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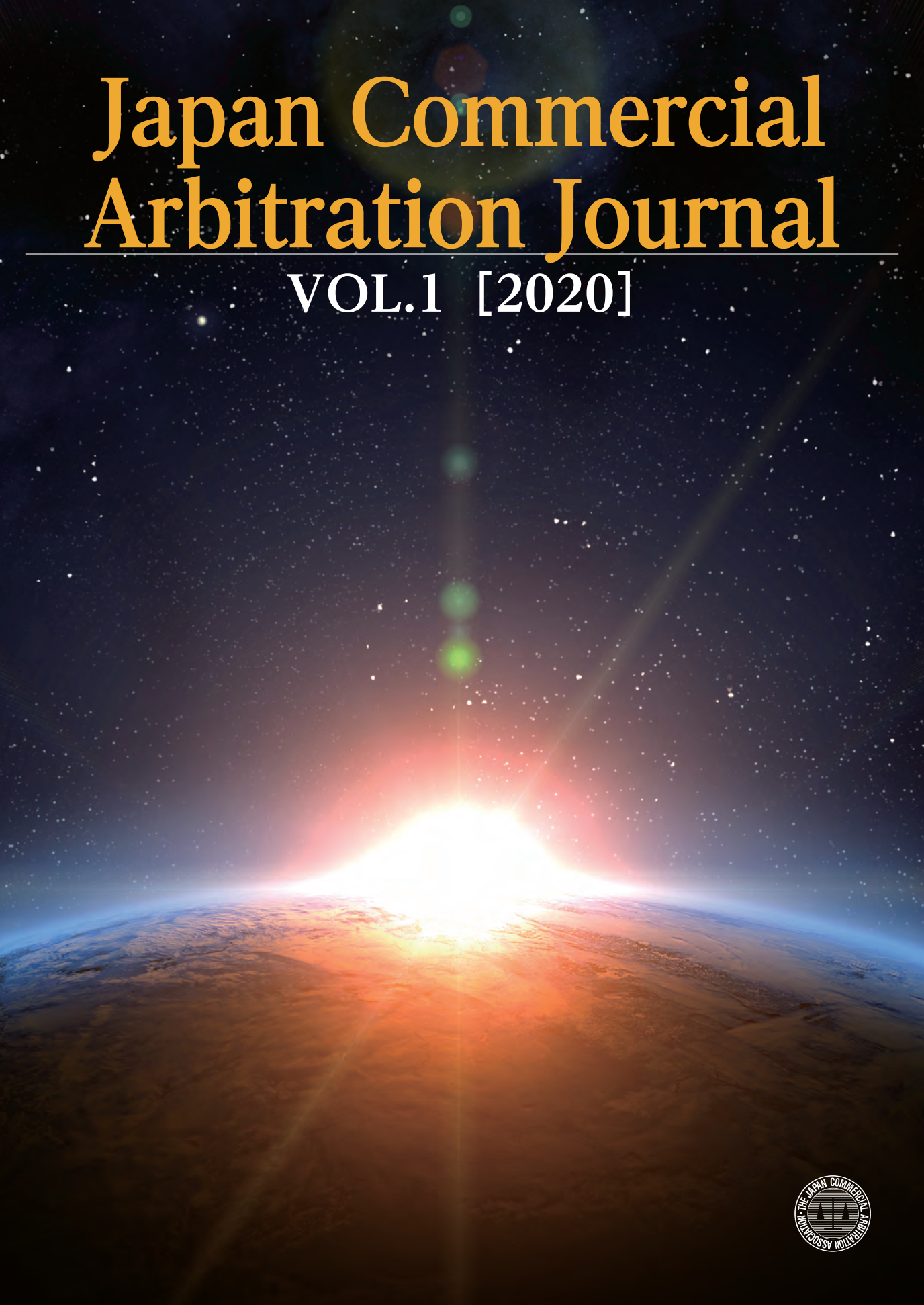

The Japan Commercial Arbitration Association
3F, Hirose Bldg, 3-17, Kanda Nishiki-cho, Chiyoda-ku, Tokyo 101-0054, Japan
www.jcaa.or.jp
planning-consulting@jcaa.or.jp

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Representative Attorney
Kunio Shimada
(DAI-ICHI TOKYO BAR ASSOCIATION)

West 18th Floor, Otemachi 1st Square 1-5-1 Otemachi, Chiyoda-ku, Tokyo 100-0004, Japan
TEL: +81-3-3217-5100 FAX: +81-3-3217-5101
E-mail:info@shimada-law.jp http://www.shimada-law.jp

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Chie Yakura
cyakura@mofo.com

MORRISON

The New JCAA Arbitration Rules —Japan's Attempt in Innovative Dispute Resolution

Professor, Keio University Law School; Principal, Law Offices of Douglas K. Freeman

Douglas K. Freeman

Ⅰ. Introduction

As the drive to strengthen Japan' s position in the international dispute resolution market is gathering steam, the Japan Commercial Arbitration Association—Japan' s leading Japanese arbitral institution—recently announced significant revisions to its arbitration rules, and introduced a new set of "Interactive Arbitration Rules," marking a bold shift in a new direction for Japan' s venerable arbitral institution.

As a practicing international arbitrator in Japan and a member of the Committee for the Amendment and Establishment of JCAA Arbitration Rules, I would like to comment on the key features and practical implications of these rules, which took effect as of January 1, 2019.

Ⅱ. The Three Rules

With the introduction of the entirely new Interactive Arbitration Rules, the JCAA now has three sets of arbitration rules. The default rules—which apply where no particular rules are specified—continue to be the Commercial Arbitration Rules, which were modified substantially to incorporate recent developments in modern arbitration rules. I will first highlight these changes, most of which also apply to the new Interactive Arbitration Rules.

Next, I will introduce the innovative features of the Interactive Arbitration Rules, which were aimed to provide speedily, cost-effective dispute resolution by mandating a "dialogue" between the arbitrator and the parties aimed to focus on the key issues of the dispute.

Finally, I will describe the revisions to the Administrative Rules for UNCITRAL Arbitration, and explain their scope of intended use.

Ⅲ. New Features of the Revised Commercial Arbitration Rules

The key features of the revised Commercial Arbitration Rules are as follows.

1. JCAA Arbitrator Candidate List

Recognizing the importance of its institutional role in providing objective information on arbitrator candidates, under the revised Rules, the JCAA will provide upon the parties' request a list of arbitrator candidates tailored to the needs of the particular case or the parties' specified criteria (Art. 9).

In generating this list, the JCAA will utilize its robust database containing approximately 100 Japanese and non-Japanese arbitrator candidates compiled from various sources. In this regard, the JCAA has made available a list of arbitrators and mediators candidates, including these who have experience in JCAA cases, to be used more generally for parties contemplating arbitration. See https://www.jcaa.or.jp/en/arbitration/candidate.html

Such information should be especially useful for parties seeking arbitrators skilled in a particular area or practicing in certain geographical regions. The compilation and dissemination of objective, detailed data in the publicly available lists—including numbers of cases handled in each year (with breakdowns of numbers handled as presiding arbitrator vs. as party appointed arbitrator), birth year, nationality and language capability—is unique and a welcome sign of the JCAA' s willingness to be more transparent and proactive as an arbitral institution.

2. Ongoing Investigative Duty for Arbitrater Independence/Impartiality Disclosure

Primarily in response to a 2017 ruling of the Supreme Court of Japan (Japanese Supreme Court Dec. 12, 2017), which held that arbitrators have an on going duty to disclose potential conflicts of interest and that such disclosures should include information the arbitrators could have known through reasonable investigation, the revised rules now specify that an arbitrator candidate should "conduct a reasonable investigation into any circumstances which may, in the eyes of the parties, give rise to justifiable doubts as to his or her impartiality or independence," and disclose such circumstances when seeking to accept an appointment (Art. 24.2). The rules also impose an ongoing duty to conduct an investigation and disclose such circumstances that arise in the course of the arbitration (Art. 24.4).

While arbitrators often consult "soft law" standards such as the IBA Guidelines on Conflict of Interest in International Arbitration (the "IBA Guidelines"), the criteria and rigor each arbitrator applies may differ based on their experience in a particular jurisdiction, and many international arbitrators may be unaware of the Japanese court' s standards. By imposing these relatively stringent disclosure requirements, the Rules seek to minimize challenges to awards based on independence and impartiality issues. The reference to a subjective standard "in the eyes of the parties" also brings the rules in line with the IBA Guidelines.

3. Ex Parte Communications Regarding Arbitrator Appointments

The revised Rules require explicit consent by all the parties for party-appointed arbitrators to engage in ex parte communications with their appointing party to discuss the appointment of the presiding arbitrator (Art. 28.5). This consent may be provided by email (Art. 2.3).

Given the disparity of ethical norms in this area, this provision helps reinforce the general

impermissibility of ex parte communications and clarifies the scope of this narrow exception. In practice, receiving party input regarding presiding arbitrator candidates is a useful exercise in party autonomy, and may be easily initiated by a joint email from the party-appointed arbitrators to the parties seeking their approval for such input.

4. Use of Tribunal Secretary

The revised Rules clarify the conditions for a sole or presiding arbitrator to engage a tribunal secretary, by requiring the consent of both parties following disclosure by the arbitrator of the expected tasks to be delegated and the calculation of remuneration (Art. 33.2).

These revisions remove a source of potential controversy in what has been considered a grey area in arbitration administration. Sensibly, the Rules also prohibit the delegation of tasks that substantially influence the tribunal' s decision (Art. 33.1), and subject the secretary' s remuneration to the arbitrators remuneration cap (Art. 33.4), —these elarifications make it easier for parties to utilize such assistance, which can be very helpful in procedurally complex cases.

5. Rights to Reject Untimely Submissions

The Rules now specify that the tribunal may reject a party' s submission of a statement or evidence if made in an untimely manner (Art. 41). While arbitrators are generally reluctant to disallow parties' submissions for fear of violating their right to be heard, having an express provision empowers a tribunal to take a firmer stance in enforcing procedural impropriety when needed in egregious cases that may significantly delay the proceedings.

6. Prohibition of Dissenting Opinions issuing

Unique among arbitration rules, the Rules now explicitly prohibit the disclosure of dissenting opinions (Art. 63). While recognizing that this issue is controversial, the JCAA decided that any benefits of allowing dissenting opinions are outweighed by their potential to invite potential challenges to the resulting award.

The pros and cons of dissenting opinions is a topic of debate in academia and among practitioners, and I personally feel that this delicate decision should be left to the arbitrator' s discretion as an important part of the adjudicative role. But as many arbitrators know, tribunals are at their best when rendering awards with unanimity, and it is hoped that occasions are rare in which an arbitrator finds this provision to be a hindrance.

7. Amended Expedited Arbitration Procedures

The Rules have expanded the scope of mandatory application of the expedited arbitration procedures required to be heard by a sole arbitrator which now apply to disputes under JPY 50 million, up from a previous threshold of JPY 20 million. These procedures are in principle conducted on a documents-only basis (i.e., without a hearing) (Art. 88) and set a non-mandatory target to render an award within three months from the arbitrator' s appointment (Art. 89).

While resolving a dispute within this compressed time frame is a challenge, it is a worthy aspiration for the Rules to encourage such rapid resolution to leverage the advantage of arbitration over litigation. It would behoove arbitrators to work to develop the skills required to expedite the resolution of disputes while ensuring procedural soundness.

8. Amendments to Arbitrator Remuneration

The arbitrator remuneration provisions have undergone some sensible revisions. The JCAA employs an hourly-rate system, subject to a gradual reduction in applicable rate (with a maximum reduction of 50% of the initial rate) and an overall cap to induce speedily case resolution.

The arbitrator' s standard hourly rate, which was previously determined on a case-by-case basis, is now fixed at JPY 50,000 (Art. 93.2). The remuneration cap based on the value of the dispute was slightly adjusted, and now differentiates between the presiding arbitrator (120%) and co-arbitrators (80%) for a three-member tribunal in recognition of the presiding arbitrator' s greater responsibilities (Art. 94.3). The threshold for starting the reduction of the hourly rate was increased from 60 hours to a more reasonable 150 hours (providing a 10% reduction every 50 hours) in light of average case duration.

The JCAA' s regime generally provides reasonable compensation in most cases. Although arbitrator remuneration does not often gain too much attention in the context of arbitration rule revisions, it is an important component of an effective arbitral institution regime, and the JCAA would be well advised to track arbitrator satisfaction with remuneration at the conclusion of their cases to ensure the fee structure continues to attract top rate arbitrators to accept appointments.

It should be noted that an arbitrator may agree with the parties to modify the remuneration rules prior to appointment, but such negotiations are prohibited after appointment (Art. 98). Parties seeking to appoint senior, renowned arbitrators may consider agreeing in advance to relax these rules (waiving the maximum fee cap in major, complicated disputes, for instance) before conducting their arbitrator search.

Ⅳ. Interactive Arbitration Rules

1. Overview

As part of a bold experiment to contain the escalation of arbitration costs driven by procedural inefficiencies frequently stemming from an adversarial dispute resolution culture, the JCAA—with some "fanfare" —has established the Interactive Arbitration Rules. The Rules' unique features aim to promote an efficient resolution of arbitration cases by prescribing an "interactive" dialogue between the tribunal and the parties to focus the proceedings on the key issues and by fixing arbitrator remuneration to incentivize swift case resolution. The Interactive Arbitration Rules must be affirmatively specified by the parties, in the absence of which the Commercial Arbitration Rules apply as the default rules. As most of the Interactive Arbitration Rules are common to the Commercial Arbitration Rules, the features unique to the

former rules are described below.

2. Tribunal' s Active Identification of Issues

The first "interactive" feature is to require the tribunal as early as possible in the proceedings to summarize the party' s claims and factual and legal issues (Art. 48.1). This feature is similar to the "list of issues" in the ICC' s terms of reference, except that the preparation of "factual and legal grounds of the claim and defense" and the "factual and legal issues" arising therefrom is mandatory in all cases, and such list must be presented to the parties to receive their feedback within a time limit specified by the tribunal.

Due to the inevitable gap in perspectives between the parties' counsel and the tribunal and pressure from their principals to conduct an all-out effort to leave no stone unturned, counsels at times devote large swaths of their pleadings on issues that bear little upon what the tribunal regards as the core, relevant issues. If administered successfully, this feature could enable the parties to home in on the issues the tribunal considers to be relevant, leading to a more efficient proceeding.

3. Tribunal Statement of Preliminary Views

The second—and potentially more controversial— "interactive" feature is the requirement for the tribunal to provide the parties with a written summary of the factual and legal issues the "tribunal considers important" and its "preliminary views with respect thereto," before making a decision on whether a hearing is necessary (Art. 56.1). As with the initial identification of issues, the parties are allowed to comment on these views (Art. 56.2). The stated views do not bind the tribunal in its subsequent decisions (Art. 56.5), and the parties cannot challenge the arbitrator based on expressing these views (Art. 56.6).

Requiring disclosure of the tribunal' s views is unique among leading arbitration rules, although the practice of disclosing the decision maker' s views is not uncommon in civil law based proceedings including litigation. The new Prague Rules on Efficient Conduct of International Arbitration released in 2018 also adopted a similar rule (see Art. 2.4), which allow, but do not mandate, such disclosure, aiming to introduce a civil law based inquisitorial approach to arbitration soft law rules. In a departure from the Prague Rules, JCAA adopted a mandatory disclosure rule which has attracted much criticism.

The JCAA acknowledges that common law lawyers in particular may find such inquisitorial proceedings offensive to their standard norms. The institution has nonetheless taken the valorous step of adopting these Rules, which, notably, are an optional set of rules that parties can use, aiming to devise a more efficient procedural regime.

I personally believe that disclosing a tribunal' s views in writing in a productive and non-biased manner requires a high degree of professional finesse and may not be effective in all cases. The tribunal also risks being perceived as biased in the eyes of the parties before its award has been issued. On this basis, I would have preferred to have the Rules encourage rather than require such disclosure.

Nonetheless, this attempt by the JCAA to be an experimental leader, rather than a follower,

in seeking to rein in the spiraling arbitration costs is laudable in its aim. And if these efforts stir debate to cause the arbitration community to reassess its excessively adversarial practices, I belive that alone is worthy of approbation.

4. Reduced, Fixed Arbitrator Remuneration

In a departure from its traditional hourly remuneration structure, the JCAA also adopted a fixed arbitrator remuneration system based on the value of the dispute, ranging from JPY 1 million for disputes worth less than JPY 50 million to JPY 5 million for disputes at or above JPY 10 million (Art. 94) for sole-arbitrator cases. Remuneration for the presiding arbitrator are slightly more, and for co-arbitrators, slightly reduced, in a three-member tribunal (Art. 95).

This fixed fee structure may not gain unanimous applause from arbitrators and could result in remuneration that is incommensurate to the work involved in certain cases. Moreover, the fixed amounts have been criticized as being unrealistically low and failing to attract skilled arbitrators.

Still, in light of the increased focus on arbitration in Japan' s domestic legal community—as seen in the opening of the Japan International Dispute Resolution Center in the heart of Tokyo this spring—if the use of arbitration expands to include domestic, commercial cases, younger practitioners and former judges may join the arbitrator pool. And experienced arbitrators may be spurred to develop streamlined procedures that afford a fair and expeditious resolution, which serve to compress overall arbitration costs, including counsel' s fees and expenses.

Overall, this is a big, bold experiment, but one worthy of embracing if arbitration is to further evolve to establish itself as the true optimal alternative dispute resolution mechanism.

5. Administrative Rules for UNCITRAL Arbitration

In these revisions, the JCAA also clarified certain details regarding the administration of UNCITRAL arbitration under the revised Administrative Rules for UNCITRAL Arbitration.

Most significantly, arbitrator' s remuneration under these Rules is determined within the range of $500 to $1500 per hour (Art. 20.2). If agreed by the parties, payment of remuneration and costs may be made during the course of the proceedings rather than at its conclusion (Art. 22.2).

This fee range is on par with, or exceeds, other arbitral institutions in the region such as SIAC and HKIAC, and is designed to attract prominent International arbitrators in suitable complex cases.

Given that parties generally choose the rules of the designated arbitral institution, cases where the JCAA is appointed to administer an arbitration under the UNCITRAL Rules are expected to be limited. But the UNCITRAL Rules may find possible use in disputes involving state entities having the need for an entirely “neutral” set of arbitral rules, and Japan may be well-placed as a neutral venue for disputes under the Belt and Road Initiative, investment state arbitration or other regional disputes involving nations.

6. Summary

While a number of the JCAA' s changes—and particularly the innovative Interactive Arbitration Rules—may raise some controversy, it is notable that the JCAA—not known for taking leadership in the arbitration arena—has taken a bold step forward to propose these Rules focusing on the user' s perspective. Whether these Rules are accepted remains to be seen, but it is refreshing to see Japan seeking to take proactive role in this innovative initiative. It is hoped that both arbitrators and counsel will respond in kind to develop new procedural techniques to increase arbitration' s attraction as the ideal means to resolve international disputes.

New Arbitration Rules Based on the Civil Law Tradition

—The 2018 DIS Arbitration Rules, the Prague Rules, and the JCAA Interactive Arbitration Rules

Attorney-at-law (Japan), Oh-Ebashi LPC & Partners

Aiko Hosokawa

Ⅰ. Introduction

There have long been discussions on bridging the common law/civil law divide in international arbitration. Generally, common law jurisdictions adopt an adversarial approach to disputes while civil law jurisdictions prefer an inquisitorial one. This leads to various differences in style of arbitral proceedings for matters such as document production, hearings, witness examinations, and the facilitation of settlements.

As to evidence procedure, the IBA Rules on the Taking of Evidence in International Arbitration (2010) (the "IBA Rules") were drafted to harmonize such differences and are now heavily used in practice. The conventional wisdom is, however, that most historical clashes between the civil and common law traditions in many areas of international arbitration have been resolved in a more or less pragmatic fashion.[1)]

Some practitioners have recently, contended that international arbitration practice - inclusive of the IBA Rules - remain rooted predominantly in the common law tradition.[2)] They have also put forward the criticism that the adversarial approach of the common law tradition tends to lead to lengthy and costly proceedings, involving broad document production procedures and lengthy witness hearings. In fact, in a recent survey of the worst characteristics of international arbitration, the issues of "cost" and "lack of speed" of international commercial arbitration were ranked the first and fourth, respectively.[3)]

Increased costs and time in international arbitration have also been partly attributed to "due process paranoia," which aptly describes the reluctance of tribunals to act decisively in certain

1) Klaus Peter Berger & J. Ole Jensen, The Arbitrator's Mandate To Facilitate Settlement, Fordham International Law Journal, Vol. 40 Issue 3 (2017) 887, 890, available at https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2653&context=ilj.

2) Andreas Respondek, How Civil Law Principles Could Help to Make International Arbitration Proceedings More Time and Cost Effective, Singapore Law Gazette February 2017 (2017) 33, 33, available at https://www.praguerules.com/upload/iblock/af3/af3352da3709e3340951a38dfe8d7f61.pdf; Cristina Ioana Florescu, In pursuit of the cherished notion of efficiency through the new Prague Rules, REVISTA ROMÂNĂ DE ARBITRAJ No. 2 2019 (2019) 38, 50, available at https://www.praguerules.com/upload/iblock/2be/2be722293282aed11986600b8983c503.pdf.

situations for fear of the arbitral award being later challenged on the basis of a party not having had the chance to present its case fully.[4] This has resulted, for example, in situations where deadlines have been repeatedly extended, fresh evidence is admitted late in the process, or other disruptive behavior by counsel is condoned due to what was perceived to be a concern by the tribunal that the award would otherwise be vulnerable to a challenge.[5] In an effort to dispel such "due process paranoia," many arbitral institutions have addressed it in their rules on arbitral procedure, guidance notes, best practices and other soft law documents.[6] The need for more proactive tribunals has also been raised.[7]

In response to the above criticisms, some have embraced a civil law approach in calling for an enhanced and proactive role for tribunals, more so streamlined arbitral proceedings, and a push to save both time and money for parties involved in arbitral disputes. This article will feature three new sets of arbitral rules based on such ideas, namely, the Arbitration Rules of the German Arbitration Institute, the Prague Rules, and the Interactive Arbitration Rules of the Japan Commercial Arbitration Association.

It is important to note that there is a diversity of rules and thought even within the civil law tradition. For example, though Japan is considered a civil law jurisdiction as much of its foundational legal tradition comes from Germany and France, aspects of the American legal tradition can also be found therein. The mixture of civil law and common law can be seen, for example, in the development of the Japanese Code of Civil Procedure. The Japanese Code of Civil Procedure was originally enacted based on the German Code of Civil Procedure in 1890, but after World War II, Japan adopted an American style adversarial witness examination system. However, Japanese judges are still active in facilitating settlements and even utilize caucuses (i.e. ex parte meetings).[8] These features differentiate Japan from the common law legal traditions, as well as some other civil law jurisdictions. Thus, though Japanese practitioners are familiar with a civil law type judiciary, they do not necessarily feel uncomfortable, nor are they unfamiliar with, common law practices such as conducting adversarial witness examinations. There is, however, a resistance to common law style fact

3) Queen Mary University of London, 2018 International Arbitration Survey: The Evolution of International Arbitration, 7-8, http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF.

4) Queen Mary University of London, 2015 Improvements and Innovations in International Arbitration, 10, http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf.

5) Id.

6) Miroslav Dubovský & Pavlína Trchalíková, Adverse inferences drawn in international arbitration under the Prague Rules, REVISTA ROMÂNĂ DE ARBITRAJ No.2 2019 (2019) 22, 24, available at https://www.praguerules.com/upload/iblock/d9f/d9f25f714b17beae1540b06aad653123.pdf.

7) Queen Mary University of London, supra note 4; Klaus Peter Berger & J. Ole Jensen, Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators, Arbitration International, Vol. 32 No. 3 (2016) 415, 431-433, available at https://www.praguerules.com/upload/iblock/882/88256e5a0d39997b4d6ec9be17303671.pdf.

8) On the contrary, Japanese arbitrators are usually well aware of the risk of caucusing in international arbitration giving rise to an issue of due process, so caucusing is not common in international arbitral proceedings conducted by Japanese arbitrators.

finding, such as American style Discovery, with its expansive document production and related lengthy hearings. It is important to note that Japan is not alone in utilizing a hybrid system. For example, ordinary civil proceedings before state courts in Italy are adversarial in nature.[9)]

In sum, it would not be appropriate to lump all civil law jurisdictions together under the category of the "inquisitorial practice." Rather, there is a need for a closer look at the context of each of the following three sets of rules.

Ⅱ. Recent Arbitral Rules Based on the Civil Law Tradition

1. The New DIS Arbitration Rules (March 2018)

The recently revised rules of Germany' s leading arbitral institution, the German Arbitration Institute (Deutsche Institution für Schiedsgerichtsbarkeit e.V.) ("DIS"), took effect on March 1, 2018 (the "2018 DIS Rules").[10)] Though most of the changes therein were essentially in line with recent trends in other major arbitration institutions, there were some unique German legal tradition inspired tweaks worth noting.[11)]

The 2018 DIS Rules aim to help parties resolve their disputes as early as possible. For example, Article 26 states that, "[u]nless any party objects thereto, the arbitral tribunal shall, at every stage of the arbitration, seek to encourage an amicable settlement of the dispute or of individual disputed issues." It is an expanded version of Section 32.1 of the former DIS Arbitration Rules (1998), which provides that, "[a]t every stage of the proceedings, the arbitral tribunal should seek to encourage an amicable settlement of the dispute or of individual issues in dispute."

In addition, under the 2018 DIS Rules, at the case management conference, the arbitral tribunal is required to discuss the applicability of the measures set forth in Annex 3 (Measures for Increasing Procedural Efficiency) and Annex 4 (Expedited Proceedings), and the use of possible alternative methods of dispute resolution, such as mediation with the parties.[12)] One of the unique measures in Annex 3 is "[p]roviding the parties with a preliminary non-binding assessment of factual or legal issues in the arbitration, provided all of the parties consent thereto."

The above provisions of the 2018 DIS Rules are in line with the practice of German judges and arbitrators, who actively encourage settlement during the arbitral proceedings. They are specifically rooted in the German legal tradition, which has been further memorialized in regards to litigation under Section 278(1) of the German Code of Civil Procedure.[13)]

While arbitrators from common law jurisdictions tend to hesitate in suggesting settlement

9) Roberto Oliva, The Prague Rules: Minimal notes from an Italian perspective, REVISTA ROMÂNĂ DE ARBITRAJ No. 2 2019 (2019) 64, 71, available at https://praguerules.com/upload/iblock/5a8/5a893e89210964faf24cd23f1a8f3640.pdf.

10) The 2018 DIS Rules are available at http://www.disarb.org/en/16/rules/overview-id0.

11) For further details of the 2018 DIS Rules, see Stephan Wilske & Aiko Hosokawa, The New DIS Arbitration Rules 2018: Germany's Offer of an Attractive Arbitration Alternative for Asian Parties, IPBA Journal No. 91 (2018) 40, available at https://ipba.org/media/normal/4245_IPBA_Sept18_final.pdf.

12) The 2018 DIS Rules, art. 27.4.

to the parties, parties from civil law jurisdictions tend to expect the arbitral tribunal to suggest a reasonable settlement when the time is ripe.[14] Such opposing points of view arise from the important role of judges in facilitating settlements between litigating parties in many civil law jurisdictions, such as Germany, Austria, Switzerland, Belgium, France, Italy and the Netherlands.[15]

Furthermore, parties from certain civil law jurisdictions expect that the arbitral tribunal will at a certain stage express a preliminary view on the merits of the case and encourage an amicable settlement. This is often referred to as the "German approach." [16] This approach is not the same as mediation, and caucusing is almost never done, but this practice has been considered to be quite successful.[17] Such practice in arbitration is common not only in Germany but also in other civil law jurisdictions, such as Switzerland, Austria and China.[18]

Thus, the provisions of the 2018 DIS Rules discussed above are backed by the practice of German courts and arbitrators, and common in other civil law jurisdictions. Utilizing such provisions can lead to an efficient and early resolution of cases.

2. The Prague Rules (December 2018)

The Rules on the Efficient Conduct of Proceedings in International Arbitration, or the so-called "Prague Rules," [19] were launched on December 14, 2018 in Prague. The rules were drafted as a result of a project initiated by the Russian Arbitration Association (the "RAA"), which aimed at securing more efficient arbitral proceedings from a civil law perspective.

