

Kluwer Arbitration Blog

Interviews with Our Editors: In Conversation with Professor Masato Dogauchi, Chief Arbitration and Mediation Officer of the Japan Commercial Arbitration Association

Hiroko Yamamoto (Assistant Editor for East and Central Asia) · Friday, March 19th, 2021

Professor Masato Dogauchi is a Chief Arbitration and Mediation Officer of the Japan Commercial Arbitration Association (“JCAA”), Professor of Law at Waseda University Law School, and Professor Emeritus at the University of Tokyo. He has authored numerous publications in the areas of arbitration, international civil procedure, and private international law. He has sat as arbitrator, both as sole arbitrator and as part of a panel of arbitrators. We are privileged to welcome him for an interview for our Blog.

Thank you Professor Dogauchi for joining us today.

1. **To start, could you please briefly introduce our readers to the JCAA and explain your role at the JCAA?**

The JCAA was established in 1950, but its caseload has been small in view of the volume of international trade and investment by Japanese companies. My mission is to innovate and promote JCAA arbitration and mediation with an aim to have more Japanese companies make a practice of adopting JCAA arbitration clauses and submitting their disputes to JCAA arbitration or mediation.

I joined the JCAA in 2018. As the Chief Arbitration and Mediation Officer, I supervise the administration of arbitration and mediation cases, the publication of journals and books, and the organization of seminars or symposia.

2. **In 2019, three new sets of arbitration rules came into force at the JCAA: the Commercial Arbitration Rules; the UNCITRAL Arbitration Rules supplemented by the JCAA Administrative Rules; and the Interactive Arbitration Rules. We understand you were actively involved in the preparation of these rules, including preparing the first draft. What takeaways from drafting these rules would you share with other arbitration rules’ revision committees?**

I have always learnt a lot through discussions in the revision committee.

The outstanding feature of the Interactive Arbitration Rules is the mandatory communications between arbitral tribunal and parties. Through such interaction, parties can learn how their assertions are perceived or understood by the arbitral tribunal. Its first draft contained three provisions on this interaction:

- (1) disclosure by the tribunal on its understanding of the parties' positions and tentative ascertainment based on such positions at an early stage of the proceedings;
- (2) non-binding suggestion by the tribunal on important factual and legal issues according to its preliminary view prior to the tribunal's decision as to whether witness examination will be conducted;
- (3) disclosure of the draft arbitral award by the tribunal just before rendering the final one.

In response to such disclosures or suggestions by the tribunal, parties may concentrate on the contentious issues in the case. The intent of these Rules was that such predictability would promote effective and efficient dispute resolution.

The provision on the disclosure of the draft award, however, was deleted as a result of discussions within the revision committee since it would prolong the proceedings and may generate dissatisfaction of the losing party. The provision had another aim, that is, to have a final award free of mistakes by having the winning party spot the mistakes in the draft. However, the revision committee concluded that this goal can be achieved in other ways, including a review by the JCAA Secretariat. The remaining two provisions would keep the parties, including their top management officers, informed of the progress of the arbitral proceedings and enable them to act reasonably.

3. Please tell us more about the unique aspects of these sets of rules, in particular, how they innovate on past practices of the JCAA or other arbitral institutions around the world.

These rules are aimed at meeting the diverse needs of the business world.

The first is the Commercial Arbitration Rules, which ensure smooth proceedings with comprehensive provisions to address potential procedural issues arising from different understandings among arbitrators, counsel, and parties. They are the default and frequently applied rules of the JCAA. They have some unique provisions.

Among others, in case of an arbitral tribunal composed of three arbitrators, it is prohibited for any arbitrator to disclose his or her dissenting or individual opinion in any manner. On account of the fact that two opposite opinions exist with regard to this issue in arbitration community, the JCAA considers it necessary to insert an explicit provision to avoid any controversies. Of course, if all parties agree, this provision can be excluded.

