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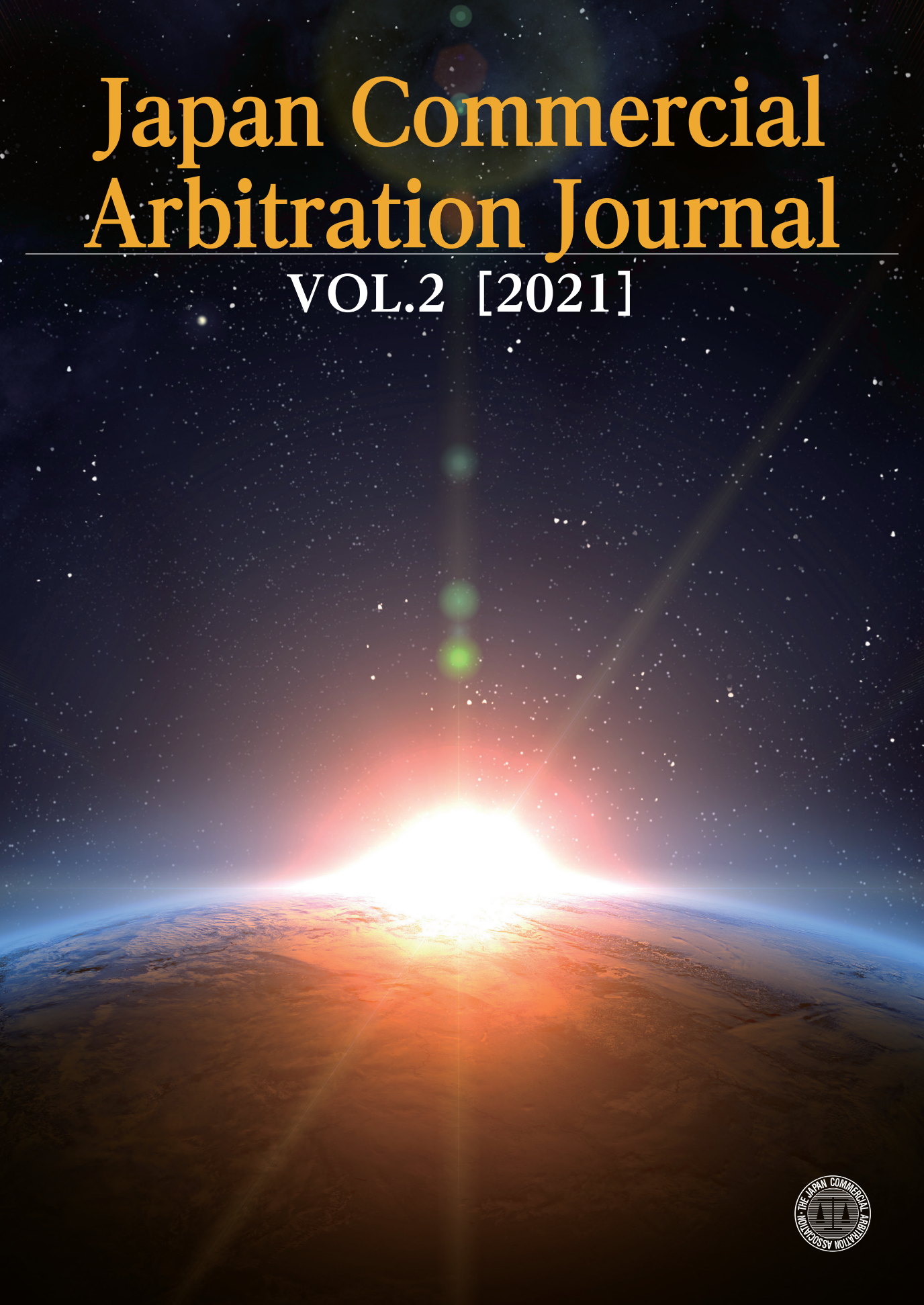

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Evaluation of the Interactive Arbitration Rules of the JCAA from the Perspective of Japanese Court Practices

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Ⅰ. Introduction

The purpose of this article is to examine and evaluate the 2019 Interactive Arbitration Rules of the Japan Commercial Arbitration Association (JCAA) (the "Interactive Arbitration Rules") in comparison with the rules of Japanese civil court practice and their operation.

Civil proceedings in Japanese courts are governed by the Code of Civil Procedure of Japan (Act No. 109 of 1996, the "Code of Civil Procedure") and the Rules of Civil Procedure (Rules of the Supreme Court No. 5 of 1996). However, their specific applications vary in practice depending on, for instance, the substance of the civil disputes; the identity of the parties involved in the civil dispute; the personalities of counsel, as well as the judges' view on civil lawsuits and their understanding of the judicial role.[3)] Therefore, as the style of the proceeding can vary due to such factors, even the same court need not necessarily proceed to try the civil suit in the same procedural way.

With this in mind, looking at the Interactive Arbitration Rules, we would like to focus on the provisions corresponding to the court' s (or the tribunal' s) supervision and management of the proceedings based on our practical experience in litigation and arbitration.

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3) For example, if a judge is of the opinion that civil litigation should push the parties to settle disputes and should be led by the parties (or see civil proceedings as a system with such an orientation), the judge may self-stipulate that his or her role is to remain an umpire. On the other hand, if a judge is of the view that civil litigation is a publicly-funded dispute resolution system, then the judge may consider his or her role to be managing the parties and proceedings in order to expand and implement the dispute resolution function as much as possible. See Shintaro Kato, Manejiaru Jyajji Ron, in Tetsuzuki sairyo ron, Kobundo (1996) at 94.

Ⅱ. PROCEDURES FOR REASONABLE SETTLEMENT OF DISPUTES

1. Overview

What should be done to reasonably resolve or settle civil disputes? Most parties, counsel and judges involved in the resolution of civil disputes will ponder on this question despite the particular position they are in.

No matter how diligently the court manages and decides the case, at least one party to the civil suit is likely to disagree with the court' s decision, whether it is a judgment upholding a claim or dismissing it with prejudice on merits. If a court upholds part of the claim and dismisses the rest of it, both parties may be dissatisfied. Under these circumstances, the filing of an appeal is an indication of how the parties have perceived the proceedings of the case and the resulting decision. Even if the parties were dissatisfied with the judgment and the reasons behind it, they would not choose to appeal if they considered the judgment inevitable in light of the substance of the disputes and the course of the proceedings and that it would be difficult for the appellate court to make a different judgment. Moreover, even if there is a possibility of receiving a different judgment on filing an appeal, parties might choose to abandon the appeal because of the time and costs involved. Even in such cases, whether the result falls within the range of an acceptable resolution remains the most important factor behind the parties' decision to appeal the judgment.

One method typically adopted in the Japanese courts, in accordance with the rules of civil procedure, which is intended to lower the rate of decisions appealed, is for the judges to organize the issues (issue-centered trial) and disclose their preliminary views on the cases relatively early on in the proceedings.

Japanese courts typically seek to determine the key contested issues relatively early on and focus the proceedings on those, in keeping with the basic structure and spirit of the current Code of Civil Procedure. It is said that: "Under the basic principles of civil litigation, the big picture of the dispute should be ascertained as quickly as possible so that the essence of the matter can be sorted out so that the court, the parties and counsel can work together to articulate the issues in order to produce the best evidence to clarify the issues and conduct intensive examination of evidence" .[4)]

The basic structure of civil dispute resolution in Japan is that the defendant/respondent disputes the facts alleged by the plaintiff/claimant, the judge then focuses on the issues that were articulated, finds evidence through examination, and applies the law to reach a conclusion. In order to perform the function of dispute resolution in litigation and arbitration

4) Morio Takeshita, Shin minji sosyou hou seitei no igi to syourai no kadai, in Morio Takeshita (ed.), Kouza shin minji sosyou hou I, Kobundo (1998) at 5; Shintaro Kato, Souten seiri tetsuzuki no seibi, in Tomokatsu Tsukahara et al. (ed.), Shin minji sosyou hou no riron to jitsumu vol.1,Gyousei (1997) at 211; Shintaro Kato, Benron jyunbi tetsuzuki no kinou, in Yoshimitsu Aoyama & Makoto Ito (eds.), Minji sosyou hou no souten [3rd ed.], Yuhikaku (1998) at 164; Tsunahiro Kikui & Toshio Muramatsu (original authors), Mikio Akiyama, Makoto Ito, Shintaro Kato, Hironari Takada, Takehisa Fukuda & Kazuhiko Yamamoto, Konmentaru minji sosyou hou III [2nd ed.], Nihon Hyoronsha (2018) at 490.

proceedings—it is thought essential for the court or arbitrator to clearly articulate the contested issues of the case relatively early in the process and thereafter to conduct an intensive examination of the evidence on those issues without wasting time on issues not contested. We refer to this approach as the "issue-focused model" of civil procedure.

As a result of the effective articulation of contested issues by the court, the parties concerned will be able to concretely recognize the object for the proof and rebuttal, which will present a clearer roadmap for the case and create a fair and transparent process. In addition, for the court or the arbitral tribunal, the effective articulation of issues is necessary as an essential part of the process that is transparent and understandable to the parties.

In the communications between the court/arbitral tribunal and the parties, the articulation of the issues involves forming a common knowledge that will serve as the basis for organizing information and clarifying the case.[5] Therefore, to create a sphere of information that clarifies the subject of the proceedings and the issues, this process needs to cover a wide range of petitions/motions, claims, and proofs. In particular, under the issue-focused model, it is also important to provide clarifications in the proceedings to sort out issues at an early stage, which requires dialogue and cooperation among the parties and the court.[6]

2. Indication of the issues

In articulating the issues, a judge' s indication of his or her understanding of the issues is fundamental for the parties and the judge to have a common understanding of the issues. Parties often say: "The articulation of claims should not only allow the court to sort out the claims of both parties, but should also clarify the issues that the court considers important at the time and the claims that the court places less emphasis on, so that both the counsel and the court can have a common understanding of the issues" . However, some counsel might be happy to eliminate the opposing party' s arguments, while insisting on the importance of their own. Therefore, articulation of the issues appropriately displays the judge' s skill and experience.

In indicating the issues, competent judges will have a pretty clear idea on what should be done or what should be refrained from doing, or what would make no difference to the proceedings. Judges are subject to a code of conduct, which requires them to provide comments appropriately at appropriate times in the proceedings to articulate the issues, based on the arguments and counterarguments of both parties and the evidence provided in support.[7]

5) Kazuhiko Yamamoto, Souten seiri tetsuzuki ni tsuite, Minsho vol. 110 (4&5) (1994) at 696; Kato, supra note 4, Souten seiri tetsuzuki no seibi at 213; Wataru Murata, Souten seiri tetsuzuki, in Tadashi Oe, Shintaro Kato & Kazuhiko Yamamoto (eds.), Tetsuzuki sairyo to sono kiritsu – riron to jitsumu no kakyo wo mezashite, Yuhikaku (2005) at 98.