In April 2017, the foundation of the Prague Rules was laid in Moscow during the annual conference of the RAA, where a presentation titled, "Creeping Americanisation of international arbitration: is it the right time to develop inquisitorial rules of evidence?" left a strong impact. A group consisting predominantly of civil law practitioners then seized on the presentation to create the Working Group of the Prague Rules (the "Working Group"). The Working Group expressed the concern that "from a civil law perspective, the IBA Rules are still closer to common law traditions, as they follow a more adversarial approach regarding document production, fact witnesses and Party-appointed experts" as described in its Note to the draft of the Prague Rules.[20]

The Working Group further stated that they were concerned that common law traditions

13) Berger & Jensen, supra note 1, at 910. Under Section 278(1) of the German Code of Civil Procedure, at every stage of the proceeding, the court is to act in the interest of arriving at an amicable resolution of the legal dispute or of the individual points at issue.

14) Id. at 892, and 899-900.

15) Id. at 902.

16) Bernd Ehle, The Arbitrator as a Settlement Facilitator, in Walking A Thin Line – What an Arbitrator Can Do, Must Do or Must Not Do (2010) 77, 80.

17) Id. at 82 and 92.

18) Id. at 81-83.

19) The Prague Rules are available at https://praguerules.com/prague_rules/.

20) Note from the Working Group on the Draft of September 1, 2018, https://praguerules.com/upload/medialibrary/b2e/b2e26123ac310b644b26d4cd11dc67d8.pdf.

increase the costs of arbitration, and that many arbitrators are reluctant to actively manage arbitration proceedings, by, for example, making an early determination or preliminary evaluation of the issues in a dispute, as a means of avoiding the risk of a challenge.[21)]

In light of the above, the initial aim of the Working Group was to develop a set of rules on obtaining evidence in international arbitration based on an inquisitorial model of procedure rooted in the civil law tradition, which could increase efficiency, and reduce the duration and costs of arbitrations.[22)]

Though the Working Group intended new rules to be an alternative to the IBA Rules, constructive criticisms from the arbitral community on the draft of the Prague Rules shifted their emphasis to general efficiency in arbitration as well.[23)] In the note to the final version, the Working Group described their purpose more broadly by stating that "the Rules, initially intended to be used in disputes between companies from civil law countries, could in fact be used in any arbitration proceedings where the nature of the dispute or its amount justifies a more streamlined procedure actively driven by the tribunal, a practice which is generally welcomed by arbitration users."

With the intention of empowering arbitral tribunals to get more proactively involved in the arbitral proceedings, reflecting the inquisitorial approach of the civil law tradition, the Prague Rules address various aspects of the arbitral proceedings, including the fact-finding process, documentary evidence, fact witnesses and experts, the iura novit curia principle, hearings, and the assistance given in amicable settlements. The following are some of the key unique features of the Prague Rules relating to the civil law tradition.

A Proactive Tribunal

At the case management conference or at any later stage of the arbitration, the arbitral tribunal may, if it deems it appropriate, indicate to the parties its preliminary views about the allocation of the burden of proof, the relief sought, the disputed issues, and the weight and relevance of the evidence submitted. Nevertheless, expressing such preliminary views would not by itself be considered as evidence of the arbitral tribunal' s lack of independence or impartiality, and cannot constitute grounds for disqualification.[24)]

Limited Document Production

Although the IBA Rules were drafted to prevent broad and expensive common law style discovery, in practice, document production under the IBA Rules are still often voluminous and burdensome as parties, at times, attempt "fishing expeditions" as a means of discovering information from the other side which may help strengthen their position. To tackle this, the Prague Rules stipulate that "[g]enerally, the arbitral tribunal and the parties are encouraged to avoid any form of document production, including e-discovery," and the party who wishes

21) Id.
22) Id.
23) Florescu, supra note 2, at 47.
24) The Prague Rules, art. 2.4.

to request certain documents from the other party must first persuade the tribunal before its document production request is allowed.[25)]

Fact Witnesses and Experts

Under the common law tradition, the parties can decide which witnesses to present and cross-examine,[26)] but under the Prague Rules, the tribunal will decide which witnesses to call.[27)] Also, at the hearing, the arbitral tribunal can direct and control the examination of witnesses, and reject questions that it considers to be irrelevant, redundant or immaterial to the outcome of the case.[28)]

The IBA Rules allow the arbitral tribunal to appoint an independent expert,[29)] but, unfortunately, this is rarely done in practice. In this regard, the Prague Rules have made the appointment of a tribunal-appointed expert the default procedure, without, however, preventing the parties from appointing their own experts.[30)] This approach may save on costs for the appointment of multiple experts.

Assistance in Amicable Settlements

Under the Prague Rules, unless one of the parties objects, the arbitral tribunal may assist the parties in reaching an amicable settlement of the dispute at any stage of the arbitration.[31)]

Some critics have contended that the major feature of the Prague Rules are already possible under most arbitration laws, institutional arbitral rules, or the IBA Rules, as they all tend to lean in the direction of party autonomy. Said critics specifically contend that an arbitral tribunal' s power to appoint its own expert, and their ability to limit document production, or shortening irrelevant and repetitive witness evidence is already possible under the IBA Rules.[32)]

The Prague Rules were, however never meant to present a completely new and perfect set of rules for the whole arbitration procedure.[33)] Rather, their aim is to provide options reflective of the civil law tradition to create tailor-made and efficient arbitral proceedings depending on the needs of the parties.

3. The JCAA Interactive Arbitration Rules (January 2019)

25) Id., arts. 4.2 and 4.3.

26) Ben Giaretta, Prague Rules OK?, The Resolver Spring 2019 Issue (2019) 8, 9-10, available at https://praguerules.com/upload/iblock/8cc/8cc7a1bab295076ede8125d342580a5c.pdf.

27) The Prague Rules, arts. 5.2-5.9.

28) Id., art. 5.9.

29) The IBA Rules, art. 6.1

30) The Prague Rules, arts. 6.1 and 6.5.

31) Id., art. 9.1.

32) Natasha Peter, The Prague Rules as choice architecture, REVISTA ROMÂNĂ DE ARBITRAJ No.2 2019 (2019) 80, 81, available at https://praguerules.com/upload/iblock/f52/f52518518a9aff503174030cf7c6830f.pdf.

33) Florescu, supra note 2, at 62.

The Japan Commercial Arbitration Association ("JCAA"), which is the most prominent Japan based arbitral institution, amended their Commercial Arbitration Rules and their Administrative Rules for UNCITRAL Arbitration, while concurrently launching a new third set of rules called the Interactive Arbitration Rules[34] (the "Interactive Arbitration Rules"). All three sets of rules took effect on January 1, 2019. As the Interactive Arbitration Rules are novel in nature and are rooted in the civil law tradition, they are of particular interest.[35]

The Interactive Arbitration Rules require the arbitral tribunal to provide the parties a written summary of their positions on the factual and legal grounds of their claims and defenses as well as the issues tentatively identified by the arbitral tribunal. The parties must then be given an opportunity to comment on the summary.[36]

The arbitral tribunal is then required to provide the parties a written summary of the factual and legal issues that it considers important, together with its non-binding preliminary views thereon. After the arbitral tribunal gives the parties an opportunity to comment thereon and on whether or not a witness examination should be conducted, the arbitral tribunal will then decide whether witness examinations are necessary.[37] The parties are prohibited from challenging a tribunal based on the issuance of such preliminary views.[38]

As already explained above, the arbitral tribunal' s disclosure of its preliminary views is a common practice in various civil law jurisdictions. The JCAA has indicated that the common law adversarial type of arbitration practice has caused costly and lengthy arbitral proceedings where parties may end up submitting evidence and arguments on matters that are not considered necessary or relevant by the arbitral tribunal.[39] The JCAA has also indicated that the above interactive communications between the arbitral tribunal and the parties at pertinent stages of the arbitral process will enhance predictability by the parties with respect to the outcome of the proceedings while also aiding the arbitral tribunal in drafting the final award efficiently.[40]

As explained above, the 2018 DIS Rules and the Prague Rules have similar but voluntary provision regarding the disclosure of the arbitral tribunal' s preliminary views, but the Prague Rules have sometimes been criticized for going too far in that they open up the potential risk that such actions might allow for disqualification of an award under the arbitration laws of some countries.[41] Though this criticism could conceivably also apply to the Interactive

34) The Interactive Arbitration Rules are available at https://www.jcaa.or.jp/common/pdf/arbitration/Interactive_Arbitration_Rules2019_en.pdf.

35) For further details of the Interactive Arbitration Rules, see JCAA, Reform of the JCAA Arbitrations Rules: Three Sets of Rules in Response to All Business Needs, January 1, 2019; Aiko Hosokawa & Miriam Rose Ivan L. Pereira, The New Interactive Arbitration Rules of the Japan Commercial Arbitration Association, Oh-Ebashi English Newsletter 2019 Summer Issue (2019), https://www.ohebashi.com/jp/newsletter/20190624_NL_en_2019summer.pdf.

36) The Interactive Arbitration Rules, art. 48.

37) Id., art. 56.

38) Id., art. 56.6.

39) JCAA, JCAA no chusai seido no kaikaku ni tsuite bijinesukai no arayuru nizu ni taio suru mittsu no chusai kisoku [Reform of the JCAA Arbitrations Rules: Three Sets of Rules in Response to All Business Needs] (2019), 7 (in Japanese).

40) JCAA, supra note 35, at 10.

Arbitration Rules and the 2018 DIS Rules, such concerns appear to be exaggerated. The indication by the arbitral tribunal of its preliminary views to the parties will not deter arbitrators from arriving at a different or contrary final conclusion in the award after a thorough review of all the submissions and evidence.[42] To be on the safe side though, arbitrators should obtain a waiver from each party on its right to challenge the impartiality of the arbitrators due to providing such views.[43] The Prague Rules and the Interactive Arbitration Rules have both already incorporated such a waiver.[44]

This new mechanism under the Interactive Arbitration Rules is expected to encourage parties to an arbitration to focus on the issues and evidence that the arbitral tribunal considers relevant, thereby reducing the cost and length of arbitral proceedings.

Ⅲ. The Contextual Differences of these Three Sets of Rules

The above features of the 2018 DIS Rules, the Prague Rules and the Interactive Arbitration Rules are all rooted in the civil law tradition, but they differ to some extent depending on the nature and cultural underpinnings of each set of rules.[45]

As to the nature of each of these rules, the Prague Rules mainly contain provisions for the taking of evidence in international arbitration because, like the IBA Rules, the Prague Rules are not intended to replace various institutional arbitration rules and were designed merely to supplement the procedure agreed upon by the parties or otherwise applied by an arbitral tribunal in a particular dispute.[46] On the other hand, compared to the Prague Rules, the 2018 DIS Rules and the Interactive Arbitration Rules do not stipulate detailed provisions on evidence taking, as is normally the case for institutional arbitration rules.

Nevertheless, the 2018 DIS Rules include measures that aim to promote efficiency regarding the taking of evidence, which are to be discussed in the case management conference (Annex 3), such as limiting the length or the number of submissions, witness statements and expert reports, conducting only one oral hearing, or limiting document production requests. These measures are in line with German practice as German arbitrators tend to avoid the unnecessary taking of evidence, limit the issues on which evidence is to be taken, and prefer not to hold lengthy witness hearings.[47]

41) Oliva, supra note 9, at 69-70; Michael McIlwrath, The Prague Rules: The Real Cultural War Isn't Over Civil vs Common Law, Kluwer Arbitration Blog December 12, 2018, http://arbitrationblog.kluwerarbitration.com/2018/12/12/the-prague-rules-the-real-cultural-war-isnt-over-civil-vs-common-law/.

42) Berger & Jensen, supra note 1, at 908-909.

43) Id.

44) The Prague Rules, art. 2.4, and the Interactive Arbitration Rules, art. 56.6.

45) For further details of the comparison of these three sets of rules, see Masato Dogauchi, Komonro gata chusai he no anchi teze toshiteno tairikuhou gata chusai [A Civil Law Model of Arbitration as an Antithesis of the Dominant Common Law Model], The Waseda law review, Vol. 95 No.3 (2020), 119 (in Japanese), and Shusuke Kakiuchi, Tairikuhou teki chusai –JCAA intarakutivu chusai kisoku to puraha kisoku no hikaku- [Civil Law Style Arbitration: A Comparative Study of JCAA Interactive Arbitration Rules and Prague Rules], JCA Journal Vol. 67 No. 1 (2020), 8 (in Japanese).

46) Preamble to the Prague Rules.

On the contrary, the Interactive Arbitration Rules are more open regarding the style of evidence taking. This feature suits the Japanese legal tradition, as it does not adopt a simple and typical "inquisitorial" approach as mentioned earlier above.

As to cultural underpinnings, the implication in the very term "German approach," German law has a long tradition of judges and arbitrators proactively assisting parties in negotiating and reaching a settlement during the proceedings.[48] Backed by this tradition, the 2018 DIS Rules mandate the arbitral tribunal to encourage an amicable settlement at every stage of the arbitration, while the Prague Rules merely permit the arbitral tribunal to do the same voluntarily. As to the Interactive Arbitration Rules, while they do not expressly touch on the facilitative role of the arbitral tribunal, the mandatory disclosure of its preliminary views may in fact effectively promote early settlement. This approach is also in line with prevailing Japanese court practice.

Ⅳ. Conclusion

As explained above, though the 2018 DIS Rules, the Prague Rules and the Interactive Arbitration Rules differ in context, they all have unique features rooted in the civil law tradition and require the arbitral tribunal to get more so involved in proceedings. All these rules serve as alternative options to the current purportedly common-law dominant arbitration world. They allow parties to use them as tools to make the arbitral proceedings a more efficient and tailor-made process, which could then attract more users to the arbitration world, especially those who are dissatisfied with the current time and cost issues of arbitration proceedings.

47) Wilske & Hosokawa, supra note 11, at 42.

48) Ehle, supra note 16.

大江橋法律事務所
OH-EBASHI

OH-EBASHI
LPC & PARTNERS

Tokyo Office

Kishimoto Building 2F
2-2-1 Marunouchi, Chiyoda-ku, Tokyo 100-0005, Japan
TEL：+81-3-5224-5566　FAX：+81-3-5224-5565

Osaka Office

Nakanoshima Festival Tower 27F
2-3-18 Nakanoshima, Kita-ku, Osaka 530-0005, Japan
TEL：+81-6-6208-1500　FAX：+81-6-6226-3055

Nagoya Office

Nagoya Crosscourt Tower 16F
4-4-10 Meieki, Nakamura-ku, Nagoya 450-0002, Japan
TEL：+81-52-563-7800　FAX：+81-52-561-2100

Shanghai, China Office

Hang Seng Bank Tower 13F, 1000 Lujiazui Ring Road Pudong New Area, Shanghai 200120, China
TEL：+86-21-6841-1699　FAX：+86-21-6841-1659

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Cooperating on Disputes[1)]
—Moving towards a Stronger Cooperative Foundation for the Settlement of Disputes in Asia

Authors[2)]:Tony Andriotis, Giorgio Fabio Colombo, David MacArthur, Masako Miyatake, Michael Mroczek, Shiori Sato and Julia Jiyeon Yu

With the rise of the correctly predicted "Asian Century," we have witnessed a transition in which Asian economies have shifted from being the recipients of Foreign Direct Investment

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2) **Tony Andriotis** is a Tokyo based Partner at Quinn Emanuel Urquhart & Sullivan. He is the President of the Greek Chamber of Commerce in Japan, an Adjunct Professor at the Tokyo Campus of Temple Law School, and is a part-time lecturer at Keio Law School and Humboldt University. He is the Professional & Institutional Affairs Officer at the JCAA, a Board Member at the JAA, and a member of the JIDRC Advisory Board. **Giorgio Fabio Colombo** is Full Professor of Law at Nagoya University Graduate School of Law, where he is in charge of International Commercial Arbitration, and Director of the Research Unit "Decolonizing Arbitration." He is admitted to the Bar of Milan (Italy). **David MacArthur** is a partner at Bae, Kim & Lee LLC in Seoul, Korea, specializing in international arbitration. With 15 years of experience in the field, David has represented clients in dozens of arbitrations under the major global and regional rules. He also acts as arbitrator and is a founding co-chair of KCAB Next, a professional development group composed of the next generation of arbitrators and practitioners. **Masako Miyatake** is a Partner at Blakemore & Mitsuki, Tokyo as well as a Guest Professor, Keio University Law School. She now serves as a Deputy Secretary of Japan International Dispute Resolution Center (JIDRC) and a member of Steering Committee of Japan International Mediation Center, Kyoto (JIMC), and is a listed arbitrator at JCAA and KCAB International. She is a MCIArb and CIArb Accredited Mediator, and has earned an LL.M. at Columbia Law School (NY, U.S.) and Ph.D. in Business Law from Hitotsubashi University Graduate School of International Corporate Strategy, (Tokyo, Japan). **Michael Mroczek** is a partner with the Tokyo based Okuno & Partners where he primarily specializes in international commercial arbitration, corporate law, M&A and finance. Michael holds two Masters of Law; one from the Basel University (Switzerland) and the other from Temple University's Law School (Tokyo, Japan). Prior to his election as President of the European Business Council in Japan (EBC), Michael served as President of the Swiss Chamber of Commerce and Industry in Japan. He is a lecturer at the University of Tokyo where he teaches International Arbitration, and he also lectures at the Temple Law School (Tokyo) and the University of St. Gallen (Switzerland). **Shiori Sato** is an associate at Linklaters' Tokyo offices, and is admitted to practice law in Japan. She has an extensive background representing Hokkaido University, where she earned her undergraduate and graduate degrees in law, as both a participant and coach in the Willem C. Vis International Commercial Arbitration Moot Competition. She began working on this article while interning at the Tokyo offices of Quinn Emanuel Urquhart & Sullivan. **Julia Jiyeon Yu** is a partner at Oon & Bazul in Singapore and teaching at the faculty of law of Kyushu University in Japan. She is qualified as a lawyer in Korea and a registered foreign lawyer in Singapore.

(FDI) to being primary investors. Moreover, we have seen much of that investment both originate and end up in Asia. Japan, Korea, China, Singapore and Taiwan have, in particular, acted as a major players in the growth of FDI throughout the continent, and in much of the world.

The Asian economic boom has also led to a regional renaissance of sorts in the area of dispute resolution. As an example, the Singapore International Arbitration Centre (SIAC) which was founded in 1991, had 90 new cases filed in 2006, while in 2019, approximately 480 new cases were filed. This represents an over 500% increase in a little over a decade. The Hong Kong International Arbitration Centre (HKIAC), too, with a longer history as an administrator of ad hoc arbitrations, has seen itself reborn in the last decade-plus with the issuance of its own arbitration rules that have seen several cutting-edge revisions. With these successes, we have witnessed other regional attempts at replication. One such success story can be found in South Korea, and the explosive growth of the arbitration caseload being handled by the Korean Commercial Arbitration Board (KCAB).

Despite Japan' s pivotal role as a key investor throughout Asia and the world at large, historically speaking, Japan has not been viewed as a leader or center for arbitration compared to other Asian jurisdictions. This situation is often explained as being tied to a purported anti-dispute, harmony-seeking culture and a strong confidence in domestic courts. Also, multinational companies based in Japan historically had no significant resistance towards arbitrating, or litigating, their disputes overseas. This historical lack of aggressive positioning in the disputes market has, however, been reconsidered as of late, and concrete efforts have been made to push Japan towards the position of a leading dispute resolution jurisdiction[3)] . Efforts have included the Japanese government' s sponsorship of the recently founded Japan International Dispute Resolution Center (JIDRC) and the recent adjustments made to the Japan Commercial Arbitration Association (JCAA) rules. Specifically, in January of 2019 the JCAA introduced a few new amendments to their previously issued rules, along with a new set of rules. The JCAA now has three sets of rules: (1) the Administrative Rules for UNCITRAL (the United Nations Commission on International Trade Law) Arbitration, (2) the Commercial Arbitration Rules and (3) the Interactive Arbitration Rules.

Japan' s recent push for a piece of the "Disputes Pie" may well be aided by the success of its neighbors in South Korea. Actions taken in Korea over the past decade are highly instructive, and can serve as a road-map for possible future actions in Japan. Moreover, a common legal tradition, geographic proximity, shared strong democratic institutions steeped in the concept of rule of law, and a general understanding amongst legal and business professionals may act in building a strong foundation for cooperation between the two North-East Asian neighbors.

3) This change in attitude has been praised in Y. Furuta, T. Andriotis, Y. Sakioka, M. Mroczek, Thoughts on Necessary Changes in Japan, in Global Arbitration Review, https://globalarbitrationreview.com/article/1169880/thoughts-on-necessary-change-in-japan. See also e.g., J. Claxton; L. Nottage, «Japan is Back» – for International Dispute Resolution Services, in Int. Arb. L. rev., vol. 20, 6, 2017. J. Kang, Arbitration – A Case for Tokyo, in Asian Legal Business, 2017, https://www.legalbusinessonline.com/features/case-tokyo/75228

We will below summarize recent and historical changes to the arbitration environments in both Korea and Japan – with a particular focus on the new JCAA rule framework - while also proposing a strategy for strengthened cooperation between the arbitration communities in these two neighboring examples of the continued rise of the Asian Century.

The Korean Example

Founded during the post Korean War industrial economic growth era under the purview of the Korean Ministry of Economy Trade and Industry (K-METI) and with the support of various trade associations, KCAB was created to facilitate resolution of disputes between Korean manufacturers and their trade partners abroad, primarily through consent-driven mediation and other services. The missions of the KCAB has been from its very inception centered solely on dispute resolution.

With the explosive growth of international arbitration involving Korean parties following the Asian Financial Crisis in the late 1990s, the KCAB found itself increasingly administering binding dispute resolution services and striving to meet the expectations of global users of such services. It was also well understood that effective arbitration services necessitated a knowledgeable and supportive judiciary. The question was asked whether the institution did not more suitably fit with the core mission and expertise of the Ministry of Justice (K-MOJ) and, ultimately, in June of 2016, the competent authority of the KCAB switched from K-METI to K-MOJ.

As the use of international arbitration in Korea accelerated in the early 2000s, authorities and practitioners began to benchmark the leading countries in the region in an effort to develop the industry further in Korea. One result was the proposal to establish the Seoul International Dispute Resolution Center (SIDRC), a state-of-the-art dispute resolution center where arbitration hearings, mediations and similar activities could be comfortably and conveniently conducted. The idea came to fruition in May of 2013 with support from K-MOJ, the Seoul Metropolitan Government, the Korean Bar Association, and the KCAB. In addition to providing hearing and meeting facilities, the facility houses local offices of leading international arbitration bodies such as the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), HKIAC, SIAC, and the International Centre for Dispute Resolution (ICDRC) of the American Arbitration Association (AAA).

As part of continuous effort to enhance arbitration, the Korean government enacted the Arbitration Industry Promotion Act in 2017 (the 2017 Act), which importantly included provisions to renew a plan to stimulate the arbitration industry every five years and to expand dispute resolution facilities while cultivating professional expertise in the area of arbitration and supporting relevant research and developments of arbitration. Though the 2017 Act does not specifically name the KCAB, it entrusts the execution of the above listed goals with an institution, corporation or organization, which we know clearly to be KCAB.

Officially, SIDRC and KCAB were consolidated in April of 2018. The reality is that the operation of SIDRC became organically integrated into KCAB International, which was also

established in April of 2018 as an independent division of KCAB. As a result of this integration, the decision was taken to move the SIDRC from the financial center in the north of Seoul to the Trade Tower in the Gangnam district of Seoul, where the KCAB is located. The new SIDRC facilities are larger than the old ones and provide a comprehensive infrastructure for Alternative Dispute Resolution (ADR) proceedings.

The launch of KCAB International was achieved with support of K-MOJ in cooperation with the KCAB Board and the domestic and international arbitration community. This was done in recognition of the distinct procedures and user expectations attendant to international arbitration in comparison to domestic arbitrations, which in practice tend to be conducted in Korean and to mirror the civil-law procedures used in Korean courts. Being operationally independent, KCAB International is able to focus on retention and training of staff with the necessary linguistic capabilities and global focus, and to undertake international outreach and promotion activities aimed at developing the use base and quality of service expected by the international business community. Having leading experts and professionals with abundant experience and expertise in international dispute resolution, KCAB International is aiming to further promote Korea as a hub of international dispute resolution in North East Asia and beyond.

The KCAB International Arbitration Rules were adopted in 2011, prior to the bifurcation of the KCAB, and were updated in 2016. These rules apply to arbitration proceedings where at least one of the parties to an arbitration agreement has its place of business in a jurisdiction other than Korea, or where the seat of arbitration is in a jurisdiction other than Korea. KCAB handled a total of 443 arbitrations in 2019, in which 373 were domestic and 70 were international. It is important to note that Korea has a healthy domestic disputes market, and that this solid foundation has been successfully seized upon by KCAB International in encouraging arbitration in regards to international disputes as well.

The Korean Arbitration Act applies to all arbitrations seated in Korea. The previous Korean Arbitration Act, which had followed the 1985 UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law or Model Law), was amended in 2016 by incorporating the 2006 amendments to the UNCITRAL Model Law. Along with the new KCAB International Rules, the amended Arbitration Act was designed to modernize the legal framework for arbitration in Korea and to convey a sense of openness to the international arbitration community.

As to issues related to the enforcement of arbitral awards, previously the Korean Arbitration Act stated that “an application to obtain a recognition order must be filed before the relevant competent court, accompanied by the original award or a copy thereof and, if the award is made in a foreign language, the translation of the award in Korean.” In order to simplify the process of recognition or enforcement of arbitral awards, however, the law was amended in 2016 so that “[t]he party requesting the recognition or enforcement of an arbitral award shall submit an authentic copy or a plain copy of the arbitral award: Provided, That if the arbitral award is made in a foreign language, it shall be accompanied by a translation in Korean.”

Japan in Transition

Statutory Framework in Japan

In 2003, Japan decided to update the old Arbitration Act, a residue of the 1890 Code of Civil Procedure based on the German Zivilprozessordnung, by creating new legislation based on the UNCITRAL Model Law, using the filters of the 1997 German Law[4] and the 1999 Korean Law[5] . The Japanese Arbitration Act[6] is mostly based on pre-amendment version of UNCITRAL Model Law (1985). The Model Law stipulates, both before and after its amendment in 2006, that "an arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to [certain provisions]." Though in Japan, arbitral awards are final and binding, much in the same way as judgements in civil litigation, the act requires an execution order prior to the execution of an arbitral award. The Japanese Arbitration Act does not reflect the 2006 amendments to the UNCITRAL Model Law, and thus lacks specific provisions on interim measures. Despite this, however, the pre-amended version of the Model Law, currently the foundation of Japan' s Lex Arbitri, is considered to be more than adequate by arbitration practitioners seeking a "pro-arbitration" seat[7] .

JCAA and TOMAC

The International Commercial Arbitration Committee, the predecessor institution to the JCAA, was established in 1950 from within the Japan Chamber of Commerce and Industry and with the support of six significant business organizations (among them: the Japan Federation of Economic Organizations, the Japan Foreign Trade Council, the Federation of Banking Associations of Japan) as an organization to particularly settle international commercial disputes, and to promote international trade, thereby contributing to the development of the Japanese economy. In 1953, the International Commercial Arbitration Committee was reorganized as the International Commercial Arbitration Association, an incorporated association independent from the Japan Chamber of Commerce and Industry, as a means of expanding and streamlining its business activities.

In 1973, the International Commercial Arbitration Association started to issue and guarantee ATA Carnets, the official forms for customs clearances under the Customs Convention on the ATA Carnet for Temporary Importation of Goods ("ATA Convention"),

4) K.H. Böckstiegel, An Introduction to the New German Arbitration Act Based on the UNCITRAL Model Law, Arb. Intern., vol. 14, 1, 1998

5) The Korean Law, however, was amended to incorporate feature of the 2006 Model Law. See J. Bang; D. MacArthur, Korean Arbitration Act Amended to Adopt Key Features of 2006 Model Law Amendments, in J. Int. Arb., vol. 34, Special Issue, 2017.

6) See, in general M. Kondō, T. Gotō, K. Uchibori, H. Maeda and T. Kataoka, Chūsaihō konmentāru, Tōkyō, 2003 (available in English as Arbitration Law of Japan, Tokyo, 2004); T. Kojima and T. Inomata, Chūsaihō, Tōkyō, 2014; M. Dōgauchi, S. Kakiuchi, K. Ichiba and M. Yukioka, Konmentāru shōjichūsai kisoku, Tōkyō, 2014; K. Yamamoto and A. Yamada, ADR chūsai-hō, Tōkyō, 2015.

7) As is discussed in FN9, there are some who take the position that Japan may not be an ideal seat of arbitration.

based on comprehensive consignment of business from the Japan Chamber of Commerce. The ATA Carnet is an international, unified Customs document that provides for the temporary duty free admission of three main categories of goods traded internationally:

- Goods for presentation or use at trade fairs, shows, exhibitions or similar events,
- Samples of value, and
- Professional equipment.

Regularly goods being imported or exported to a different country need to pass through customs procedures. If, however, said importer or exporter of goods are Carnet holders handling the types of items listed above, under the ATA Convention, a waiving a customs duties may be permitted. The Carnet aspect of the JCAA has for the most part been the primary revenue source of the institution since 1973.

