation abroad as being Japan-focused, partly reflecting the fact that almost all its cases involving at least one Japanese party but also the nature of the appointment of its Presidents.

The result is that the JCAA loses credibility for Japanese SMEs and even large Japanese companies seeking to include it in cross-border contracts as the arbitral venue. More generally, Japan is missing out on the potential to be a neutral and quite geographically-convenient seat in Asia for disputes between for example parties in the Americas and China or along the latter's "One Belt, One Road" initiative, and between parties in Southeast Asia and North Asia other than Japan. Yet Japan was quick to ratify the New York Convention (in 1961), and has implemented the UNCITRAL Model Law (from 2003) for both international and domestic disputes. Courts have interpreted both instruments in a pro-arbitration spirit, as Nottage outlined with Tatsuya Nakamura in 2013 and with Nobumichi Teramura in their chapter in Anselmo/Gu (eds) The Developing World of Arbitration (Hart, January 2018).

So can Japan make a comeback now in the increasingly competitive world of international dispute resolution services? The opportunity is well worth taking, despite the notorious risk-averseness of Japanese policymakers. And this will probably be Japan's last chance, especially now that Korea's Arbitration Industry Promotion Act has come into effect since August 2017. That statute commits the Korean government to planning and funding initiatives beyond its longstanding support for the KCAB.

Adding the TCIDR

The complex institutional history behind JCAA (and TOMAC) suggests that the best option for Japan will be to set up a new umbrella organisation, which could be named the Tokyo Centre for International Dispute Resolution (TCIDR). This would be similar to the Seoul International Dispute Resolution Centre, successfully established in 2013 and seemingly now an inspiration for Japan, but with even stronger international flavour. The President of TCIDR should have excellent English (whether as a native speaker or otherwise), a world-wide reputation and extensive expertise in international dispute resolution (in terms of practice and publications), and marketing acumen (to promote Japan as a venue for international dispute resolution services generally, whether or not involving Japanese parties). The TCIDR could also have a thoroughly international board (closer to the diversity evident within the SIAC Court of Arbitration), as well as including non-Japanese employees and interns.

The TCIDR would promote and offer facilities for international arbitrations that already do (and should increasingly) take place in Japan under ICC, ICDR or other rules, as well as for ad hoc arbitrations. But it can also provide support for other types of cross-border ADR, such as adjudication (expert determination) in construction disputes. The TCIDR could additionally provide a venue for mediation, especially for short sessions in "breakouts" from arbitration proceedings underway in Tokyo. These might be led by mediators appointed separately from the arbitrators, thus offering a different option to the JCAA's traditional Arb-Med practice. Such mini-mediations might also be conducted off-site, for example in downtown premises of universities (such as Keio Law School) that actively promote practice-oriented teaching and learning in international dispute resolution. This would defray costs to the Japanese government and other sponsors for TCIDR facilities and activities – possibly the Japan Association of Arbitrators (JAA) and Bar Associations. Anyway, commercial property rentals and other operational costs in Tokyo are now very reasonable by regional standards.

Adding the JIMC-Kyoto

The new TCIDR would be complemented by the Japan International Mediation Center-Kyoto (JIMC-Kyoto), which will offer international commercial mediation services beginning already in 2018. The idea for JIMC-Kyoto came from disputes lawyers in Tokyo and Osaka who felt that the peaceful environment in the old capital, with its natural beauty and traditional Japanese architecture, might be conducive to amicable settlements.

JIMC-Kyoto will offer various services including appointing mediators, supporting ad hoc mediations, and administering mediations under rules presently being drafted by the organising committee. Managed by the JAA and Doshisha University, it will maintain a secretariat at Doshisha's campus in central Kyoto. Doshisha will also offer physical facilities for mediations, including rooms for the parties and mediation rooms with interpretation booths.

JIMC-Kyoto aims to be a truly international institution. While court-annexed mediation and ADR in Japan tends to follow a more evaluative approach (compared for example to Australia), JIMC-Kyoto will not proscribe any particular type of mediation but rather leave it to the mediators and parties to determine the appropriate methodology. For this purpose, the organising committee is compiling a panel of international mediators whose approaches are facilitative, evaluative and or in between. The Singapore International Mediation Center, with its own panel of international mediators, is advising JIMC-Kyoto on the composition of this panel. JIMC-Kyoto and the SIMC have also made plans to collaborate on mediator training, events and promotion. The Centre's potential is bolstered as UNCITRAL's Working Group II progresses towards an instrument for the enforcement of international commercial settlement agreements resulting from mediation.

Further Promising Developments

Another key player in successfully promoting both these initiatives to reposition Japan as a regional

hub in international dispute resolution services will be the Justice Ministry. Its Litigation Bureau has been expanded in recent years (now called the *Shomu-kyoku*), partly to respond to more and increasingly complex domestic lawsuits involving the Japanese government, but also by adding an "international litigation" support unit (including several *bengoshi* lawyers on fixed-term contracts) to assist the Foreign Ministry. One of the unit's aims is to be better prepared for any investor-state dispute settlement claim that might be brought against Japan, amidst proliferating investment treaties and slowly increasing inbound FDI. Yet it could achieve this partly by becoming more familiar with and supportive of international commercial arbitration and mediation processes.

In addition, the Litigation Bureau as well as other parts of the Justice Ministry involved primarily in law reform projects still rely significantly on elite-track career judges being seconded by the Supreme Court's General Secretariat. If the Ministry can develop a more active role in promoting international dispute resolution services, this may eventually result in Japanese judges speaking out more publically about the advantages of ADR, including in international forums. So far, this almost never happens. By contrast, judges particularly from common law jurisdictions within the Asia-Pacific region often actively promote their home countries as desirable venues for international dispute resolution services.