6) Shintaro Kato, Syakumei no kouzou to jitsumu, in Yoshimitsu Aoyama sensei koki syukuga ronbunsyu: Minji tetsuzukihougaku no aratana chihei, Yuhikaku (2009) at 461;Shintaro Kato, Syakumei supra note 5 Tetsuzuki sairyo to sono kiritsu at 123;Shintaro Kato, Minji sosyou ni okeru syakumei in Shintaro Kato (ed.), Minji sosyou shinnri, Hanrei Taimuzusya (2000) at 227.

7) Shintaro Kato, Shinsho kaiji in supra note 5 Tetsuzuki sairyo to sono kiritsu at 250.

Parties often want the judges to be clear about arguments that they have no interest in, in order to save time and effort. Most judges will attempt to convey to the counsels early on in the proceedings, in carefully chosen language, the court' s provisional views on whether any allegation is close to being inappropriate in itself or is unlikely to be substantiated. This communication forms the basis of a common understanding among the parties and the court and allows the parties to direct their focus to arguments that might be more fruitful in resolving the dispute and leave aside those the court is unlikely to support.[8)]

3. Disclosure of preliminary views

(1) Expression of a preliminary view on questions of law

In Japanese court practices, there are three types of disclosures of preliminary views of the court: (a) expression of a preliminary view on questions of law; (b) disclosure of preliminary view regarding the possible outcome of the case (disclosure of preliminary view in the narrow sense); and (c) disclosure of a preliminary view for amicable settlement.

The expression of a preliminary view on questions of law means that when the arguments of the parties are in conflict with each other on legal questions such as interpretation of the law or the distribution of burden of proof, a judge may try to articulate a common understanding between the parties and the court by expressing an opinion on how to proceed with the case in terms of the legal issues.[9)]

The expression of a preliminary view on questions of law may be either: (a) based on an established court precedent or a commonly accepted theory; or (b) without being based on an established court precedent or a commonly accepted theory. Option (a) is usually not problematic. As for (b), judges need to be more careful in expressing their views by going through the process of hearing opinions and arguments of the parties and the exchange of opinions between the parties.

(2) Preliminary view on possible outcome of the case (disclosure of preliminary view in the narrow sense)

Disclosing the court' s preliminary view on the possible outcome of the case (disclosure of preliminary view in the narrow sense) clarifies how judges perceive and evaluate the presence or absence of probative facts in light of documentary evidence submitted and so on.[10)] For example, the court may point out the difficulty of proving probative facts at issue or the existence and applicability of rule of thumb. When the judge announces these matters, the counsel and the parties will have the opportunity to reconsider the schedule of proof or to consider the appropriateness of a compromise settlement. If, as the result of disclosure of the judge' s preliminary view, there are any questions or objections from the parties, the court needs to respond to such questions or objections appropriately. It is expected that the judges and the parties/counsel will deepen their understanding of the case through discussions following the disclosure of the court' s preliminary view in pursuit of an amicable resolution.

8) Kato, supra note 7 at 251.

9) Kato, supra note 7 at 251.

10) Kato, supra note 7 at 252.

Ⅲ. Arbitral Tribunal' s Active Role in Clarifying Parties' Positions and Ascertaining Contested Issues under the JCAA Interactive Arbitration Rules

1. Provisions of Article 48 of the Interactive Arbitration Rules

Article 48 of the Interactive Arbitration Rules allows the arbitral tribunal to take an active role in clarifying parties' positions and ascertaining the contested issues and is intended to achieve efficient articulation of the issues through active involvement of the arbitral tribunal.[11] This corresponds to the articulation of issues in Japanese court practice in which the court, at an early stage, would articulate the issues as it understood them provisionally.

Article 48.1 of the Interactive Arbitration Rules provides that "At a stage as early as possible in the arbitral proceedings, the arbitral tribunal shall draft a document containing a summary of each Party' s positions on factual and legal grounds of the claim and the defense ("Positions") and the factual and legal issues that the arbitral tribunal tentatively ascertains arising from the Positions ("Issues"). The arbitral tribunal shall present such document to the Parties, and give the Parties an opportunity to comment on the Positions and the Issues within a time limit fixed by the arbitral tribunal."

This provision stipulates that the arbitral tribunal shall: (1) determine whether a legal framework is in place to guide the claims and whether the alleged facts (both primary and circumstantial facts) are sufficient to guide the claims (i.e. whether the claims have merit); (2) consider the counter party' s answers, admissions or denials, and rebuttals; (3) present a rough picture of the issues with a tentative draft of contested issues; and (4) hear the opinions of the parties. The arbitral tribunal is also required to prepare an interim written summary of the issues at stake. The tribunal would then of course review the documents and evidence and move forward with the proceedings.

As a subsequent procedure, "[w]ithin the time limit fixed by the arbitral tribunal under Article 48.1, the Parties shall provide their comments in writing on the Positions and the Issues specifying which parts of the Positions and the Issues they agree or disagree with." (Article 48.2). This rule therefore imposes an obligation on the tribunal to engage in dialogue with parties to promote better communication.

Also, the arbitral tribunal "may revise the Positions and the Issues taking into account the comments provided by the Parties under Article 48.2" (Article 48.3) and "may use the revised Positions under Article 48.3 as the Parties' positions set forth in the arbitral award" (Article 48.4).

Moreover, in light of the unpredictability in the parties' presentation of their arguments and evidence, the Rules further provide that, "[n]otwithstanding Article 48.4, during the further course of the arbitral proceedings, if a Party finds further amendments to be required, the Party may request in writing that the Positions be amended. Unless the arbitral tribunal rejects the request because of delay, the arbitral tribunal may use such amended Positions as

11) Shusuke Kakiuchi, Nihon syoji chusai kyoukai chusai kisoku no kaisei to sono igi, Juli 1535 (2019) at 27.

the Party' s position set forth in the arbitral award" (Article 48.5).

2. Interpretation, Evaluation and Operation

(1) Early stage of the procedure

The arbitral tribunal' s active role in clarifying the parties' positions and ascertaining the issues involves a dialogue between the tribunal and the parties at the stage of articulation of the issues. In terms of timing, how should we interpret the words "[a]t a stage as early as possible in the arbitral proceedings" ? In the authors' view, if an answer to a request for arbitration has been received, and if they are satisfactory to the tribunal to the extent that the tribunal could roughly grasp the gist of the case, that would be the right stage. If those conditions are not satisfied, it could also be the stage where more detailed written statements have been exchanged. Although an arbitral tribunal' s written summary of contested issues should be considered provisional, it is expected that such a document would serve as the basis for the arbitral award.[12)]

In the practice of civil litigation, are the contested issues often effectively articulated? In many cases they are, but in some cases the issues are not successfully articulated. Although there are a variety of reasons for such failures, one reason may be that counsel and judges lack a deep understanding of the legal framework and significance of issue-articulation and the process for doing so.[13)]

Also, the use of issue-articulation in civil lawsuits is not uniform. Although there is a practice in court proceedings to prepare a proposal for the articulation of issues, that has not been implemented in all cases because neither the court nor the parties are required to do so. In contrast, the Interactive Arbitration Rules require the drafting of a summary of contested issues.[14)]

(2) Oral discussions

Although the process of clarifying the parties' positions and ascertaining the contested issues is referred to as a "dialogue" between the arbitral tribunal and the parties, they are usually conducted in writing in terms of procedure (See Articles 48.1 and 48.2 of the Interactive Arbitration Rules). Does that mean the Rules do not contemplate oral discussions?[15)]

This question arises because, in Japanese court practice, during the course of preparatory proceedings, issues are often clarified and articulated through a process in which counsel

12) Masato Dogauchi, JCAA no chusai seido no kaikaku ni tsuite, JCA Journal Vol. 66, No. 1 (2019) at 12.

13) Shintaro Kato, Souten seiri tetsuzuki no kouzou to jitsumu, in Toga Yoshio sensei Endo Kenji sensei koki syukuga: Minji tetsuzuki ni okeru hou to jissen, Seibundo (2014) at 248.

14) In arbitration practice, the usefulness of issue determination (issue definition) has been pointed out. On the other hand, it is necessary for the arbitral tribunal to avoid prematurely inclining towards a decision before the parties have had sufficient opportunity to argue, prove, and defend themselves against the claims, as this may lead to grounds for annulment of the arbitral award or grounds for refusal of enforcement. Gary Born, International Commercial Arbitration 3rd ed., Wolters Kluwer (2020) at 2408-2409.

15) Professor Makoto Ito raises the question, "Is there a need for oral discussion?" . Makoto Ito, Funsou kaiketsu seido toshite no chusai no kinou koujyou to intarakuteibu chusai kisoku 2019 – chusaitei no shinsyou kaiji wo chushin to shite, JCA Journal Vol. 66, No. 7 (2019) at 5.

respond orally, in court, to questions from the court or from the opponent party about the legal briefs that counsel had submitted and thereby clarifying their positions.

During such oral discussions, it is usually not acceptable for counsel to respond to the court' s questions by saying, "we will reply in our next written legal brief" . The court will likely say, "It' s not such a big question. You can answer as much as the counsel knows. The court' s question is whether the meaning of paragraph A in the brief is X or Y, or neither." This is a serious occasion for counsel and the judge because well-prepared counsel who understands the case should be able to handle the questioning. Even if there is only one major oral argument, the judge can sense both the competence of counsel and counsel' s grasp of the case, and counsel can also sense the competence of the judges and the depth of their understanding of the case record. It is therefore important for the parties and the judges to be well prepared; a preparation session lasting 30 minutes to an hour would be tiring. Oral discussion is seen as an effective way to organize information and to form a common knowledge that becomes the basis for the clarification of a case. While there are cases in which it is necessary to get a party to take a position through oral discussion (in such cases, it is usual to keep such matters in the written record of the preparatory proceedings), there are many cases in which it is not necessary to do so. If the counsel responds by saying, "If we answer now, it means A, but we will check again, so please allow us to reserve the possibility of withdrawal," then the judge will usually be fine with that.