In 2003, the International Commercial Arbitration Association changed its name to the Japan Commercial Arbitration Association with the purpose of promoting the efficient settlement of international and domestic commercial disputes through the use of ADR vehicles, such as mediation and arbitration. Though the Head of JCAA has traditionally come from the ranks of the Japanese Ministry of Economy, Trade and Industry (J-METI), and JCAA frequently exchanges information with the Japanese Ministry of Justice (J-MOJ) and J-METI, the institution is not instructed nor supervised by them, or any other government agency or Ministry. Despite the name change, and the recent stress on ADR at the JCAA, the primary source of revenue for the JCAA continues to be Carnet, and it today accounts for approximately 70% of JCAA revenue.

Though considered the primary Japan based ADR institution, JCAA is not alone in the Pacific archipelago. The Japan Shipping Exchange, Inc. (“JSE”) was established in 1921 along the lines of the Baltic Mercantile and Shipping Exchange of London to provide the facilities for establishing freight and/or charter contracts in Japan. Nevertheless, JSE does not strictly function as a shipping exchange. JSE is a non-governmental/non-profit organization aiming to facilitate world maritime related business transactions and assist maritime organizations which carry out these transactions. Since its inception, JSE has been serving the shipping industry in such ways as administrating maritime arbitration, drafting and promulgating maritime contract forms, publishing in-depth analysis on shipping and logistics in the form of monthly magazine "KAIUN", and providing electronic shipping data bases. More than 370 companies and organizations join and support JSE in day-to-day activities in an effort to promote both domestic and international maritime transactions. The Tokyo Maritime Arbitration Commission of JSE (TOMAC) is a committee within JSE that is capable of administering arbitrations involving shipping related disputes. Specifically, TOMAC resolves disputes arising under bills of lading, charter parties, contracts relating to the sale and purchase of ships, shipbuilding, ship financing, the manning of ships, and the like. TOMAC, like the JCAA, tends to handle anywhere from 10 to 20 arbitrations a year.

JIDRC and Government Call to Action

In June of 2017, the Basic Policy on Economic and Fiscal Management and Reform 2017 (2017 Policy) was approved by the Cabinet of Japan. It aimed to "develop a foundation to activate international arbitration" in Japan as one of the important policies of the Japanese Government. Responding to the 2017 Policy, in September of that same year, the Liaison Conference of Relevant Ministries and Agencies for Stimulating International Arbitration was established from within the Japanese Government, with the aim of encouraging cooperation among relevant government organizations and to consider and promote comprehensive and efficient approaches to develop the necessary foundation for the expansion of international arbitration in Japan.

In December of 2017, the Japan International Arbitration Center Establishment Association was founded, and was soon thereafter renamed the Japan International Dispute Resolution Center Operating Association (the Association). With the support of the Association, JIDRC was established in February 2018. JIDRC opened its first hearing facility in Osaka and started operations in May of 2018 with the joint effort of both government and the private sector. Though JIDRC - Tokyo officially opened in April of 2020, the scheduled opening ceremony and corresponding seminars were postponed due to the COVID-19 pandemic.

Changes to JCAA Rules

The JCAA Commercial Rules

Before the rule changes of 2019, the Commercial Rules were the default rules where an arbitration clause does not indicate a specific set of JCAA rules. This default status for the Commercial Rules continues on to the present. In 2019 JCAA implemented inventive changes to remove inefficiencies in the previous rules, while strengthening protections against appeals and challenges. The Commercial Rules also give clear solutions on procedural issues which may potentially be leading to differing opinions as well as addressing issues which have not been addressed by the rules of peer institutions.

The first major change in the new rules were inserted to minimize challenges to JCAA awards, and were motivated by a recent controversy related to an Osaka High Court decision setting aside an arbitral award due to a purported conflict by an arbitrator[8)] . The implemented rules now clarify the extent of the arbitrator' s ongoing obligation to conduct "reasonable investigations" and disclose any circumstances that may, in the eyes of the parties, give rise to "justifiable doubts" to their impartiality and independence. Additionally, the new rules also explicitly state that a declaration must be made in advance by all

8) We specifically refer to *the Sanyo Electric v. Prem Warehouse LLC* decision. After the Osaka High Court set aside the arbitral award due to nondisclosure of a potential conflict of interest, the Japanese Supreme Court reversed and remanded the decision back to the Osaka High Court holding that an abstract disclosure of potential conflict situations is not sufficient to discharge an arbitrator's duties under the Japan Arbitration Law. The revised Commercial Rules now state that a general disclaimer in respect to conflicts, such as given by the arbitrator in *the Sanyo Electric v. Prem Warehouse LLC*, would not be sufficient.

arbitrators in relation to such circumstances that may arise in the future which may be viewed as raising a conflict. Said declaration, which is sometimes referred to as an Advance Waiver, does not discharge the arbitrators of their ongoing duty of disclosure in line with IBA Guidelines on Conflict of Interests in International Arbitration and Japanese Court decisions, such as those tied in to the Osaka High Court decision noted above. The new rules also disallow Arbitrators from delegating decision making to third parties, such as tribunal secretaries. The rules clarify that the appointment of tribunal secretaries should be subject to the consent of the parties to the action. The new rules further require the disclosure of the tribunal' s secretary as well as the terms and conditions of appointment.

Furthermore, the rules prohibit arbitrators from disclosing their dissenting opinion "in any manner." This rule was inserted as a means of streamlining the arbitration process, and keeping costs low as the drafting of dissenting opinions can be time and, and thus cost, consuming. Specifically, the drafters felt that dissenting opinions might open the door to post-award impartiality challenges, and, that, as such, disallowing the issuance of such opinions might serve to limit grounds to a challenge.

The rules also allow for an expansion of the types of expedited procedures that can be heard by single arbitrators. Though such proceedings were previously only available for disputes with claims of upwards of 20 million JPY, the maximum claim amount has been increased to 50 million JPY. Furthermore – and of particular import in the difficult times of pandemic – said tribunals can be conducted solely on the basis of documentations. This, in turn, further speeds up the award issuance process.

Lastly, and most controversially, the new rules include a provision setting arbitrator fees to 50,000 JPY an hour, while also reducing arbitrator fees where over 150 hours are billed by any one particular arbitrator, provided that the reduction does not exceed 50 percent of the initial hourly fee. It is important to note, however, that the previous rendition of the Commercial Rules set 60 hours as the threshold. As such, the new rules are actually more so arbitrator friendly in this regard. Though this fixed hourly rate was included in order to give parties to a dispute a greater sense of fee predictability, and though the rules appear to have been tweaked to give more leeway to arbitrators on fees, the primary criticism here rests on the reasoning that any required lessoning of arbitrator fees will serve to discourage the most sought after arbitrators from serving on tribunals utilizing these rules. Parties do, however, maintain the right to jointly opt out this system – in writing - prior to the constitution of the arbitral tribunal.

The JCAA Administrative Rules for UNCITRAL Arbitration

Much as predictability and consistency is a key sought after variable in international commerce, consistency in rules is an important factor for many in the international arbitration community, as consistency allows for smooth transitioning between different rules and institutions. It is this consistency that allows for arbitration to be truly international in nature. Practitioners and arbitrators are free to practice throughout the world when rules are harmonized, or, at least well known and easy to conform to. In light of this, the JCAA has

turned to a world standard issued by United Nations for said consistency; specifically the UNCITRAL Arbitration Rules (the UNCITRAL Rules), which were drafted by UNCITRAL and later adopted by the UN General Assembly in 1976. Though the UNCITRAL Rules are primarily used in ad-hoc arbitration, they are well known and well understood internationally. In order to make these UNCITRAL Rules suitable for administrating arbitration proceedings by an institution, the JCAA has introduced the Administrative Rules. Accordingly, these Administrative Rules are designed – as they were previously - to provide a minimal and essential framework for the UNCITRAL Arbitration Rules to be effectively overseen by an institution.

The JCAA also altered the UNCITRAL Rules to allow for a time-charge remuneration system in US Dollars for arbitrators, which as a default ranges between 500 and 1500 (USD) per hour. Where there is no agreement made between the parties, the JCAA will set the rate on the basis of factors like the reputation of the arbitrator and the complexity of the case. By raising the hourly rates of arbitrators to a comparable level with other reputed international arbitral institutions in the region, while also permitting the payment of arbitrator fees prior to the termination of the arbitral proceedings, the amendments are clearly meant to attract the interest of high profiled international arbitrators.

The JCAA Interactive Rules

Unlike the Commercial and Administrative Rules, the Interactive Rules, though based partly on the Commercial Rules, have been created as a distinct and novel category of rules by the JCAA, and were partly inspired by the Prague Rules on the Efficient Conduct of Proceedings in International Arbitration (the Prague Rules). These new rules are meant to give parties to an arbitration the option of selecting rules steeped in the Civil Law tradition while also encouraging efficient and cost-effective procedures. As such, the Interactive Rules encourage a more so active role by the arbitral tribunal; a shift from the Common Law adversarial system to a more so Civil Law based inquisitorial system. Additionally, in order to keep costs low, the rules include a fixed system of remuneration for arbitrators.

The rules further impose a duty of the tribunal to communicate with the parties as a means of improving the predictability of proceedings and to narrow issues of contention at an early stage. The arbitral tribunal is further obliged to present its preliminary views on a case during the proceedings. The disclosure of a preliminary, neutral and sovereign view by the tribunal may encourage the parties to the dispute - notably a party that has been made aware that the tribunal may rule against them - to withdraw from the case prior to the issuance of an award. Such announcements prior to the award might, however, seem unfamiliar to Common Law practitioners, as issuance of such views may indicate a lack of neutrality and impartiality by the tribunal. Critics argue that such purported lack of impartiality would act as an infringement on their right to a fair hearing. As a result of these concerns tied in to these criticisms, the Interactive Rules prohibit challenges to arbitrators based on their conveyance of preliminary views. It is thus of great import that parties electing to utilize the Interactive Rules are well aware of this provision beforehand, or, alternatively, that they agree to wave

this provision in writing prior to the start of the arbitration.

In regards to the fixed fees set for arbitrators, concerns have been raised that the remuneration ceiling is lower than most well regarded arbitrators are comfortable with, and, as a result, arbitrations conducted under the Interactive Rules will very likely not be staffed with the highest quality of international arbitrator. Though this is a valid point, the JCAA has clarified that they intend these specific rules to appeal to Small and Medium Sized Enterprises (SMEs) that will likely be under financial restraints during dispute proceedings, and as such, they strive to create a scenario comforting such SMEs through the introduction of an easily understood and predictable fixed fee system. Furthermore, as with the rule provisions on the giving of preliminary views, parties to an arbitration are free to agree to disregard the fee restraints imbedded in the rules.

JCAA Rule Overview

In recent years the willingness of Japanese companies involved in international transactions to submit a dispute to arbitration is on the rise. Such development is supported by the ambitious course jointly taken by the Japanese government and the JCAA. Together they established a straightforward approach to restructure and improve the JCAA' s reputation as a viable and more transparent institution for international arbitration which in turn helps Japan to become a welcoming seat for international arbitration.

The JCAA has introduced a "premium" set by adopting the UNCITRAL Arbitration Rules, a "standard" set by updating the Commercial Rules and an "interactive model" striving for reasonable costs by introducing the Interactive Rules. The recently introduced JCAA Arbitration Rules offer a flexible choice of options to cover a wide range of business needs. Above and beyond this, the JCAA stresses that all three sets of rules can be freely adjusted where the parties to an arbitration agree to do so.

Suggested Path Forward

In recent years Japan has embraced a more forthrightly pro-arbitration stance, as both government and private sector alike have notched up their promotion of the country as a safe and reliable place of arbitration. This shift has not come easily or quickly, however, in comparison to Korea. It may be said that Japan has faced entrenched historical perceptions, often ungrounded, as a country where a foreign party might not receive fair and unbiased treatment[9] . Those stubborn[10] stereotypical misrepresentations probably made (and to some

9) R. Coleman, A Preliminary Investigation of Possible Areas of Discrimination Against Foreign Litigants in Japanese Court and Arbitration Practice, in Saney and Smit (eds.) Business Transactions with China, Japan, and South Korea, New York, 1983; R. T. Greig, International Commercial Arbitration in Japan: A User's Report, in J. Int. Arb., vol. 6, 4, 1989; C. R. Ragan, Arbitration in Japan: Caveat Foreign Drafter and Other Lessons, in Arb. Intern., vol. 7, 2, 1991; P. Godwin, Japan – eight years on and no progress, in Global Arbitration Review, https://globalarbitrationreview.com/article/1067624/japan-%E2%80%93-eight-years-on-and-no-progress.

10) Y. Hayakawa, The Distorted Image of the Japanese System of International Commercial Arbitration, in JCAA Newsletter, vol. 5, 1999.

extent still make) the task for Japan harder than its peninsular neighbor.

This said, however, it is undeniable that the Korean example could give some hints applicable to the Japanese contexts. While the JCAA has historically dealt with the Carnet system, if Japan truly intends to build a robust domestic industry as an arbitration seat or hub, it would probably require more full-time attention by the institution. In most countries, this Carnet activity is dealt with by Chambers of Commerce, and not by arbitral institution. Such is the case of Korea, where ATA Carnets fall under the jurisdiction of the Korea Chamber of Commerce. The JCAA should consider making ADR its exclusive focus, in line with the most competitive institutions in the world. Further to this, consideration should be made in regard to the various roles that J-MOJ and J-METI play in regards to the expansion of Japan' s influence in the area of international arbitration and the government' s positioning in regards to institutions such as JCAA and JIDRC. The authors are not herein opining as to whether one Ministry is better suited than the other. Japan need not emulate Korea in this regard. We are merely contending that the government of Japan would be well served in seriously thinking through the best means of attaining its goal in growing the use of arbitration in Japan. Japanese authorities might also consider the possibility of combining JCAA with TOMAC. Such a union would likely prevent the inefficient duplication of efforts, while cutting down on costs and allow for shared efforts at market growth.

Making regional institutions like the KCAB and JCAA attractive to a global clientele will also require continued efforts in providing a satisfactory level of service at international standards. The KCAB has in recent years provided a remarkable example of adaptation to this international environment. English remains the language of cross-border business, and the KCAB has responded to this by creating KCAB International, an institution staffed almost exclusively by English speakers. Moreover, KCAB International has made concrete efforts to build international interest in their institution by aggressively utilizing non-Korean interns and by often cooperating with sister institutions and international organizations, such as UNCITRAL. This ability to provide high quality arbitration services in English, while also building a substantive brand that reaches outside of national borders, is of capital importance for the success of any truly international institution. In this sense, JCAA has all the potential to follow suit. Tokyo is an extremely cosmopolitan city, with a vast availability of professionals with native or near-native competence in English. In addition to drawing from the local talent pool, an internship - or full time position - at the JCAA would be an attractive opportunity for professionals coming from countries in which Japan is one of the primary investors; such as Cambodia, Vietnam, Uzbekistan, to name a few. Here it should be pointed out, however, that over the past year, the JCAA has made real efforts at internationalizing their staff and outlook. As, however, the JCAA has the admirable goal of also attracting interest in domestic arbitration, a bifurcation, such as that seen with the KCAB, may help in attracting the necessary talent for both a domestic Japanese specialized JCAA, and an outward looking "JCAA International."

In addition, further cooperation between Japan and Korea in the field of arbitration would seem very appropriate as both countries share a number of common features. With some

effort, such features could be easily turned into strategic advantages in the regional competition for arbitration. Both countries have legal systems solidly grounded in the Civil Law tradition, while both have also recently embraced an American style system of legal education. Irrespective of whether or not theories on the "delocalization" of arbitration should be deemed valid, the practice of international commercial arbitration must be able to accommodate truly international needs. As places where the legal system is still based on Continental Europe, but where – for example - legal education has been strongly inspired by the United States, both Japan and Korea are able to appreciate different approaches and strategies. In both countries there is a very active legal community of professionals who have been trained to understand a code-based legislation and a Civil Law grounded procedural style, who have also often completed postgraduate education in the US or the UK; the primary bastions of the Common Law tradition. Just a glimpse at the attorney profiles on the websites of the most prestigious Japanese and Korean law firms will show how this cross-cultural background is appreciated; most of the top firms in both Japan and Korea are well stocked with attorneys with degrees from the United States and the United Kingdom.

The JCAA and KCAB will be in a prime position to encourage cooperation between the Japanese and Korean arbitration communities. This cooperation might include discussion related to the harmonization of rules, or even efforts towards the harmonization of respective arbitration acts. Such a harmonization of rules may further encourage the use of Japan or Korea as a neutral seat where parties to an arbitration represent just one of the two countries. For example, where a Japanese and an American company have a dispute, the Japanese party may want to consider recommending Korea as the seat of arbitration, and vice versa, where a Korean company is involved with a dispute with a company from a third-party nation like America, Japan might serve as a satisfactorily neutral seat. If the rules of both institutions were harmonized, practitioners would likely feel more comfortable in moving smoothly between the use of both institutions. Along these same lines, consideration should also be made in regards to the encouragement of the sharing of facilities, and the issuance of MOUs in furtherance of such cooperation by and between all relevant institutions; inclusive of JCAA, KCAB, SIDRC and JIDRC.

Additionally, secondments or exchange programs and jointly organized events between the two institutions would likely assist in building a spirit of cooperation which serve as a foundation for further joint efforts. Along these lines, both KCAB and JCAA may want to consider working cooperatively to take on a leadership role amongst other civil law jurisdictions in Asia. In particular, institutions in jurisdictions in which both Japanese and Korean corporation are actively involved, such as those in South East Asia, should be approached. In an arbitration world where the purported common law preferences have recently been put in question by initiatives such as the Prague Rules, the ability to understand both traditions and to eventually juggle with features (and sensitivities[11]) of both is an invaluable strategic asset. As demonstrated by the JCAA Interactive Rules, the legal community in Japan is already fully aware of this issue.

This comparative law advantage has strong potential. This is particularly true as most

emerging Asian countries are experiencing a similar pattern; legal systems based on Civil Law tradition (sometimes in post-Soviet or post-Socialist version) and yet highly influenced by American-style reforms (especially in the field of business and financial law).[12] This Civil Law expertise may also help JCAA and KCAB to create an alternative arena to the HKIAC–SIAC duopoly, which is, to date, catering a large chunk of the English language arbitration cases seated in East and South East Asia.

11) For example,arbitrators trained in Japanese or Korean law are likely fully aware that parties from both the Common and Civil Law worlds may have very different reactions towards any attempt by an arbitral tribunal to settle a dispute, outside of the scope of the issuance of an award. Indeed, the need to counter the narrative under which in Japan arbitrators would always try to make parties reach an amicable agreement (M. L. D. Hanlon, The Japan Commercial Arbitration Association: Arbitration with the Flavor of Conciliation, in Law and Policy in International Business, vol. 22, 3, 1991; D. A. Livdahl, Cultural and Structural Aspects of International Commercial Arbitration in Japan, in J. Int. Arb., vol. 20, 4, 2003.) was duly taken into account when the JCAA updated their rules.

12) It is also worth mentioning that the Civil Code of Japan was used as a basis to inspire legal reforms in Cambodia and Vietnam, which codifications incorporate several features of Japanese law. Due to similarities between the Japanese and Korean legal system, Korean lawyers will likely feel as comfortable with these new statutes as would Japanese lawyers.

The Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers —Recent Developments toward Internationalization

Momo-o, Matsuo & Namba
Attorney-at-Law, admitted in Japan and the State of New York
Junya Naito

Momo-o, Matsuo & Namba
Attorney-at-Law, admitted in Japan
Ryo Otobe

Ⅰ. Introduction

The legal services of foreign lawyers in Japan are regulated by the Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers (*Gaikoku Bengoshi ni yoru Hōritsu Jimu no Toriatsukai ni kansuru Tokubetsu Sochi Hō*, often shortened to *Gaiben Hō*) (hereinafter, the "Act").[1] The Act was enacted in May 1986 and became effective in April 1987. It allows foreign lawyers to handle legal services in Japan concerning foreign laws if they meet certain requirements and are registered as a *Gaikoku Hō Jimu Bengoshi*, or Registered Foreign Lawyer (hereinafter referred to as "*Gaiben*").

A bill to amend part of the Act was submitted to the 200th Extraordinary session of the National Diet on October 18, 2019. The bill passed the House of Representatives, but not the House of Councilors. In the 201st session, the bill passed and was enacted on May 22, 2020 (the amended Act is hereinafter referred to as the "2020 Amended Act").

The purpose of this article is to introduce the Act and its recent developments including the enactment of the 2020 Amended Act. First, we will summarize the Act and the history of its past amendments. We will then focus on the amendments in the 2020 Amended Act and the background and purposes of such amendments.

Ⅱ. Historical Summary of the Act and its Amendments

Prior to the Act taking effect in 1987, basically, *bengoshi*, an Attorney-at-Law qualified in Japan under the Attorney Act (hereinafter, "*Bengoshi*") exclusively handled legal services in Japan.

However, this changed when the Act allowed *Gaikoku Bengoshi* (lawyers admitted to practice in foreign jurisdictions and who are equivalent to *Bengoshi*, hereinafter referred to as "Foreign Lawyers")[2] to handle legal services in Japan if certain requirements were met

1) Act No. 66 (1986).

including, *inter alia*, qualification equivalent to an Attorney-at-Law in the subject attorney' s eligible foreign jurisdiction[3] , not less than five years of experience in the provision of legal services in the foreign jurisdiction (this type of requirement is hereinafter referred to as the "Experience Requirement"), possessing a plan, a Japan-based residence and financial basis to perform properly and reliably, and the ability to compensate for damages to clients in the event of negligent or fraudulent execution of their duties. The Act further required reciprocity between the jurisdiction of the Foreign Lawyer and Japan.

A Foreign Lawyer is eligible to handle legal services under the Act as a *Gaiben* only after the Minister of Justice approves the Foreign Lawyer' s qualifications, and the Bar Association registers the Foreign Lawyer into the Roll of Registration as a *Gaiben*.

1. Experience Requirement Regarding Legal Services

The Experience Requirement under the Act has been gradually eased over the years. Initially, two years of experience in Japan was allowed to be included as part of the five-year-experience requirement by an amendment enforced in 1995. In a subsequent amendment in 1998, the required term of experience was shortened to three years, in which one year of experience in Japan can be included.[4]

2. Attorney Corporation

Under the original Act, a *Gaiben* was prohibited from employing *Bengoshi* or from establishing a joint venture with *Bengoshi*. This restriction was in order to keep well-financed *Gaiben* from substantially handling legal services concerning Japanese law through such employment or from substantially controlling *Bengoshi*.[5] By the amendment which took effect in 1995, a *Gaiben* was allowed to engage in Specified Joint Services (*Tokutei Kyōdō Jigyō*) with *Bengoshi* having five years or more years of experience in Japan. Thereafter, the necessity to promote cooperation between *Bengoshi* and *Gaiben* was recognized in order to respond to increasing demand in Japan for international legal services.[6] The next amendment effective in 2005 allowed a *Gaiben* to employ *Bengoshi* and also to establish a Foreign Law Joint Enterprise[7] (*Gaikoku Hō Kyōdō Jigyō*) with *Bengoshi*. At the same time, to avoid the inappropriate influence of a *Gaiben* on legal services under Japanese law, the Act provided for

2) Defined as "a person whose professional duties are to provide legal services as a practice in a foreign jurisdiction and who is equivalent to *Bengoshi*" in Article 2, item (ii) of the Act. [Note that the article numbers of the Act cited in the footnotes hereinafter reflect the article numbers of the Act prior to the 2020 amendments.]

3) In the case of federal state stipulated by Ministry of Justice Order, "Foreign Jurisdiction" means its constituent unit such as a state, territory and others stipulated in the Order. Article 2, item (ii) of the Act, Article 1 and Appended Table (in relation to Article 1) of Regulation for Enforcement of the Act.

4) Article 10, paragraph (1), item (i) and paragraph (2) of the Act.

5) Takanaka Masahiko, *Bengoshihō Gaisetsu 5th Ed*., Sanseidō (2020) at 384.

6) *Id*.

7) In Article 2, item (xv) of the Act at the time, defined as "an enterprise jointly operated by a *Gaiben* and a *Bengoshi* under a partnership contract or other continuous contract for the purpose of providing legal services" .

several restrictions on a *Gaiben* who employs *Bengoshi* or forms a Foreign Law Joint Enterprise with *Bengoshi*. Further, under the amendment of the Act, which took effect in 2016, a *Gaiben* was allowed to establish a Registered Foreign Lawyer Corporation[8] (*Gaikoku Hō Jimu Bengoshi Hōjin*).

3. Representation in International Arbitration

When the Act was originally introduced, it contained no provisions regarding representation in international arbitration by Foreign Lawyers including *Gaiben*. The amendment effective in 1996 defined an International Arbitration Case (*Kokusai Chūsai Jiken*) as "a civil arbitration case which is conducted in Japan and in which all or some of the parties are persons who have an address or a principal office or head office in a Foreign Jurisdiction." [9] A *Gaiben* is allowed to represent a client in procedures for an International Arbitration Case by this amendment.[10] In addition, a Foreign Lawyer (*Gaikoku Bengoshi*) who is not a *Gaiben* (excluding a person employed in Japan and providing services there, based on their knowledge concerning foreign laws) is allowed to represent a client in procedures in Japan for an International Arbitration Case which they have been requested to undertake or undertook in the foreign jurisdiction of their qualification,[11] regardless of the governing law of the International Arbitration Case.

Ⅲ. The 2020 Amended Act

1. Background of the New Bill

Even after several amendments to the Act, there remained a need to respond to increasing demand for international legal services due to the internationalization and specialization of legal services in Japan. The Cabinet' s "Implementation Plan for Regulatory Reforms" (*Kisei Kaikaku Jisshi Keikaku*) and the ensuing report entitled the "Review Committee for the Registered Foreign Lawyer System Report" (*Gaikokuhō Jimu Bengoshi Seido ni Kakaru Kentōkai Hōkokusho*) in July 2016[12] suggested (a) introduction of a corporation for providing legal services under Japanese and foreign laws, established by *Bengoshi* and *Gaiben*[13] ; and (b) easing of the term of the Experience Requirement as follows: either (i) two years of experience in Japan can be included in the three-year requirement, or (ii) the term of Experience Requirement is shortened to two years, during which one year of experience in Japan is deemed sufficient.[14]

8) In Article 2, item (iii)-2 of the Act, defined as "a corporation established by a *Gaiben* for the purpose of handling legal services concerning foreign laws (meaning legal services regarding a legal case, all or a major part of which the laws that are or were in effect in a foreign jurisdiction apply or should apply [. . .]) pursuant to the provisions of this Act" .

9) Article 2, item (xi) of the Act.

10) Article 5-3 of the Act.

11) Article 58-2 of the Act.

12) For the English version, see http://www.moj.go.jp/content/001207135.pdf

13) *Id*. from pages 4 to 7.

14) *Id*. from pages 1 to 4.

Concurrently, a sense of urgency among the Japanese Government and legal practitioners emerged regarding the lack of popularity of Japan as a seat of international arbitration when compared to foreign jurisdictions, particularly to Asian jurisdictions such as Singapore, Hong Kong and South Korea. The Liaison Meeting among Relevant Ministries toward Revitalization of International Arbitration (*Kokusai Chūsai no Kasseika ni Muketa Kankeifushō Renraku Kaigi*), which was held from September 2017, issued a report in April of 2018 titled "Possible Measures Towards Revitalization of International Arbitration" (*Kokusai Chūsai no Kasseika ni Mukete Kangaerareru Sesaku*).[15)]

It pointed out that clarification on the scope of representation by *Gaiben* and Foreign Lawyers should be examined.[16)] The newly formed Review Committee for Representation in International Arbitration, etc. by *Gaiben* or Foreign Lawyers (*Gaikoku Hō Jimu Bengoshi ni yoru Kokusai Chūsai Dairitō ni kansuru Kentōkai*) further studied this issue and produced its September 25, 2018 report[17)] which included suggestions regarding the expansion of the scope of representation of International Arbitration Cases by *Gaiben* and Foreign Lawyers.[18)]

Following the two reports, the Ministry of Justice proceeded with codifying the amended bill and the Cabinet submitted the bill to the Diet on October 18, 2019.

