# Japan's (In)Capacity in International Commercial Arbitration

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Not long after the ICCA Congress held in Sydney, the Japan International Dispute Resolution Center (JIDRC) was established in Osaka on 1 May 2018, with some fanfare from the Japanese government and local legal circles. 'JIDRC-Osaka' does not provide arbitration services but offers specialist facilities for international arbitration hearings and other forms of Alternative Dispute Resolution (ADR). Facilities are reasonably priced as they are housed quite centrally in a modern Ministry of Justice building.

Further, on 1 September, the International Arbitration Center in Tokyo (IACT) started operation as the first Asian international arbitration body specialised in intellectual property disputes. Unusually for international arbitration institutions, the top page of the IACT's website displays prominently an extensive list of former judges agreeable to serving as presiding arbitrators, including Dr Annabelle Bennett SC from Australia.

These new initiatives are based on the 'Basic Policy on Economic and Fiscal Management and Reform 2017' approved by the Cabinet of Japan. The Justice, Sports, Trade and Transportation ministries in Japan are reportedly discussing how

they should promote Japan as a seat for international commercial arbitration ("ICA") to the world in English.
We examine the challenges in developing Japan as a regional arbitration hub, keeping in mind our separate article regarding Australia's capacity in ICA.

**Japan's ICA Capacity**

While not as comprehensive as the Austrade brochure, the Japan Commercial Arbitration Association (JCAA) earlier published a pamphlet entitled 'Responding to the needs of international business: A guide to international commercial arbitration in Japan' ("JCAA Pamphlet"). It argues for Japan as a compelling arbitration forum mainly because of a revised Japanese Arbitration Law and a modern Japan that is 'energetic yet refined, fully wired but also enticing: … where fast-paced international business mixes seamlessly with a cultural yearning to seek consensus amid traditional notions of fair play'.[fn]JCAA Pamphlet at page 1.[/fn]

Regarding arbitration law, the pamphlet mentions:

- a global standard (the Japanese Arbitration Law was introduced in 2004 based on the 1985 UNCITRAL Model Law)
- party autonomy
- court assistance and minimal interference ('Court intervention in arbitral proceedings is prohibited under the … Arbitration Law except in specifically defined circumstances. Instead, courts play a supporting role, rendering valuable assistance by appointing arbitrators, serving notice or taking evidence')[fn]JCAA Pamphlet at page 2.[/fn]
- representation by foreign legal counsel (registration is unnecessary to represent clients in ICA cases seated in Japan)
- the New York Convention (Japan is a signatory and the Arbitration Law is in line with it).

The first point might surprise some readers as a selling point because Japan was quite late in Asia to adopt the 1985 Model Law, and the Japanese Arbitration Law has still not officially adopted any of the 2006 amendments to the Model Law.[fn]http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html[/fn] However, most Model Law jurisdictions have not adhered to the amendments either, so it could be argued that they do not yet constitute a 'global standard'. Moreover, the Japanese Arbitration Law is partly based on

UNCITRAL's deliberations resulting in the 2006 amendments.

As for the attraction of a 'modern' Japan, the pamphlet claims:

- an advanced nation ('Japan possesses all the facets necessary for reliable and effective resolution of commercial disputes by arbitration')[fn]JCAA Pamphlet at page 8.[/fn]
- good communications and transport connections
- a business and financial hub (especially Tokyo)
- cultural benefits ('Equality before the law and fair play are highly valued norms of Japan's democratic society')[fn]JCAA Pamphlet at page 9.[/fn]

The pamphlet's authors may have been too modest, an enduring trait of Japanese culture, as there are further advantages for choosing Japan as the seat for ICA. Parties can now find Japanese and non-Japanese expert arbitrators based in Tokyo (and even Osaka or Seoul, both not far away), as well as some ICA specialisation among law firms and lawyers (Bengoshi and Gaikokuho-Jimu-Bengoshi).[fn]See for example: Who's Who Legal[/fn] Japanese arbitration institutions also have strong connections with internationally well-known arbitrators from various jurisdictions.[fn]List of Arbitrators and Mediators (Non-Japanese) who have conducted JCAA Arbitration and/or Mediation cases filed since 1 January 1998[/fn] In addition, as introduced at the outset of this blog posting, the country has new arbitration centres and support facilities established under the Japanese government's recent pro-arbitration policy. Finally, Japan lies in Asia, although Japan is no longer 'the largest economy in the world's most dynamic region'.[fn]JCAA Pamphlet at page 1.[/fn] Japan's political and economic environment has also been stable particularly in recent years, although it is necessary to monitor the Trump government's unpredictable trade and diplomatic strategies (see, for example, comments here).