In this way, the discussions leading up to oral arguments are prompt and opportunistic, and in light of the circumstances, the court and the parties share a rule of non-commitment interaction (no responsibility for the answer and freedom to withdraw one' s oral comment). The non-commitment rule states that: "During the process of articulating the issues, a verbal commitment is never deemed a confession and shall not be adopted as evidence against either party or subsequently invoked against either party (even if it is a fact that is not subject to confession)" .[16] This is based on the idea that free and vigorous discussion is preferable for the articulation of issues (formation of common knowledge), and thus parties should not be held to their word in oral statements when arguments and objections have not yet been clarified. The rule is intended to guarantee free and candid conversations and does not encourage irresponsible and endless discussions.

Since the articulation of issues under the Interactive Arbitration Rules in an arbitration proceeding is carried out in writing by rule, even if oral arguments are held, there would be no concern that the parties would make irresponsible statements or endless arguments because ultimately what matters is what is written down. Accordingly, it is appropriate to make a decision based on consideration of whether the articulation of issues in the case is possible by only exchange of documents or whether it can be made more efficient by using oral arguments. At the very least, if the parties choose the Interactive Arbitration Rules, there seems to be no basis to disallow oral discussion.[17]

16) Kenya Nagashima, Souten seiri to youken jijitsu, Seirinshoin (2017) at 83.
17) Ito, supra note 15 at 6.

Ⅳ. Expressing the Arbitral Tribunal' s Preliminary Views

1. Provisions of Article 56 of the Interactive Arbitration Rules

Article 56 of the Interactive Arbitration Rules allows the arbitral tribunal to express its preliminary views. This corresponds to the disclosure of the judges' preliminary views in Japanese court practices. The dialogue between the arbitral tribunal and the parties is considered mandatory, in which the arbitral tribunal presents its preliminary views and guarantees the parties an opportunity to state their views.

Article 56 (1) of the Interactive Arbitration Rules provides that:

"In order to assist the Parties to present their cases effectively and efficiently, prior to the time of the arbitral tribunal' s decision as to whether or not witness examination will be conducted, the arbitral tribunal shall prepare and give a written summary to the Parties on the following items: (1) the factual issues that the arbitral tribunal considers important and the arbitral tribunal' s preliminary views with respect thereto; (2) the legal issues that the arbitral tribunal considers important and the arbitral tribunal' s preliminary views with respect thereto; and (3) any other matters that the arbitral tribunal considers important."

The preliminary views expressed by the arbitral tribunal under Article 56.1 "shall not be binding upon the arbitral tribunal' s subsequent decisions or the arbitral award." (Article 56.5). Also, "[t]he Parties shall not challenge any arbitrator based on the fact that he or she has expressed preliminary views under Article 56.1." (Article 56.6). Article 56.5 clearly states that the views presented by the Arbitral Tribunal are provisional, and Article 56.6 stipulates that the views presented by the Arbitral Tribunal cannot become a ground to challenge arbitrators, because the preliminary views can be changed even if such preliminary view may imply adverse consequences for a party.

Further, "[t]he arbitral tribunal shall give the Parties an opportunity to comment on the items under Articles 56.1(1) through (3) within a time limit fixed by the arbitral tribunal. " (Article 56.2). On the other hand, "[t]he Parties, within the time limit fixed by the arbitral tribunal under Article 56.2, may comment in writing on the items under Articles 56.1(1) through (3) and, on whether or not witness examination should be conducted." (Article 56.3). In response, "[t]aking into account the Parties' comments under Article 56.3, the arbitral tribunal shall decide whether or not to witness examination will be conducted" (Article 56.4).

2. Interpretation, Evaluation and Operation

The expression of preliminary views by the arbitral tribunal corresponds to the indication of issues, the expression of preliminary views on questions of law, and disclosure of preliminary views regarding the possible outcome of the case in Japanese court practices.

The timing for the arbitral tribunal to present its views will normally be after the exchange of written submissions and before the admission of a witness for evidentiary hearing.

Even if the preliminary views have been presented, the arbitral tribunal should reconsider them if any doubt or counterargument is expressed in the statement of opinions of the parties, because such views are provisional. As a result, the preliminary views presented may

change. By providing for presentation of the preliminary views of the arbitral tribunal, Article 56 of the Interactive Arbitration Rules is intended to ensure effective progression of the arbitration procedure while ensuring due process (prevention of surprise to parties).[18)]

The presentation of "the legal issues that the arbitral tribunal considers important and the arbitral tribunal' s preliminary views with respect thereto" will give the parties the opportunity to reformulate their approach and strategies for the examination of witnesses on the evidentiary hearing. Furthermore, through the arbitral tribunal' s presentation of issues and provisional views, the arbitral tribunal and the parties can exchange their views and develop a normative framework (interpretative theories) to be applied (particularly when there is no established court precedent or commonly accepted theory on questions of law). Under the Interactive Arbitration Rules, while the requirement of conducting the proceedings in writing has the benefits of making the procedure clear, because the tribunal has an "active role in clarifying parties' positions and ascertaining issues" (Article 48), it may be worthwhile to try conducting the proceedings by oral discussions as well.

The active involvement of the arbitrator in the disclosure of preliminary views as provided by the Interactive Arbitration Rules may appear unfamiliar to those accustomed to common law practices, but should appear familiar to those accustomed to civil law practices.[19)] We feel the same way. However, since such disclosure leads to the highly effective progression of the arbitration procedure, the Interactive Arbitration Rules are of great significance in presenting new options for efficient dispute resolution if a successful track record of resolving matters can be built up under the Interactive Arbitration Rules.

18) Ito, supra note 15 at 6; Kakiuchi, supra note 11 at 27.

19) Noboru Kashiwagi, Intarakuteibu chusai kisoku to chusaitei no zanteiteki na kangaekata no teiji ni tsuite, JCA Journal Vol. 66, No. 6 (2019) at 5.

Emergency Measures – Japanese Law and Practices of the JCAA

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Ⅰ. Introduction

As arbitration becomes increasingly popular, the need for interim orders, even before an arbitral tribunal has been constituted, has grown significantly. In response to this, for the last ten to fifteen years, many arbitral institutions in the world have adopted the rule to appoint an emergency arbitrator to expeditiously issue interim orders. This article will briefly introduce the current position of the Japanese law and its contemplated amendment, as well as JCAA' s rules and practices regarding emergency measures, including my own experience to serve as an emergency arbitrator.

Ⅱ. Current Japanese Law and JCAA Rules on Emergency Measures

1. Arbitration Act of Japan

The current Japanese arbitration law, Arbitration Act of Japan (the "Act"), is modelled after the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law"). The Act came into force in 2004 and has not been amended since. Therefore, the Act does not reflect the 2006 version of the Model Law, meaning that while the Act authorizes tribunals to render interim orders,[1)] such orders are not enforceable. In order to obtain an enforceable interim order in Japan, parties must apply to a Japanese court for an enforceable decision outside the arbitration procedure.[2)]

The Act has no provisions on emergency measures. It seems to be the prevailing view that an emergency arbitrator is not a "tribunal" under the Act, but at the same time the Act does not prohibit emergency measures.

1) Article 24 of the Act.

2) Article 15 of the Act provides that parties may apply for interim orders to Japanese courts before filing of arbitration or while an arbitration procedure is pending.

2. JCAA Rules

The Japan Commercial Arbitration Association ("JCAA"), the leading arbitral institution in Japan, has incorporated provisions regarding interim measures by tribunals in its Commercial Arbitration Rules ("JCAA Rules") since 2004, when the Act came into effect, and added provisions regarding emergency arbitrators in the JCAA Rules in 2014.

Provisions on emergency measures in the JCAA Rules are mostly similar to, but slightly different from, those of other well-known arbitral institutions. Below is a brief description of how emergency arbitrator procedures will be conducted under the JCAA Rules.

(a) Timing of Application

A party may apply for emergency measures before the arbitral tribunal is constituted or when any arbitrator has ceased to perform his or her duty.[3] An application for emergency measures can be made even before filing a request for arbitration, but the applicant must file the request for arbitration within 10 days from the date of applying for emergency measures.[4]

(b) Basic Timeline

The JCAA will appoint an emergency arbitrator, in principle within two business days from its receipt of application for emergency measures,[5] and the emergency arbitrator shall make reasonable efforts to decide on the emergency measures within two weeks from appointment. [6]

The emergency arbitrator must give each party a reasonable opportunity to comment,[7] but has the discretion whether to hold a hearing. The length of hearing, if held, shall be one day at maximum.[8]

(c) Available Relief and Requirements

Interim measures include (i) keeping or restoring the status quo, (ii) preventing action that is likely to cause current or imminent harm or prejudice to an arbitration procedure, (iii) preserving assets for future enforcement of an award and (iv) preserving evidence.[9] Emergency arbitrators may also order provisions for security for costs.[10]

In the case of (i) through (iii) above, in order to obtain a favorable interim order, the applicant must show that (a) harm not adequately reparable by an arbitral award of damages is likely to result, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed, and (b) there is a reasonable possibility that the applicant will succeed on the merits.[11]

It is a little unclear under the JCAA Rules whether the allocation of costs should be ordered in the emergency measures. On one hand, Article 66, Paragraph 4 of the JCAA Rules, which provides that the tribunal shall determine the cost and its allocation in the final award, is not

3) JCAA Rules, Article 75, Paragraph 1.
4) JCAA Rules, Article 75, Paragraph 7.
5) JCAA Rules, Article 76, Paragraph 4.
6) JCAA Rules, Article 77, Paragraph 4.
7) JCAA Rules, Article 71, Paragraph 4.
8) JCAA Rules, Article 77, Paragraph 3.
9) JCAA Rules, Article 71, Paragraph 1.
10) JCAA Rules, Article 72.
11) JCAA Rules, Article 71, Paragraph 2.

mutatis mutandis applicable to interim measures in general pursuant to Article 71, Paragraph 5. On the other hand, Article 80 of the JCAA Rules, which provides that the tribunal may apportion the costs, may apply *mutatis mutandis* to emergency measures by way of Article 79 of the JCAA Rules. Based on these provisions, the current practice of the JCAA is to include allocation of costs in the emergency measures if requested by either party.

(d) Effect of Order and Subsequent Procedures

An interim measure ordered by an emergency arbitrator is binding upon the parties, and will remain in effect until the arbitral tribunal modifies, suspends or terminates it.[12] In the meantime, the emergency arbitrator and the arbitral tribunal are free to modify, suspend or terminate the interim measures.[13] The emergency arbitrator shall not be appointed as an arbitrator for the same dispute, unless otherwise agreed in writing by the parties.[14]

(e) Costs

The JCAA Rules offer a simple fixed fee and remuneration structure for emergency arbitrator procedures. The JCAA' s administrative fee is 200,000 JPY (which is less than 2,000 USD), exclusive of applicable consumption tax.[15] An emergency arbitrator' s remuneration is 1,200,000 JPY (approximately 11,000 USD) if the order is rendered, and 300,000 JPY (approximately 2,800 USD) if no order is rendered, also exclusive of applicable consumption tax.[16]

Ⅲ. Some Practical Observations on Emergency Measures

Based on the law and the rules explained above, as well as my experience serving as an emergency arbitrator, I would like to address two practical observations below, namely: (i) how to complete the procedures within the short time period and (ii) the practical effects of emergency measures.