2. Amendments in the 2020 Amended Act

(a) Expansion of the Scope of Representation in International Arbitration

Under the Act prior to the 2020 amendments, as mentioned above in II.3., *Gaiben* and Foreign Lawyers were allowed to provide representation in International Arbitration Cases.[19)] To qualify as an "International Arbitration Case" , (i) the case is required to have its seat of arbitration in Japan and (ii) all or some of the parties to the case are persons who have an address or a principal office or head office in a Foreign Jurisdiction.[20)]

Prior to the 2020 amendments, *Gaiben* and Foreign Lawyers were not able to represent clients in arbitration cases under which the seat of arbitration is outside Japan. However, even if the seat of arbitration is outside Japan, in practice, certain arbitration procedures such as hearings including witness testimony can and in fact do occur in Japan, because the location of arbitration procedures and the seat of arbitration have no direct relationship. In order to allow *Gaiben* and Foreign Lawyers to provide representation in cases where proceedings occur in Japan, the Japan-seat requirement was abolished in the 2020 Amended Act, and thus, an arbitration case whose seat of arbitration is in a foreign jurisdiction categorically falls within an "International Arbitration Case" .[21)] It should be noted, however,

15) https://www.cas.go.jp/jp/seisaku/kokusai_chusai/pdf/honbun.pdf

16) *Id*. at page 4.

17) For the English version, see http://www.moj.go.jp/content/001308967.pdf

18) *Id*. from pages 2 to 7.

19) Article 5-3 and Article 58-2 of the Act.

20) Article 2, item (xi) of the Act.

21) Article 2, item (xiv)-(c) of the 2020 Amended Act. [Note that the article numbers of the 2020 Amended Act cited in the footnotes hereinafter reflect the article numbers after all of the amendments take effect under Article 1 of the Supplementary Provisions of the 2020 Amended Act.]

that, as a matter of course, the Attorney Act and the Act regulate legal services in Japan, and therefore, this amendment is only relevant when some of the arbitration procedures—whose seat of arbitration is outside Japan—occur in Japan.

Furthermore, prior to the 2020 amendments, to qualify as an International Arbitration Case, at least one party to an arbitration case was required to be a person whose address or principal office or head office is outside Japan. However, even if all the parties are located in Japan, if the parent company of one or both parties is located outside Japan, the parent company may control the party and thus the case itself. Under the 2020 Amended Act, the scope of an "International Arbitration Case" is broadened by expanding the definition of a party to the International Arbitration Case to the following: a party in the definition will include a person of which more than fifty percent (50%) of the voting shares (or equivalent) are owned by a person whose address or principal office or head office is outside Japan.[22] By the amendment, if the parent company of a party to the case has an address or a principal office or head office outside Japan, *Gaiben* and Foreign Lawyers can represent such client in the International Arbitration Case.

Another expansion of "International Arbitration Case" is that a case under which the governing law agreed upon by the parties to the case is added to "International Arbitration Case." [23] By this amendment, if the governing law is a foreign law, *Gaiben* and Foreign Lawyers can categorically represent clients.

The Act prior to the 2020 amendments allowed *Gaiben* and Foreign Lawyers to represent clients on the procedures for mediation (settlement) resulting from an International Arbitration Case.[24] It was argued and accepted under the Act that such procedures should include mediation (settlement) proceedings carried out during the arbitration case (so called "Arb-Med"). However, the Act prior to the 2020 amendments was silent on other mediation proceedings including mediation proceedings conducted before the commencement of an arbitration case (so-called "Med-Arb") and mediation proceedings when there is no arbitration agreement.

There is an international trend to utilize mediation proceedings for the resolution of international disputes,[25] and to expand representation by *Gaiben* and Foreign Lawyers, the 2020 Amended Act allows *Gaiben* and Foreign Lawyers to represent clients in mediation proceedings concerning disputes that meet the requirements of an International Arbitration Case and have an agreement to arbitrate, which occur both before and after the commencement of the arbitration.[26] By this amendment, in addition to Arb-Med, most of

22) Article 2, item (xiv)-(a) of the 2020 Amended Act.

23) Article 2, item (xiv)-(b) of the 2020 Amended Act.

24) The parenthetical phrase of Article 5-3 of the Act prior to the 2020 amendments.

25) The establishment and opening of the Japan International Mediation Center in Kyoto (JIMC-Kyoto) in November 2018 reflect such trend in Japan. Globally, the Singapore Mediation Convention was made in 2019, and numerous jurisdictions have been signatories to the Convention. This Convention grants a party to mediation (settlement) the ability to enforce it in the signatory jurisdiction. Although as of now Japan is not a signatory, this Convention could still have an impact on mediation (settlement) occurring in Japan in that a deed of settlement can probably be enforced in the signatory jurisdiction.

Med-Arbs will be able to receive representation by *Gaiben* and Foreign Lawyers. As long as the above requirements are met, the scope and the type of the mediation proceedings that *Gaiben* and Foreign Lawyers may represent is not limited.

Moreover, the 2020 Amended Act newly establishes the category of "International Mediation Case" , which is defined as a civil mediation case regarding a dispute (limited to civil disputes over a commercial contract or transaction between business operators), where (i) one or some of the parties is a person of which more than fifty percent (50%) or more of the voting shares (or equivalent) are owned by a person whose address or principal office or head office is outside Japan or (ii) Japanese law is not applicable to the formation and effect of the claim arising out of the contract or transaction (only when the applicable law has been agreed upon by the parties).[27] By these amendments, *Gaiben* and Foreign Lawyers are permitted to represent clients in International Mediation Cases that are independent from an International Arbitration Case, or a Med-Arb (even without an agreement to arbitrate). It should be noted that International Mediation Cases conducted by the Japanese courts or administrative bodies of the Japanese government or municipalities cannot be represented by *Gaiben* or Foreign Lawyers.[28]

(b) Easing of the Experience Requirement

Prior to the 2020 amendments, the Experience Requirement for *Gaiben* was at least two years of experience outside Japan, in addition to one year of experience in Japan. While some have argued that the two years of experience outside Japan should be shortened to facilitate the ability of Foreign Lawyers to work in Japan, others have stressed that a certain period of work experience needs to be maintained to secure the ability and integrity of Foreign Lawyers who are to become *Gaiben*. Under the 2020 Amended Act, the requirement of three years of experience in total remains, but two years of experience in Japan can be included within the three years of experience.[29] In other words, the requirement for experience outside Japan has been shortened to one year, thus reducing burden for *Gaiben* applicants who settled in Japan soon after becoming lawyers in their local jurisdictions.

(c) Introduction of a Joint Corporation by *Bengoshi* and *Gaiben*

Though *Gaiben* have been allowed to incorporate a Registered Foreign Lawyer Corporation (*Gaikokuhō Jimu Bengoshi Hōjin*) which can provide legal services to the extent that *Gaiben* are allowed, the 2020 Amended Act allows for the establishment of Attorney-at-Law/ Registered Foreign Lawyer Joint Corporation[30] (*Bengoshi-Gaikokuhō Jimu Bengoshi Kyōdō Hōjin*, or *Bengoshi-Gaiben* Joint Corporation), a corporation which consists of *Bengoshi* and *Gaiben* as its members.[31] *Bengoshi-Gaiben* Joint Corporations are expected to provide full legal services as a corporation. In addition, *Bengoshi-Gaiben* Joint Corporations can establish

26) Article 7, item (i) of the 2020 Amended Act.
27) Article 2, item (xv) of the 2020 Amended Act.
28) Article 7, items (ii) of the 2020 Amended Act.
29) Article 12, paragraph (2) of the 2020 Amended Act.
30) Article 68 of the 2020 Amended Act.
31) Article 2, item (vi) of the 2020 Amended Act.

branches (secondary offices) in Japan. It is therefore expected that "one-stop" legal services can be provided by *Bengoshi-Gaiben* Joint Corporations.

Ⅳ. Effective Dates of the Amendments

The amendments regarding (a) expansion of representation by *Gaiben* and Foreign Lawyers and (b) easing of the Experience Requirement will take effect on August 29, 2020.[32)]

The amendments regarding (c) establishment of *Bengoshi-Gaiben* Joint Corporations will take effect within two years and six months from the date of the promulgation of the 2020 Amended Act.[33)]

Ⅴ. Conclusion

In this article, we have reviewed the Act and its amendment history and the amendments in the 2020 Amended Act. Although the world is currently facing the COVID-19 crisis and international travel and mobility have been greatly reduced as a result, the overall trend of internationalization and specialization of legal markets and services will only grow in the future. The 2020 Amended Act is a testament to how Japan is responding to the calls for further internationalization and openness of its legal market.

32) Article 1 of the Supplementary Provisions of the 2020 Amended Act.

33) *Id*.

Four Court Decisions After an Arbitral Award

Professor, Aoyama Gakuin University and Attorney, Waseda University Legal Clinic L.P.C.

Yoichiro Hamabe

Introduction

International commercial arbitration, a means of dispute resolution, is generally deemed to be faster, more reliable and cost effective than litigation as it is decided by arbitrators who are impartial third parties. However, a losing party may file a petition with the court to set aside an arbitral award, if there are any reasonable grounds to doubt the impartiality or independence of the arbitrator(s).

Article 18(4) of the Japan Arbitration Act ("JAA")[1] provides, "During the course of the arbitration procedure, an arbitrator shall, without delay, disclose to the parties all the facts that are likely to give rise to doubts as to his/her impartiality or independence (excluding those which have already been disclosed)." If it is found that reasonable grounds to doubt the impartiality or independence of the arbitrator were not disclosed in accordance with Article 18-(4) of the JAA, the parties may challenge such arbitrator under Article 18(1) of the JAA. If the breach of duty of disclosure by an arbitrator is deemed to be a material procedural defect, the arbitral award may be set aside. Any dispute over setting aside of an arbitral award is subject to the court intervention at three instances with remitted trial.

This article discusses a case in Japan where a losing party challenged an arbitral award on the basis of arbitrator's breach of duty to disclose a concrete relationship under some unclear circumstances that was likely to give rise to doubts as to his/her impartiality or independence. Part I of this article provides the background and related facts in this case. Part II provides the summaries of the court decisions in this dispute. Part III focuses the contents of the decision of the Supreme Court (3rd Petty Bench) on December 12, 2017, which overturned the Osaka High Court's decision to set aside the arbitral award and remanded the case to the High Court for further consideration[2] . Part IV provides some comments on the court decisions with some lessons in conclusion.

1) English translation of the Arbitration Act of Japan is located at the Japanese Law Translation Database System.

Ⅰ. Case Summary

There was an arbitration agreement in an international contract for the sale and purchase of air conditioning equipment, concluded around October 2002. Based on the arbitration agreement, Sanyo Electric Co. Ltd and Sanyo Asia Pte Ltd. (the "Claimants")[3] commenced the arbitration procedure against Prem Warehouse LLC, and Prem Sales LLC (the "Respondents") under the rules of the Japan Commercial Arbitration Association ("JCAA") in Osaka, Japan, in June 2011. In accordance with the arbitration agreement, a total of three arbitrators were appointed; each party appointed one arbitrator and the two party-appointed arbitrators appointed the presiding arbitrator "for for this case (Arbitration Case No. Osaka 11-02 of JCAA)" After approximately three years of arbitration proceedings, an arbitral award was rendered in favor of the Claimants by the arbitral tribunal on August 11, 2014.

However, on November 13, 2014, the Respondents filed a petition at the Osaka District Court to set aside the arbitral award, arguing that the presiding arbitrator had failed to disclose a conflict of interest.

The presiding arbitrator was a member of the Singapore office of a U.S.-based famous international law firm, King and Spalding ("K&S"), with approximately 1,100 lawyers and 20 offices worldwide, including 10 offices in the United States. About one and a half years after the arbitration commenced, a new lawyer joined the San Francisco office of K&S in February 2013. Before his move to K&S, he acted as a counsel for Panasonic Corporation of North America ("Panasonic North America") in an unrelated class action against Panasonic North America pending in the United States District Court for the Northern District of California. Both Panasonic North America and Sanyo Electric Co. Ltd are subsidiaries wholly-owned by Panasonic. (the "Fact"). The presiding arbitrator did not disclose that a lawyer from a different office of K&S had acted for a sister company of one of the Claimants and the arbitral award was made in favor of the Claimants.

Such a relationship between the two lawyers was later found, and the Respondents (Petitioners) argued that the failure to disclose violated Article 18 (4) of the JAA. The Respondents requested the arbitral award be rescinded, arguing that there were grounds for setting aside under Article 44 (1), items (iv) (vi) and (viii) of JAA.[4]

Ⅱ. Court Decisions

The Osaka District Court rejected the petition, but the Osaka High Court, the appeal court, set aside the arbitral award. However, on further appeal, the Supreme Court of Japan

2) Minshu Vol. 71, No. 10. English translation of this decision is posted in the Japanese Yearbook of International Law, Vol 61, at 395 (2018).
Also, see https://www.courts.go.jp/app/hanrei_en/detail?id=1558 (https://www.courts.go.jp/saikosai/index.html)

3) In April 2004, Sanyo Electric Co., Ltd. succeeded to the rights and obligations of Sanyo Electric Air Conditioning under the original sales contract, and in April 2011, Sanyo Electric Co., Ltd. became a wholly-owned subsidiary of Panasonic Corporation. Also, in January 2009, Sanyo Asia Pte Ltd, a Singaporean corporation, succeeded to the rights and obligations of Sanyo Airconditioners Manufacturing Singapore Pte Ltd, under the original sales contract.

overturned the Osaka High Court's decision and remanded the petition to the high court for further consideration.

1. Osaka District Court

The Osaka District Court rejected the petition for setting aside of arbitral award on March 17, 2015.[5] The District Court found that the arbitrator' s failure to disclose his colleague' s connection to the Claimant's sister company Panasonic North America should be a sister company, not a subsidiary, of Sanyo Electric Co. Ltd. did not create doubts to his impartiality or independence. It cannot be deemed that the existence of this fact has affected the conclusion of the arbitral award. Even if the presiding arbitrator's breach of the above obligation of disclosure falls under Article 44 (1) (vi) of the JAA, such defect was minor, and it was not reasonable to set aside the decision. (full stop) Accordingly, the petition was dismissed.

2. Osaka High Court

However, the Osaka High Court, the appeal court, set aside the arbitral award on June 28, 2016.[6] The court reversed the decision of the district court by ruling that the arbitrator could have investigated the existence of conflicts of interest through a conflicts check without any particular difficulty, the conflict was "likely to give rise to doubts as to the arbitrator's impartiality or independence," and the arbitrator breached the obligation to disclose under the JAA. Also, the court pointed out that the statement of an abstract and potential conflict of interest that may arise in the future does not constitute a proper disclosure of an actual event of conflict. Accordingly, the arbitrator had breached the obligation to disclose the conflict of interest. Non-disclosure of the conflict constitutes a breach of the disclosure obligations under Article 18 (4) of the JAA and is a serious procedural defect. Even if a breach of the obligation to disclose a conflict of interest does not directly affect the conclusion of the arbitral award, it falls under the grounds for setting aside arbitral awards under Article 44 (1), item (vi) of the JAA.

The district court and the high court seem to have made very different evaluations on similar assumptions.

3. The Supreme Court and the Aftermath

Nevertheless, on December 12, 2017, the Third Petty Bench of the Supreme Court overturned the Osaka High Court's decision and remanded to the Osaka High Court to have it further and fully heard.

After this decision, the Osaka High Court rejected the petition for setting aside of the arbitral

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4) Article 44 (1) of JAA provides, if any of the following grounds exist, the parties may file a petition with the court to set aside the Arbitral Award:

(iv) the petitioner was unable to put up a defense in the arbitration procedure;

(vi) the composition of the Arbitral Tribunal or the arbitration procedure is in violation of Japanese laws and regulations (if the parties have reached an agreement on the matters concerning the provisions unrelated to public order in such laws and regulations, said agreement);

(viii) the content of the Arbitral Award is contrary to public policy in Japan.

5) Osaka District Court, March17, 2015, 2014 (arb) No. 3, 2270 Hanrei Jiho 74.

6) Osaka High Court, June 28, 2016, 1431 Hanrei Times 108.

award on March 11, 2019[7] by finding that before the arbitral award was made, the presiding arbitrator had not been aware of the Fact and the Fact could not normally be found by the presiding arbitrator' s reasonable investigation.

Ⅲ. Supreme Court Decision

The Supreme Court appears to have concluded that both the district court and the high court were wrong and that the case should be reconsidered.

1. Two Issues

This Supreme Court decision took issue with the following two points as stated in the high court decision.

The first point is that the statement of an abstract and potential conflict of interest that may arise in the future does not constitute a proper disclosure of an actual event of conflict.

The second point is that the conflict was a fact "likely to give rise to doubts as to the arbitrator's impartiality or independence," and the arbitrator breached the obligation to disclose under Article 18 (4) of the JAA.

The Supreme Court approved the first point, but denied the second. In other words, the Supreme Court affirmed the judgment that the statement of an abstract and potential conflict of interest that may arise in the future does not constitute a proper disclosure of an actual event of conflict. However, the Supreme Court could not reach the conclusion that the arbitrator breached the obligation to disclose under Article 18 (4) of the JAA for setting aside of the arbitral award.

2. Reasoning

The Supreme Court appears to have made an opposing judgment from the original high court decision. The Supreme Court overturned the high court decision to set aside the arbitral award for the following reasoning:

(a) The arbitrator is obliged to disclose all the facts of Article 18 (4) of JAA to the parties, if the arbitrator is aware of the facts with respect to Article 18 (4) of JAA.

(b) In light of the fact that the same paragraph does not limit the facts to be disclosed to those recognized by the arbitrator, the arbitrator is obliged to disclose what can usually be found by a reasonable range of investigations regarding the existence of facts with respect to Article 18 (4) of JAA.

(c) In addition, the arbitrator shall find out any facts relevant for purposes of Article 18 (4) of the JAA. The obligation to disclose is simply “in the course of the arbitration proceedings,” , with the only exception of "already disclosed" facts. For example, the arbitrator may be requested information from the parties until the arbitration procedure is completed. Regardless of the presence or absence of such request, the arbitrators bear the same obligation.

(d) Therefore, if the arbitrator did not disclose the facts set forth in Article 18 (4) of the JAA to the parties, he would have violated the disclosure obligation in the same paragraph. In

7) Osaka High Court, March 11, 2019, 1468 Hanrei Times 65.

addition, it is a reasonable interpretation that it is necessary for the arbitrator to be aware of facts that the arbitrator could usually find out by conducting a reasonable range of investigations.

(e) However, even in light of the documents submitted to the court, it is not clear whether the presiding arbitrator was aware of the facts before the arbitration decision was made.

(f) Also, it is not clear whether K&S was aware of this fact, or what sort of conflict check system was provided in K&S, to which the presiding arbitrator belonged.

(g) Therefore, it is not clear whether the fact could normally be found by the presiding arbitrator through a reasonable investigation before the arbitral award was made.

(h) Without confirming each of the above points, the judgment that the presiding arbitrator had breached disclosure obligations was clearly a violation of laws and regulations.

As the high court ruling on the second issue was made without confirming the points listed above, the ruling contains illegality that obviously affects its judgment. Therefore, the high court decision should inevitably be quashed without considering the rest of the reasons for appeal.

Ⅳ. Some Comments

1. Four Decisions

Since the seat of arbitration of this case was Japan, the JAA governs the arbitration procedure and the procedures of the court related to the arbitration proceedings, in accordance with Article 1 of the JAA. Article 4 of the JAA provides that with respect to an arbitration proceeding, the court may exercise its authority only in cases expressly provided for in the JAA.

Eventually, the parties of this case received the court decisions at least four times through substantial hearings. While arbitration proceedings could be conducted in English between Singaporean or Japanese corporations and US companies in this dispute, the court proceedings could only be conducted in Japanese. Therefore, all the evidence had to be translated to Japanese, which could be exceptionally expensive and extremely burdensome to the parties up to the conclusion of this dispute.

2. Conflict of Interest

There were many commentaries against the setting aside of the arbitration rendered by the Osaka High Court, because many specialists believed/ were of the view that the arbitrator's disclosure duty was not violated. If an arbitral award could be set aside easily, an unfavorable judgment could be reversed by discovering a far-fetched relationship later. And this would be against justice. They argued that this kind of dispute could be viewed as the action of making a final decision at a later time in a tossup.

However, in order to show justice, arbitrators should maintain their fairness or independence, which is the key of arbitration. That is why an arbitrator should disclose any facts that would raise doubts of impartiality or independence during the course of an arbitration.

Recently, awareness of conflicts of interest has rapidly changed in various areas in Japan. For example, conflict of interest in parent-subsidiary transactions and MBO (Management

Buyout) have been seriously scrutinized in business law areas, and business society is becoming more sensitive to conflicts of interest and is gradually adopting stricter thinking. The high court decision may be a reflection of such a recent trend over conflict of interest in Japan.

If undisclosed fact indicates that the arbitrator departed from ethics, it would be difficult to quell a suspicion that the related party may have obtained an advantageous arbitral award in collusion with the arbitrator through its firm in an unfair manner. If this is the case, such arbitration should never be allowed, and the arbitral award should be set aside.

3. Conflict Check System in International Law Offices

The Supreme Court did not quash the decision of the High Court and decide the conclusion by itself, but remitted the case to the High Court to reconsider several factual issues because some important facts were not clear on the basis of the court records of the proceedings at the three instances over three years. One of the reasons would be the difficulty for the courts to ascertain the actual practices of conflict check system in international law offices.

In general, it may be difficult to assert and prove the internal circumstances of a global law firm. The problem is the extreme difficulty to understand from the outside what sort of conflict check system is provided in a firm such as K&S' , which has many offices around the world. And it is extremely difficult for both parties to prove whether such a system is fully and properly functional or not.

However, such a big firm is expected to fully maintain a conflict check system. After the Supreme Court decision, the remitted high court scrutinized the details of how the conflict check system worked in this case. In conclusion, it was recognized that there had been no reason to believe that the presiding arbitrator could normally find out the Fact by conducting a reasonable scope of investigation.

4. Duty of Investigation

An arbitral award should be set aside if the arbitrator knew the related client and was taking measures to render an award advantageous to them. On the other hand, the arbitration should not be set aside if the arbitrator could not have known anything at all through a reasonable investigation as long as a reliable conflict check system is properly provided. In particular, if the Singapore office and the San Francisco office were economically linked to each other or had some influence on each other, the conflict check system should have been designed to cover all overseas offices.

In order to fulfill the obligation to disclose, arbitrators are obliged to investigate within a reasonable range as to whether doubtful circumstances exist. However, if a questionable relationship is found later, it may then be questioned whether the disclosure obligation has been fulfilled.

5. Risky Appointment

The underlying facts in this case are probably quite usual because arbitrators are sometimes appointed from major law firms. Movement of lawyers between firms is very common, and it would create a delicate conflict of interest issue.

Although the seat of arbitration was Japan, the presiding arbitrator for this case selected

and appointed by lawyers belonged to the Singapore office of an international law firm, even though many independent lawyers actually separate from big firms in order to be an arbitrator in Singapore.

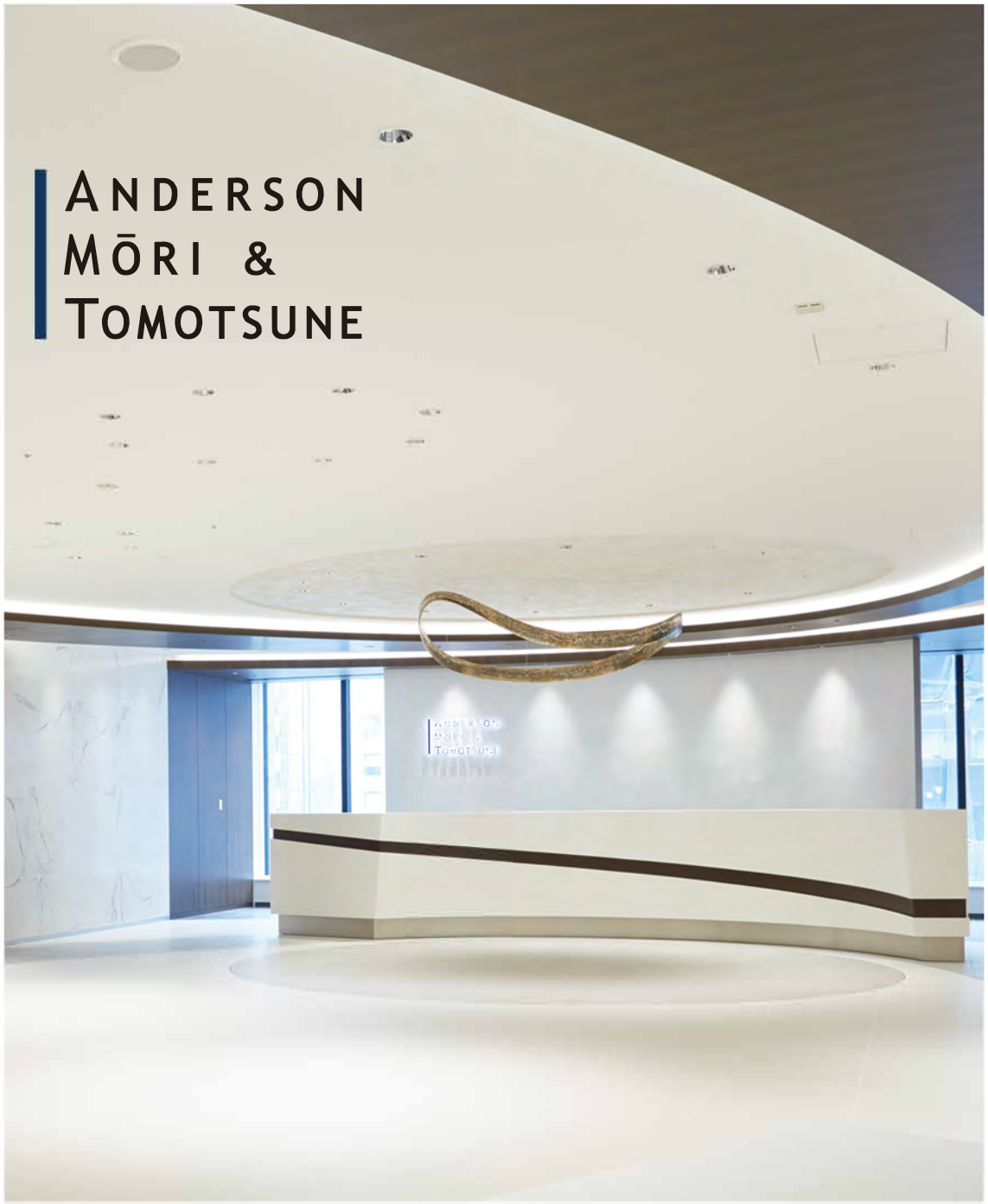
From the point of view of the client, the risk of court interventions should be avoided as much as possible. Considering the economic burden of the dispute resolution, arbitrators should be selected from among the lawyers who would not pose conflict issues. It is necessary to recognize the existence of ethical problems and the risks that this case has shown.

In this case, the presiding arbitrator submitted a statement, writing "Attorneys at K&S may in the future give advice to, or represent, clients in cases which are not related to the Arbitration Case but in which the clients' interests conflict with those of any of the parties to the Arbitration Case and/or any of its/their affiliated companies. Attorneys at K&S may also in the future give advice to, or represent, any of the parties to the Arbitration Case and/or any of its/their affiliated companies in cases not related to the Arbitration Case." [8)]

However, the Supreme Court affirmed the high court decision that an arbitrator' s abstract statement to the parties that there is a possibility of occurrence of events that "would likely to give rise to doubts as to his/her impartiality or independence" under Article 18 (4) of the JAA is not enough for such events to be considered as facts "which have already been disclosed" as referred to in the same paragraph.

While a world-wide office network of an international firm can provide advantageous services to clients, it could also bring some burdensome risk of conflict. Although the arbitral award was finally upheld, the wasted costs were not recoverable.

8) https://www.courts.go.jp/app/hanrei_en/detail?id=1558 (https://www.courts.go.jp/saikosai/index.html)



ANDERSON MŌRI & TOMOTSUNE

Otemachi Park Building, 1-1-1 Otemachi, Chiyoda-ku, Tokyo 100-8136, Japan
Tel: 81-3-6775-1000 URL: www.amt-law.com

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Setting Aside of Arbitral Awards under the Japan Arbitration Act

—Recent Decisions by the Japanese Courts

Professor, Doshisha University

Naoshi Takasugi

Ⅰ. Introduction

The year 2018 saw the launch of the Japan International Mediation Center in Kyoto (JIMC-Kyoto) by the Japan Arbitration Association (JAA), on the beautiful campus of Doshisha University, steps from the Imperial Palace. In the same year, the Japan International Dispute Resolution Center (JIDRC) was also established as the entity to be charged with promoting international arbitration in Japan in addition to the Japan Commercial Arbitration Association (JCAA). That led, in 2020, to the JIDRC' s opening of advanced facilities for arbitration hearings in central Tokyo. It is now more accessible than ever for Japanese companies to settle international commercial disputes in Japan, without having to go to, for example, Singapore or Hong Kong.

