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2024 JCAA Arbitration Days Recap Day 1: Japanese Arbitration Trends and Practices

Bruno Savoie (City-Yuwa Partners), Mihiro Koeda (Miura & Partners), and Tatsushi Nishizaki (City-Yuwa Partners) · Monday, December 16th, 2024

This year, Japan held its first ever Japan International Arbitration Week (JIAW) in Tokyo from 18-22 November 2024. Previously held as a standalone event for the first time last year, this year's Japan Commercial Arbitration Association (JCAA) Arbitration Days featured an expanded two days of sessions in English followed by one day of sessions in Japanese. This article reports on the first day of the JCAA Arbitration Days, which took place in hybrid format on 20 November 2024.

A welcome speech by Mr. Shinsuke Kitagawa (President of the JCAA) signaled the start of the three-day event wherein he introduced some of the recent changes at the JCAA, in particular the establishment of an Advisory Board comprised of leading arbitrators and practitioners from the global arbitration community to guide the strategic direction and development of arbitration services, including refining procedures, promoting best practices, and addressing emerging trends in arbitration. The keynote speech by Mr. Kenya Suzuki (Presiding Judge of the Civil Division 8, Tokyo District Court) followed, where he addressed the recent amendments to the Japanese Arbitration Act and efforts made by Japanese courts in arbitration-related cases. Now all arbitration-related cases filed with the Tokyo District Court since April 2023 are assigned to the 8th Division which specializes in commercial cases, in an effort to concentrate judicial experience with arbitration cases. These developments illustrate Japan's recent efforts to make arbitration in Japan more predictable and attractive.

Arbitration Practices and Japanese Business Culture

The first two panels of the event addressed the unique dynamics and features of arbitrations in Japan, the first more focused on the characteristics of the JCAA arbitrations, while the second highlighted unique cultural aspects of the country and its impact on arbitration.

As part of the first panel moderated by Mr. Tony Andriotis (DLA Piper, Tokyo and JCAA Professional and Institutional Relations Officer), Dr. Helena Chen (Chen & Chang, Taiwan) shared her positive outlook on the combination of arbitration and mediation under the JCAA's Commercial Arbitration Rules and Interactive Arbitration Rules, which uniquely allow for the same individual to serve as both arbitrator and mediator for the same case if agreed by the parties. Ms. Sally Harpole (International Arbitrator and Mediator, California) highlighted the efficiency of

proceedings administered by the JCAA, in particular under the expedited procedure, with an average length of 4.5 months for disputes up to JPY 50 million (approximately USD 330,000), according to the JCAA's statistics.[1)]

The panelists also chartered a path for the continued growth of arbitration in Japan. Mr. Ryan Goldstein (Quinn Emanuel Urquhart & Sullivan, Tokyo) proposed that Japan could distinguish itself by focusing on IP arbitration, given the large patent portfolio held by some Japanese companies and as some IP licensing issues could be resolved by way of arbitration more efficiently. Mr. Goldstein also identified litigation funding as another opportunity to create another selling point for Japan if clear rules could be implemented. Mr. Goldstein added that many Asian parties may find unique aspects of Japan's legal system and culture, such as its civil law background particularly if the parties share the same background, to be familiar and attractive. Mr. Hiroyuki Tezuka (Nishimura & Asahi GKJ, Tokyo) suggested that the seamless transition mechanism between mediation and arbitration under the JCAA rules could also be an aspect that makes the JCAA stand out. Ms. Louise Stoupe (Morrison & Foerster, Tokyo) emphasized the need for continued education of Japanese users on JCAA arbitration as well as further promotion abroad, for more awareness and visibility of the institution.

In the second session moderated by Mr. Shinji Ogawa (JCAA, Manager of Arbitration and Mediation), several panelists turned attention to the unique decision-making process and culture of Japanese companies and their potential impact on arbitrations. Mr. Peter Harris (Clifford Chance, Tokyo) and Mr. Ben Jolley (Herbert Smith Freehills, Tokyo) remarked that counsel should be aware that many Japanese companies require decisions to be made through meetings or a set internal process (the *ringi* process) and many decisions may not be made on the spot during mediation. This may lead to difficulties in managing timelines in an arbitration, mediation, or negotiation process. Mr. Jolley and Mr. Daniel Allen (Mori, Hamada & Matsumoto, Tokyo) added that Japanese companies are usually document intensive, which means that counsel may need to deal with a wealth of emails and internal documents that were often created without involvement of legal counsel and include rather candid comments. Practitioners should be wary of such cultural characteristics as they may have a significant impact on document production.

Prof. Dr. Lars Markert (Nishimura & Asahi GKJ, Tokyo) advised that because of such cultural characteristics unique in Japan, attorneys sometimes need to take up a "protective" role for Japanese clients vis-à-vis the other party or the tribunal during arbitral proceedings. Mr. Harris also shared the view that many Japanese companies are more prone to settle rather than to litigate, but once their chances of settlement are entirely exhausted (or if they feel that they have been wronged such that the relationship has completely broken down), they can completely change their mindset and pursue the dispute all the way. Prof. Markert and Ms. Stoupe shared their insights from their experiences that they see more Japanese companies leaving more room for settlement during arbitral proceedings—that is, even after they switched to a "thorough fight" mode.