1. How to Conclude in Two Weeks

According to the information written in Japanese on the JCAA' s website,[17] in all cases where emergency measures were ordered under the JCAA Rules, emergency arbitrators rendered such orders within two weeks from their appointment. In order to meet this short deadline, in my view, an emergency arbitrator should be proactive, and the emergency arbitrator as well as the parties should be flexible as to the schedule, while of course bearing in mind equal treatment of the parties.

(a) Proactiveness

As to the proactiveness of emergency arbitrators, the JCAA Rules themselves expect or

12) JCAA Rules, Article 77, Paragraph 5.
13) JCAA Rules, Article 77, Paragraph 1 and Article 78, Paragraph 2.
14) JCAA Rules, Article 77, Paragraph 8.
15) JCAA Rules, Article 108.
16) JCAA Rules, Article 102.
17) https://www.jcaa.or.jp/arbitration/statistics.html (last viewed on August 9, 2021)

even mandate emergency arbitrators to be more proactive than in normal cases, by requesting emergency arbitrators to set up a procedural schedule as soon as possible.[18] There are practical needs for proactiveness as well. Counsel may not have enough time to fully address the issues in one submission. Particularly in smaller cases, counsel may not be so familiar with emergency arbitration procedures. As a result, there can be some ambiguity in the submission, or certain issues may be left unexplored by both parties while the emergency arbitrator needs these to be addressed for the purposes of rendering the order. The time sensitive nature of this short two-week period exemplifies the importance of even a single day which cannot be wasted, and as such, an emergency arbitrator should not leave it up to the parties whether they will make clarifications or not. The better course of action is to directly request the submitting party to clarify any uncertain or ambiguous points expediently.

(b) Flexibility of the Schedule

As to flexibility of the schedule, although an emergency arbitrator is to set up a procedural schedule, it seems better to agree on the possibility for amendments. In practice, after examining one party' s submission, sometimes an extension to the original planned schedule would seem fair and appropriate, and at other times, a shorter response period may be deemed as sufficient. Again in a short two-week period, adjusting the schedule only for a couple of days could lead to avoid last-minute blurred lines of communications.

(c) Example in Practice

In order to be proactive and flexible, I myself, as an emergency arbitrator, endeavored to review submissions from the parties on the day of submission, identify seemingly new allegations, to which the other party might want to rebut, and ask the other party by e-mail on the same day, with all relevant persons included as addressees, whether it wanted to respond with a suggestion of a deadline for the next submission, if any. By doing this, all persons involved could communicate with one another without suffering annoyance due to time differences, or without spending valuable time arranging conferences, and without worrying about inadvertent ex-parte communications.

2. Practical Effects of Emergency Measures

In addition to the legal or formal effects of emergency measures mentioned in II above, I am of the opinion that in many cases emergency measures are very useful for expediting the resolution of a dispute and saving relevant costs. For instance, if one party, despite the existence of an arbitration agreement, initiates litigation proceedings as a delaying tactic, an anti-suit injunction by the emergency arbitrator can quickly and effectively discourage such an attempt. Or, if the emergency arbitrator, even preliminarily and subject to later modification, finds that there is a reasonable possibility that the requesting party will succeed on the merits, both parties, especially the responding party, will have the chance to re-evaluate their case more objectively. As a result, the parties may settle, or narrow down the issues in the subsequent arbitration procedure, sometimes quite dramatically. I know of a case where the

18) JCAA Rules, Article 77, Paragraph 2.

parties found the reasoning given by the emergency arbitrator to be quite persuasive, and subsequently, the parties ceased disputing a specific issue and agreed to select the emergency arbitrator to serve as the sole arbitrator in order to save time and cost. Indeed, emergency measures often have the similar effect as an early neutral evaluation.

Ⅳ. Contemplated Amendment of the Act

Lastly, I would like to introduce in this article the current movement to amend the Act. Since 2017, the Japanese government has adopted the policy to promote arbitration in Japan. To implement this policy, the government has taken various measures including providing assistance to the Japan International Dispute Resolution Center to open arbitration facilities in Osaka in 2018 and in Tokyo in 2020. As one of these measures to promote arbitration in Japan, the government is now planning to amend the Act to be compatible with the 2006 version of the Model Law. It is contemplated that the amended Act will incorporate most of the provisions regarding interim measures in the 2006 version of the Model Law, except for a provision on preliminary orders which expressly sets forth an interim order issued without hearing the other party. As of August 2021, it is expected that the amendment bill will be submitted to the Diet in 2022. When the amendment will come into force, interim measures rendered by arbitral tribunals all over the world can be enforceable in Japan after obtaining an enforcement order by the court. Note, however, the amended Act will still remain silent on whether an emergency arbitrator is a "tribunal." Therefore, as mentioned in I above, pursuant to the prevailing view, emergency measures will not in themselves become enforceable, but will be enforceable once a tribunal confirms the same as the tribunal' s interim order.

In addition, in order to obtain an enforcement order, currently, a full translation of the written submission into Japanese is necessary, but under the amended Act, a translation of a part or all of the interim orders can be omitted with the court' s permission.

Ⅴ. Conclusion

Even currently, I am of the view that emergency measures are highly expedient and effective dispute resolution tools. As web conferences have become common practice during the COVID-19 pandemic, communication among the parties and the emergency arbitrator located in distant locales has become smoother than in the past. The anticipated amendment of the Act to allow the enforcement of interim measures, will enhance the attractiveness of emergency measures with the hope that such emergency measures will soon be transformed into a tribunal' s interim order and then become enforceable. With these developments, I expect that the use of emergency measures in Japan will steadily increase in the near future.

Arbitration Clauses under Revised JCAA Arbitration Rules

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Ⅰ. Introduction

On January 1, 2019, the revised Arbitration Rules of The Japan Commercial Arbitration Association (hereinafter referred to as "JCAA") came into effect. In response to the revised Arbitration Rules, revised model arbitration clauses were also published. In addition, arbitration clauses other than the model arbitration clauses were subsequently published. I had an opportunity to write an article about the arbitration clauses under the revised JCAA Arbitration Rules in the Japanese language that was published in the August 2019 issue of the JCA Journal, which is now posted on the Japanese website of JCAA. In that article, I reviewed the revised arbitration clauses mainly from the standpoint of Japanese companies and proposed other arbitration clauses that may be considered under the revised arbitration rules. I present such article here, rewritten in English, with the added focus of also reviewing such arbitration clauses from the standpoint of non-Japanese companies, with some additional new ideas.

Please note that this article does not reflect any opinion of JCAA or Oh-Ebashi LPC & Partners, and is limited to my individual observation.

Ⅱ. IBA Guidelines for International Arbitration Clauses

If there is any problem in the arbitration clause, the arbitration procedure may be terminated (Article 23, Paragraph 4, Item 2 and Article 40, Paragraph 2, Item 4 of the Arbitration Act of Japan) or the arbitration award may be set aside (Article 44, Paragraph 1, Items 2, 5, 6, and 8 of the Arbitration Act of Japan), or the arbitration award may not be recognized or enforced (Article 45, Paragraph 2, Items 2, 5, 6, 8 and 9 of the Arbitration Act of Japan) in Japan. The same may also apply in countries other than Japan (see Article 32, Paragraph (2)(c), Article 34, Paragraphs (2)(a)(i), (iii) and (iv) and (b)(ii), and Article 36, Paragraphs (1)(a)(i), (iii) and (iv) and (b)(ii) of the UNCITRAL Model Law on International Commercial Arbitration and Article V 1(a), (c), (d), (e), and 2(b) of the Convention on the Recognition and Enforcement of Foreign Arbitration Awards). In addition, if a Japanese company, the opponent of a non-Japanese company, brings an action in

Japan because the jurisdiction of the Japanese Courts is broad (Article 303, Item (i) (the place for performance of the obligation in an action on a claim for performance of a contractual obligation), Item (ii) (the location of seizable property of the defendant in an action for the payment of monies), and Item (viii) (the place where the consequences of a tort arise in an action for a tort) and Article 3-6 (Jurisdiction over a Joint Claim)), the action shall not be dismissed and the action shall continue (Article 14, Paragraph 1 of the Arbitration Act of Japan, see Article 8, Paragraph (1) of the UNCITRAL Model Law on International Commercial Arbitration). Accordingly, the parties should draft the arbitration clause with more care than any other clause.

With respect to drafting of arbitration clauses, the International Bar Association has published the IBA Guidelines for Drafting International Arbitration Clause (hereinafter referred to as the "IBA Guidelines"). The IBA Guidelines intend "to provide a succinct and accessible approach to the drafting of international arbitration clauses" and provide in Guideline 2 "The parties should select a set of arbitration rules and use the model clause recommended for these arbitration rules as a starting point." "By doing so, the parties will ensure that all the elements required to make an arbitration agreement valid, enforceable and effective are present. They will ensure that arbitration is unambiguously established as the exclusive dispute resolution method under their contract and that the correct names of the arbitral institution and rules are used (thus avoiding confusion or dilatory tactics when a dispute arises)."

Therefore, first, I will review the model arbitration clauses of JCAA, which the IBA Guidelines regard as a starting point.

Ⅲ. JCAA Model Arbitration Clauses

1. Revised Model Arbitration Clauses

The model arbitration clauses posted by JCAA on its website are as follows.

(a) Arbitration Clause for Arbitration under UNCITRAL Arbitration Rules[1)]

> All disputes, controversies or differences arising out of or in connection with this contract shall be finally settled by arbitration in accordance with the UNCITRAL Arbitration Rules supplemented by the Administrative Rules for UNCITRAL Arbitration of The Japan Commercial Arbitration Association. The place of the arbitration shall be [city and country].

(b) Arbitration Clause for Arbitration under Commercial Arbitration Rules

> All disputes, controversies or differences arising out of or in connection with this contract shall be finally settled by arbitration in accordance with the Commercial Arbitration Rules of The Japan Commercial Arbitration Association. The place of the arbitration shall be [city and country].