As is well known, the internationally-preferred mechanism for the resolution of international commercial disputes is not litigation before national courts but arbitration at leading arbitration institutions; accordingly, it is commonplace for international contracts to include an arbitration clause. Arbitration is based on these agreements to arbitrate, and is therefore private by nature. Most arbitral tribunals consist of one or three arbitrator(s) (according to the parties' arbitration agreement), and the arbitral tribunal' s decision is called an "arbitral award" . Enforcement of arbitral awards is a straightforward matter in almost all countries across the world due to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention")[1)] .

The reason why it is possible to accept that an arbitral award might be treated as having an effect similar to that of a judgment of a national court is that the arbitrators can be expected to be as independent, impartial and fair as domestic judges, and arbitral proceedings are expected to be conducted with procedural fairness and to afford due process to the parties, as is generally guaranteed in court proceedings. These expectations derive, at least in part, from

1) See, the UNCITRAL website: https://uncitral.un.org/. The number of parties to the New York Convention is 162 (browsed on March 15, 2020).

an overarching expectation that the country of the place of arbitration, i.e. the arbitration' s legal seat, supervises the arbitral proceedings to ensure their fairness. In principle, a petition to set aside an arbitral award shall be filed only in a court of the country where the arbitration had its legal seat and in which the arbitral award was made[2] .

Each country generally has its own laws to govern arbitral proceedings taking place under its jurisdiction; these laws will typically also set out the grounds for a party to the proceeding to seek to have the arbitral award set aside—i.e., declared invalid. In Japan this law is the Arbitration Act ("AA"), which derives from the 1985 version (not the 2006 version) of the UNCITRAL Model Law. Promulgated in 2003, it provides the grounds for a Japan-seated arbitral award to be set aside in its Article 44(1)[3] .

The purpose of this paper is to analyze the current state of the law concerning the setting aside of an arbitral award under Article 44 of the AA. In this paper, after introducing two recent relevant decisions by Tokyo High Court, I will then assess the current state of the law concerning the setting aside of arbitral awards in Japan.

Ⅱ. Recent Decisions

2.1. Tokyo High Court Decision of August 19, 2016

(a) Summary of Facts

This case dealt with Article 44(1)(vi) and (viii) of the AA.

In this case, X filed a petition before Tokyo District Court to set aside an arbitral award dated October 28, 2014, pursuant to an arbitration administered by the Japan Commercial Arbitration Association (JCAA).

X is a Japanese company that sells the product of its parent company. In 2010, X concluded

2) See, Blackaby et al., Redfern and Hunter on International Arbitration, 6th ed. (OUP, 2015), para.10.05.

3) Article 44(1) of the AA reads as follows:

"(1) If any of the following grounds exist, the parties may file a petition with the court to set aside the Arbitral Award:

(i) the Arbitration Agreement is not valid due to the limited capacity of a party;

(ii) the Arbitration Agreement is not valid on grounds other than the limited capacity of a party pursuant to the laws and regulations designated by the agreement of the parties as those which should be applied to the Arbitration Agreement (if said designation has not been made, Japanese laws and regulations);

(iii) the petitioner did not receive the notice required under Japanese laws and regulations (if the parties have reached an agreement on the matters concerning the provisions unrelated to public order in such laws and regulations, said agreement) in the procedure of appointing arbitrators or in the arbitration procedure;

(iv) the petitioner was unable to defense in the arbitration procedure;

(v) the Arbitral Award contains a decision on matters beyond the scope of the Arbitration Agreement or of the petition presented in the arbitration procedure;

(vi) the composition of the Arbitral Tribunal or the arbitration procedure is in violation of Japanese laws and regulations (if the parties have reached an agreement on the matters concerning the provisions unrelated to public order in such laws and regulations, said agreement);

(vii) a petition filed in the arbitration procedure is concerned with a dispute which may not be subject to an Arbitration Agreement pursuant to the provisions of Japanese laws and regulations; or

(viii) the content of the Arbitral Award is contrary to public policy in Japan."

a distributorship agreement (“Agreement”) with Y, which granted Y exclusive sales rights in respect of the product in the United Kingdom and other regions. Key terms of the Agreement were a minimum purchase quantity provision, and an arbitration clause calling for arbitration under the auspices of the JCAA. In 2012, X terminated the Agreement, following which Y submitted a request for arbitration to the JCAA, claiming that X had breached the Agreement and seeking damages.

The arbitration was conducted in Japan by an arbitral tribunal consisting of a sole arbitrator (“Tribunal”), using English as the language of the arbitration. The Tribunal applied Japanese law as the governing law, in accordance with the Agreement. The Tribunal ultimately concluded, in its Award rendered 28 October 2014, that X had breached its obligations under the Agreement, and ordered X to pay to Y the damages resulting from X’ s breach of the Agreement.

X asked the Tokyo District Court to set aside the award, principally on two bases: that (i) the Award violated applicable mandatory law (such as EU Competition Law) and (ii) the Tribunal had based its award on a misinterpretation of Japanese law. These infelicities, X argued, constituted grounds for set-aside pursuant to Article 44(1)(vi) or (vii) of the AA (i.e., the provisions relating to arbitrability and public policy).

After the Tokyo District Court dismissed X’ s motion in the first instance[4] , X appealed to the Tokyo High Court.

(b) Summary of Decision

The Tokyo High Court dismissed X’ s appeal on the following grounds.

(i) X had asserted that the mandatory provisions of EU Competition Law and the Japanese Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (the “Japanese Antitrust Act”) were a matter of public policy in Japan and that, in any event, misinterpretation of Japanese law by the Tribunal should be considered contrary to the public policy of Japan.

The Tokyo High Court found that whether the content of an arbitral award can be considered contrary to public policy should be determined not based on whether the tribunal applied laws and regulations that form part of the public policy of Japan, but based on whether the tribunal’ s application of those laws produces a result that is contrary to public policy; therefore, the Tokyo High Court reasoned, a tribunal’ s failure correctly to apply the substantive law or any applicable mandatory law will not automatically constitute grounds for setting aside of the award.

Applying that standard, the Tokyo High Court determined that (a) it could not be said that the mandatory provisions of EU Competition Law form part of the public policy of Japan, and (b) that the Japanese Antitrust Act could not apply because the exclusive sales rights under the Agreement related to the markets of the United Kingdom and other (non-Japan) regions.

(ii) X had also argued that the Tribunal’ s allocation of the burden of proof in the Award was incorrect as a matter of Japanese law, and that the Tribunal’ s mistake created grounds for set aside under AA Article 44(1)(vi) or (viii).

4) Tokyo District Court Decision of February 17, 2016. See, 2016WLJPCA02176008 [Japanese only].

The Tokyo High Court dismissed this argument as well, concluding that the allocation of the burden of proof as to substantive matters is substantive in nature, with the result that this type of mistake, even if established, would not give rise to grounds for setting aside of the award under (vi) or (viii).

2.2. Tokyo High Court Decision of August 1, 2018[5)]

(a) Summary of Facts

This case dealt with Article 44(1)(iv), (v), (vi) and (viii) of the AA.

In this case, X and Y had concluded a patent cross-licensing agreement ("CL Agreement") in February 2008. Under the CL Agreement, each of X and Y were permitted exclusive use of the other' s patents, with Y additionally to pay royalties to X. The CL Agreement was to be governed by Japanese law, and contained an arbitration clause providing for the resolution of disputes through arbitration under the Commercial Arbitration Rules of the JCAA ("JCAA Rules") seated in Tokyo.

After concluding the CL Agreement, X had a dispute with a separate company Z (which, for the avoidance of doubt, was not a party either to the litigation under discussion here, or to the underlying arbitration) concerning X' s patents, which resulted in a settlement between X and Z (the Settlement). Y then initiated an arbitration against X, asserting that the Settlement was effectively a license and therefore violated Y' s right to exclusivity under the CL Agreement.

The arbitral tribunal ("Tribunal") rendered an award ("Award") ordering X to pay damages to Y, and that Y was relieved of its duty to pay royalties.

Then X filed a petition for setting aside of the Award before the Tokyo District Court. The District Court accepted the petition and set aside portions of the Award under Article 44(1)(viii) of the AA, because the Tribunal had omitted to decide an issue, such omission would have been serious enough to affect the outcome of the case under the Japanese Code of Civil Procedure, which caused the Award to infringe what the court considered to be Japanese procedural public policy[6)] .

(b) Summary of Decision

Y appealed to the Tokyo High Court, and the High Court revoked the portions of the District Court Decision that had set aside the Award, holding as follows.

(i) The Tokyo High Court held that the standard for determining whether there has been a violation of laws or regulations in an arbitration is not based on the Japanese Code of Civil Procedure, but on the Arbitration Act, in particular its Article 26[7)] , which refers to the rules of

5) Kinyu Shoji (1551) 13 [2018]. As to the English translation of the case, Japanese Yearbook of International Law, vol.62 (2019), p.462 [by Mathew Harnett].

6) Tokyo District Court Decision of March 28, 2018, Kinyu Shoji (1551) 24 [2018].

7) Article 26(1) of the AA reads as follows:

"(1) The rules of an arbitration procedure which the Arbitral Tribunal should observe shall be as provided by the agreement of the parties; provided, however, that such rules shall not violate the provisions concerning public order provided in this Act."

procedure chosen by the parties to the arbitration agreement (in this case, the JCAA Rules). The fact that the arbitral proceedings may be inconsistent with the civil procedure law applicable in the courts of the seat of arbitration is not, by itself, a violation of Article 44(1)(vi) of the Arbitration Act. This is because the Code of Civil Procedure does not apply (mutatis mutandis or otherwise) to arbitral proceedings conducted by arbitral tribunals.

(ii) The Tokyo High Court further held that set-aside of an arbitral award is permitted only where there are grounds as explicitly provided in Article 44(1) of the Arbitration Act. This approach allows for set-aside when procedural guarantees (due process) in arbitration have not been observed. In interpreting the provisions articulating the grounds for set-aside (Article 44(1)(i) to (viii)), it is not desirable to take an expansive or analogical interpretation, and it is appropriate to interpret them in accordance with the framework of the wording of the Article.

(iii) As to whether the petitioner was unable to present its defense in the arbitration (Article 44(1)(iv)), the Tokyo High Court held that although an award may be set aside where there has been a clearly unfair proceeding, such as the arbitral tribunal (or arbitrators) actively interfering with the party's opportunity to present its case or defense, set-aside is not available when there is mere dissatisfaction with deadlines, etc. (Article 31 of Arbitration Act and Articles 36 and 49 of the JCAA Rules) determined by the arbitral tribunal. It is necessary to ensure that the parties' costs are not inflated by prolongation of the proceedings, and there is no need to give the parties an opportunity for endless arguments.

(iv) The Tokyo High Court further found that, as the parties had agreed that the JCAA Rules would be the applicable procedural rules for the arbitration, it was appropriate for those rules to govern procedural issues (unless their application were to violate public policy provisions in Japanese laws or regulations). Article 25 of the Arbitration Act provides that "(1) The parties shall be treated with equality in an arbitration procedure. (2) The parties shall be given a full opportunity to explain his/her case in an arbitration procedure" and Articles 44 and 45 provide grounds for setting aside the arbitral award and grounds for non-recognition of the arbitral award, respectively, as "the petitioner was unable to present its defense in the arbitration procedure" and "the Arbitral Award contains a decision on matters beyond the scope of the Arbitration Agreement or of the petition presented in the arbitration procedure" . If the award were to contain any material in conflict with these provisions, the award may be set side, regardless of the content of the JCAA Rules.

It should be noted here that the standard of interpretation of these provisions is not based on the Code of Civil Procedure, but on the international standard of the basic principles to be followed in civil dispute resolution proceedings such as arbitration. The international standard is, after all, considered to be whether the principles expressed in Article 25 of Arbitration Act were substantially guaranteed or not. The determination of whether there were substantial guarantees is left to the wisdom and good sense of the legal profession and not to the elaborate hermeneutics of the domestic civil proceedings of the arbitral forum.

The legislative purpose of the Arbitration Act is to apply general standards (equal treatment, guaranteed opportunity to explain the case) to individual cases and for judgments to be based on the wisdom and common sense of lawyers, rather than to impose specific and detailed

standards. In addition, an argument that would result in a request for substantive review of an arbitral award should simply be dismissed on a simple wording (e.g., 'the claimant's argument is, after all, a request for substantive review of the arbitral award and does not amount to grounds for revocation of the arbitral award').

Ⅲ. Some Comments

3.1 The Issues addressed by the Decisions

The points of significance in the 2016 Decision are: [1] the court found that "the interpretation of the distribution of the burden of proof as to substantive matters is substantive in nature" and therefore such an issue cannot constitute a violation of the laws and regulations of Japan for the purposes of Article 44(1)(vi); and [2] the court found that whether the content of the arbitral award is contrary to public policy should be determined not based on whether the tribunal applied laws and regulations that form part of the public policy of Japan, but based on whether the tribunal' s application of those laws produces a result that is contrary to public policy, and therefore, an arbitrator' s failure to apply the substantive law or any applicable mandatory law would not necessarily constitute grounds for setting aside of the award with respect to "public policy" in Article 44(1)(viii) of the AA.

The 2018 Decision then clarified that [1] "the standard for determining whether there has been a violation of the laws and regulations in an arbitration proceeding is not based on the Japanese Code of Civil Procedure, but on the Arbitration Act, in particular its Article 26" with respect to whether "the arbitral proceedings" can be considered to have been conducted in violation of the laws and regulations of Japan under Article 44(1)(vi); and that [2] "[t]he international standard is, after all, considered to be whether the principles expressed in Article 25 of Arbitration Act were substantially guaranteed" which is to be determined in accordance with "the wisdom and good sense of the legal profession" .

3.2 Interpretation of "the arbitration procedure is in violation of Japanese laws and regulations" in Article 44(1)(vi)

Both decisions addressed the meaning of the wording "the arbitration procedure is in violation of Japanese laws and regulations" used in Article 44(1)(vi) of the AA. Reading the decisions together, we can glean several useful clarifications as to how the set-aside provisions of the AA can be expected to be applied to challenges based on procedural failures within the arbitral proceedings.

Firstly, the 2018 Decision focused on the meaning of "Japanese laws and regulations" . According to the 2018 Decision, even if an arbitration would (if it had been a Japanese court litigation) fall under the grounds for retrial prescribed by the Japanese Code of Civil Procedure, such as due to an omission of a serious matter affecting the outcome of the case[8)] , this does not mean that the arbitral award may be set aside. In other words, for the purposes of the

8) See, Tokyo High Court Decision of March 13, 2012 which approved this approach.

AA, "Japanese laws and regulations" does not encompass the Japanese Code of Civil Procedure. Rather, the words of the AA should be interpreted autonomously within the AA. This interpretation seems correct because arbitration is fundamentally different from litigation, as the Tokyo High Court pointed out[9] .

Secondly, in determining the meaning of the wording "in violation of Japanese laws and regulations" , the procedural principles in Article 25 of the AA—namely, that the parties to an arbitration are to be treated with equality and each to be afforded a full opportunity to present its case—will be taken into consideration. In this point as well, the 2018 Decision seems to be correct[10] .

Thirdly, for a party' s dissatisfaction with an arbitral award to give rise to grounds for set-aside under the AA, there must have been an underlying violation of a procedural nature. As the 2016 decision observed, it was because of the substantive nature of the allocation of the burden of proof that the Tribunal' s error on that point could not constitute grounds for set-aside under Article 44(1)(vi)[11] .

Finally, although a breach of procedure is a prerequisite, the mere fact that there has been a procedural breach is not enough to set aside the award under Article 44(1)(vi) of the AA. The breach must be serious[12] .

3.3 Interpretation of "public policy" in Article 44(1)(viii)

Both Decisions also dealt with the interpretation of "public policy" in Article 44(1)(viii), and provided helpful clarifications on several points.

As a threshold matter, it is uncontroversial that, where Japan is the seat of arbitration, the meaning of "public policy" should be interpreted from the perspective of Japanese law. That point is clear from the text of Article 44(1)(viii)[13] .

In the 2016 Decision, the court confronted the argument that a violation of EU competition law might constitute a salient public policy violation[14] . Certainly, it is straightforward to argue that competition law is considered a fundamental legal principle in many countries, with the result that a violation of competition law may implicate public policy considerations, or even fall within statutory provisions relating to set-aside or enforcement of arbitral awards on public policy grounds[15] . However, because the "public policy" to which Article 44(1)(viii) of the AA

9) See, supra 2.2 (b)(i) and (iv).

10) See, supra 2.2 (b)(iv).

11) See, supra 2.1 (b)(ii).

12) When the result of an arbitral award would be the same as if there had been no violation, the prevailing opinion says that there is no need to set aside the arbitral award. See, N. Takasugi, "Defect in Determination of Applicable Law to the Merits in International Commercial Arbitration and Annulment of the Resulting Award", in International Public Policy Studies, vol.21 (2016), p.51.

13) The text of Article 44(1)(viii) mention "public policy in Japan".

14) See, supra 2.1 (b)(i).

15) See, H. Kronke et al eds., Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention (Kluwer, 2010), p. 382 et seq.; R. Wolff ed., New York Convention: Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 - Commentary (Beck, 2012), p. 435.

refers is the public policy of Japan alone, only a violation of the Japanese Antimonopoly Act could be at issue in set-aside proceedings under Article 44(1)(viii); a violation of foreign competition law is not, without more, a violation of the public policy of Japan. In this case, the Japanese Antitrust Law could not apply to the underlying Agreement, which had granted Sales Rights in territories other than Japan; as a result, there could be no question of a violation of Japan' s Antitrust Law. Therefore, it is fair to say that the above claim by X lacked a basis, and the 2016 Decision' s analysis on this point appears to be reasonable.

Secondly, "public policy" refers not just to rules of a substantive nature but also to those of a procedural nature. This interpretation is the prevailing view in Japan[16] . Internationally, interpretation of Article 34 of the UNCITRAL Model Law (on which Article 44 of the AA is based), 'public policy' has been generally consistent with that view[17] . Both of the decisions discussed in this article seem not to present a problem on this point.

Thirdly, although some academic commentators have taken the view that whether there has been a violation of "public policy' for the purposes of Article 44(1)(viii) of the AA ought to determined according to the abstract question of whether or not relevant mandatory law has been correctly applied in the arbitral award, the 2016 Decision clearly adopts the alternative approach that it should be determined on the basis of the results flowing from the arbitral award' s application of mandatory law. The Decision' s approach corresponds to the majority academic opinion in Japan[18] and seems in any event to be correct.

Ⅳ. Concluding remarks

Clear legal standards regarding the grounds for setting aside of arbitral awards are essential for any jurisdiction that aims to achieve popularity as an arbitral seat. As the cases discussed in this article signify, the circumstances in which Japanese courts might set aside an award for a defect in the underlying arbitral proceedings are becoming clearer, and will continue to do so as further judgments accumulate.

The ability of the local courts to carry out their supervisory function with respect to arbitral proceedings and awards is a critical factor in a jurisdiction' s viability as a seat of arbitration. The Japanese courts are among the most credible courts in the world, both in terms of ability and integrity. This author is therefore optimistic that the Japanese courts will continue to render appropriate arbitration-related judgments in the future, and that confidence in Japan as a seat of arbitration will grow.

16) See, M. Kondo et al., Chusai-ho Commentar [Commentary on Arbitration Act] (Shojihomu, 2003), p.253.

17) See, UNCITRAL, 2012 Digest of Case Law on the Model Law on International Commercial Arbitration (2012), Art.34, para.130 and the cases from various jurisdictions mentioned there.

18) See, Kojima & Inomata, Chusai-ho [Arbitration Law] (Nippon Hyoronsha, 2014), pp. 517-518.

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How Companies Can Prepare for Global Disputes in the Era of Japan's Work Style Reform

Attorney at Law, admitted in N.Y. and Japan/F.C.I.Arb.
Kasumigaseki International Law Office/International Arbitration Chambers
Yoshihiro (Yoshi) Takatori

Attorney at Law, admitted in Japan
Orrick, Herrington & Sutcliffe LLP and Orrick Tokyo Law Offices, *a gaikokuho joint enterprise*
Yumiko Ohta

Work Style Reform Law

For many years, Japanese labor laws went largely without reform. While businesses continued to evolve, these laws remained premised on the traditional system of lifetime employment and time-based wages. This has created entrenched labor issues, such as low productivity, depressed wages, *karoshi* (death by overwork), power harassment (bullying), forced unpaid overtime and the increased use of contingent employees (employees paid on an hourly basis, contract employees and dispatched workers).

To address some of the above issues, Japan passed legislation commonly referred to as the "Work Style Reform Law" ("WSRL") in 2018. Below, we outline the main changes made by this act.

1. MANAGEMENT OF WORKING HOURS

- Upper Limit on Permitted Overtime Hours

Under the WSRL, absent a special agreement, overtime work is generally limited to 45 hours a month and 360 hours a year. Even where a special agreement is in place, it is limited to 100 hours a month and 720 hours a year, with the average across multiple months not to exceed 80 hours. Here again, the law makes it clear that the monthly maximums should not be often repeated.

- Required Awareness of Employee Work Hours

Under the WSRL, employers are required to be aware of employee work hours via statutorily provided means (e.g., through direct observation or other objective means). This is contradictory to the recent shift to performance-based work and is a huge challenge for many companies.

- Introduction of "Highly Skilled Professionals" Exemption.

Under the WSRL, "highly skilled professionals" (HSPs) are exempt from regulations related to work hours. An HSP is defined as any individual (i) whose work requires highly specialized knowledge and is of a nature such that the amount of time worked and the work product are

typically not highly correlated and (ii) who receives annual compensation of JPY 10.75 million or more. The types of roles eligible to constitute HSPs are narrow and include developers of financial products, broker-dealers, analysts, consultants and research and development professionals.

2. FAIR TREATMENT OF EMPLOYEES, REGARDLESS OF EMPLOYMENT STATUS[1)]

The WSRL creates a prohibition on unreasonable disparity in treatment between regular and contingent employees. The reasonableness of disparity in treatment must be considered against the nature and purpose of such disparity. It is expected that contingent employees, who made up over 38% of the entire employee population in 2019, will bring many lawsuits for more wages and benefits based on this prohibition.

3. REINFORCEMENT OF THE PROTECTIVE ROLE OF INDUSTRIAL (COMPANY) PHYSICIANS

Under the Work Style Reform Law, employers are obligated to: (i) provide industrial physicians[2)] with information necessary for the proper management of the health of employees; and (ii) report advice rendered by industrial physicians to the employer's internal health committee.

Anti-Power Harassment Law

Until 10 years ago, dismissals were by far the most reported claim for consultation and mediation to Japan's local labor inspection offices. Over the past 10 years, however, claims in regards to "power harassment" have doubled, thus shooting it to the top of the claim list. Power harassment is a kind of severe, institutionalized bullying that is difficult to understand without knowledge of Japanese societal and workplace norms. It has become quite common for employees claiming unlawful termination to add power harassment claims against individuals such as representative directors, direct managers and HR personnel. To prevent power harassment in the workplace, on May 29, 2019, Japan passed a legislation commonly referred to as the "Anti-Power Harassment Law" [3)].

The Anti-Power Harassment Law defines "power harassment" as any action conducted by an employee at the workplace taking advantage of his/her superiority over others, which is beyond the reasonable scope of work and harms the work environment[4)] . The most important factor in determining whether the alleged conduct constitutes power harassment is whether it

1) Applicable to large companies starting April 2020 and to small and midsized companies starting April 2021.

2) Under the Industrial Health and Safety Work Style Reform Law, an employer must have in place an "industrial physician" (a company doctor) for each place of employment with 50 or more employees employed from time to time. Such industrial physicians may render advice to the employer on matters regarding the management of the health of employees.

3) Applicable to large companies starting June 2020, and to small and midsized companies starting April 2022.

4) Article 30, Paragraph 2, Item 1 of Labour Policy Promotion Law.

is beyond the reasonable scope of work. Japan's Ministry of Health, Labour and Welfare issued Guidelines for Power Harassment[5] which define actions beyond the reasonable scope of work as being those which (1) in light of social standards are obviously unnecessary in the performance of duty, (2) are largely beyond the scope of work while being inappropriate in the manner to achieve business objectives or (3) are beyond socially acceptable limits based on frequency of improper behavior and the number of alleged harassers. This means that business instructions and negative feedback from managers that are objectively necessary and are given in a reasonable and appropriate manner are not power harassment. However, the media and information procured from social networking platforms often mislead people into thinking that any action that makes employees uncomfortable is power harassment. This gap in understanding is creating claims and disputes as well as having a chilling effect on managers. This is not a healthy situation, so correctly understanding the scope of power harassment is very important.

The Anti-Power Harassment Law obligates companies to take preventive measures as well as to handle reported cases appropriately, using a similar framework as the laws against sexual harassment in the workplace[6]. Namely, employers must clarify what power harassment is, establish a policy that they do not tolerate power harassment and notify and educate all employees through measures such as provisions in their work rules, training materials, etc. Further, employers must establish a written policy imposing strict measures against harassers. This is typically done through revisions to the work rules. Employers must also clearly advise and educate all employees of the new rules. In addition, employers must establish a hotline and notify all employees thereof. As the individuals in charge of monitoring the hotline must be well trained in dealing with questions related to employment law and privacy matters, outside law firms are often retained by employers to run such hotlines.

Employers are obliged to take the following actions where an investigation confirms that an employee has been a victim of power harassment:

1) Support the victim (for example, helping the victim to improve relationship with the harasser, providing support to the victim if he/she is suffering from mental illness, providing consultation with regard to such employee's mental health issues);
2) Actions against proven harasser (for example, transferring the harasser to another department, considering disciplinary action, making the harasser apologize to the victim); and
3) Proactive measures to prevent similar events (for example, distribute an anti-harassment policy, further training).

As a workplace disciplinary action is considered to be rather drastic in Japan, under the Japanese labor laws, disciplinary actions are lawful and effective only when: (i) power harassment is defined and disciplinary action for power harassment is clearly stated in the work rules or individual employment contracts; (ii) the action in question constitutes power

5) "Guidelines Concerning Measures to be Taken by Employers in terms of Employment Management with regard to Problems Caused by Power Harassment in the Workplace."

6) Article 30 of Anti-power Harassment Law.

harassment and there is an applicable disciplinary action in the work rules or individual employment contract; and (iii) a disciplinary action is socially appropriate and is not abusive of rights. Unlike sexual harassment, power harassment is usually related to the performance of duties, and it calls for difficult judgments as to whether a certain action should be considered power harassment. Thus, employers must always give opportunities to employees accused of harassment so as to allow them to properly respond to the allegations lodged against them.

Companies' Obligations to Maintain a Safe Workplace and Mental Health Care

Article 5 of the Labor Contract Law creates a duty for employers to provide a safe and healthy working environment to employees.

In Japan, the number of cases of employees claiming damages against employers for the breach of such a duty has increased substantially. Cases where courts confirm that mental illness is caused by alleged power harassment are still limited, but if an employee takes administrative leave due to mental illness caused by power harassment, employers may not treat them as having constructively resigned, even if they are unable to return to work at the expiry of the administrative leave, and employers must support their returning to office as a part of such duty. As it takes time to receive recognition for occupational sickness or a judgment from a court for power harassment, employers inevitably bear the risk of judging whether such action is power harassment or not and, therefore, employers are advised to assist employees in returning to the office as much as practical, even if the conduct is not likely to be considered power harassment.

To prepare for possible future disputes, employers should work with the employee to develop a written "back to work plan," which might include reassignment to a different manager or group, gradual increase of responsibility, alterations to the volume of work and work hours or assignment of a supervisor meant to oversee the employee's work to ensure that assignments are not excessively burdensome. Efforts must also be made to draft a Plan B in case the "back to work plan" is not successfully implemented.

Note that employers are ultimately entitled to determine whether an employee is fit to return. When making decisions, however, employers should not simply rely on doctor's certificates written by the personal physicians of relevant employees but should strive to gather additional information where reasonable. This includes, for example, requesting a report from a consolation between both the industrial physicians and the personal physician of the relevant employee, and in some cases, communicating directly with the family and friends of said employee.

Mental illness can qualify as an occupational illness. In preparation for possible future claims for occupational illness by employees and possible lawsuits for damages, employers must keep all records of measures that they took.

Enhanced Responsibility for Industrial Physicians

The WSRL strengthens two concepts: 1) industrial physicians' industrial health care function; and 2) industrial physicians' face-to-face guidance for employees working long hours.

Employers must provide industrial physicians with the necessary information in order for industrial physicians to be able to appropriately manage the health of employees, including the status of the work and working hours of employees. Employers must also report the content of the recommendations from the industrial physicians to the Safety and Health Committee ("Committee"), which must then take necessary measures to ensure the health of their employees.

These amendments strengthen the relationship and collaboration between the industrial physician and the Committee, and are meant to strengthen the protection of the safety and health of employees.