## Japan's ICA Incapacity

Nonetheless, as in our other posting's assessment of the recent Austrade brochure promoting Australia for ICA, such advantages need to be weighed against some downsides. The most serious immediate challenge for promoting Japanese ICA is probably still a relative paucity of arbitrators based in Japan who are able to confidently handle arbitration cases in English.[fn]According to ICC Statistical Report (Language of awards): "Awards approved in 2017 were drafted in a total of

13 languages. English remains the predominant language (for 77% of the awards).”[/fn] Although the Japanese arbitration community has maintained a pool of good-quality arbitrators and attorneys who are fluent in the language, their total numbers remain low.

Although the Japanese government and legal profession are aware of this situation and have tried to improve it, their commitment has sometimes come into question. A recent example is the ‘Opening Ceremony’ for JIDRC-Osaka, entitled ‘The Future of International Arbitration in Japan’ but conducted in Japanese instead of English. To really establish Japan as a new international ADR hub, it seems important to create opportunities to expose local practitioners to legal English and to engage in the lingua franca of modern ICA.

Another challenge for seating ICA in Japan is the country’s geographical inconvenience. Although certainly not as remote as Australia, Japan is on the outskirts of Asia. Tokyo is one of the world’s leading megalopolises, but the city itself is distant from other major Asian economic centres: seven hours from Singapore; four hours from Hong Kong; three hours from Taipei, Shanghai and Beijing. Tokyo might be an appealing arbitration venue for companies doing business in the city itself or around Japan. But other parties, especially Asian corporations with no strong business interests there, will probably continue to favour the very popular regional arbitration venues like Singapore and Hong Kong.

One way to overcome the geographical disadvantage is to develop a niche marketing approach, as we urged recently for Australia. The establishment of the IACT is a promising experiment, although there is a risk of impeding a critical mass in ICA caseload and the development of a consistent ‘Japan’ brand. (The caseload is already split between the JCAA and TOMAC, and a ‘JIDRC-Tokyo’ facility is also now envisaged ‘in the very near future’.) There is also still scope to focus on disputes between parties in the Americas or along the ‘Belt and Road’ where Chinese investors are involved in multi-national consortiums. Moreover, e-arbitrations would be helpful to combat geographical inconvenience, but few Japanese arbitration institutions (even IACT) seem to be interested in developing online arbitration platforms yet.

A final difficulty relates to the putative ‘cultural yearning to seek consensus’.[fn]JCAA Pamphlet at page 1.[/fn] Given world-wide concerns about the costs, delays and over-formalisation of ICA, can this be niche-marketed as a

positive, for example by emphasising the Arbitration Law's nod to Arb-Med and its practice notably in JCAA arbitrations? Or do the persistence of such concerns show that it is implausible to compete on price, given the information asymmetries in the ICA 'market' (on the demand side) and the growth of large law firms even in Asia (on the supply side)? Is the attraction of consensus even cultural (as opposed to economic), or changing (alongside at least some aspects of Japan's wider legal order), or something best addressed in separate international mediation proceedings and institutions (like another new ADR facility, the Japan International Mediation Centre – Kyoto)?

**Conclusion**

Given such difficult questions, and Japan's advantages and disadvantages particularly in the context of established and emerging regional hubs (including now Kuala Lumpur and Seoul), the Japanese government probably and quite understandably cannot be expected to invest much taxpayers' funding into any ambitious project to promote Japanese ICA. The features identified as demonstrating Japan's ICA capacity are nothing really new or distinctive; they can be found in the existing hubs – often even more so – and even in jurisdictions like Australia that are now trying again to join the inner circle. Japan also faces capacity constraints, including some lack of human resources and geographical inconvenience, and difficult issues around how to explain and promote its broader approach towards dispute resolution in a complex society.

More than one year has passed since the Japanese government announced its then new initiative, but government ministries still mostly appear to be engaged in drafting some detailed plan for promoting Japanese ICA. Benjamin Franklin famously said, 'time is money'. If this American saying seems incongruous, what about: 'Odawara-hyō-jō (小田原評定)'? But this seems depressing because it evokes how the Go-Hōjō samurai clan (one of the strongest in 16th century) were defeated due to their long-running but unproductive debate over tactics. The lesson now is that the world of ICA changes fast: make your next move, Japan!