1) The Japanese language meaning of "The arbitration clause for arbitration under UNCITRAL Arbitration Rules and the Administrative Rules for UNCITRAL Arbitration" is posted on the Japanese website of JCAA.

(c) Arbitration Clause for Arbitration under Interactive Arbitration Rules

> All disputes, controversies or differences arising out of or in connection with this contract shall be finally settled by arbitration in accordance with the Interactive Arbitration Rules of The Japan Commercial Arbitration Association. The place of the arbitration shall be [city and country].

2. Previous Model Arbitration Clause

The model arbitration clause for arbitration under Commercial Arbitration Rules previously published by JCAA was as follows:

> All disputes, controversies or differences which may arise between the parties hereto, out of or in relation to or in connection with this Agreement shall be finally settled by arbitration in (name of city) in accordance with the Commercial Arbitration Rules of the Japan Commercial Arbitration Association.

3. Revision Points

With regard to published discussion of the revision of the model arbitration clauses, I know only the article entitled, "Regarding the Reform of JCAA Arbitration System-Introduction of the Three Arbitration Rules to Meet All Needs of Business Community" by Mr. Masato Dogauchi in the January 2019 issue of the JCA Journal. Although the article only states "The part corresponding to the designation of the place of arbitration is written as 'in (name of city)' in English. However, in order to make it clear that this part does not designate the physical place where the arbitration procedures such as hearings are to be conducted, but the place of arbitration, 'The place of the arbitration shall be (city and country) is written in English.'"

Then, comparing the revised model arbitration clause for arbitration under Commercial Arbitration Rules with the model arbitration clauses previously published, the revision points are as follows:

> All disputes, controversies or differences (a) *which may arise* (b) *between the parties hereto*, out of (c) *or in relation* to or in connection with (d) *this Agreement* shall be finally settled by arbitration in (e) (*name of city*) in accordance with the Commercial Arbitration Rules of the Japan Commercial Arbitration Association.

(a) "Which may arise" has been changed to "arising." Because it is unclear whether or not a dispute will occur or what kind of dispute will occur at the time of conclusion of the contract, it seems to me that "which may arise" is broader than "arising." But I do not think that there is any substantial change.

(b) "Between the parties hereto" has been deleted. A dispute between parties that have not entered into an agreement may arise in connection with an agreement. For example, one party to a joint venture agreement, as a shareholder of the joint venture, claims damages from a director of the joint venture dispatched from the other party on the grounds of breach of the duty of due care. Though the arbitration agreement may not always bind a person who has not signed the agreement in such case, I think that it will be more difficult for the arbitration agreement to bind a person other than the parties to the agreement if "between the parties hereto" is specified. Thus, such deletion might broaden the subjective scope of the arbitration agreement.

(c) "Or in relation to" is deleted. The IBA Guidelines state in Guideline 3 "the scope of an arbitration clause should be defined broadly to cover not only all disputes 'arising out of' the contract, but also all disputes 'in connection with' (or 'relating to') the contract. Less inclusive language invites arguments about whether a given dispute is subject to arbitration." From the viewpoint that the dispute subject to arbitration should be broadly stated, it may be better to include "or in relation to." Since the IBA Guidelines also contain "or relating to" in the parentheses after "in connection with," however, it does not seem to be problematic if "in connection with" is stated as in the revised model arbitration clause, even though "in relation to" is deleted.

(d) "This Agreement" has been changed to "this contract." This is not a substantial change. If the contract in question defines itself as "this Agreement," "this Agreement" shall be stated in the arbitration clause, and if "this contract" is stated therein on the other hand, "this contract" shall be stated in the arbitration clause. For example, in the case of a shareholder agreement that abbreviates itself as "SHA" and one of the agreements attached thereto as "contract," "this contract" in the arbitration clause may lead to the conclusion that the dispute arising from the shareholder agreement is not the subject of the arbitration agreement because "this contract" may be deemed to be referring to the agreement attached to the shareholder agreement.

(e) Not only the name of the city but also the name of the country are stated. In addition to the foregoing explanation, it is better to specify the name of the country because the place of arbitration is an important element that may determine the governing law of the arbitration agreement as well as the governing law of the arbitration procedures. The governing law of the arbitration agreement is the law applicable to the existence, validity, interpretation, subjective scope, objective scope, etc. of the arbitration agreement. There are few agreements which explicitly state the governing law of the arbitration agreement, and such governing law is not provided in JCAA's model arbitration clauses. In the absence of a provision of such governing law, it may be construed as the law of the place of arbitration, or it may be construed as the governing law of the contract containing the arbitration clause. In order to eliminate the ambiguity in this regard, it is contemplated that the governing law of

the arbitration agreement should be stated. For example, a model arbitration clause for arbitration under the HKIAC Administered Arbitration Rules is set forth as follows:

> "Any dispute, controversy, difference or claim arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted.
> The law of this arbitration clause shall be ... (Hong Kong law). *
> ..."
>
> Note:
> * Optional. This provision should be included particularly where the law of the substantive contract and the law of the seat are different. The law of the arbitration clause potentially governs matters including the formation, existence, scope, validity, legality, interpretation, termination, effects and enforceability of the arbitration clause and identities of the parties to the arbitration clause. It does not replace the law governing the substantive contract.
> ...

But negotiations on the governing law of the arbitration agreement itself may be protracted, and the failure to agree on such governing law may lead to the failure to conclude the contract itself. In addition, it is generally construed that the governing law of the arbitration agreement may be agreed upon between the parties, but this may not be the case in all countries. Therefore, I do not think that it is always necessary to provide the governing law of the arbitration agreement in the arbitration clause.

4. Arbitration Clause for Expedited Procedures

The arbitration clause for the expedited arbitration procedures was published in the June 2019 issue of the JCA Journal, which is now posted on the Japanese website of JCAA. There, it was explained "Expedited arbitration procedures are arbitral procedures which can be used to settle disputes of 50 million yen or less, in principle.[2)] A sole arbitrator shall make efforts to render an arbitral award within three months from when the arbitral tribunal is duly constituted. In general, such procedures are used in small-amount disputes, but they are also considered suitable for cases which are relatively easy to state and prove, such as disputes relating to loans for consumption of money, even in the case of large-amount disputes." And the arbitration clause for the expedited arbitration procedures is now posted on JCAA's website as follows:

2) To be precise, it seems to be less than JPY50,000,000 (Article 84.1 of the Commercial Arbitration Rules, and Article 85.1 of the Interactive Arbitration Rules).

Under the Commercial Arbitration Rules and the Interactive Arbitration Rules, expedited arbitration procedures apply in general where the amount or economic value of a claim does not exceed JPY50,000,000. If the parties prefer the expedited arbitration procedures regardless of the amount in dispute, JCAA suggests that the parties include the following clause in the contracts:

"All disputes, controversies or differences arising out of or in connection with this contract shall be finally settled by arbitration in accordance with the expedited arbitration procedures of the Commercial Arbitration Rules* of The Japan Commercial Arbitration Association. The place of the arbitration shall be [city name], [country name]."

* Note: The parties may also choose the expedited arbitration proceedings under the Interactive Arbitration Rules.

The expedited arbitration procedures were referred to as the "simplified procedures" in the Japanese language and applied when the amount of the economic value of the dispute was not more than JPY20,000,000 under the previous Commercial Arbitration Rules. Therefore, the amount of the economic value of the dispute for the expedited arbitration procedures has been greatly increased by the revision. As mentioned in Note of the publication, the expedited arbitration procedures are also provided in the Interactive Arbitration Rules. But please note that such procedures may be very speedy procedures because the arbitral tribunal shall prepare and give a written summary to the Parties on the arbitral tribunal's preliminary views under the Interactive Arbitration Rules as mentioned below, and then shall make efforts to render an arbitral award within three months as mentioned above.

5. Cross Arbitration Clause

(a) JCAA once posted the arbitration clause based on the defendant's domicile (hereinafter referred to as the "Arbitration Clause based on the Defendant's Domicile") on its website, etc., under which the claimant shall request arbitration in the country of the respondent's domicile. In arbitration, the other party of the claimant is usually called as the respondent, though the other party of the plaintiff is called the defendant in litigation. For that reason, the Arbitration Clause based on the Defendant's Domicile should have been called the Arbitration Clause based on the Respondent's Domicile. But the Code of Civil Procedure of Japan provides jurisdiction based on the defendant's domicile for fairness. Thus, it was called the Arbitration Clause based on the Defendant's Domicile in Japan.

But JCAA stopped posting the Arbitration Clause based on the Defendant's Domicile on its website, etc., because I think that an arbitral institution should advertise the model arbitration clause under its own arbitration rules.

(b) With regard to the revision of the arbitration rules, JCAA said that it "believed that it was necessary to differentiate its services and to conduct distinctive arbitration based on the recognition that JCAA was one step behind in competition with arbitral institutions in other countries," and that therefore it prepared its arbitration rules which "included rules that were not found in the arbitration rules of other organizations." Characteristic rules appear to be the Interactive Arbitration Rules, which require the arbitral tribunal to prepare and give a written summary to the Parties on the arbitral tribunal's preliminary views. The Interactive Arbitration Rules are considered to be suitable for disputes between Japanese companies and companies in civil law countries, as the German Arbitration Institution (Deutsche Institution für Schiedsgerichtsbarkeit (DIS)) specifies "Providing the parties with a preliminary non-binding assessment of factual or legal issues in the arbitration, provided all of the parties consent thereto" in Annex 3 (Measures for Increasing Procedural Efficiency) of 2018 DIS Arbitration Rules. I think that JCAA would like to increase the number of arbitration cases between Japanese companies and companies in civil law countries by introducing the Interactive Arbitration Rules.

Hong Kong and Singapore, however, increase the number of arbitration cases by serving as a third-country place of arbitration. Even if the arbitration rules of JCAA are good, especially for companies in civil law countries, it is not easy to have non-Japanese companies choose to arbitrate in Japan where the opponent Japanese company is located. I also believe that the same applies to many other arbitral institutions, since it does not seem so easy to have Japanese companies choose to arbitrate in other countries where the opponent non-Japanese company is located.

Therefore, I believe that JCAA should advertise the cross arbitration clause under which the claimant requests arbitration in the country where the respondent is located in order to increase the number of international arbitration cases. In the July 2019 issue of the JCA Journal, a cross arbitration clause was published. I wrote in the August 2019 issue of the JCA Journal "Since this is a very good attempt, I would like JCAA to post the cross arbitration clause, at least on the Japanese website of JCAA for Japanese companies." Now JCAA posts the publication of the cross arbitration clause on its Japanese website. I think that JCAA should post the cross arbitration clause on its English website, too.