In light of the current COVID-19 pandemic, the assistance of industrial physicians in creating a workplace environment that protects the safety and health of employees is particularly important. Employers who do not take this seriously thus open themselves up to a great deal of potential regulatory and legal liability.

Four Aspects of Compliance and Possible Liability for Corporations

Regarding compliance issues, four specific possible liability risks should be considered[7].

1- Civil liability, such as tort liability under Article 709 of Japanese Civil Code. For example, if an employer fails in managing possible risks in relation to the COVID-19 pandemic or any other workplace risk where causation is proved, employees, and, at times, even their families, may be entitled to monetary damages.

2- Criminal liability, such as negligence. To illustrate, when employers fail to protect employees from possible harm in contravention to the advice of their industrial physicians, such negligence may be beyond a criminal level.

3- Administrative liability, including possible sanctions imposed by government agencies such as the Ministry of Health and Welfare, which has authority to put appropriate administrative sanctions against corporations that do not implement due care in regards to the safety and health of employees in compliance with the relevant laws and regulations.

4- Reputational/Media Risk, such as negative press reports or general market views, has the potential to be even more damaging than the negative effects.

Proper Utilization of Industrial Physicians

According to Article 14-3, provisions 3 and 4 of the Ordinance on Industrial Safety and Health ("Ordinance"), employers must report the contents of the recommendations of

7) Yoshihiro Takatori "20 Rules for Dispute Resolution between Corporations," Chuo Keizai, 2012.

industrial physicians to the Committee.

Based upon the above obligation and the strengthened role of industrial physicians to take care of safety and health issues, including gathering environmental/medical information and recommending any necessary/efficient countermeasures to employees and employers, employers shall be liable for any failure to consult with, or follow the recommendations of, their industrial physicians in terms of the above four aspects of possible liabilities.

As the basis for such significant liabilities on employers, the Ordinance imposes specific requirements on employers in respect of retaining industrial physicians and appointing the Committee. Article 14-4 of the Ordinance requires employers to provide their industrial physicians with the authority to:

a) Provide opinion/advice to the employer or the Committee;

b) Gather information from employees to implement necessary countermeasures for safety and health; and

c) Instruct/direct employees to conduct any necessary emergency countermeasures for the protection of employees' health.

Article 23 (5) of the Ordinance provides that the industrial physician shall have the power to request the Committee to conduct discussions and related inspection in regards to the protection of the health of their employees.

Additionally, Article 104 (1) to (4) of the Industrial and Safety Act ("Act") provides that employers shall make efforts to consult with employees and implement necessary countermeasures to respond to any needs, so that industrial physicians can create an environment for further efficient activities and utilize their expertise to put in place appropriate health controls for employees.

In order to maximize positive effects and encourage efficiency amongst industrial physicians, it is important for employees to be aware of the role of the industrial physicians and the methods that are available to obtain helpful advice and information on safety and health.

Along these lines, Article 101 (2) of the Act provides that employers clearly advise and notify employees of the duties, goals and responsibilities of their industrial physicians.

Cross-Border Dispute Resolution in Japan

The Japanese labor laws, including the Act, impose various mandatory obligations on employers and they apply to Japanese affiliates of global companies. Section 6, Article 3-7 of the Civil Procedure Code, allows for employees in Japan to bring lawsuits against employers in Japanese courts notwithstanding exclusive jurisdiction outside of Japan if it was agreed to in the employment contracts. Thus, if employees choose Japanese courts, the above issues will be resolved in Japanese courts.

While arbitration agreements for labor-related disputes directly between individual employees and corporations are invalid under the Japanese Arbitration Act (by-laws Article 4), civil disputes, such as claims for monetary damages due to the failure of an employer to properly manage the safety and health of its employees through an industrial physician and

other required means, can be resolved through arbitration, especially in the case where both employers and employees would prefer to keep the dispute confidential. Foreign parent companies with Japanese affiliates, such as subsidiaries, should thus make an effort to familiarize themselves with both Japanese labor law and the procedural rules of Japanese courts and Japan-based ADR mechanisms, such as JCAA arbitration and mediation. Note, however, that even though the governing law for these types of employment disputes must be Japanese, the utilization of ADR mechanisms would allow parties to dispute flexibility as to the ultimate place of dispute settlement.

From June 2020, disputes concerning power harassment can be resolved through mediations by dispute resolution committees established at each prefecture's Labour Standards Bureau and by local Labour Standard Bureaus. These mediation bodies are capable of conducting investigations by interviewing alleged harassers and victims in private, and the use of these mediation bodies could be useful for companies when employees refuse to cooperate with company-initiated investigations because of fear of retaliation. This can be an efficient option for employment-related dispute resolution, or as an amicable solution even for cases involving cross-border aspects, such as foreign affiliated companies.

JIMC-KYOTO —An Attractive Option for International Mediation

Vice President, the Japan Association of Arbitrators Chief Director, the Japan International Mediation Center in Kyoto

Haruo Okada

Ⅰ. Introduction

International mediation is attracting worldwide attention as an effective means of dispute resolution. In November 2018, the Japan International Mediation Center in Kyoto (JIMC-Kyoto)[1] was established in the city of Kyoto, Japan, by the Japan Association of Arbitrators (JAA), a public interest incorporated association. Traditional Japanese culture has a high affinity for mediation. Against this background, JIMC-Kyoto provides mediation services in Kyoto, a symbolic city known for its traditional Japanese culture. JIMC-Kyoto offers both "software" and "hardware" consistent with global standards of mediation practice. In this article, the Chief Director of JIMC-Kyoto introduces some of the features and fascinating aspects of international mediation in Kyoto administered by JIMC-Kyoto.

Ⅱ. Background to the Establishment of JIMC-Kyoto

1. International Mediation is Gathering Global Attention

Mediation is a voluntary process whereby parties to a dispute select an independent and impartial third person (mediator) to assist them with their negotiations.

Mediation can be extremely effective not only for domestic disputes, but also for international commercial disputes. For a long time, the primary method of resolving international commercial disputes has been international arbitration. In the future, a combination of international mediation and international arbitration may well become the mainstream. A clear advantage of mediation is that it costs far less and can be completed much faster than arbitration. The disputing parties also have control of the process, because they, not the mediator, will decide whether to settle their dispute. Mediation is also less adversarial than arbitration (which is very important to maintaining business relationships), and it makes a win-win solution possible by focusing on the common interests of the parties.

1) https://www.jimc-kyoto.jp/

From this perspective, positive-sum results are possible, compared to the zero-sum result of adversarial proceedings that yield a winner and a loser.

Mediation enjoys a high success rate with the participation of experienced and highly skilled international mediators. Asian jurisdictions, including Singapore, Hong Kong (SAR), Malaysia, Korea, and mainland China, are eagerly putting infrastructure in place with the goal of becoming hubs for international mediation. Examples of established dispute resolution centers that offer international mediation services in Asia are the Singapore International Mediation Centre (SIMC) and the Hong Kong International Arbitration Centre (HKIAC).

On August 7, 2019, a signing ceremony for the Singapore International Commercial Mediation Convention was held, marking a significant step in the internationalization of mediation. The Convention aims to grant international enforcement power to settlement agreements reached via international commercial mediation with similar effect to the New York Convention for arbitration. The number of signatories has gradually increased since then, and, at the time of publication of this article, 52 countries, including the United States, China, India, Singapore, and South Korea, have signed the Convention.

The signing ceremony of the Convention was a symbolic and historic event that marked a major shift in attitudes toward the mediation of international commercial disputes. It may not be too bold to suggest that international mediation is gaining traction as a principal method of resolving international commercial disputes.

2. Traditional Japanese Culture Has a High Affinity with Mediation

The spirit of mediation is inherent in Japanese culture, whose origin can be traced back to the Seventeen-Article Constitution of A.D. 604, said to be the first constitution of Japan. The first article provides “Cherish the harmony among the people.”

Mediation has long been used to resolve a wide range of disputes in Japan. Domestic mediation practice has developed to meet the expectations of domestic Japanese parties. JIMC-Kyoto draws on this tradition of mediation while offering mediation services consistent with global standards of mediation practice.

Before JIMC-Kyoto was established, Japan did not have the needed infrastructure to support international mediation. It lacked the “hardware,” such as dedicated facilities, as well as the “software,” such as an international panel of mediators. With international mediation gaining traction in the world, JIMC-Kyoto was established to fill this void in November 2018 as Japan's first permanent organization specializing in international mediation.

Ⅲ. Attractive Features of Mediation at JIMC

JIMC-Kyoto enables international mediation by supplying the necessary hardware and software infrastructure in line with international standards in the city of Kyoto.

1. Setting in Kyoto - Why Kyoto?

Settlement is most likely when disputing parties are committed to the mediation process.

Mediations can normally be completed in a short period of time, often one or two consecutive days. It is critical that mediations be held in the right environment. The venue should be neutral and, ideally, away from outside distractions. The right venue will encourage parties to commit themselves fully to the process.

Kyoto is the ideal international mediation venue for these reasons. The peaceful atmosphere of the city – with its gardens, temples, and shrines – creates a favorable atmosphere for amicable negotiations. This will give mediation the greatest opportunity of success.

Kyoto benefits from easy access to foreign and Japanese parties alike. The rail network in Japan is considered by many to be the most reliable, frequent, and comfortable in the world. The Kyoto city center is connected directly by high-speed train to Kansai Airport in Osaka. Kyoto is an attractive and safe tourist destination with excellent accommodations, food, and transportation services.

2. Hard Infrastructure (Facilities)

(a) Doshisha University

JIMC-Kyoto benefits from the support of Doshisha University. The JAA (on behalf of JIMC-Kyoto) signed a memorandum of understanding with Doshisha that gives mediation parties access to excellent facilities, including private rooms for parties, printing facilities, and mediation rooms, one of which contains a simultaneous interpretation booth. There are also onsite cafes and restaurants that offer diverse global cuisine. These facilities match the quality of other leading dispute-resolution centers and are offered at an extremely low cost.

Doshisha University is located in the center of Kyoto, a short distance from the central Kyoto train station. The wooded campus, just across the street from the Kyoto Imperial Palace, is beautiful, calm, and removed from bustle and distraction.

(b) Kodai-ji

A unique feature of the mediation administered by JIMC-Kyoto is the option of conducting mediation at temples and shrines in Kyoto. Temples and shrines have been historically important venues for resolving

Doshisha University

Interpretation Booth

Mediation Room

Mediation and Party Rooms

disputes. Kodai-ji, a temple located at a short distance from the central train station at the foot of the mountains, is now available as a mediation venue. Kodai-ji was established in 1606 and is renowned for its Buddhist architecture and gardens. Rooms in the temple can be used for mediation. JIMC-Kyoto is working to secure similar arrangements with other area shrines and temples.

3. Soft Infrastructure

(a) Mediator Panel

Mediators are the key to a successful mediation. JIMC-Kyoto is very proud to have an excellent mediator panel with a highly experienced, diverse group of mediators. Currently, we have 51 non-Japan resident mediators from various jurisdictions across the world in addition to approximately 70 Japan resident mediators. Please refer to JIMC-Kyoto' s website for details.

The international composition of the panel has been acknowledged by leading commentators. In Nadja Alexander and Shouyu Chong (eds)' s "The Singapore Convention on Mediation: A Commentary (Kluwer Law International, 2019)," a leading commentary on the Singapore Convention, JIMC-Kyoto is cited as one of three institutions with an international and diverse panel of mediators, together with the ICC and SIMC.

(b) Mediation Rules

JIMC-Kyoto has published mediation rules that are consistent with global standards. They are suitable for use in mediations of all sizes and degrees of complexity. Please refer to JIMC-Kyoto' s website for details.

Consistent with global standards, the rules protect confidentiality. Information relating to the mediation, party statements, and documents are protected from disclosure in any subsequent proceedings, including litigation or arbitration. This confidentiality requirement contributes to the high success rate of international mediation. Without the assurance of strict confidentiality, parties would not be able to speak freely to the mediator and might even avoid mediation altogether.

(c) Expedited Procedures

Procedural details, including deadlines, are provided in the mediation rules. We expect the mediation process for most mediations to be completed within three months from the initial filing.

(d) System Design for "User-friendly" Procedures

JIMC-Kyoto features inexpensive and predictable costs. For example, the filing fee is JPY 50,000, and the administrative fee (including facility use) is JPY 100,000 (per party), if the amount of the dispute is JPY 20,000,000 or below, and JPY 150,000 (per party), if the

amount of the dispute is JPY 20,000,000 – 100,000,000.

JIMC-Kyoto facilities can also be used for ad-hoc mediations not administered by JIMC-Kyoto.

Please refer to JIMC-Kyoto' s website for details.

(e) Organization Specializing in Mediation

JIMC-Kyoto is dedicated exclusively to mediation and does not administer arbitration proceedings. Hybrid dispute mechanisms, including "med-arb" (i.e. mediation followed by arbitration if the mediation does not resolve all claims), can be provided in dispute-resolution clauses or otherwise agreed by disputing parties. Mediation under JIMC-Kyoto' s auspices can be paired with ad-hoc arbitration or arbitration administered by any institution. This option is not limited to Japanese institutions, such as the JCAA, but extends to foreign institutions, such as the SIAC or the ICC.

The JIMC-Kyoto mediation rules provide that mediators will not act as arbitrators unless the disputing parties clearly agree otherwise. This default provision is consistent with international mediation practice. It is intended to encourage disputing parties to speak freely and openly with their mediator without concern that their statements could later be used against them, should the mediator be called on to decide the underlying claims as an arbitrator. Parties who wish to have the same person act as mediator and arbitrator may agree to derogate from this rule.

3. Operating Organization of JIMC-Kyoto

JIMC-Kyoto is operated by the JAA, a public interest incorporated association, with members who are legal practitioners, scholars, businesspeople, and others familiar with international alternative dispute resolution. JIMC-Kyoto also enjoys the support of prominent international advisors.

Ⅳ. JIMC-Kyoto Mediation Alternatives

Mediation can be used alone or in combination with other dispute resolution mechanisms, including arbitration.

1. Providing for Mediation Alone

Parties may wish to agree to mediation as a stand-alone procedure. This can be achieved by including a mediation clause in a contract or by concluding a mediation submission agreement after a dispute has arisen. The advantage of an agreement to mediate without a corollary agreement to arbitrate is that it may be easier to reach agreement by mediation alone. This is particularly true after a dispute has arisen. Mediation is comparatively inexpensive and efficient. The parties have no obligation to settle their dispute by mediation, and either party may end the mediation proceedings at any time. By contrast, the preferences of parties about arbitration are unlikely to be the same. Parties may have different ideas about the choice of law, the place of arbitration, and administering institutions. This will make it more difficult to

agree on the terms of an arbitration clause in a contract than on a stand-alone mediation clause. Once a dispute has arisen, the problem of agreeing to arbitration is exacerbated, because the goodwill between the parties is likely to have broken down.

JIMC-Kyoto' s model clause for mediation alone is as follows:

Model clause for using mediation alone for use in contracts

"All disputes, controversies or differences which may arise between the parties hereto, out of or in relation to or in connection with this contract shall be first submitted to Japan International Mediation Center in Kyoto (the "Center") for resolution by mediation in accordance with the Mediation Rules of the Center."

Model clause for using mediation alone after a dispute arises

"The parties hereby agree to submit the following disputes between the parties to Japan International Mediation Center in Kyoto (the "Center") for resolution by mediation in accordance with the Mediation Rules of the Center.

[Description of the disputes] "

2. Providing for Mediation and Arbitration

Mediation and arbitration are not "either-or" processes but can work together. Where parties can agree, it may be preferable to include a dispute resolution provision in a contract that provides for both mediation and arbitration. This commonly takes the form of an escalation clause, which provides for arbitration if mediation fails. An escalation clause will ensure that parties commit themselves to mediation before arbitration.

As mentioned above, parties may combine JIMC-Kyoto mediation with ad hoc arbitration or arbitration under any institutional rules, not just the rules of Japanese institutions.

JIMC-Kyoto' s model clause for med-arb is as follows:

Model clause for med-arb for use in contracts

"All disputes, controversies or differences which may arise between the parties hereto, out of or in relation to or in connection with this contract shall first be submitted to Japan International Mediation Center in Kyoto (the "Center") for resolution by mediation in accordance with the Mediation Rules of the Center. If the dispute has not been settled pursuant to the said Rules within 60 days following the filing of a Request for Mediation or within such other period as the parties may agree in writing, such dispute shall thereafter be finally settled by arbitration in [name of city and country], in accordance with [name of Arbitration Rules] [e.g., the Commercial Arbitration Rules of the Japan Commercial Arbitration Association; the Rules of Arbitration of the International Chamber of Commerce; or the UNCITRAL Arbitration Rules then in force]."

Ⅴ. Conclusion

Japan has a culture and history that are highly compatible with mediation. Building on this foundation, JIMC-Kyoto was established as a permanent institution to administer global standard mediation in Kyoto, the symbolic city of Japanese tradition. JIMC-Kyoto has excellent

"hardware" and "software" to support the mediation process in line with international standards. JIMC-Kyoto offers administered mediation and ad hoc mediation services and can accommodate hybrid processes that incorporate mediation and arbitration. As such, JIMC-Kyoto seeks to be an attractive choice for international mediation involving Japanese parties as well as foreign parties with no connection to Japan.

The ADR Act —Purpose, Actual Situation and Future

Professor of Law, Hitotsubashi University

Kazuhiko Yamamoto

Ⅰ Introduction

The purpose of this article is to explain the purpose, actual situation and future of the Act on Promotion of Use of Alternative Dispute Resolution (Act No.151 of December 1, 2004) (hereinafter "ADR Act" or "Act"). This Act came into being as one of the results of the discussion regarding comprehensive reform on the judicial system at the end of the last millennium. After more than 15 years' practice of this Act, now is an appropriate time to discuss its meanings and limits.

This article starts with the background of ADR in Japan before the introduction of the Act (see Ⅱ) and continues with its legislative history (see Ⅲ). It further explains the purpose and contents of the Act (see Ⅳ) and focuses on its actual situation and problems (see Ⅴ). Finally it provides some comments on the future of the Act and the Japanese ADR system (see Ⅵ). Hopefully this article can contribute to further understanding of Japanese ADR.

Ⅱ Situation of ADR in Japan before ADR Act

The merits of ADR are now generally recognized in Japan. As compared with the mutual negotiation between parties in conflict, ADR, through intervention of a neutral third party, may provide the parties with more neutral and fair proceedings, especially for a weak party. Dispute resolution providers can rebalance the inequality between parties by case administration. When compared with court proceedings, ADR may provide a simpler, more rapid, cost-effective, flexible and confidential proceeding. These merits are very important as Japanese civil procedures are known as complex, long, expensive, rigid and open to the public.

Despite these unignorable merits, the ADR system was not well-developed in Japan for a long period of time. Looking back on the history of Japanese ADR, early development of judicial and administrative ADR (public sector ADR) shaped the characteristics of our ADR system. Judicial ADR, referring to conciliation at court, was first implemented in 1922 and

soon expanded to many types of conflicts. Administrative ADR developed in post World War Ⅱ Japan, where the presence of the administration was stronger. Up to the end of the last century, public sector ADR played a leading role in Japan.

On the other side, private ADR institutions were established on a patchwork basis, many of which did not go well. Many problems are attributable to this malfunction: limited publicity, scarce providers, insufficient funding, defective legal rules, etc. These problems were so intricately intertwined that it was significantly difficult to solve them and to promote private sector ADR in Japan.

Ⅲ Legislative History of ADR Act

The turning-point was the discussion of judicial reform which began in 1999. This discussion took place in the Council of Judicial System Reform (CJR) which concerned the entire judicial system in Japan including ADR. The final report of CJR in 2001 stated that ADR was expected to be an attractive and real alternative to the civil procedure for constructing an efficient civil justice system in Japan. The CJR report called for fundamental reform of the legal system for this purpose.

To this end, the Japanese Government established 11 working groups, one of which was the ADR working group. It consisted of 11 members with various backgrounds (the author was one of the members) and devoted to the reform of the ADR legal system. It took the group more than three years to finalize a concrete plan of reform. The biggest issue in the discussion was for which type of ADR a new legislation was needed. As set out in the sections that follow, the conclusion of this discussion was to create a certification system for ADR providers.

After presentation of the report by the working group, a bill was submitted to the Diet by the Government and was approved in 2004. The Government carefully prepared for the enforcement of the Act and on April 1st of 2007, the ADR Act finally came into effect after nearly 10 years' discussion.

Ⅳ Purpose and Contents of the ADR Act

The purpose of the ADR Act is stipulated in Article 1. This article recognizes first of all that ADR has become an important means of dispute resolution in Japanese society and defines ADR as "procedures for resolution of a civil dispute between parties who seek, with the involvement of a fair third party, a resolution without using litigation" . It then establishes the overarching purpose of the Act is to enable parties to choose the most suitable method for dispute resolution. To achieve this purpose, the ADR Act is divided into two parts: the general part of the Act and the part addressing certification issues.

The general part has great significance because it clarifies the purposes, basic concepts and principles of ADR for the first time in Japanese history. This part is applicable not only to private sector ADR but also to public sector ADR. Article 2 defines key concepts of this Act: private dispute resolution procedures, dispute resolution providers, certified dispute resolution

procedures and certified dispute resolution business operators. Article 3 lays down the basic principles of ADR: legitimacy, fairness, voluntariness, swiftness, specialty and flexibility. Among these principles, the principle of legitimacy is often debated and sometimes criticized. It is my understanding that this principle does not mean strict conformity with law, but simply means exclusion of clearly illegal resolution. This principle should be read in light of Japanese dispute resolution history where anti-social groups often intervened in this field and led to illegal resolution. Article 4 declares the responsibilities of the government were to research and analyze domestic and foreign ADR procedures as well as to provide relevant information to promote public awareness of ADR. It manifests the recognition of legislators that the Government plays a critical role in promoting ADR in Japan.

The part addressing certification issues provides for standards, procedures and effects of public certification of ADR operators. While giving some legal effects that are equal to judicial procedure to ADR is indispensable to promote ADR, it is impracticable to give such effects to all resolutions made by various ADR operators. Consequently, it is essential to certify the ADR operators which fulfil the minimum requirements, and legal effects should only be given to their resolutions. According to the Act, to be certified, ADR operators shall apply to the Minister of Justice (Articles 5 and 8). Only those operators who satisfy the standards (Article 6) and are not disqualified (Article 7) can obtain certification after certain procedures (Articles 8 – 13). Some obligations are imposed upon certified ADR operators: adequate explanation to ADR parties (Article 14), prohibition of use of crime group members (Article 15), preservation of procedure records (Article 16), etc. Certification is accompanied with certain legal effects: renewal of prescription (Article 25), suspension of legal proceedings (Article 26), exemption of some obligations to use conciliation before bringing litigation (Article 27), and permission of receiving fees and remunerations for services provision (Article 28). The last effect is of great importance, because provision of remunerated legal services by non-lawyers is strictly prohibited and punished in Japan by Article 72 of the Attorney Act. This prohibition has restrained the activity of ADR in the private sector for such a long time that this exception admitted in the ADR Act has opened up new possibilities for Japanese ADR.

V Actual Situation and Problems of the ADR Act

Regarding the actual situation of Japanese ADR, the overall utilization of ADR is still low, but ADR work relatively well in some areas. For example, financial ADR handles more than 1,000 cases every year, and 30 to 40% of which are successfully settled. Similarly, the nuclear accident ADR which was established after the 2011 Fukushima nuclear power plant accident handled more than 5,000 cases in its most active year. However, two points must be raised. One is that this number is still small when compared with that of judicial ADR, namely court conciliation. In the judicial conciliation system in 2018, 34,019 cases were registered, and 57% of which were successfully conciliated (28% were concluded without conciliation and 13% were withdrawn). As these statistics demonstrate, even today public sector ADR still has overwhelming presence in Japan.

Furthermore, the current situation of ADR gives us some insight of the direct effect of the ADR Act. At the end of 2019, 158 certified ADR operators were active, and 1,071 cases had been registered. 36% cases were successfully conciliated (30% were refused by another party before the commencement of the process, 23% were concluded without conciliation and 11% were withdrawn). That is to say, the rate of success was up to 51% (excluding cases where an opposing party refuses to commence the process). In regard of the duration of process, 50% cases were resolved in less than three months, and 74 % in less than six months.

The ADR Act has achieved three positive results. The first is the increased number of certified ADR operators. 158 operators would have been unthinkable without this Act. On top of that, these private ADR operators are handling cases of diverse areas: medical, border, environment, sports, housing, pet, etc. Conflicts in most of these areas would have been left unresolved in the absence of the ADR Act. The third achievement is the high quality of certified ADR. The rate of success (after acceptance of the procedure by opposing parties) is almost equal to that of judicial ADR, and the procedure is speedy. Most users of ADR are satisfied with the provided services as user surveys show.

However, three significant problems still exist in the certification system. The first problem is the limited number of cases handled by private sector ADR. A thousand cases a year is only one thirtieth of that of judicial ADR. In addition, most cases are resolved by a few specific ADR operators, and 83% of certified operators are handling less than five cases per year. Another issue is that ADR supported by professional or industry group takes up an absolute majority and the true private sector is a minority. In other words, certified ADR is half-public, and the ADR Act is not adequate to enhance pure private ADR sector. The last problem is the low rate of acceptance of the procedure by opposing parties. It is not an obligation to accept ADR procedure, but in order to fully utilize ADR, efforts have to be made to enhance the acceptance rate.

On the whole, the ADR Act has achieved its purposes to some extent, but it is just halfway to its final goal.

Ⅵ Future of the ADR Act

To improve the above-mentioned current situation of Japanese ADR, several proposals for the reform of the ADR Act have been made.

The most comprehensive proposal was the one submitted by the Japan ADR Association (JADRA) to the Minister of Justice in April 2018. This JADRA report titled “Proposals to Reform ADR Act” puts forward 15 radical points of reform. What follows will outline the principal proposals.

Concerning the general part of the Act, the JADRA report proposes to make the responsibilities of the Government clearer. At present, the Act sets forth responsibilities about research and information, but this report suggests to extend the governmental responsibilities to educate conciliators and to enhance the cooperation between the courts and ADR providers, etc. In addition, the JADRA report urges financial support to ADR providers by the

government. Considering the financial challenges faced by private sector ADR, such support seems to be essential, but it is difficult to convince tax payers that this is the case.

Concerning the part dealing with certification, the JADRA report also presents several reform proposals. One is to enable the court to suggest the parties to use the ADR process. If the parties of litigation do not know of the ADR system, the court may advise them of alternative dispute resolution which is more favorable not only to the parties but also to the society as a whole. Additionally, because obligation to negotiation is now accepted in several ADR like financial ADR and the nuclear accident ADR that operate relatively well among Japanese ADR, the JADRA proposes to obligate ADR parties to accept negotiation.

The most important proposal of the JADRA report is to enforce the ADR settlement. Currently, an ADR settlement is not enforceable. If a party does not abide by a settlement, another party has to bring litigation before the court. Such approach largely lessens the attraction of ADR, especially taking into account that the settlement of judicial ADR is enforceable as a matter of course. Without enforceability, lawyers cannot advice their clients to opt for ADR with confidence. For this reason, the JADRA report calls for a new scheme in which a party can obtain court exequatur that makes a settlement of ADR enforceable. This scheme will lighten the burden of ADR parties to obtain enforceability and to enhance the use of private sector ADR.

Ⅶ Conclusions

The CJR report should be reaffirmed as the origin of the ADR Act, which identifies that “ADR shall be an attractive alternative to court litigation” . This proposal is still meaningful even in today’ s context, therefore the ADR Act should be improved progressively and the JADRA proposals should be carried out as rapidly as possible.

In the near future, the Japanese ADR system might face some external factors that can have considerable impact on it. First, Japan will soon have to decide whether to ratify the Singapore Convention that enables an enforceable transnational commercial conciliation agreement. If this Convention was ratified, the problem of enforceability of domestic ADR settlement, which is an outstanding issue of the ADR Act, could presumably be solved. Second, attention should be given to the impact of the Online Dispute Resolution (ODR) trend. For example, eBay is said to resolve 60 million conflicts all around the world per year by ODR. This figure is striking for Japan where only 500,000 litigations are brought to the court per year. The Japanese government has just started the discussion to enhance ODR which will surely have a huge influence on the entire landscape of ADR before long.

2019, the first year of the Reiwa era, started a new epoch for Japan. Japanese ADR may also see a new epoch. A close eye should be kept on the development of ADR in Japan.

An Introduction to Japan International Dispute Resolution Center

Executive Director & Secretary General of JIDRC (Japan International Dispute Resolution Center), Professor of Law at Rikkyo University, Partner at Uryu & Itoga

Yoshihisa Hayakawa

Ⅰ. Japan as Seat of Arbitration

Domestic Japanese commercial disputes are often resolved through negotiated settlements. Where, however, settlement is impossible, such domestic disputes are usually effectively resolved via the Japanese court system. When dealing with international disputes, however, jurisdictional issues often arise, and, partly as a result, the use of international arbitration has emerged as a means of avoiding such disputes within a dispute.

