Kluwer Arbitration Blog

YSIAC Tokyo Event: Arbitration as an Advantage: Strategic Use of International Arbitration for Business Success

Gai Matsushita (Nishimura & Asahi), Lexi Takamatsu (Mori Hamada & Matsumoto), and Masataka Sato (Anderson Mori & Tomotsune) · Sunday, January 19th, 2025 · YSIAC

On the opening day of the inaugural Japan International Arbitration Week, November 18, 2024, YSIAC held a panel discussion titled “Arbitration as an Advantage: Strategic Use of International Arbitration for Business Success,” in Tokyo, Japan, bringing together leading in-house counsel and private practitioners to discuss the strategic use of international arbitration by companies across various sectors and jurisdictions. Key topics included how disputes are viewed within business and legal departments, cultural and structural factors influencing the adoption of arbitration, effective use of arbitration as a tool to facilitate settlement, and the use of third-party funding to mitigate the risk of arbitration.

The panel featured speakers Ben Jolley (Partner, Herbert Smith Freehills, Tokyo), Moses Park (Barrister, Liberty Chambers, Hong Kong), Jennifer Yoo (Partner, Peter & Kim, Seoul), and Tomohiro Tateno (Senior Legal Counsel, INPEX Corporation, Tokyo), and was moderated by Lexi Takamatsu (Foreign Law Counsel, Mori Hamada & Matsumoto, Tokyo).

Stereotypes & Appetites for Disputes

The session commenced by addressing the traditional perception that Japanese companies avoid disputes to maintain harmony. Mr. Tateno highlighted that this perspective is evolving, as Japanese companies increasingly engage in arbitration based on industry needs, the preferences of their project partners and the nature of their relationships with counterparties. Mr. Jolley added that willingness to engage in arbitration may vary, even within Japan, depending on the industry, the type of dispute, the value of the dispute and the likelihood of recovery.

Other panelists provided comparative insights from other jurisdictions, illustrating diverse attitudes shaped by cultural and organizational factors. For instance, Ms. Yoo emphasized that, while disputes are culturally perceived as risks or potential losses in Korea, large corporations tend to follow through with arbitrations, once initiated, until the end. Ms. Yoo explained that in addition to general cultural factors, the organizational structure of Korean companies means that many different stakeholders need to agree before settling an arbitration (or starting one) and that the person who is seen as spearheading the movement to settle (or initiate) arbitration may be subject to subsequent internal scrutiny. In relation to this, Mr. Jolley commented that the traditional

organizational structure of Japanese companies also requires a great deal of information gathering and consensus-building to decide whether the company will proceed with arbitration, during which legal departments and external counsel must play an important role.

Mr. Park argued that, based on his experience, a company's size and resource availability may play a more significant role than its jurisdiction and cultural factors in determining its appetite for disputes. Large corporations often view disputes as a risk management tool, whereas smaller entities may perceive them as a critical threat.

Arbitration as a Catalyst for Settlement Discussions

The panel also explored potential misconceptions about arbitration irreparably damaging settlement discussions, explaining that arbitration can instead act as a catalyst for settlement.

Mr. Jolley clarified that initiating arbitration doesn't necessarily mean proceeding to the end, and that, in fact, many "off-ramps" naturally occur in a typical procedural timetable (*e.g.*, after document production or the next round of submission). Mr. Park noted that once the parties have filed their initial notice of arbitration and response, they have more information to determine whether to settle their dispute. Ms. Yoo agreed and explained that the key reasons parties struggle to settle is a lack of information or fear of information asymmetry, but once parties are reassured that they have sufficient information—such as after initial submissions or after document production—they are more likely to settle. She noted that she has also seen an increase in the use of bifurcation for liability issues (*e.g.*, contract interpretation issues in the first phase and factual application in the second phase), which creates an additional "off-ramp" for the parties.

The panel further discussed how technological advancements, such as virtual hearings, have transformed arbitration dynamics and their value in potentially reaching a settlement. Mr. Tateno and Ms. Yoo noted that increased participation by senior management in virtual hearings has bolstered the comprehension of the disputed issues and yielded more opportunities for settlements.

Ms. Yoo additionally pointed out that the involvement of independent experts during arbitration is a critical factor in enabling parties to assess their case more comprehensively and objectively, and to reach resolutions. In the context of construction disputes, Mr. Jolley noted that independent experts can help in providing a more objective assessment of the parties' cases than would, for example, a claims consultant: while a claims consultant's job is to put forward the best possible outcome for the client, an expert in an international arbitration—who must be prepared to sit for cross-examination—may help to give the client a more balanced understanding of the strengths and weaknesses of their case.

Mr. Jolley added that where a party is a government entity, it may, in some jurisdictions, be nearly impossible to reach a commercial settlement without starting arbitration proceedings because there may be political consequences for government representatives who sign off on a settlement amount.

Use of Emergency Arbitration

Mr. Park next shared his own experience of how a strategically timed emergency arbitration can exert pressure on a party to settle. Due to the short timelines of emergency arbitration proceedings, an application filed during an inconvenient time of year can compel even the most intransigent parties to come to the negotiation table.

Mr. Jolley noted that in the construction context, emergency arbitration can also be used to prevent the calling of performance bonds, walking the parties back from what is often the "point of no return" and bringing them back to the negotiating table. He observed that a mere (but credible) threat of emergency arbitration often serves as a powerful tool to de-escalate conflicts.

De-risking International Arbitration

Mr. Jolley explained that third-party funding can de-risk the use of international arbitration to recover disputed amounts. Mr. Park added that third-party funders may not consider disputes below a certain threshold. However, internal systems can be established within companies to emphasize potential gains from pursuing a dispute rather than focusing solely on the risks. For example, Mr. Park noted that in some financial institutions in Hong Kong, once a dispute arises, the matter is transferred from the deals department to the disputes department. While the key performance indicator ("KPI") for the deals department treats disputes as a risk, the KPI of the disputes department is based on recovering value from the dispute.

Conclusion

Ms. Takamatsu closed the session by thanking the panelists and attendees. The session underscored the evolving role of international arbitration—not merely as a mechanism to secure awards but as a strategic asset that facilitates settlements and adds value to business operations. Taking a step further, deep insights were shared on the decision-making process behind initiating and terminating an arbitration from various practical viewpoints, including cultural differences, the phase of proceedings, and technological developments.

The event concluded with a networking reception, offering participants an opportunity to engage informally and delve deeper into the topics discussed.

More coverage from Japan International Arbitration Week is available here.

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