(c) The cross arbitration clause also benefits Japanese companies as well as non-Japanese companies which prefer to settle disputes through settlements out of arbitration, because the cross arbitration clause is likely to restrain each party from requesting arbitration easily because it must do so in the country where the opponent is located. That is how the cross arbitration clause is likely to facilitate settlement negotiations between the parties out of arbitration. However, it is stated in the publication, "If the other party breaches the contract, arbitration will be conducted in the other party's country. Therefore, care must be taken if the other party is likely to breach the contract." Accordingly, it is necessary to examine whether or not the other party is likely to breach the contract, and what arbitral institution is located in the country of the other party and what the arbitration rules of such institution are, before agreeing on a cross arbitration clause.

(d) The published cross arbitration clause is as follows:

> All disputes, controversies or differences arising out of or in connection with this contract shall be finally settled by arbitration. If arbitral proceedings are commenced by X (foreign corporation), arbitration shall be held pursuant to the Commercial Arbitration Rules of The Japan Commercial Arbitration Association and the place of arbitration shall be (the name of the city in Japan); if arbitral proceedings are commenced by Y (Japanese corporation), arbitration shall be held pursuant to (the name of rules) of (the name of arbitral institution) and the place of arbitration shall be (the name of the city in foreign country).

(e) The former Arbitration Clause Based on the Defendant's Domicile is as follows:

> All disputes, controversies or differences which may arise between the parties hereto, out of or in relation to or in connection with this Agreement shall be finally settled by arbitration in (the name of city in Japan) pursuant to the Commercial Arbitration Rules of The Japan Commercial Arbitration Association if X (foreign corporation) requests the arbitration or in (the name of city in foreign country) pursuant to (the name of rules) of (the name of arbitral institution) if Y (Japanese corporation) requests the arbitration.

(f) In comparison, the name of the arbitration clause has changed from the Arbitration Clause Based on the Defendant's Domicile to the cross arbitration clause. As it is stated "This is an introduction to the cross arbitration clause. It is also called the Arbitration Clause Based on the Defendant's Domicile or finger pointing clause. It is an arbitration clause that stipulates that the arbitration procedures shall be conducted at the location of the other party to the arbitration (generally referred to as the respondent to the arbitration)," the Arbitration Clause Based on the Defendant's Domicile is substantially the same as the cross arbitration clause. The reason for the name change is uncertain. As mentioned above, it is precise to call the other party of the claimant as the respondent in the case of arbitration, and if so, such clause should have been called the arbitration clause based on the respondent's domicile (or location), but such clause has not often been called so. In addition, foreigners who criticize the cross arbitration clause have come to call such clause a finger point clause or cross clause. These may be the reasons for the name change.

Next, the former Arbitration Clause based on the Defendant's Domicile was written in a single sentence, but the revised cross-arbitration clause consists of two sentences, the first sentence of which only provides for settlement of disputes by arbitration, and the second sentence of which provides for the main purport of the cross arbitration clause. This may result in settlement of disputes by arbitration rather than by court because the first sentence is valid, even if the cross arbitration clause itself becomes problematic.

The other differences are as described in "3. Revision Points" above.

(g) The risk of inconsistent arbitral awards has been pointed out because the two arbitral procedures may be conducted in the same dispute. However, such risk of inconsistent arbitral awards is not expected to be substantial, since the respondent against whom arbitration is requested is usually entitled to submit a counterclaim in such arbitration conducted in the respondent's country (see Article 19 of the Commercial Arbitration Rules). If a Japanese company first requests for arbitration in the other party's country and the other party is unable to submit a counterclaim under the arbitration rules of the arbitral institution in the other party's country, the other party will request for arbitration under the Commercial Arbitration Rules of JCAA in Japan in accordance with the cross arbitration clause. Compared to arbitration in the other party's country, including not only the original claim but also the counterclaim, it would not be unfavorable to Japanese company to arbitrate the counterclaim in accordance with the Commercial Arbitration Rules of JCAA in Japan. Considering above, the cross arbitration clause may not be so good for non-Japanese companies which may not submit counterclaims under the arbitration rules of the arbitral institutions in countries where such non-Japanese companies are located.

The publication stated, "In theory, the party against whom the request for arbitration is made might not submit the counterclaim in such arbitration but request for another arbitration in the other party's country. In order to avoid such a situation, it is more desirable to also provide that if one arbitral proceedings are commenced, the party may not commence another arbitration." The publication introduces the following provisions.

> .....Once one of the parties commences arbitral proceedings in one of the above places in accordance with the rules of the respective arbitral institution, the other party shall be exclusively subject to the arbitral proceedings and shall not commence any arbitral proceedings as well as court proceedings. The time receipt of the request for arbitration by the arbitral institution determines when the arbitral proceedings are commenced.

The Commercial Arbitration Rules of JCAA limit the period for submitting a counterclaim to four weeks from the receipt of the notice of the request for arbitration (Article 19). However, according to the above provisions, Japanese companies may request new arbitration to JCAA even after such period for submitting a counterclaim has elapsed. However, it is safer for Japanese companies to finish submitting counterclaims within the above period, because of the risk that the other party will dispute this issue.

Ⅳ. Arbitration Clauses for Arbitration under Commercial Arbitration Rules and Arbitration under Interactive Arbitration Rules

1. Hearing of Opinions of Parties at Appointment of the Third Arbitrator

The Commercial Arbitration Rules "newly provides detailed procedural rules that are one step more advanced than other arbitral institutions, such as clarification of the provisions on the arbitrator's impartiality and independence, specification of disciplinary rules in the case

where the sole arbitrator or the presiding arbitrator of the arbitral tribunal uses an assistant, and prohibition of disclosing dissenting opinions by the arbitrators."[3] Then, several criticisms have been made from the perspective of differences from conventional arbitration rules or arbitration rules of other arbitration institutions. One of them is that the arbitrators appointed by the parties are prohibited from hearing opinions on the appointment of the third arbitrator separately from the parties who appoint such arbitrators (Article 28.5 of the Commercial Arbitration Rules, and Article 28.5 of the Interactive Arbitration Rules). Such provisions are not specified in the arbitration rules of main arbitral institutions. In addition, the party-appointed arbitrators in the United States tend to weigh heavily the intentions of the parties. Actually in the arbitration administered by the American Arbitration Association (hereinafter referred to as "AAA") in which I was involved, the counsel who was a U.S. attorney discussed the appointment of the third arbitrator with the party-appointed arbitrator.

It is possible to hear opinions of the appointment of the third arbitrator ex parte from the appointing party "only if all the Parties so agree in writing" (Article 28.5 of the Commercial Arbitration Rules, and Article 28.5 of the Interactive Arbitration Rules). It is not specified that all the Parties shall so agree in writing only after the commencement of the arbitral proceedings. Therefore, I believe that it is possible to provide such agreement in the arbitration clause. The provisions I propose are as follows:

> Provided, however, that the Party-appointed arbitrator may communicate ex parte with the Party who has appointed the arbitrator to discuss the appointment of the third arbitrator.

2. Disclosing Dissenting Opinions

No provisions such as Prohibition of Disclosing Dissenting Opinion (Article 63 of the Commercial Arbitration Rules, and Article 64 of the Interactive Arbitration Rules) are specified in the arbitration rules of the main arbitral institutions. Some criticize such provisions by saying that it should be allowed to disclose a dissenting opinion in the case where the award to be rendered by the other two arbitrators would obviously contain a material error, and that it would not be possible to appoint a distinguished arbitrator if it is prohibited to disclose a dissenting opinion even in such case. It is not specified in the Commercial Arbitration Rules of JCAA that disclosure of a minority dissenting opinion may be allowed by written agreement of all the parties differently from hearing opinions from the parties of the appointment of the third arbitrator ex parte from the appointing parity. However, the Arbitration Rules are, in principle, not mandatory provisions but discretionary provisions. Both the Commercial Arbitration Rules and the Interactive Arbitration Rules provide that the parties may vary any of the Rules except for Parts 3 and 4 of the Rules by their agreement, in the General

3) "Regarding the Reform of JCAA Arbitration System-Introduction of the Three Arbitration Rules to Meet All Business-Related Needs of Business Community" by Mr. Masato Dogauchi in the January 2019 issue of the JCA Journal

Provisions thereof (Article 5 of the Commercial Arbitration Rules and Article 5 of the Interactive Arbitration Rules). Therefore, I believe that it is possible to provide an agreement contrary to the prohibition of disclosing minority dissenting opinion in the arbitration clause. One example that I propose is as follows:

> Provided, however, that the arbitrator may state its dissenting or individual opinion in the arbitral award.

V. Arbitration Clause for Arbitration under UNCITRAL Arbitration Rules

Arbitration Clause for Arbitration under UNCITRAL Arbitration Rules has been prepared only in the English language. It is true that most agreements that contain Arbitration Clause for Arbitration under UNCITRAL Arbitration Rules and the Administrative Rules for UNCITRAL Arbitration of JCAA are written in English. But I think that it is better to have a Japanese version (or Japanese translation at least) of such Arbitration Clause, considering that one of the parties to arbitration thereunder is often a Japanese company. Therefore, I have prepared such Japanese translation in the above mentioned article.

The UNCITRAL Arbitration Rules themselves have been prepared by the United Nations Commission on International Trade Law (UNCITRAL), a legal body of the United Nations system. Therefore, such Rules are written in the six official languages of the United Nations: Arabic, Chinese, English, French, Russian and Spanish. Such versions are the authentic texts and the Japanese translation is just for reference only. However, considering that one of the parties to arbitration under such Rules is often a Japanese company as mentioned above, I would appreciate it if JCAA could also provide us with a Japanese translation of such Rules. For reference only, I have found unofficial Japanese translations of the UNCITRAL Arbitration Rules (as revised in 2010) and the UNCITRAL Arbitration Rules (with new Article 1, Paragraph 4, as revised in 2013) on the Internet, both of which are translated by Mr. Shoji Yazawa.

Incidentally, the UNCITRAL Arbitration Rules (with new Article 1, Paragraph 4, as revised in 2013) literally includes a new Article 1, Paragraph 4, which sets forth, "For investor-State arbitration initiated pursuant to a treaty providing for the protection of investments or investors, these Rules include the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ('Rules on Transparency'), subject to article 1 of the Rules on Transparency."

