

The Rise of Japan Arbitration: A Balance to the Common Law Forces of International Arbitration in Asia?

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On 31 May 2021, the Japan Commercial Arbitration Association (“JCAA”), Japan International Dispute Resolution Center (“JIDRC”), and the Japanese Ministry of Justice (“Moj”) co-hosted a webinar on developments in arbitration in Japan and Japan’s potential as an international arbitration hub.

Some of the key takeaways from the event include:

- positive experiences with the physical and legal infrastructure in Japan, including the neutrality and impartiality of the Japanese judiciary to foreign parties and the JCAA’s efficiency and professionalism in case administration;
- the need for policymakers to decide whether to adopt a static or dynamic approach to Japan’s arbitration infrastructure;
- the need for further clarity on Japan’s position on third-party funding and conditional fee arrangements; and
- the need for further diversity in the boards of key institutions, such as the

JCAA, in line with the goal of increasing its international appeal.

Opening Remarks

Mr. Kazuhiko Bando, President of the JCAA, observed that there is significant potential for growth for international arbitration in Japan. Merits for arbitrating in Japan include an independent and efficient judiciary, a vast talent pool of qualified lawyers, the JIDRC's extensive infrastructure and support, the JCAA's excellent track record of case management and high rate of enforceability for its awards, and (as evidenced by the MoJ's participation in this webinar) the government's support for promoting international arbitration in Japan.

Japanese Government's Initiatives for Promotion of International Arbitration

Mr. Koji Kanki, Minister's Secretariat of the MoJ's Attorney International Affairs Division, highlighted three key efforts by the MoJ: 1) developing facilities for arbitration, 2) fostering human resources, and 3) promoting arbitration.

First, JIDRC has established two facilities: one in Tokyo, which opened in March 2020, and the other in Osaka. These facilities are fully equipped to support the technological needs of arbitration, such as video conferencing and real-time translation services. The JIDRC is also considering the use of AI for transcription services, as well as the use of cloud computing for case management.

Second, the MoJ has been investing in the training of young practitioners through training videos, seminars (such as this event), and opportunities to serve as interns at renowned arbitral institutions overseas. The MoJ has also facilitated practitioners to teach at universities to provide practical insights and increase interest in international arbitration.

Third, in order to promote international arbitration in Japan, the MoJ has been organizing events for enterprises and lawyers in and outside Japan. These efforts also include MoJ holding seminars in partnership with overseas arbitral institutions.

In addition, the MoJ has sought to make the legislative framework more conducive

for arbitration. For instance, in 2020, the Act on Special Measures Concerning the Handling of Legal Services by Foreign Lawyers was amended. The amendments broadened the scope of “international arbitration cases” that foreign lawyers could act on and relaxed the professional experience requirements. As a result, companies arbitrating in Japan will enjoy greater freedom to choose counsel who is qualified to practice outside Japan even when all the parties are Japanese parties, so long as there are certain foreign elements.

Since October 2020, the Committee on the Reform of International Arbitration in Japan has been reviewing Japan’s Arbitration Act. In March 2021, they released the interim draft proposals, which include proposed revisions on the enforcement of interim measures, expanding the Tokyo and Osaka District Courts’ jurisdictions to hear arbitration-related cases and permitting the courts to discretionarily waive the requirement for Japanese translations of awards and/or exhibits. Mr. Kanki also shared that requirements on the form of arbitration agreements are being discussed. These revisions are intended to make the law more arbitration-friendly and to ensure conformity with the 2006 Amendments to the UNCITRAL Model Law.

The Strength of Japan as a Place of Arbitration

Having addressed the recent government initiatives, the webinar shifted to the user’s experience. Ms. Yoshimi Ohara, Partner at Nagashima Ohno & Tsunematsu, offered two reasons for choosing Japan as the seat of arbitration: 1) the Japanese courts’ pro-arbitration stance and 2) the unique efficiency of Japan’s legal system.