In addition, the Commercial Arbitration Rules have another unique provision on the use of a tribunal secretary. It is sometimes observed that an arbitrator works together with an associate lawyer to assist part of the arbitrator's tasks. Such third person's involvement is prohibited under these Rules in principle since it might be against the expectation of the parties and might give rise to the leakage of secrets of the proceedings or conflicts of interests. If an arbitrator would like to appoint a tribunal secretary, it is necessary to obtain all parties' consent in writing, after providing information regarding the proposed secretary, including the tasks to be performed and method for calculating the secretary's remuneration. The gist of this provision is also to avoid any

controversies on this matter.

The second set of rules is the UNCITRAL Arbitration Rules, the international standards created by the United Nations based on which the JCAA facilitates the arbitration proceedings. Under these rules, parties, counsel, and arbitrators can take advantage of the best universal arbitration practices.

The third is the Interactive Arbitration Rules, which seek to improve the parties' predictability in the proceedings by means of mandatory disclosure of the arbitral tribunal's preliminary observations and views twice in the process of arbitration. The fixed remuneration scheme for arbitrators is adopted in principle, where the remuneration is calculated based on the amount of the claims. The Interactive Rules are intended to break the protracted and costly common law style arbitration practices, and to deliver time-efficient and cost-effective dispute resolution. These rules are aimed at cases between parties in civil law jurisdictions. The Interactive Rules have been applied in only one case by special submission. In that case, the Commercial Arbitration Rules were originally designated in the arbitration clause.

Incidentally, with regard to mediation, JCAA's mediation rules were amended and came into force in January 2020. The new, versatile Commercial Mediation Rules are designed to provide reasonable dispute resolution by encouraging the parties to reach a settlement agreement. The Rules set forth strict confidentiality protocols and incorporate enforceability requirements as set out in the Singapore Convention on Mediation, to which Japan has not yet become a party.

4. Amendments to the Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers (*Gaikoku Bengoshi ni yoru H?ritsu Jimu no Toriatsukai ni kansuru Tokubetsu Sochi H?*) broadened the scope of party representation by foreign counsel in international arbitration and came into effect in August 2020. What effects have you seen or do you expect to see in the practice in front of the JCAA?

The definition of "international cases" in which foreign lawyers without Japanese practicing license can represent their clients in the arbitral proceedings conducted in Japan was expanded by the 2020 amendment. According to the new rule, cases are "international" when one of the following requirements is met:

- (1) when the parties are domestic companies, at least one of them is more than 50% owned by a foreign company; or
- (2) foreign law is agreed by the parties as the governing law of the merits; or
- (3) the place of arbitration is outside Japan.

Foreign lawyers may also represent their clients in mediation cases if either the first or second requirement above is met.

Under the amended Act, foreign lawyers may represent their clients in nearly all international arbitration and mediation cases since excluded cases are those purely domestic in which Japanese law is applied and Japanese language is used. In practice, there used to be some cases where the JCAA had to inform the foreign lawyers of the restrictions under the previous Act. From now on, this will no longer be the case.

5. Apart from the administration of arbitrations, what other initiatives does the JCAA undertake to promote the use of arbitration? Relatedly, the first volume of the [Japan Commercial Arbitration Journal](#) was published in 2020. Please tell us more about the journal and future plans for it.

The JCAA has published a monthly law journal for almost seventy years. In addition, although the JCAA used to publish newsletters in English for many years, the content thereof was not rich and the volume of publication was very limited. In order to promote the arbitration and mediation of Japan at the global stage, the first issue of Japan Commercial Arbitration Journal containing thirteen articles was electronically released in 2020. Such an electronic version can be easily accessed by lawyers in different jurisdictions. The JCAA will issue this Journal annually to introduce trends in arbitration, mediation, and court litigation in Japan.

6. What are your hopes and visions for the JCAA? In your view, what may be some ways which the arbitration community or legislature can consider to encourage further growth of arbitration in Japan?

We are excited to see huge potential for growth in the arbitration and mediation market in Japan. The JCAA will further promote the merits of Japan as a place of arbitration and mediation through seminars and journals.