That is "the 2013 version … incorporates the UNCITRAL Rules on Transparency for Treaty-based Investor-State Arbitration."[4] JCAA does not provide us with the UNCITRAL Arbitration Rules 2013 but the UNCITRAL Arbitration Rules 2010 and Administrative Rules for UNCITRAL Arbitration 2019. But I do not think that JCAA never administers Treaty-based Investor-State Arbitration, because JCAA clarifies that it will administer arbitration under UNICTRAL Arbitration Rules 2013 by Rule 2.1 of the Administrative Rules for UNCITRAL Arbitration of

4) https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration

JCAA, "The term 'UNCITRAL Arbitration Rules' means the UNCITRAL Arbitration Rules adopted by the United Nations General Assembly in 1976, 2010 or 2013 applied to the arbitration proceedings in accordance with Rule 3" and Rule 3 thereof states, "The UNCITRAL Arbitration Rules adopted by the United Nations General Assembly in 2010 shall apply where an arbitration agreement provides for arbitration under the UNCITRAL Arbitration Rules without specifying which version (i.e., the UNCITRAL Arbitration Rules adopted in 1976, 2010 or 2013)." I understand that neither Article 1, Paragraph 4 of the UNCITRAL Arbitration Rules 2013 nor the UNCITRAL Rules on Transparency for Treaty-based Investor-State Arbitration is used in any commercial arbitration, for which JCAA model arbitration clauses should be agreed. I think that is why the UNCITRAL Arbitration Rule 2013 itself is not provided by JCAA.

Differently from the UNCITRAL Arbitration Rules, the Administrative Rules for UNCITRAL Arbitration of JCAA are prepared by JCAA. Therefore, JCAA could have made both the English version and Japanese version of such Administrative Rules the authentic texts as previous Administrative and Procedural Rules for Arbitration under the UNCITRAL Arbitration Rules of JCAA. At the very least, I would be grateful if JCAA could provide us with Japanese translation of such Administrative Rules. On November 16, 2018, the Japanese version of the "Comparison between the Existing Administrative and Procedural Rules for Arbitration under the UNCITRAL Arbitration Rules and New Administrative Rules for UNCITRAL Arbitration" was published, but the English version of the Administrative Rules for UNCITRAL Arbitration of JCAA was amended slightly thereafter, so unfortunately such Japanese version does not completely conform with the current effective Administrative Rules for UNCITRAL Arbitration of JCAA.

Ⅵ. Arbitrator's Remuneration

1. Commercial Arbitration Rules

(a) Under the Commercial Arbitration Rules, the "hourly rate of an arbitrator shall be JPY50,000" (Article 93.2), "the hourly rate shall be reduced by 10% for every 50 hours in excess of the initial 150 hours" (Article 95), the upper limit of the arbitrator's remuneration is set on the basis of the amount or economic value of the claim (Article 94), and the "remunerations shall not be paid … if an arbitrator ceases to perform his or her duty because of … resignation" (Article 96, Paragraph.1(2)). Some people express concern that the parties cannot appoint "globally recognized and reputable arbitrators" in arbitration under the Commercial Arbitration Rules because of this. The foregoing provisions, however, "may be changed only if all the Parties so agree in writing before constitution of the arbitral tribunal" (Article 97.1). Therefore, I believe that the parties may stipulate such agreement in the arbitration clause even before commencement of the arbitral proceedings.

(b) With respect to such reduction of the hourly rate, such upper limit and such non-payment, etc., I propose the following arbitration clause which excludes the application of the relevant provisions.

> All disputes, controversies or differences arising out of or in connection with this contract shall be finally settled by arbitration in accordance with the Commercial Arbitration Rules (the "Rules") of The Japan Commercial Arbitration Association. The place of the arbitration shall be [city and country]. Provided, however, that neither Article 94 Upper Limit of Arbitrator's Remuneration, Article 95 Reduction of Hourly Rate nor Article 96 Reduction or Non-payment of Arbitrator's Remuneration of the Rules shall apply.

(c) On the other hand, even if it is specified in the arbitration clause that the provision regarding the hourly rate of the Commercial Arbitration Rules shall not apply, there remains an issue of how to determine the hourly rate. It is difficult to specifically determine the hourly rate at the stage of drafting the arbitration clause. Here, it is contemplated that the arbitration clause stipulates that the parties shall agree on the hourly rate of the arbitrator(s) at the stage of the appointment of the arbitrator(s). However, it is anticipated that the parties cannot agree at the stage of the appointment of the arbitrator. For example, the parties cannot agree on the hourly rate of the arbitrators because one party does not agree in order to prevent the other party from appointing an arbitrator who the other party desires. It is also contemplated that the arbitration clause stipulates that the party to appoint an arbitrator and the arbitrator to be appointed by the party may agree on the hourly rate of such arbitrator, there is a risk that the hourly rate of the arbitrator to be appointed by the other party is likely to be very large and be incurred (see Article 80 of the Commercial Arbitration Rules). As will be mentioned below, it may be an option to apply Administrative Rules for UNCITRAL Arbitration or only Rule 20 Hourly Rate Charge Basis of such Rules. But there is an issue whether or not only such Rule 20 of the Administrative Rules for UNCITRAL Arbitration may be applied if the Commercial Arbitration Rules of JCAA, including especially Part 3 Arbitrator's Remuneration, apply, because the Commercial Arbitration Rules of JCAA do not allow the Parties to vary Part 3 or Part 4 thereof (Article 5).

(d) Because Part 3 Arbitrator's Remuneration of the Interactive Arbitration Rules provides the contingency remuneration of the arbitrators based on the amount or economic value of the claim, the parties may wish to choose the arbitrator's remuneration based thereon, even though arbitral proceedings are conducted under the Commercial Arbitration Rules. But as mentioned above, the parties may not vary Part 3 the Arbitrator's Remuneration of the Commercial Arbitration Rules. Then, it may be contemplated to choose the Interactive Arbitration Rules but change Part 1 Arbitration Procedures and Part 2 Expedited Arbitration Procedures thereof into Part 1 and Part 2 of the Commercial Arbitration Rules as follows:

> All disputes, controversies or differences arising out of or in connection with this contract shall be finally settled by arbitration in accordance with the Interactive Arbitration Rules (the "Rules") of The Japan Commercial Arbitration Association ("JCAA"). The place of the arbitration shall be [city and country]. Provided, however, that Part 1 Arbitration

Procedures and Part 2 Expedited Arbitration Procedures of the Rules shall not apply but that Part 1 Arbitration Procedures and Part 2 Expedited Arbitration Procedures of the Commercial Arbitration Rules of JCAA shall apply.

On the contrary, if the parties would like arbitral proceedings to be conducted in accordance with the Interactive Arbitration Rules, which require the arbitral tribunal to prepare and give a written summary to the Parties on the arbitral tribunal's preliminary views as mentioned above, but the arbitrator's remuneration should be decided based on such hourly rate as the Commercial Arbitration Rules, I provide a sample arbitration clause as follows:

All disputes, controversies or differences arising out of or in connection with this contract shall be finally settled by arbitration in accordance with the Commercial Arbitration Rules (the "Rules") of The Japan Commercial Arbitration Association ("JCAA"). The place of the arbitration shall be [city and country]. Provided, however, that Part 1 Arbitration Procedures and Part 2 Expedited Arbitration Procedures of the Rules shall not apply but that Part 1 Arbitration Procedures and Part 2 Expedited Arbitration Procedures of the Interactive Arbitration Rules of JCAA shall apply.

2. Arbitrator's Remuneration based on the Administrative Rules for UNCITRAL Arbitration in Arbitration under the Commercial Arbitration Rules

Rule 20.2 of the Administrative Rules for UNCITRAL Arbitration sets forth "The JCAA shall determine an hourly rate within the range of USD500 to USD1,500 for each arbitrator taking into account the arbitrator's experience, the complexity of the case and related matters" and in such Rules there are no provisions which may reduce the hourly rate or set forth the upper limit of the arbitrator's remuneration. Although JCAA may reduce the arbitrator's remuneration "if the arbitrator ceases to perform his or her duties due to his or her resignation or other reasons" (Rule 21.1 of the Administrative Rules for UNCITRAL Arbitration), "JCAA shall consult with the Committee for Reviewing Arbitrator's Remuneration and take into account the Committee's proposal" in such case (Rule 21.2 thereof). In addition, I do not think that JCAA may choose non-payment because JCAA differentiates non-payment from reduction in Article 96 of the Commercial Arbitration Rules and Article 96 of the Interactive Arbitration Rules, though JCAA would have chosen non-payment if JCAA reduced the arbitrator's remuneration to zero. Therefore, it is feasible to appoint a "globally recognized and reputable arbitrators" in arbitration under the UNCITRAL Arbitration Rules supplemented by the Administrative Rules for UNCITRAL Arbitration of The Japan Commercial Arbitration Association. Then, it is considered that the arbitral proceedings themselves are conducted under the Commercial Arbitration Rules (or, if you like, the Interactive Arbitration Rules) with the Administrative Rules for UNCITRAL Arbitration applied to the arbitrator's remuneration.

In Part 1 Administrative Rules for UNCITRAL Arbitration of the Administrative Rules for UNCITRAL Arbitration, the following provisions are stipulated.

The "'Rules' provide for the procedures and other necessary matters integrated into and supplemental to the UNCITRAL Arbitration Rules …where the Parties have agreed to resolve their dispute by arbitration under the UNCITRAL Arbitration Rules" (Rule 1);

"The JCAA shall, in either of the following cases, provide administrative services for arbitration under the UNCITRAL Arbitration Rules in accordance with Rules 5 through 17 below: (a) Where the Parties have agreed in advance to have the JCAA provide administrative services for arbitration under the UNCITRAL Arbitration Rules; or (b) Where the Parties agree in writing to arbitration conducted under the Rules and notify the JCAA of such agreement (i) after the claimant has requested arbitration under the Commercial Arbitration Rules or the Interactive Arbitration Rules but (ii) before the confirmation or appointment of any arbitrator by the JCAA" (Rule 4.1); and in addition, "Part 2 and Part 3 of the Rules shall apply as the integral part of Part 1 of the Rules" (Article 5).

However, the Administrative Rules for UNCITRAL Arbitration provide in their General Provisions that the parties may vary any of such Rules except for Parts 2 and 3 thereof by the parties' agreement (Rule 6). Though it is somewhat unclear whether or not the Administrative Rules for UNCITRAL Arbitration approve varying Rules 1, 4.1 and 5 above mentioned, but assuming that it approves thereof, I propose the following provisions.

> All disputes, controversies or differences arising out of or in connection with this contract shall be finally settled by arbitration in accordance with the UNCITRAL Arbitration Rules (the "Rules") supplemented by the Administrative Rules for UNCITRAL Arbitration (the "Administrative Rules") of The Japan Commercial Arbitration Association ("JCAA"). The place of the arbitration shall be [city and country]. Provided, however, that Part 1 Arbitration Procedures and Part 2 Expedited Arbitration Procedures of the Commercial Arbitration Rules* of JCAA shall apply and prevail the Rules and Part 1 Administrative Rules for UNCITRAL Arbitration of the Administrative Rules.
>
> * Note: I believe that the parties may also choose the Interactive Arbitration Rules.