First, the Japanese courts’ pro-arbitration stance is part of the wider pro-arbitration infrastructure of Japan. In Ms. Ohara’s experience, the Japan courts generally refrain from excessive intervention and regularly enforce arbitral awards. The latest statistics from the Tokyo District Courts confirm this: in the past six months, the Court has been in favor of upholding arbitral awards in a majority of appeals.[fn] Hidenobu Nagasue, *Survey on Arbitration-related Cases Handled by the Tokyo District Court*, 721 *JCA Journal* 3-12 (2017).[/fn]

Second, Ms. Ohara believes that the convergence of common and civil law traditions in Japan’s legal system makes it an ideal arbitral destination, particularly in cross-border contractual disputes where parties come from diverse legal backgrounds. Differences in legal traditions could impede the willingness to

arbitrate because parties might be uncomfortable with adopting unfamiliar legal practices. This in turn might also stoke their fear of higher legal costs. For example, in common law jurisdictions, document productions and hearings tend to be more extensive, the latter due to the evidential weight of witness testimony. In civil law jurisdictions, written submissions tend to be lengthier.

In such instances, Japan's mixture of legal traditions places it in a good position to serve as a neutral and cost-efficient arbitral destination. As an illustration, while cross-examinations play an important role but less so than in common law jurisdictions, Japan's legal system also requires judges to take a 'hands-on' approach (as in civil law jurisdictions). This is in contrast to common-law based arbitral seats in Asia, such as Singapore and Hong Kong. Consequently, arbitrations seated in Japan may take the best aspects of the two systems thereby better managing costs.

Features of JCAA Arbitration

Prof. Masato Dogauchi, Chief Arbitration and Mediation Officer of the JCAA, Professor of Law at Waseda University Law School, and Professor Emeritus at the University of Tokyo, explained key features of JCAA arbitration. Prof. Dogauchi outlined the JCAA's three different sets of rules: 1) Commercial Arbitration Rules 2019, 2) Interactive Arbitration Rules 2019, and 3) UNCITRAL Arbitration Rules 2010 and Administrative Rules for UNCITRAL Arbitration 2019.

The Commercial Arbitration Rules 2019 was designed to make arbitration more accessible to businesses. The rules offer the latest features in other institutional rules, such as expedited arbitration, interim measures by an emergency arbitrator, consolidation and joinder, and mediation in the course of the arbitration. The provisions on expedited arbitration are to be revised in June 2021 to make the provision apply to higher-value disputes. Other cost-saving features include provisions on the appointment of the tribunal's secretary and the prohibition against dissenting opinions to reduce the time spent by arbitrators in drafting their award, given their hourly fees.

The Interactive Arbitration Rules 2019 contain provisions that overlap with the Commercial Arbitration Rules 2019, but also draw on the civil law approach to case management by requiring the tribunal to take an active role in identifying issues

and communicating its preliminary views. This is to increase predictability and thereby facilitate settlement and is intended to appeal to enterprises that have historically preferred litigation in Japanese courts.

The UNCITRAL Arbitration Rules 2010 and Administrative Rules for UNCITRAL Arbitration 2019 are the universal rules of arbitration adopted by UNCITRAL and the JCAA. These rules can be used by international parties who prefer to arbitrate in Japan with rules that they are more familiar with.

Prof. Dogauchi concluded with some insightful statistics on JCAA arbitration:

- The JCAA has a panel of more than 400 arbitrators, two-thirds of whom are non-Japanese, and from more than 50 countries.
- 86% of cases filed with the JCAA from 2016 to 2020 are international cases (where one or more parties are foreign companies or related entities). Of those cases, 48% of the arbitrators appointed were non-Japanese.
- 57% of cases were conducted in English, 3% in both English and Japanese, 3% in Chinese, 2% in both Chinese and Japanese, and only 35% were conducted purely in Japanese.
- The average length of proceedings in 2011-2020, from the constitution of the tribunal to the issuance of the final award, is 12.8 months (including periods where the arbitration was stayed).

Concluding Thoughts

The points discussed in this webinar offer a compelling case for expecting growth in international arbitration in Japan. The overall pro-arbitration ethos and proactive approach of the Japanese government suggest that existing areas of uncertainty will be addressed. In its approach towards future developments in the arbitration infrastructure, it appears Japan will likely take the dynamic route like Singapore and Hong Kong, given its relatively new position in the market, compared to mature arbitral hubs like London and Paris. Only time will tell if Japan is capable of rivaling the leading Asian centers of Singapore and Hong Kong, but based on recent developments, there appears to be much promise.