Arbitration is international in its nature. Roughly 50% of the arbitral proceedings are conducted in English and half of the arbitrators are foreign nationals. The JCAA has a list of candidates for arbitrators, and the information of those who consented to publication is available on the JCAA website. As I mentioned above, the JCAA has three sets of arbitration rules. Among the published candidates, the numbers of those who indicated their openness to accepting appointments under these rules are as follows:

	Commercial Arbitration Rules	UNCITRAL Arbitration Rules	Interactive Arbitration Rules
Non-Japanese	229	275	166
Japanese	98	73	82
Total	327	348	248

In respect of mediation, JCAA's panel of over 200 candidates for mediators offers a highly diverse spectrum of mediators representing various areas of expertise and hailing from over 50 jurisdictions. The majority of them are non-Japanese nationals. The JCAA rules allow parties to appoint mediators as well as arbitrators not on the list.

Since internationally recognized arbitrators and mediators act in the JCAA and other institutions, the quality of proceedings and final result is assured irrespective of the institution. In terms of cost, however, the remuneration scheme under the JCAA rules is reasonable. For instance, time charge system is in principle adopted under the Commercial Arbitration Rules, but the upper limit of remuneration is set depending on the amount of claims. Under the Interactive Arbitration Rules, as mentioned earlier, the fixed remuneration system is adopted in principle. These user-friendly systems are one of the features of JCAA arbitration.

Lastly, I would like to highlight the new, state-of-the-art conference centers in Tokyo and Osaka, equipped with advanced digital communication tools and operated by the Japan International Dispute Resolution Center. If physical meetings are to be held in Japan, participants can enjoy smooth proceedings in a comfortable environment in these conference centers.

Professor Dogauchi, thank you very much for your time and invaluable insights.

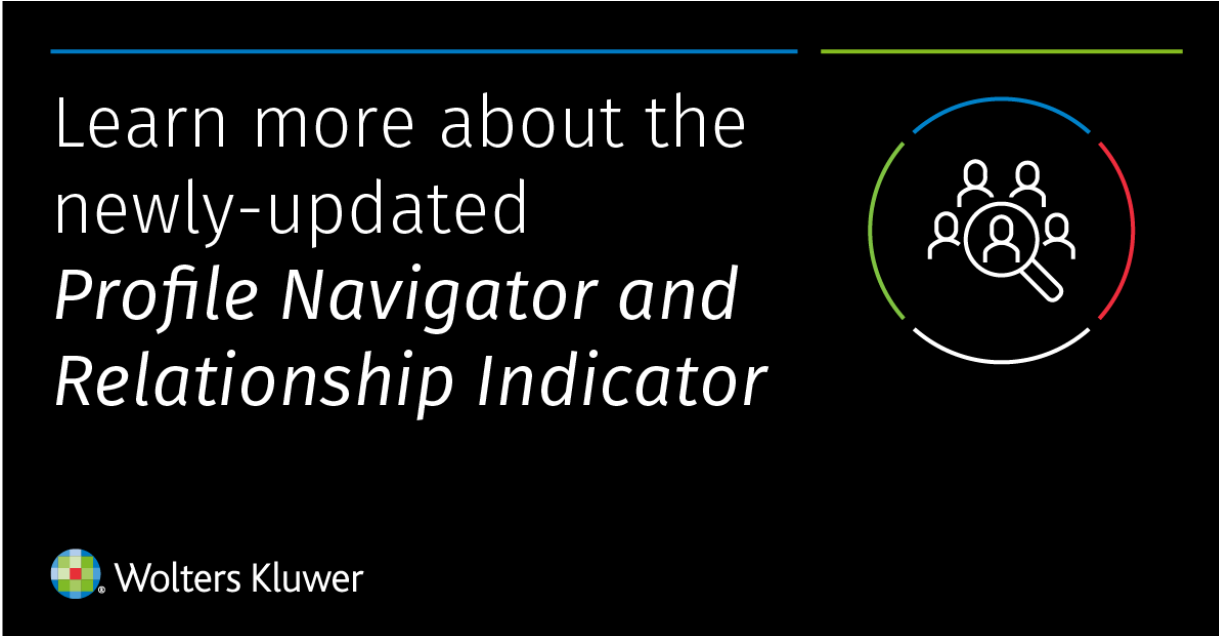
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