When negotiating international arbitration clauses for contract inclusion, Parties often differ on their preferred arbitral seat. Often the Party with the upper-hand in the negotiations is, however, differed to when making this decision. Other times, the Parties draft their dispute resolution clause hastily and without much thought, as they are instead concentrating on the primary focus of the contract. Though many international arbitrations involve Japanese parties, and Japan is often in the stronger negotiating position, Japan is rarely selected as a seat of arbitration. Often arbitration clauses proposed by the non-Japanese Party are used "as-is" without much consideration in regard to the designation of the seat of arbitration due to lack of expertise or experience in international arbitration. Additionally, many pundits have pointed to Japan' s historical lack of a state of the art arbitration facilities, such as Maxwell Chambers in Singapore, as well as a general lack of international arbitration professionals residing in Japan.

Ⅱ. Recent Changes

In furtherance of their mandate to investigate Japan' s positioning in the sphere of international ADR, in June of 2017 the Research Commission on the Judiciary System of Japan' s governing Liberal Democratic Party (the LDP Commission) proposed the

establishment of a Japan based international arbitration center. In that very same month the Government of Japan (GOJ) announced its Basic Policy on Economic and Fiscal Management and Reform which declared the development of a foundation to build up and encourage international arbitration would be considered to be of great policy importance. Along said policy directive, in 2018 and 2019 the LDP Commission further proposed to have the country expeditiously move forward in strengthening its position globally in regard to ADR.

Additionally, in April 2018 a GOJ panel representing several different Ministries and Agencies published an interim report which encouraged cooperation between both the public and private sectors in the development of Japan based specialized personnel such as arbitrators and practitioners while also calling for action to increase awareness of the GOJ' s goals amongst domestic Japanese corporates, as well as the international community at large.

Ⅲ. The Establishment of Japan International Dispute Resolution Center (JIDRC)

On the basis of the above, Japan International Dispute Resolution Center (JIDRC) was established – at least on paper- in February 2018.In May 2018, a pilot project utilizing commercial space in the Nakanoshima Godo Chosha district of Osaka commenced, which allowed for the holding of seminars, as well as arbitration hearings.

It can be used, in principle, on weekdays: Morning Set: from 9:00am to 1:30 pm, and/or Afternoon Set: from 1:30 pm to 6:00pm. The service charges per four and half hours for the use of the facilities are: Main room: 50,000 JPY, Medium room: 10,000 JPY and Small room: 5,000 JPY. It is easily accessible to Kansai International Airport and Osaka International Airport.

Furthermore, the Ministry of Justice (the MOJ) gave the JIDRC a five year mandate, starting in 2019, to investigate means of cooperating with other international arbitral organization while encouraging the development of Japan based world class arbitration personnel with the goal of forwarding Japan' s positioning in the international ADR sphere.

Ⅳ. Tokyo Facilities for Arbitration Hearing of JIDRC

The Tokyo Facilities for Arbitration Hearing of JIDRC have already been established in Toranomon, Tokyo as top level facilities exclusively for international arbitration and ADR in the world, which may be used, in principle, everyday: Morning Set: from 9:00am to 1:00 pm, Afternoon Set: from 1:00 pm to 5:00pm and/or Evening Set: from 5:00pm to 9:00pm.

The facilities are equipped with the latest conferencing technology available for international arbitration hearings at a reasonable price, such as

videoconferencing and simultaneous interpretation systems. The service charges per four hours for the use of the facilities are: Main room: 50,000 JPY, Medium room: 25,000 JPY and Small room: 20,000 JPY.

It is directly accessible to Narita International Airport and Haneda International Airport by limousine bus, and various forms of public transit. The building which houses JIDRC Tokyo is conveniently connected to a Metro station.

Moreover, JIDRC provides many training sessions and seminars in the area of international arbitration and other types of ADR. JIDRC will also internationally promote Japan as the Seat of Arbitration.

Through these activities, it would become easier to make proposals to designate Japan as the seat of arbitration in future contract negotiations with foreign countries, by making Japan a more so hospitable location for dispute resolution.

Ⅴ. Concluding Remarks on Japan as a Seat of Arbitration

Japan' s appeal as a seat of arbitration is expected to increase further in the future due to all the reasons laid out above. In addition, I list below other key factors in regard to the viability of Japan as a successful seat for international arbitration.

1)World Standard Legal Arbitration System

Japan' s Arbitration Act is based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Arbitration, and Japan, like most of the world, is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). As there is no equivalent treaty in place in regard to the enforcement of foreign judgements with any substantial amount of signatories, the New York Convention is a primary factor in the popularity of arbitration in the settlement of international disputes. Additionally, Japanese law, with few exceptions, is very open to allowing non-Japanese

attorneys to act as both advocates and arbitrators in arbitral proceeding seated or venued in Japan. Furthermore, Japanese courts do not excessively interfere with arbitration proceedings and take a cooperative stance towards the recognition and enforcement of arbitral awards.

2)Advanced Facilities exclusively for Arbitration Hearing at a Reasonable Price

JIDRC offers advanced conferencing facilities at a reasonable rate in both Tokyo and Osaka.

3)System for Promoting International Arbitration Supported by the Public and Private Sectors

Various training seminars related to international arbitration are convened by JIDRC and other arbitration related organizations, and the development of personnel with sufficient abilities in effectively and efficiently processing international arbitration proceedings in the English language is being speedily promoted.

4)Safety and Splendid Tourism Resources

It should be noted that Japan is a convenient country in various terms as well as a safe and secure place. There are many direct flights with various countries worldwide and transportation from the airport to the center of cities is rather simple. Tokyo and Osaka have sufficient organized infrastructures and multitudes of excellent hotels and restaurants in the vicinity of JIDRC facilities.

It should particularly be noted that Japan, being a safe country, is a place where one may stay safe, secure and sound during the hearing period. Of course, there is no difficulty in visiting splendid tourism locations if there is room in time during the period of stay.

I would be delighted if this paper could work for your better understanding of the present situation of international arbitration in Japan and if it would become easier to make proposals to designate Japan as the seat of arbitration in future contract negotiations and to perform arbitration hearing proceedings in Japan.

New IP Conciliation Proceedings at Japanese Courts

Judge, Tokyo District Court
Yoshiaki Shibata

1. An overview of the new IP conciliation proceedings at Japanese courts

As of October 1, 2019, the intellectual property divisions of the Tokyo District Court and Osaka District Court (the "IP Divisions") began implementing a new practice for conciliation proceeding concerning intellectual property rights (hereinafter referred to as "IP conciliation"). The purpose, features and model proceedings of IP conciliation are described below. Some IP conciliation cases have already been filed under this new practice.

At Japanese courts, intellectual property disputes have been disposed by litigation proceedings or provisional disposition proceedings. In Japan, almost all patent infringement lawsuits fall within the exclusive jurisdiction of the Tokyo District Court and Osaka District Court, and the IP Divisions thereof have disposed of such lawsuits. Appeals therefrom are under the exclusive jurisdiction of the Intellectual Property High Court. Lawsuits against appeals from administrative decisions of the Japan Patent Office ("JPO") also fall within the exclusive jurisdiction of the Intellectual Property High Court. These courts have prepared and published guidelines for their proceedings.[1)] As a consequence of such efforts, in both system and practice, the time interval from the commencement of a case to its disposition by a court of first instance hovers around 15 months. It can be said that intellectual property litigation in Japan has been highly regarded in terms of the quality and expeditiousness of the process in conducting hearings and rendering judgments.

Furthermore, nowadays, alternative dispute resolution ("ADR") has been drawing much attention as a resolution tool in the area of intellectual property disputes. Under such circumstances, in order to promote more effective dispute resolution, the IP Divisions of the Tokyo District Court and the Osaka District Court started a new practice of IP conciliation, with the main objective of resolving intellectual property disputes that arise in the context of business. IP conciliation aims to make proceedings accessible, expeditious and highly

1) For the English translation of such guidelines, please refer to www.ip.courts.go.jp/eng/info/Guidelines_for_Proceedings/index.html.

specialized, and parties can take advantage of this form of ADR.

With this development, it has been said that Japanese courts now provide the third resolution tool for intellectual property disputes, in addition to litigation and provisional disposition proceedings.[2)]

2. Features of IP conciliation proceedings

IP conciliation proceedings have the following features.

(1) Flexibility

The parties in an IP conciliation have the flexibility to fix the object for resolution in view of the circumstances of their negotiations. The primary objective of IP conciliation is for the parties to solve a dispute through mutual consultation at court. However, the parties can also choose to return to out-of-court negotiations after receiving the advice from the conciliation committee. They can also consider the option of filing a lawsuit while considering the developments in the IP conciliation proceedings.

(2) Expeditiousness

Any of the negotiating parties may file a petition for IP conciliation with either the Tokyo District Court or the Osaka District Court based on the parties' agreement on jurisdiction. At this point, the disputing parties have likely identified the issues to a certain extent through negotiations and have in their possession the relevant documents. In the IP conciliation, the parties will then be asked to submit their allegations and evidence by the first date for proceedings. In principle, the conciliation committee will also be expected to express its opinion verbally by the third date for proceedings. The IP conciliation proceeding is thus designed to result in a speedy (expeditious) resolution of the subject dispute.

(3) Expertise

The IP conciliation will be administered by a conciliation committee composed of the judge of the IP Division and two expert conciliators such as lawyers and patent attorneys who are very experienced in handling IP cases. Judicial research officials may also be tasked by the conciliation committee.

(4) Confidentiality

The IP conciliation proceedings, including the fact that a petition therefor has been filed, are not disclosed to the public. This allows the parties to resolve the dispute privately and keep from the public the existence of the dispute itself.

2) Guide to IP Conciliation Proceedings at the Tokyo District Court and Guidelines of IP Conciliation Proceedings at the Osaka District Court , p. 1.

3. Cases covered by and suitable for IP conciliation

(1) Cases covered

The matters that may be submitted for IP conciliation are basically the same as those that are subjects of litigation concerning intellectual property rights, such as disputes involving patent rights, utility model rights, design rights, trademark rights, copyrights, layout-design exploitation rights, unfair competition acts under the Unfair Competition Prevention Act, and the unauthorized use of another person's name or portrait for advertising or commercial purposes.

(2) Cases suitable for IP conciliation

Cases that can be suitably addressed or resolved in an IP conciliation include disputes that have arisen during the negotiations of the parties, involving simple issues or issues which have been identified by the parties through their negotiations, and which the parties wish to resolve through mutual consultation.

Disputes suitable for IP conciliation include the following:

(i) Disputes over the similarity of trademarks;
(ii) Disputes over the existence or non-existence of a prior user's right to a trademark;
(iii) Disputes over the existence or non-existence of copyright infringement;
(iv) Disputes over the amount of damages caused by an infringement of intellectual property rights;
(v) Disputes over the existence or non-existence of a wrongful acquisition of trade secrets;
(vi) Disputes over the existence or non-existence of an imitation of the configuration of goods;
(vii) Disputes over the existence or non-existence of an infringement of patent rights (only cases with simple issues or issues that have been identified through the negotiations of the parties);
(viii) Disputes over ownership of patent rights; and
(xi) Disputes over licensing fees.

4. Composition of the conciliation committee

The conciliation committee is composed of three members, namely, one judge of the IP Division and two experts such as lawyers and patent attorneys experienced in IP cases. Such experts include retired Chief Judges of the Intellectual Property High Court. If technical matters are involved in the dispute, such as when the dispute concerns a patent right, a judicial research official may be tasked by the conciliation committee to administer some of the affairs.

5. Procedural flow

The parties will be required to submit their respective allegations and relevant evidence by the first date for proceedings. The conciliation committee is expected to express its opinion verbally by the third date for proceedings but it may present a conciliation proposal earlier than such date. In more difficult cases where it takes more time to coordinate the contents of an agreement between the parties, the committee may hold four or more hearings, taking into consideration the wishes of the parties.

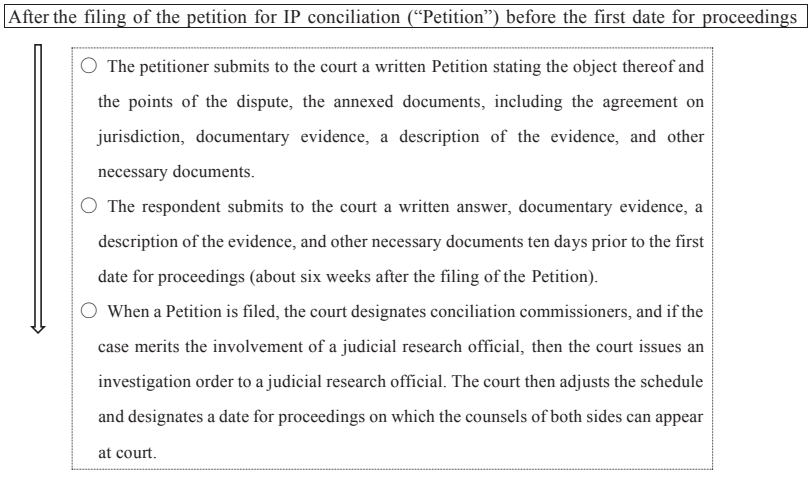
The proceedings may be held using a video conference system or other similar devices if a party is located in a remote place.

The conciliation committee will express an opinion that includes its determination on the issues as well as its view, if so, that litigation or provisional disposition would be a more suitable way to resolve the dispute in light of the difficulty of proof and the complexity of the case. Taking into consideration the committee's opinion, the parties have the option of continuing consultations through the IP conciliation proceedings, or terminating such proceedings (due to the unsuccessful conciliation or withdrawal of the petition for conciliation), and returning to out-of-court negotiations, or filing a lawsuit or seeking a provisional disposition.

After the IP conciliation ends unsuccessfully or the petition therefor is withdrawn, with respect to the Tokyo District Court, if a lawsuit is filed therewith regarding the same or similar claim as the claim that was the subject of the IP conciliation, then the litigation proceedings of such lawsuit will be administered by a judge of a division other than the IP Division to which the judge who served as a member of the conciliation committee belongs.

A model of the IP conciliation proceedings is set out below. The proceedings in actual cases may vary depending on the policy of the conciliation committee and other factors.

IP Conciliation Proceedings Model[3]



3) Id., Attachment 3.

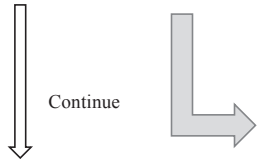
On the first date for proceedings (about 6 weeks after the filing of the Petition)

○ The court confirms the issues and identifies the facts based on the written Petition, the written answer and the items of documentary evidence submitted, and hears both parties' wishes and requests, toward resolving the dispute through consultation between the parties.

○ From the viewpoint of ensuring fruitful proceedings from the first date for proceedings, it is preferred that persons who are familiar with the dispute (e.g., persons in charge of the IP divisions) appear in court.

○ In some cases, if the issues are simple and can be judged from the written allegations and documentary evidence submitted by the parties, then the conciliation committee may present its opinion or suggest the direction of a possible solution on the first date for proceedings.

○ If the conciliation committee finds any points that need to be supplemented in the allegations and evidence of the parties, then it will instruct the parties to submit supplementary allegations and evidence.

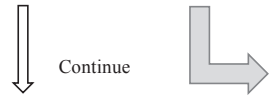


● Successful conciliation
● Unsuccessful conciliation / Withdrawal of Petition
⇒ Out-of-court negotiations between the parties
⇒ Litigation / Provisional disposition

On the second date for proceedings (3 weeks to 1.5 months after the first date for proceedings)

○ If the parties submit supplementary allegations and evidence, then the conciliation committee will hold discussions with the parties, and continue to hear the parties' wishes and consider a conciliation proposal, in an effort to encourage the parties to reach an agreement.

○ In some cases, the conciliation committee may present its opinion or suggest the direction of a possible solution on the second date for proceedings.



● Successful conciliation
● Unsuccessful conciliation / Withdrawal of Petition
⇒ Out-of-court negotiations between the parties
⇒ Litigation / Provisional disposition

On the third date for proceedings (3 weeks to 1.5 months after the second date for proceedings)

○ In principle, the conciliation committee will verbally present its opinion to the parties by the third date for proceedings, with regard to the committee's determination on the issues or whether it is appropriate to pursue a resolution of the dispute by litigation or provisional disposition.

○ If the conciliation committee has already presented its determination on the issues and the parties have started consultation about the conciliation proposal, then the parties will go on with their consultation, with the aim of reaching a successful conciliation. Even if conciliation is unsuccessful by the third date for proceedings, if there is a prospect for the parties to reach an agreement through consultation and the parties wish to continue the conciliation proceedings, then the proceedings will be continued.

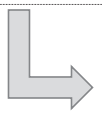
○ If the conciliation committee presents its determination on the issues on the third date for proceedings, then the parties will hold discussion on the conciliation proposal based on the committee's determination, with the aim of reaching a successful conciliation on that date. If

the parties wish to continue the conciliation proceedings, then the proceedings can also be continued.

○ Having heard the conciliation committee's determination, the parties can also choose to stop using the conciliation proceedings and go back to out-of-court negotiations.

○ If the conciliation committee presents a view that the case is suitable to be resolved through litigation or provisional disposition proceedings, then the conciliation proceedings will terminate due to the unsuccessful conciliation or withdrawal of the Petition, and the parties can consider filing a lawsuit or petitioning for an order of provisional disposition.

(Continue)



● Successful conciliation
● Unsuccessful conciliation / Withdrawal of Petition
⇒ Out-of-court negotiations between the parties
⇒ Litigation / Provisional disposition

● Successful conciliation
● Unsuccessful conciliation / Withdrawal of Petition
⇒ Out-of-court negotiations between the parties
⇒ Litigation / Provisional disposition

Recognition and Enforcement of Business Dispute Resolutions in Japan in the Age of Global Cooperation

Professor of Law, Hitotsubashi University

Keisuke Takeshita

Ⅰ. Introduction

In 2019, two important conventions relating to the recognition and enforcement of dispute resolutions in civil and commercial matters were concluded. One was the Judgments Convention[1] of the Hague Conference on Private International Law (HCCH), and the other was the Singapore Convention on Mediation[2] of the United Nations Commission on International Trade Law (UNCITRAL). When considered together with the New York Convention on Arbitration[3] and the HCCH Convention on Choice of Court Agreements[4] , it appears that international cooperation in this aspect of private international law will continue to strengthen and gain momentum in the coming decades. Japan should also contribute to such international cooperation, though of all four above-mentioned conventions, Japan is only a contracting state of the New York Convention.

This paper introduces and analyzes the current Japanese rules regarding the recognition and enforcement of business dispute resolutions, that is, foreign judgments, arbitral awards, and mediated settlement agreements. Through this analysis, I clarify the key elements important for Japan to endorse such international cooperation.

Ⅱ. Recognition and Enforcement of Foreign Judgments

1. Overview of the Rules

Japan has concluded almost no international instrument addressing the recognition and

1) HCCH Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (concluded on July 2, 2019).

2) UN Convention on International Settlement Agreements Resulting from Mediation (adopted on December 20, 2018 and opened for signature on August 7, 2019).

3) UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (opened for signature on June 10, 1958).

4) HCCH Convention on Choice of Court Agreements (concluded on June 30, 2005).

enforcement of foreign judgments, and is a contracting state to only a few conventions that deal with the recognition and enforcement of judgments rendered by courts of contracting states[5] . The rules specified in these conventions cover only specific matters. Therefore, in general, Japan recognizes and enforces foreign judgments in accordance with its national laws[6] .

Article 118 of the Code of Civil Procedure (Act No. 109 of 1996, hereinafter referred to as "CCP")[7] provides for the recognition of foreign judgments. If a judgment by a foreign court, which is final and binding in that foreign state, fulfills the requirements for recognition provided in Article 118, that judgment is "automatically" recognized in Japan. That is, it becomes effective in Japan without undergoing any Japanese court procedure.

However, if a party wants to enforce a foreign judgment in Japan, that party needs to bring an action in a Japanese court seeking an enforcement judgment (*exequatur*) as provided in Article 24 of the Civil Execution Act (Act No. 4 of 1979, hereinafter referred to as "CEA"). During the proceeding seeking an enforcement judgment, the Japanese court confirms only the fulfillment of the specified requirements for recognition of the foreign judgment without reviewing the judgment' s merits (Article 24 (4) of the CEA). If fulfillment of the requirements is confirmed, the court renders an enforcement judgment declaring the enforceability of the foreign judgment in Japan. Such a foreign judgment with the issuance of a Japanese enforcement judgment becomes "*saimu meigi*" (Title of Obligation), and thereafter the holder of the "title" (i.e., the judgment creditor) can apply to an execution court for compulsory execution of the foreign judgment (Article 22 of the CEA).

It is noteworthy that the Japanese word "*shikkou*" is used for both "enforcement" and "execution," whereas "*shounin*" is used for "recognition." In Japan, "recognition" is usually understood to mean the acceptance of the legal effects (including, but not limited to, res *judicata*) that a foreign judgment has as a judicial determination in its state of origin (i.e., the country/jurisdiction whose court rendered the judgment).[8] "Enforcement" and "execution" are merged into a single concept "*shikkou*" that refers to all the procedural steps followed for the realization of judgments in Japan. As fulfillment of the requirements for recognition of a foreign judgment is necessary for the judgment' s enforcement in Japan (Article 24 (5) of the

5) Convention on Supplementary Compensation for Nuclear Damage (adopted on September 12, 1997 and opened for signature on September 29, 1997); International Convention on Civil Liability for Oil Pollution Damage, replaced by the 1992 Protocol (adopted on November 27, 1992); and International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, superseded by the 1992 Protocol (adopted on November 27, 1992). Article 10 of the Bunker Convention (International Convention on Civil Liability for Bunker Oil Pollution Damage, adopted on March 23, 2001) also provides for the recognition and enforcement of judgments. The Japanese Diet approved ratification of the Bunker Convention on May 5, 2019.

6) For more information on the rules for the recognition and enforcement of foreign judgments under Japanese law, see, *e.g.*, Elbalti Béligh, "Foreign Judgments Recognition and Enforcement in Civil and Commercial Matters in Japan," *Osaka University Law Review*, Vol. 66 (2019), p. 1; Anselmo Reyes (ed), *Recognition and Enforcement of Judgments in Civil and Commercial Matters* (2019), pp. 97-117 [Kazuaki Nishioka]; Adeline Chong (ed), *Recognition and Enforcement of Foreign Judgments in Asia* (2017), p. 105 [Toshiyuki Kono].

7) The names of Japanese Codes and Acts referred in this paper are the unofficial English translations by the Ministry of Justice of Japan, which are available at <http://www.japaneselawtranslation.go.jp/>.

CEA), recognition is often regarded as a precondition for the enforcement of such judgments in Japan.

2. Requirements for Recognition and Enforcement of a Foreign Judgment

Article 118 of the CCP lists four requirements for the recognition of a foreign judgment in Japan that is final and binding in the state of origin.

Item (i) of Article 118 specifies the requirement of indirect jurisdiction. However, the text of item (i) does not specify the details of the grounds of indirect jurisdiction, leaving such details for interpretation through case law. In this regard, the Supreme Court of Japan, in a judgment issued in 2016[9], ruled as follows: "With respect to the issue of whether a court of the relevant foreign country has indirect jurisdiction over the relevant claim (other than claims concerning personal status), it is reasonable to construe that such issue should be determined by applying the provisions regarding international jurisdiction set out in the Code of Civil Procedure of Japan, having due regard to specific circumstances of each individual case, in light of reasonableness and from the perspective of whether it is appropriate for Japan to recognise the judgment of the relevant foreign court." [10] Based on the existing case law, it is generally understood that the "mirror image principle" (*Spiegelbildprinzip*)[11] is adopted for the equal treatment between Japan and other foreign countries. In accordance with this principle, grounds for indirect jurisdiction should be considered basically by the same criteria as applied when determining the grounds for direct jurisdiction.

Item (ii) of Article 118 specifies the requirement of an appropriate service of process. To fulfill this requirement, a summons or an order necessary for the commencement of litigation needs to be served to the losing defendant. This requirement remains unfulfilled if the service of process is effected through publication and other similar means. According to a Supreme Court Judgment issued in 1998[12], if Japan and the state of origin are both contracting states to a convention on service of process[13], the documents should be served through the

8) In Japan, some scholars have argued that the period of prescription should be characterized as a matter of substantive law and a judgment's effect in relation to the applicable period of prescription is to be determined based on the applicable law relating to the relevant rights on which the judgment ruled. According to their arguments, recognition of a foreign judgment in Japan should not involve consideration of period of prescription. Cf. Akira Takakuwa, "*Gaikoku Hanketsu no Shounin* [Recognition of Foreign Judgments]," in Akira Takakuwa and Masato Dogauchi (ed), *Kokusai Minji Sosho Ho (Zaisan Ho Kankei)* [International Civil Procedure (Property Law)] (2002), p. 312.

9) Supreme Court Judgment, April 24, 2014, 68 *Minshu* (*Saikou Saiban Sho Minji Hanreishu*) (4) 329 [2014]. An English summary is available in *Japanese Yearbook of International Law*, Vol. 58 (2015), p. 463. Also see, Béligh Elbalti, "The Jurisdiction of Foreign Courts and the Recognition of Foreign Judgments Ordering Injunction: The Supreme Court Judgment of April 24, 2014," Japanese Yearbook of International Law, Vol. 59 (2016), p. 395.

10) *Japanese Yearbook of International Law*, Vol. 58 (2015), p. 464.

11) Cf. Heinrich Nagel/Peter Gottwald, *Internationales Zivilprozessrecht* (7. Aufl., 2013), p. 611.

12) Supreme Court Judgment, April 28, 1998, 52 *Minshu* (3) 853 [1998]. An English summary is available in *Japanese Annual of International* Law, Vol. 42 (1998), p. 155.

13) For example, HCCH Convention on Civil Procedure (concluded on March 1, 1954); Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (concluded on November 15, 1967).

methods provided for in such conventions. Item (ii) also provides that, in cases where appropriate service of the relevant document for the commencement of litigation is not accomplished, this requirement is deemed to be fulfilled if the defendant formally takes part in the foreign court proceeding from which the judgment results.[14)]

Item (iii) of Article 118 specifies the requirement of public policy. If the recognition of a foreign judgment is contrary to the public policy in Japan, such foreign judgment cannot be recognized in Japan. The public policy includes both substantive and procedural aspects. For example, recognition of a foreign judgment ordering the payment of punitive damages would be contrary to Japanese substantive public policy and thus, for such judgment, this requirement is not fulfilled.[15)] As for the procedural aspect of the Japanese public policy, a Supreme Court Judgment[16)] in 2019 referred to this requirement. In this judgment, the Supreme Court ruled that, as an important process constituting the foundation of the Japanese civil procedural order, the CCP ensured the opportunity of parties to file an appeal by notifying them of the contents of judgments or giving them the substantive opportunity to become aware of the contents of judgments. It also ruled that if a foreign judgment became final and binding without giving such an opportunity to file an appeal to the parties, the court proceedings contradicted the fundamental principles or doctrines of Japanese judicial order, and thus, did not satisfy the requirement provided in Item (iii).

Item (iv) of Article 118 specifies the requirement of reciprocity. According to a Supreme Court Judgment issued in 1983[17)] , reciprocity means that "in the country where the foreign court rendering the judgment in issue is situated …, the same type of the judgment as that rendered by a Japanese court would have effect under the conditions which are not different in the important points from those as prescribed in Items of Article 200." [18)] There have been judgments in which Japanese courts have recognized reciprocity with Hong Kong, Germany, the United Kingdom, Singapore, Switzerland, the Republic of Korea, and certain states and jurisdictions of the United States (Hawaii, Washington DC, Nevada, Texas, etc.).[19)] However, as reciprocity between Japan and the People' s Republic of China does not exist, Chinese judgments are not recognized in Japan[20)] and vice versa.[21)] There are arguments against this requirement of reciprocity because it is irrelevant to the protection of rights of private

14) According to the above-mentioned Supreme Court Judgment issued in 1998, the requirement of Item (ii) is fulfilled not only when the defendant argues the merits of the case without contesting jurisdiction, but also when the defendant appears in the court for the purpose of contesting the court's jurisdiction.

15) Supreme Court Judgment, July 11, 1997, 51 *Minshu* (6) 2537 [1997]. An English summary is available in *Japanese Annual of International Law*, Vol. 41 (1998), p. 104. In this judgment, only the compensatory part of the foreign judgment was recognized and enforced.

16) Supreme Court Judgment, January 18, 2019, 73 *Minshu* (1) 1 [2019].

17) Supreme Court Judgment, June 7, 1983, 37 *Minshu* (5) 611 [1983]. An English summary is available in *Japanese Annual of International Law*, Vol. 27 (1984), p. 119.

