Kluwer Arbitration Blog

The JCAA Celebrates 70 Years of International Arbitration in a Changing World

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On 17 November 2023, the leading arbitration-related institutions and government entities in Japan co-hosted an international arbitration conference, entitled "*Exploring Innovative Solutions in a Changing World*", to showcase Japan's flourishing ecosystem as a preferred place of arbitration, and to mark the 70th anniversary of the Japan Commercial Arbitration Association (JCAA). Held in Tokyo, this event was organized by the JCAA with the support of Japan's Ministry of Justice (MOJ) and Ministry of Economy, Trade and Industry (METI), along with the Japan Association of Arbitrators (JAA). It comes in the wake of recent amendments to the Japan Arbitration Act and the Foreign Lawyers Act that were meant to further enhance the attractiveness of Tokyo as a seat of arbitration.

Garnering a wide audience of over 250 people, the event kicked off with opening remarks from senior government officials, who reiterated the Japanese government's commitment to supporting the growth of arbitration in Japan. Professor Kazuhiko Yamamoto of the JCAA delivered a keynote speech, where he spoke about the JCAA's 70-year history and pivotal role in the evolution of Japan's arbitration system, noting the gradual increase in arbitration cases over the decades. He also emphasized that the recent legal reforms have further streamlined the arbitration process in Japan.

Current State and Future Prospects of Arbitration in Japan

The first panel provided an overview of arbitration in Japan and those administered by the JCAA. It featured Professor Yamamoto, along with Mr. Yuichi Takano (Mitsui & Co.), Mr. Tsuyoshi Harada (Nippon Steel Corporation), and Mr. Takashi Takashima (United Nations Office of Legal Affairs). Given the predominant in-house representation on the panel, the discussion centered on the needs of corporate clients in dispute resolution and their diverse experiences across different jurisdictions. The consensus was that while Japan still has progress to make, it is on the right path, but that further active participation by the Japanese government would greatly assist in moving things forward.

Learning from Arbitration Leaders: Reflections on How to Make Arbitration a Success

Moderated by Ms. Yoshie Midorikawa (Miura & Partners) and featuring Kevin Kim (Peter & Kim, Seoul) and Yu-Jin Tay (Mayer Brown, Singapore), one of the key topics addressed was the development of arbitration in South Korea and Singapore. Mr. Kim reflected on the bottom-up effort to create a new market for arbitration in Korea by cooperating with other local practitioners, including transactional lawyers and potential users of arbitration. In contrast, Mr. Tay raised Singapore's use of a top-down strategy by the government to achieve its quick assent to the status of first-class dispute resolution center. Both the bottom-up and top-down strategies contain useful lessons for Japan in the years ahead.

The panelists also shared observations from their experience with Japanese companies. Mr. Kim pointed out that some Japanese companies perceive dispute resolution as integral to business; he suggested that encouraging a broader understanding of arbitration's benefits and implementing internal measures like document retention policies could enhance Japanese parties' effectiveness in arbitration. Additionally, he underscored the need for lawyers capable of explaining the arguments and conveying the business and legal practices of Japan to arbitral tribunals.

Common Law vs. Civil Law Perspectives on Expediting Arbitration

The final panel, moderated by Ms. Miriam Rose Ivan Pereira (Oh-Ebashi LPC & Partners), discussed expediting arbitration from common law and civil law viewpoints. Panelists included Mr. Tony Andriotis (DLA Piper, Tokyo), Mr. Tony Dymond (Debevoise & Plimpton, London and Hong Kong), Ms. Yoshimi Ohara (Nagashima Ohno & Tsunematsu), Ms. Julia Jiyeon Yu (Oon & Bazul, Singapore), and Mr. Shinji Ogawa (JCAA).

Arbitrators' Proactive vs. Passive Approach

In examining the role of the arbitral tribunal, Mr. Ogawa highlighted the ongoing discussion on whether an arbitrator should be passive or proactive in interacting with parties to a dispute. Mr. Ogawa raised the Interactive Arbitration Rules of the JCAA as an example of how institutions can encourage proactive tribunals that may even encourage settlement.

Ms. Ohara then explained that common law arbitrators are hesitant to embrace such proactivity due to concerns about neutrality. Parties, however, want to know where the arbitral tribunal stand to be able to guide them in arriving at a favorable conclusion. Thus, as an alternative, she suggested that the arbitral tribunal seek clarification from the parties to facilitate the proceedings. She supported proactive arbitration, citing its alignment with the approach of proactive judges in numerous civil law jurisdictions. She emphasized that as long as the scope and structure of this approach are appropriately defined, arbitrators from civil law and common law backgrounds can adopt a proactive stance.

Ms. Yu observed that common law arbitrators prioritize party autonomy due to concerns about enforceability and the risk of undermining proceedings. In contrast, civil law arbitrators frequently act as guardians, aiming to facilitate settlements.

After celebrating the fact that there has been one successful case of the Interactive Arbitration Rules, Mr. Andriotis commented that a tribunal need not fear breaching concepts of neutrality by

simply declaring from the start that mediation is always an option and an efficient means of dispute settlement.

Mr. Dymond highlighted the importance of arbitrators blending civil law and common law principles but acknowledged common law lawyers' reservations about sharing preliminary views or using med-arb due to potential information disclosure issues. He differentiated the civil law approach from SIAC's arb-med-arb method, suggesting the latter may be more acceptable to common law practitioners because the same professionals are not used in mediation and arbitration. He supported arbitrators providing preliminary views if the parties provide consent to avoid claims of the arbitral tribunal prejudging the case or due process concerns.

Document-Only Proceedings in Expedited Procedures

The panel also addressed document-only proceedings, which is a general feature of an expedited proceeding. Ms. Ohara noted a potential pitfall: arbitrators are not always able to follow written advocacy alone and emphasized the importance of brief hearings in confirming the tribunal's understanding.

Mr. Dymond, on the other hand, stated that much can be done on paper, for instance, court matters, leave applications, appellate practice, and adjudication of construction disputes in the UK. However, he agreed that for complex matters, a short hearing is useful.

Other Methods to Expedite Proceedings

The panel concluded by discussing how arbitral institutions can expedite arbitration proceedings. Mr. Ogawa expressed interest in enhancing JCAA services, focusing on feedback mechanisms. He also suggested parties to implement time constraints for awards within arbitration agreements and utilizing expedited procedures of the JCAA. Ms. Yu emphasized the secretariat's role in evaluating arbitrator conduct for reappointments and discouraging time extensions for awards. Mr. Andriotis highlighted the ICC's method of penalizing late award submissions as a model for other institutions to emulate. Mr. Dymond praised SIAC and HKIAC's early dismissal rules.

Meanwhile, Ms. Ohara cautioned institutions to consider the impact of new rules, which generally apply automatically, in comparison to those specifically chosen by the parties. She also suggested providing more administrative assistance to arbitrators and counsel who lack experience to help them make submissions more efficiently.

Conclusion

Tokyo is a first-class city, and arguably the crown jewel of the world's third largest economy. Recent legislative efforts by the Japanese government are indicative of a road which will be invested in moving forward. As such, Tokyo deserves to be a showcase of Asia's growing might in the international arbitration space. The success of this event shows promise to unify the various events held throughout the year in Tokyo into a more substantive arbitration event, akin to Hong Kong's Arbitration Week or Seoul's Arbitration Festival.

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