Finally, Prof. Markert pointed out that arbitration in Japan is more often used for international disputes than domestic disputes, which are usually resolved through litigation, and added there should be more room for domestic arbitration in Japan, particularly in certain types of disputes which require specific expertise, such as construction and post-M&A disputes. Prof. Markert suggested that the promotion of domestic arbitration in Japan could contribute to the further growth of international arbitration by making Japanese parties increasingly comfortable with arbitration.

Japan's Role in Shaping International Arbitration

The last panel of the day was moderated by Ms. Miriam Rose Ivan L. Pereira (Oh-Ebashi LPC & Partners, Tokyo and JCAA Public Relations Officer) and featured lessons learned from other seats of arbitration and insights on opportunities for Japan.

Mr. Yu-Jin Tay (Mayer Brown, Singapore) reported that Singapore's journey towards becoming a successful seat was sparked by a governmental vision to consider international arbitration as an engine of economic activity. Mr. Tay suggested that while many countries have the right strategy and ingredients, it is often the execution of that plan which makes the difference. He noted that only 20 years ago, Hong Kong was considered to be the only truly viable seat of international arbitration in Asia and no one seriously considered such position would be challenged. However, many would agree that Singapore now shares the position.

Mr. Matthew Gearing KC (Fountain Court Chambers, London) reported that Hong Kong also benefited (similar to Singapore) from significant governmental financial backing in the 1990s, especially given the costs of running state-of-the art facilities in an expensive city. He emphasized the key role that Hong Kong's judiciary played during early stages (in particular Justice Neil Kaplan) in developing the reputation of a reliable and forward-thinking seat of arbitration, as well as the importance of having a "broad" bar—i.e., a pool of both local and international lawyers from diverse legal jurisdictions and backgrounds.

As to Japan's neighbor, South Korea, Prof. Hi-Taek Shin (Twenty Essex, Korea) remarked that success of the Korean Commercial Arbitration Board (KCAB) is largely attributable to collaboration between private initiative and governmental financial support. The KCAB successfully developed its once mostly domestic caseload into international arbitration cases. By providing positive experience in domestic arbitration cases to parties, the KCAB attracted repeat customers who turned to the KCAB for international disputes as well. Prof. Shin added that the KCAB is more focused on cases that involve Korean parties, and he expected this would remain the KCAB's strategy for the foreseeable future.

Mr. Naoki Idei (Kojima Law Offices, Tokyo) called attention to a popular opinion that domestic arbitration is less favored in Japan (except for construction arbitrations) because litigation in Japan is reputed to be highly efficient and of high-quality. He views that this cannot be the main reason, however, indicating that while Korean judicial system also shares similar reputation, Korea has a much more active domestic arbitration scene. Based on this, Mr. Idei stressed the importance of promoting domestic arbitration to Japanese businesses, including SMEs, as a viable alternative to judicial resolution. He added that growth of domestic arbitration would eventually lead to growth of international arbitration in Japan.

Turning to Europe, Prof. Nathalie Voser (Rothorn Legal, Switzerland) indicated that Switzerland has historically benefitted from a reputation for neutrality, and that despite a strong push to promote Asia-based arbitration in the 1990s and early 2000s, Switzerland has been successful in maintain its standing. She noted that there is no governmental financial support for arbitration in Switzerland and credited some of the success of Switzerland instead to a concise and efficient arbitration law, as well as international promotion efforts by the Swiss Arbitration Association.

With regard to the role of Japan in shaping international arbitration, Prof. Dr. Klaus Sachs (CMS, Germany) acknowledged that Japan is not yet truly on the radar of the international arbitration

community, although it is now changing. Prof. Sachs stressed that newcomers such as Japan have the chance to innovate and offer features that other venues do not. This is especially the case with regard to efficiency, in light of increasing complaints worldwide over prolonged proceedings which leads to more costs. The JCAA's Interactive Arbitration Rules are remarkable for their settlement-centered approach and have tremendous potential by improving the interaction between the parties and the arbitral tribunal during the proceedings.

Concluding Thoughts

The first day of the JCAA Arbitration Days highlighted the potential of Japan as a rising seat of arbitration in Asia, with its unique legal culture which enables seamless transition mechanism between mediation and arbitration, as well as its civil law background unlike Hong Kong and Singapore. It might not be a so distant future that people say Hong Kong and Singapore were considered to be the only truly viable seats of international arbitration in Asia and no one seriously considered such position would be challenged.

More coverage from Japan International Arbitration Week is available here.

References

?1 For cases filed under the currently effective JCAA Arbitration Rules 2021, the expedited arbitration procedures have an average duration of 3.1 months for disputes up to JPY 50 million, and 6.3 months for disputes up to JPY 300 million.

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