18) *Ibid*., p. 120. The rules currently stipulated in Article 118 were set out in Article 200 of the CCP at that time.

19) See, Reyes, *supra* note 6, p. 107.

20) Cf. Osaka High Court Judgment, April 9, 2003, 1841 *Hanrei Jihou* [Law Case Reports] 111; 1141 *Hanrei Times* [Law Tiems Reports] 270. An English summary is available in *Japanese Annual of International Law*, Vol. 48 (2005), p. 171.

persons.[22] However, from the viewpoint of judicial cooperation between countries, the requirement of reciprocity is necessary for the protection of private persons' procedural rights as discussed below.

Ⅲ. Recognition and Enforcement of Decisions and Agreements Reached Using Alternative Dispute Resolution

1. Arbitral Awards

In Japan, the Arbitration Act (Act No. 138 of 2003) implements the New York Convention on Arbitration. Article 45 (1) of the Act provides that an arbitral award shall have the same effect as a final and binding judgment irrespective of whether the place of the arbitration is in Japan or in another country. Article 45 (2) sets out the grounds for refusal to recognize an arbitral award. The grounds are almost the same as those provided in Article V of the New York Convention, although some differences exist, such as the clarification of the applicable law.[23] In order to enforce and execute an arbitral award, the party invoking the award needs to file a petition for an enforcement order. Once a Japanese court issues an enforcement order, the arbitral award becomes "*saimu meigi*" (Title of Obligation) and can be executed in Japan.

There are not many cases of enforcement orders reported in law journals. However, there is the case of the Osaka District Court Order dated March 25, 2011[24] , in which an enforcement order was issued for a China International Economic and Trade Arbitration Commission (CIETAC) arbitration award. Article 8 (4) of the Japan-China Trade Agreement (January 1974)[25] provides that the contracting states are obliged to enforce arbitral awards issued by the relevant authorities in accordance with the law of the country where enforcement is sought. The court considered that this trade agreement prevailed over the New York Convention to which both countries were contracting states.[26] Applying the relevant provisions of the Japanese Arbitration Act, the court decided to issue an enforcement order, thus, recognizing and enforcing a Chinese arbitral award.[27]

2. Mediated Settlement Agreements

The Singapore Convention deals with international settlement agreements resulting from

21) Cf. Qisheng He/Yahan Wang, "Resolving the Dilemma of Judgment Reciprocity: From a Sino-Japanese Model to a Sino-Singaporean Model," *Yearbook of Private International Law*, Vol. 19 (2017/2018), p. 217.

22) For this discussion, see Béligh, supra note 6, pp. 25-29.

23) Item (iii) of Article 45 (2) of the Arbitration Act clarifies the applicable law which governs the proper notice of the appointment of the arbitrator or the arbitration proceedings. Cf. Article V(1)(b) of the New York Convention.

24) 2122 *Hanrei Jihou* 106; 1355 *Hanrei Times* 249.

25) (Japanese) Treaty No. 4 of 1974.

26) Cf. Article VII (1) of the New York Convention.

27) Also, in the Tokyo District Court Judgment of March 24, 2014, the enforcement of a CIETAC arbitral award was discussed. Because the plaintiff's liability under the award had already been extinguished through a set-off arrangement, the plaintiff commenced an action to oppose enforcement of the award for which an enforcement order had been already issued. The court confirmed the plaintiff's claim in relation to such action. For an English summary of this case, see *Japanese Yearbook of International Law*, Vol. 60 (2017), p. 506.

mediations. At this point, Japan has neither ratified nor signed the Singapore Convention. In Japan, such settlement agreements are usually regarded as contracts. If a party to a settlement agreement wants to enforce and execute the agreement, it is necessary for the party to commence a court action and acquire a judgment in its favor compelling enforcement of the agreement. To be a contracting state of the Singapore Convention, Japan would need to revise the rules stipulated in the CEA.

An exception to this is a settlement agreement before a Japanese court[28] (judicial settlement/*transactions judiciaires*): such agreements have enforceability in Japan. Article 267 of the CCP provides that, if a settlement is recorded in a juridical document, such record has the same effect as a final and binding judgment.[29] In addition, if a settlement agreement that addresses the payment of a certain amount of money or any other fungible thing or rights to a certain amount of securities is documented by a Japanese notary in an authentic instrument with a statement essentially providing that the obligor agrees to immediate compulsory execution, such an instrument is enforceable in Japan. Such special authentic instrument is called "*shikkou shousho*," and is also listed as "*saimu meigi*" (Title of Obligation) in Article 22 of the CEA.

However, a settlement achieved during a foreign court proceeding does not have enforceability in Japan. Also, similar instruments prepared by foreign notaries are not regarded as "*saimu meigi*" (Title of Obligation) and cannot be enforced and executed directly in Japan. At least currently, there is a strict distinction between such settlements and instruments in Japan and in foreign countries.

Ⅳ. Analysis

It can be understood that Japanese rules relating to recognition and enforcement of dispute resolutions in civil and commercial matters are based on a general policy of equal treatment between Japan and other relevant countries. As stated above, to confirm the grounds for indirect jurisdiction of a foreign court, which is a requirement for recognition of a foreign judgment, Japanese courts basically use the same criteria as applied when determining the grounds for direct jurisdiction. As for arbitral awards, Japan does not treat foreign awards differently from Japanese awards. The same rules for recognition and enforcement apply to all arbitral awards, irrespective of the place of arbitration. With the principle of equal treatment as the foundation, it seems that Japan has adopted a "generous" policy in this regard. Such a policy reflects internationalism that has been an important doctrine of Japanese private international law.[30]

28) There are two types of judicial settlements under Japanese law. First, the settlement reached during a Japanese court proceeding, and second, the settlement entered into prior to the filing of an action (Article 275 of the CCP).

29) However, there are different views on whether such settlement agreements have *res judicata*. Cf. Makoto Ito, *Minji Sosho Ho* [Code of Civil Procedure] (6th ed., 2018), pp. 499-501.

30) Cf. Keisuke Takeshita, "Sadajiro Atobe and Kotaro Tanaka: The Universal Private International Law School of Thought in Japan," *Japanese Yearbook of International Law*, Vol. 56 (2013), p. 217.

However, there are rules that seem to contradict this generous policy, such as the reciprocity requirement for recognition and enforcement of foreign judgments and the treatment of foreign judicial settlements and settlements documented in authentic instruments. It is necessary to consider how to understand these contradicting rules.

In my opinion, the key element in understanding these rules is compatibility. If a foreign dispute resolution is not compatible with its Japanese counterpart, recognition and/or enforcement of such resolution in Japan based on the doctrine of equal treatment is problematic. If Japan recognizes and enforces a foreign judgment, it means that the same dispute will not be adjudicated in a Japanese court proceeding. Therefore, if Japan wants to ensure that private persons have the right of access to justice to the same extent as offered by the Japanese courts, the foreign court procedure should at least share the same fundamental principles and doctrines as those of Japan, such as independence of judges and non-discrimination on the basis of nationality. In other words, compatibility is a prerequisite for the equal treatment of Japanese and foreign judgments. The foreign country would also not recognize and enforce a Japanese judgment if such compatibility does not exist. Therefore, compatibility is essential to establish reciprocity between Japan and foreign countries, and I think this is the reason why reciprocity is still a requirement for the recognition and enforcement of foreign judgments in Japan. Article 29 of the HCCH Judgments Convention provides rules for the establishment of relations pursuant to the Convention. This provision might work to avoid undesirable recognition and enforcement of judgments in the absence of compatibility between two contracting states. As for arbitration, the rules worldwide are in much more harmony, and an arbitration the place of which is in a foreign country is usually compatible with an arbitration in Japan. Therefore, Japan can recognize and enforce arbitral awards, irrespective of whether the place of arbitration is in Japan or in a foreign country. Regarding settlements agreements, at least currently, foreign judicial settlements and authentic instruments prepared by foreign notaries are not regarded as compatible with Japanese judicial settlements and "*shikkou shousho*" prepared by Japanese notaries. Thus, it is necessary to discuss the eligibility of "the mediator" provided in Article 2(3) of the Singapore Convention before Japan becomes its contracting state.[31] Because of Article 72 of the Attorney Act (Act No. 205 of 1949), persons other than attorneys licensed in Japan usually cannot serve as mediators in a legal dispute settlement procedure for the purpose of obtaining fees. This Article aims to offer appropriate legal services in Japan. Therefore, it would be consistent with such rules to make it a requirement for the enforcement of international settlement agreements that the mediator involved in achieving the settlement agreement must possess qualifications equivalent to those possessed by Japanese attorneys from the viewpoint of compatibility.[32]

It is important to establish international cooperation frameworks for the realization of justice for private persons. However, it should be kept in mind that compatibility among the dispute

31) Article 2(3) of the Singapore Convention referred to "mediators" just as "third person or persons" and does not define in detail the term. Cf. Nadja Alexander/Shouyu Chong, *The Singapore Convention on Mediation: A Commentary* (2019), paras. 2.18-2.42.

resolution regimes of different countries is necessary if a country wants to ensure that private persons' procedural protections are equivalent to those in other countries.

V. Conclusion

Until now, Japan has not actively sought to become a member state of the various conventions relating to the recognition and enforcement of dispute resolutions in civil and commercial matters, which serve as the framework for international cooperation in this aspect of private international law. Since this international cooperation framework might be strengthened and promoted in the coming decades, Japan should support and contribute to it. For this purpose, it is necessary for Japan to consider the possibility of becoming a contracting state of such conventions. However, Japan cannot be a member of such a framework without realizing the compatibility between Japanese and foreign judicial rules for dispute settlements. Discussions should be held in Japan to consider whether and how Japan' s national rules on disputes should achieve compatibility with international standards of such rules for dispute resolutions.

32) One can argue that fulfilling this requirement would not be a problem because parties have the right to choose their mediator. This is a matter relating to party autonomy in international dispute resolution and should be studied further.

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Tokyo

JP Tower, 2-7-2
Marunouchi, Chiyoda-ku
Tokyo 100-7036, Japan

Tel: +81 3 6889 7000
Fax: +81 3 6889 8000
Email: info@noandt.com

Contact: Naoki Iguchi
(Daini Tokyo Bar Association)

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Interim and Provisional Measures in Japanese Courts for Disputes Involving Agreements with Arbitration Clauses

Attorney-at-law, TMI Associates
Kazuhide Ueno

Attorney-at-law, TMI Associates
Akihiro Goda[1)]

With the growing awareness that international arbitration provides a more workable option for resolving international disputes than lawsuits in national courts, it has become a popular option for business entities, including those established in Japan, to include mandatory arbitration clauses in their contracts. That being said, there may be instances in which involvement of a national court is necessary in order to ensure the proper conduct of the arbitration, such as when interim or provisional measures of protection are required. Although the arbitral tribunal itself may have the power to issue such measures, it is often the case that interim or provisional measures are not enforceable in national courts. While some countries -- such as Israel, Malaysia and New Zealand -- have made legislative efforts to make interim measures by arbitral tribunals enforceable,[2)] the Japanese Diet has not taken any similar action.[3)] Accordingly, it is necessary for Japanese courts to get involved in situations where interim measures with respect to Japanese entities are necessary, such as those involving the preservation of assets. Under this backdrop, this paper (i) introduces Japanese civil proceedings in general (in Section I), (ii) explains Japanese arbitration laws concerning interim and provisional measures (in Section II), and (iii) delves into the requirements for provisional remedies under relevant Japanese law (in Sections III and IV). This paper also discusses examples where provisional remedies may be sought in a Japanese court.

1) The authors' opinions are personal, and are based on their research findings and do not reflect the opinions of TMI Associates or its partners. Further, this paper is not, and should not be construed as, legal advice.

2) Nigel Blackaby *et al.*, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th ed. 2015) at p.423 citing Israel Arbitration Law of 1968, s. 1; Malaysian Arbitration Act 2005, s. 2; and New Zealand Arbitration Act 1996, Sch. 1, art. 171.

3) Regarding this point, the Japanese Federation of Bar Associations has made a proposal to amend the relevant laws to make interim measures by an arbitral tribunal enforceable, by its opinion letter dated June 21, 2019. Accessible at https://www.nichibenren.or.jp/library/ja/opinion/report/data/2019/opinion_190621.pdf (Japanese only).

Ⅰ. Overview of Jurisdictional Procedure and Civil Provisional Remedies in Japan

Japan's judicial system is based on a civil law framework, and as such is based on codified laws. In civil trials in Japan, the jury system is not used, and professional judges examine the facts, apply the law and render judgments in all cases. The first trial in most civil cases is held at a District Court. While the majority of civil trials are conducted by one judge, trials regarding disputes involving special statutory matters or which the court deems to be significant are conducted by a panel of three judges.[4)]

In addition to these trial proceedings, civil preservative relief in Japan enables early binding court decisions. The procedures for civil preservative relief are handled by a single judge, whose duty is to decide the case as soon as possible. Although the decisions of civil preservation can be appealed, they take effect immediately when the orders are issued. The procedures for this relief involves, depending on the nature of the relief sought, either a trial or a hearing, and often are held *ex parte*. Since civil preservative relief is only a temporary remedy with the ultimate outcome to be determined in a later trial, it is common that deposit be ordered to be provided as a condition for the civil preservative orders to be issued. The requirements for issuing the orders are set forth in the criteria in the Civil Provisional Remedies Act (Act No.91 of 22 December 1989) (the "CPRA"), which governs actions for provisional remedies in Japanese courts. We will discuss these requirements in detail later in Section III.

Ⅱ. Arbitral Tribunal or Domestic Court – Alternatives Interim and Provisional Measures in Japan

The needs of interim and provisional measures taken by the Japanese court would depend on what alternative exists for the potential users of the measures – namely the arbitral tribunal' s interim and provisional measures. Rules concerning arbitrations in Japan are set forth in the Japanese Arbitration Act (Act No. 138 of 2003) (the "JAA"). The JAA came into effect on March 1, 2004. The JAA is largely based on the UNCITRAL Model Law on International Commercial Arbitration (1985) (the "Model Law").

Article 24(1) of the JAA provides that an arbitral tribunal may, unless the parties agree otherwise, order a party to take such interim or provisional measures as the tribunal considers necessary in respect of the subject matter of the dispute. The JAA does not specify or otherwise limit the types of remedies that an arbitral tribunal may order. Thus, arbitral

4) The average period for a trial in a court of first instance in a regular proceeding in 2018 was 13.2 months according to the Court Data Book (http://www.courts.go.jp/about/databook2019/index.html) (Japanese only). One of the common criticisms of the civil court system in Japan is that court proceedings are slow. In comparison with the United States, the delays in the Japanese system have been attributed to the fact that (i) hearings and trials are not held consecutively, (ii) new evidence can be submitted with almost no restrictions to an appeals court, and (iii) grounds for appeal are often found. (See Hideo Tanaka, *The Japanese Legal System*, University of Tokyo Press, (1976), p.475.)

tribunals may, under its rules, such as Article 71 of the Japan Commercial Arbitration Association' s Commercial Arbitration Rules 2019 ("JCAA Rules"), grant interim measures, for example, to maintain or restore the status quo, provided that the tribunal is satisfied that harm not reparable by a damages award would occur in the absence of such an order and that the applicant has a reasonable possibility of succeeding on the merits. Also, emergency arbitrators may, under the JCAA Rules (Articles 75 to 79) or the rules in other arbitration institutions, grant interim measures.[5)]

The JAA empowers an arbitral tribunal to make a broad range of interim orders, such as for security for costs or the preservation of assets or evidence, but such orders are not enforceable by a Japanese court.[6)] Although such orders cannot be enforced by a court, in practice, they are commonly followed by the parties, due to the fear of the arbitral tribunal forming a negative opinion of a non-compliant party.

On the other hand, Article 15 of the JAA allows parties to request an "interim measure of protection" from a court in relation to any civil dispute which is the subject of an arbitration agreement. The relevant provision states:

> [i]t is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure in respect of any civil dispute which is the subject of the arbitration agreement.

This is consistent with Article 9 of the Model Law, which states that applying to a court for an interim measure is not incompatible with an arbitration agreement. While the JAA generally applies only to arbitrations seated in Japan, pursuant to Article 3(2) of the JAA, Article 15 also applies when the place of the arbitration is outside of Japan or is unspecified.

Article 15 of the JAA confirms that the parties to an arbitration agreement are not prohibited from seeking interim and provisional measures from a court in the same dispute. As Article 15 does not specify or otherwise limit the types of remedies that a court may order, the CPRA instead governs the substantial and procedural requirements for obtaining interim and provisional measures.

Therefore, a Japanese court has the power to grant interim relief in aid of foreign-seated arbitrations as long as the criteria in the CPRA are met.

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5) As mentioned elsewhere, the ability of the court to intervene in arbitrations, including the appointment of emergency arbitrators, is restricted to the powers given to it under the JAA, pursuant to Article 4. Since the JAA does not mention emergency arbitrators, it is unlikely that the court would be able to intervene.

6) Those interim orders by the title of obligation (*saimumeigi*).

Ⅲ. Requirements of Interim or Provisional Measures in Japanese Courts under the CPRA

1. Substantive Requirements

The CPRA provides for two types of provisional remedies. First, a provisional seizure order (*karisashiosae*) may be issued to attach the respondent' s property to secure applicant' s monetary claim. Second, a provisional disposition order (*karishobun*) may be issued to preserve the status quo of disputed subject matter or to establish an interim relationship between the parties. Preserving evidence is not within the scope of the CPRA, but rather falls under the scope of the Code of Civil Procedure (Act No. 109 of 1996).[7)]

To obtain an order of provisional seizure or provisional disposition, an applicant must demonstrate a *prima facie* case for the claims to be preserved and the practical need for preserving them in an *ex parte* procedure.[8)] On the other hand, to obtain a provisional disposition order to establish an interim relationship, an applicant must show a *prima facie* case for (i) the claims to be preserved and (ii) the need to avoid any substantial detriment or imminent danger that would otherwise occur to the applicant regarding the relationship of the rights in dispute. The latter requirement is called the "necessity requirement" .

2. Procedural Requirements

In principle, the court is required to hear oral arguments or hold a hearing at which the respondent may be present. In all provisional remedy cases, an applicant must also provide security as a condition for the court to issue an order.

In practice, an applicant can obtain an order of provisional seizure or provisional disposition for disputed subject matter in an *ex parte* procedure. In order to obtain a provisional disposition order to establish an interim relationship between the parties, oral arguments or a hearing at which the respondent may be present are generally required unless the circumstances are such that the objectives of the petition for provisional disposition cannot be achieved if such proceedings are held.

If an applicant' s claim is simple and can easily be proven by sufficient documentary evidence, an order of provisional seizure or provisional disposition to preserve the status quo may be obtained within a few days of filing the petition. However, in the case of a provisional disposition order to establish an interim relationship, the proceedings tend to last far longer because the court is required to hold oral arguments or a hearing at which the respondent may be present.

A provisional injunctive remedy order can be obtained only against a respondent, or an asset owned thereby, such as cash in bank accounts. In the case where there is an asset under the name of a third party, which in fact belongs to the respondent, the applicant can obtain a provisional remedy order against such asset if the applicant succeeds in proving that

7) Although interim measures are often discussed in the context of evidence collection, we do not discuss this in this paper.

8) Articles 13 and 20(1) of the CPRA.

the real owner of such asset is the respondent. If a provisional seizure order relates to a claim by the respondent for payment of a debt, the debtor is prohibited from paying such debt.

3. Liability of the Applicant for Damages and Security for the Measure

If the respondent can later discharge the injunctive relief, the applicant can be held liable for damages suffered by the respondent. Thus, the applicant must also provide security as a condition for the court to issue an order. The court determines the amount of the required security at its own discretion by taking into consideration the amount of the claim, the value of the assets to be provisionally seized and other facts.[9] On a case-by-case basis, orders generally fall in the range of 10 percent to 40 percent of the value of the property.

4. Consequences of a Respondent' s Non-Compliance

If a respondent fails to comply with an order for provisional seizure or provisional disposition to preserve the status quo of any disputed subject matter, the applicant may obtain a title of obligation (*saimumeigi*) through a judgment or otherwise and enforce it. If a respondent fails to comply with an order of provisional disposition to establish an interim relationship between the parties regarding any disputed subject matter, the applicant can enforce the order (*e.g.*, in cases where the provisional disposition order is to deliver an item or items of movable property), or can obtain an order requiring the respondent to pay a specified sum to the applicant until the respondent complies with its obligations under the provisional disposition order (*e.g.*, in cases where the provisional disposition order is to build a building on a certain parcel of land).

Ⅳ. Interim or Provisional Measures in Japanese Courts for Agreements with Arbitration Clauses

Under Japanese law, provisional measures can be ordered by a court as long as the substantive and procedural requirements under the CPRA are met. However, whether a *prima facie* case is demonstrated depends on the practice of each court. Moreover, each justice has wide discretion to make decisions regarding these requirements, and their decisions depend largely on the facts of the case. As a practical consideration,[10] Japanese courts may be supportive of issuing provisional measures in cases involving arbitration clauses even if interim and provisional measures otherwise exist in the relevant arbitration rules. Because interim and provisional measures by the arbitration tribunal are not enforceable under Japanese law,

9) In addition to the court's ability to order security for costs under the CPRA, Article 24(2) of the JAA provides that an arbitral tribunal may also order any party to provide appropriate security in connection with any interim or provisional measures ordered pursuant to Article 24(1).

10) Other jurisdictions may have relevant laws making clear that any application should be made first to the arbitral tribunal, and only then to the court of the seat of the arbitration (Nigel Blackaby *et al*., *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th ed. 2015) at p.425). The JAA and the CPRA do not have this concept.

actions by a court regarding these measures are seen as necessary to preserve assets in Japan. In addition, whenever an emergency and *ex parte* process is necessary to preserve assets in light of risks of such assets being hidden or disposed, a court likely will grant the provisional measure.[11)]

That being said, Japanese courts are reluctant to grant provisional relief in certain types of cases. First, if granting such relief would be virtually equivalent to resolving the actual claim of the arbitration, a Japanese court typically would not grant the order. For example, if a claimant requests provisional relief ordering delivery of goods to the claimant when the subject matter of the dispute concerns the respondent' s obligation to deliver the goods, the subject of the provisional relief is to be resolved by the arbitration in accordance with the agreed arbitration provisions in the agreement and the institutional rules applicable to the arbitration. In such a case, the court may find, *prima facie*, that neither (i) the claims need to be preserved nor (ii) the "necessity requirement" has been met, unless there is some extenuating circumstance whereby the arbitration proceeding would not be able to provide relief in a timely manner.

Second, the same applies to relief that would be equivalent to deciding claims in parallel proceedings. Take an example of an arbitration agreement that exists between a Japanese company and a foreign company and the foreign company brings an action before its home courts in breach of the agreement. In that case, the first thing the Japanese company would do is to file a request for arbitration with an arbitration body and argue for and seek to demonstrate the validity of the arbitration agreement. At the same time, the Japanese company would have to seek dismissal in the foreign court on the basis of the existence of the arbitration agreement. However, the court proceedings in the foreign court likely would be quite burdensome for the Japanese company. It also has to face unpredictability of the outcome in such foreign court. Accordingly, the Japanese company might consider filing an application for provisional disposition in a Japanese court to seek a provisional measure under the CPRA. Given the existence of a valid arbitration agreement, the Japanese company could be considered to have a contractual right to stop the foreign company from filing a lawsuit in its home jurisdiction. Therefore, it seems theoretically possible for the Japanese company to seek an order of provisional disposition from a Japanese court under the CPRA to cause the foreign company to provisionally suspend its lawsuit in the foreign court. If such a provisional disposition is issued, the foreign company would be in breach of its obligations under the arbitration agreement and be subject to fines determined by the Japanese court.

Although the above scenario is theoretically possible, the "necessity requirement" must be met for the court to issue the provisional disposition order. It is likely that the court will notice that the Japanese company has made the arbitration request to an arbitration body, and it will be less keen on imposing provisional measures in Japan compelling the foreign company to withdraw the lawsuit in its own country and impose fines on the foreign company.

11) Arbitration proceedings on the other hand do not have *ex parte* proceedings for granting interim and provisional measure (*Ibid* at pp.423-424).

It is important to monitor the development of case law in this area as well as proposed legislative action to give enforcement power to interim and provisional measures of arbitral tribunals in order to better predict how provisional measures will be handled in cases involving agreements with arbitration clauses where a party is Japanese.

TMI Associates constantly endeavors to meet the needs of its clients and society as a whole by utilizing its comprehensive internal and external networks in new and emerging legal practice areas.

TMI Associates

23rd Floor, Roppongi Hills Mori Tower, 6-10-1 Roppongi, Minato-ku
Tokyo 106-6123, Japan
Tel: +81(0)3-6438-5511 Fax: +81(0)3-6438-5522
E-mail: info_general@tmi.gr.jp
http://www.tmi.gr.jp/english/

TOKYO / NAGOYA / OSAKA / KYOTO / KOBE / FUKUOKA / SHANGHAI / BEIJING / HO CHI MINH CITY / HANOI / YANGON / SINGAPORE / PHNOM PENH / BANGKOK / SILICON VALLEY / LONDON

A Message from JCAA

President

Kazuhiko Bando

Since its inception in 1950, JCAA has offered first-class arbitration and mediation dispute resolution services for the domestic and international community. In addition, recently the Japanese government has injected its resources to make Japan a preferred seat of arbitration and mediation in order to strengthen the rule of law for the benefit of global businesses. In line with such policy, JCAA is committed to carefully gathering information on the needs of international business and legal practitioners and is reforming all JCAA services based on those needs.

Among other changes made, JCAA has decided to publish a new English journal. JCAA hopes that this journal will help legal practitioners around the globe obtain information on dispute resolutions in Japan.

In planning and editing this journal, JCAA was supported by the following Supporting Law Firms:

- Anderson Mōri & Tomotsune
- Momo-o, Matsuo & Namba
- Mori Hamada & Matsumoto
- Nagashima Ohno & Tsunematsu
- Oh-Ebashi LPC & Partners
- Orrick Tokyo Law Office
- TMI Associates
- Kasumigaseki International Law Office/International Arbitration Chambers

JCAA takes this opportunity to express its sincerest gratitude for their assistance.

Chief Arbitration and Mediation Officer

Masato Dogauchi

JCAA is changing. In January 2019, three sets of JCAA arbitration rules came into force: first, the UNCITRAL Arbitration Rules, supplemented by the JCAA Administrative Rules, ensure world-standard proceedings with a high degree of flexibility and autonomy for arbitrators; second, the Commercial Arbitration Rules provide clear solutions to some contentious procedural issues in order to facilitate smooth proceedings; third, the Interactive Arbitration

Rules provide more predictable, faster dispute resolution by stipulating communication from the arbitral tribunal to the parties and a system of fixed remuneration for arbitrators.

In February 2020, JCAA's new Commercial Mediation Rules came into effect. Under these new rules, parties have more options to flexibly adapt to the specifics of their case. Mediation has strong potential to resolve disputes promptly and cost effectively.

Working with colleagues in the international legal community going forward, JCAA will play a more significant role in arbitration and mediation in Japan and throughout the world.

External Supporting Lawyers

Public Relations Officer

Hiroko Nihei

Japan has great potential for developing into an ADR hub. I hope to contribute to raising awareness in the global community of the attractiveness of JCAA arbitration/mediation and Japan as a seat. It is my pleasure to be able to support JCAA with its challenge to the next stage.

Professional & Institutional Relations Officer

Tony Andriotis

Japan has a solid and internationally well respected legal system, a stable political system, and an incredible infrastructure; all elements that make Japan an ideal seat for the settlement of international disputes. I am thus extremely grateful to have been approached by the JCAA to assist them in their further growth and internationalization.

* Ms. Nihei and Mr. Andriotis provide support to the JCAA on a part-time basis and continue to work full-time at their respective law firms. They will not be involved in the JCAA's case administration and will be kept isolated from information thereof. They serve as Public Relations Officer/ Professional & Institutional Relations Officer of the JCAA solely in their individual capacity, and not as lawyers or representatives of their respective law firms.

■ Staff, Arbitration& Mediation Department

Shinji Ogawa, Manager

JCAA provides quick and comprehensive support throughout its arbitration and mediation proceedings, and has established a reputation as being efficient and user-friendly. We will make every effort to meet the real needs of our users and provide dispute resolution services that go beyond global standards.

Jieying Peng, Staff

As the sole commercial arbitral institution in Japan, JCAA endeavors to provide cost-effective and streamlined dispute resolution services. I hope to contribute to raising JCAA's international profile as a dispute resolution center and assisting more people from around the world in resolving disputes through arbitration and mediation.

Other staff members

There are three other staff members in arbitration and mediation division.


THE JAPAN COMMERCIAL ARBITRATION ASSOCIATION

The Japan Commercial Arbitration Association (JCAA)

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