If the UNCITRAL Arbitration Rules and Part 1 Administrative Rules for UNCITRAL Arbitration of the Administrative Rules for UNCITRAL Arbitration are completely excluded, Part 2 Arbitrator's Remuneration and Part 3 Administrative Fee of the Administrative Rules for UNCITRAL Arbitration may not be applied. Therefore, I specify that Part 1 and Part 2 of the Commercial Arbitration Rules should take precedence only.

3. Arbitrator's Remuneration based on the Commercial Arbitration Rules in Arbitration under UNCITRAL Arbitration Rules

Non-Japanese companies may prefer arbitration under the UNCITRAL Arbitration Rules to arbitration under the Commercial Arbitration Rules or the Interactive Arbitration Rules of JCAA, even in small-amount disputes. But in such small-amount disputes, the parties may wish to limit the arbitrator's remuneration. Then, I propose the following arbitration clause

where the arbitral proceedings shall be conducted in accordance with the UNCITRAL Arbitration Rules but the arbitrator's remuneration shall be decided under the provisions of Part 3 of the Commercial Arbitration Rules (or, if you like, Part 3 of the Interactive Arbitration Rules, which provides the contingency remuneration based on the amount or economic value of the claim as mentioned above).

> All disputes, controversies or differences arising out of or in connection with this contract shall be finally settled by arbitration in accordance with the Commercial Arbitration Rules* (the "Rules") of The Japan Commercial Arbitration Association ("JCAA"). The place of the arbitration shall be [city and country]. Provided, however, that Part 1 Arbitration Procedures and Part 2 Expedited Arbitration Procedures of the Rules shall not apply but that the UNCITRAL Arbitration Rules supplemented by Part 1 Administrative Rules for UNCITRAL Arbitration of the Administrative Rules for UNCITRAL Arbitration of JCAA shall apply.
>
> * Note: I believe that the parties may also choose the Interactive Arbitration Rules.

Here, I exclude Part 1 and Part 2 of the Commercial Arbitration Rules (or Part 1 and Part 2 of the Interactive Arbitration Rules) because I believe that there are no provisions which forbid such exclusion.

Ⅶ. Japan-American Trade Arbitration Agreement

JCAA published one model arbitration clause under the Japan-American Trade Arbitration Agreement dated as of September 16, 1952 between JCAA and AAA as follows:

> All disputes, controversies, or differences which may arise between the parties, out of or in relation to or in connection with this contract, or the breach thereof, shall be finally settled by arbitration pursuant to the Japan-American Trade Arbitration Agreement, of September 16, 1952, by which each party hereto is bound.

According to such publication, if arbitration proceedings are conducted in Japan under the Japan-American Trade Arbitration Agreement, JCAA's rules shall apply. I believe that the Commercial Arbitration Rules shall apply in such case because there were no other rules than the Commercial Arbitration Rules in 1952 and because Article 3 of the Commercial Arbitration provides "The Rules shall also apply where an arbitration agreement provides for JCAA arbitration without specifying the Rules, the Interactive Arbitration Rules or the UNCITRAL Arbitration Rules." I believe, however, that the parties may choose the Interactive Arbitration Rules or the UNCITRAL Arbitration Rules even under the Japan-American Trade Arbitration Agreement. On the other hand, AAA has many arbitration rules such as the International Arbitration Rules and the Commercial Arbitration Rules. Article 1(1) of the International

Arbitration Rules of AAA provides "Where parties … have provided for arbitration of an international dispute by the International Centre for Dispute Resolution (ICDR) or the American Arbitration Association (AAA) without designating particular rules, the arbitration shall take place in accordance with these Rules ... " and Section R-1(a) of the Commercial Arbitration Rules of AAA specifies "The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter AAA) under its Commercial Arbitration Rules or for arbitration by the AAA of a domestic commercial dispute without specifying particular rules." Therefore, I believe that the International Arbitration Rules of AAA shall apply if arbitration proceedings are conducted in the USA under the Japan-American Trade Arbitration Agreement. But I think that the parties may choose the rules of AAA, too. Thus, I propose the following sample arbitration clause.

All disputes, controversies, or differences which may arise between the parties, out of or in relation to or in connection with this contract, or the breach thereof, shall be finally settled by arbitration pursuant to the Japan-American Trade Arbitration Agreement, of September 16, 1952, by which each party hereto is bound. If the arbitration is to be held in Japan, it shall be conducted in accordance with the Commercial Arbitration Rules* of the Japan Commercial Arbitration Association. If the arbitration is to be held in the United States of America, it shall be conducted in accordance with the International Arbitration Rules of the International Centre for Dispute Resolution** of the American Arbitration Association.

* Note: I believe that the parties may also choose the Interactive Arbitration Rules or the UNCITRAL Arbitration Rules supplemented by the Administrative Rules for UNCITRAL Arbitration.

** Note: I believe that the parties may also choose the Commercial Arbitration Rules, etc. of the American Arbitration Association.

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The New JCAA Mediation Rules and Japan's Future in International Mediation

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Ⅰ. Introduction

As part of Japan' s recent efforts to strengthen its position in the international dispute resolution market, the Japan Commercial Arbitration Association—Japan' s leading ADR institution—has fully revamped and adopted the JCAA New Commercial Mediation Rules (the "Rules") with the aim of making its mediation services more attractive and accessible to foreign and domestic corporate users in the international disputes arena.

As a practicing international arbitrator and mediator residing in Japan, I would like to comment on the key, distinct features and practical implications of the Rules, which took effect on February 1, 2020. I should note that I was also a member of the Committee for the Amendment and Establishment of JCAA Mediation Rules and advised the JCAA during the drafting process of these Rules.

Whereas the JCAA previously administered separate sets of mediation rules for domestic and international mediation procedures, they have combined these into one set of rules to facilitate the Rules' promotion.

The Rules are being adopted at an auspicious time in which Japan is witnessing the adoption of major international ADR initiatives aimed at increasing the use of international mediation and arbitration, including the inauguration of the Japan International Mediation Center in Kyoto (JIMC-Kyoto) in 2018, and the opening of the state-of-the-art arbitration/mediation facilities of Japan International Dispute Resolution Center (JIDRC) in Tokyo in 2020, following the inaugural Osaka facilities established in 2018.

With their distinct features and emphasis on practicality and transparency, the Rules are expected to contribute to the increased use of international mediation in Japan

Ⅱ. Key Features of the Revised Commercial Mediation Rules

The key features of the Rules are based on respect for party autonomy and flexibility regarding the mediation proceedings, and include the JCAA' s active assistance in the selection

of mediator candidates, enhanced independence disclosure, provisions contemplating multiple mediators, default rules for mediation proceedings, adoption of a Japanese version "without prejudice" rule, provisions adopted to the United Nations Convention on International Settlement Agreements Resulting from Mediation ("Singapore Convention"), and default provisions for mediator remuneration.

Details of these key provisions are outlined below.

1. JCAA Mediator Candidate List and Mediator Selection

Finding an appropriate and competent mediator for a case frequently dictates the success of the mediation, and mediation centers across the world are enhancing their mediator recommendation services to assist parties in selecting skilled mediator candidates suitable to the nature of the dispute.

Toward this end, the JCAA has recalibrated its mediator database which now includes over 200 mediator candidate profiles, which are available to the public on its website (https://www.jcaa.or.jp/en/mediation/candidate.php?mode=view). The data includes the candidates' nationality, location, language capabilities and links to additional available information.

Separately, the JCAA can also provide a tailor-made recommendation list of mediator candidates to the parties upon request (Art. 8), which list may contain one to five candidates based on the dispute' s case profile and desired attributes. The JCAA is also actively recruiting former judges to be included in the database who would be skilled in handling domestic legal cases. Owing to the long tradition of judicial mediation practiced by judges in the Japanese courts, many Japanese judges are experienced in evaluative mediation—a process familiar to Japanese counsel—and their involvement as mediators may assist in the resolution of Japanese-law governed domestic cases.

Further, the parties may request the JCAA to appoint their mediator for them directly. In this case, to enable the appointment of a mediator who matches the parties' desires, the Rules proscribe the following procedures: (i) first, the JCAA sends a list of mediator candidates to the parties; (ii) second, each party informs the JCAA of the name(s) of any unacceptable candidates and their order of preference of acceptable candidates; (iii) third, the JCAA appoints a mediator taking into account the order of preference expressed by the Parties and any other relevant circumstances (Art.17.5 & 17.6).

JCAA' s proactive involvement in the mediator selection process is expected to assist parties in identifying appropriate mediator candidates, including for cases involving specific legal areas.

2. Independence/Impartiality Disclosure

A rather unique feature among the Rules is the inclusion of a detailed provision concerning mediator independence, which mirrors the comparable requirements of JCAA' s new arbitration rules adopted in 2019 (See Art. 24 of the JCAA Commercial Arbitration Rules (2019)).

In addition to the typical provision requiring the independence and impartiality of the

mediator (Art 15.1), the Rules also require the mediator to "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 to disclose such circumstances when seeking to accept an appointment (Art. 15.2). The Rules further impose an ongoing duty to conduct such investigation and provide disclosure during the course of the mediation (Art. 15.4).[1)]

To require this level of propriety for mediators may strike observers as somewhat excessive given that mediation proceedings are not subject to the same procedural protocols as arbitration proceedings in which an award resulting from a faulty proceeding could be set aside. Nonetheless, parties who engage in mediation may appreciate the additional assurance of neutrality of their mediator, which could bolster the reliability of the mediation process thereby contributing to the Rules' increased usage.

Needless to say, these requirements would not prohibit parties from appointing a mediator who in fact lacks "neutrality" where circumstances require, such as when the parties desire to engage their respective general counsel to jointly mediate a dispute which has arisen between them.

3. Multiple Mediators

Notably, the Rules provide procedures for appointing two mediators: one by the applicant and the other by the respondent (Art. 17.2). In practice, a dual mediator setup can be productive, for instance in cases where a deep mistrust exists between the parties who desire to have a mediator that each of them has selected unilaterally. A settlement proposal agreed by both party-appointed mediators may be more readily accepted by the parties thereby facilitating early resolution. (While in an abundance of foresight, the Rules further provide for the possible appointment of three mediators, circumstances requiring such a multitude of mediators are rather hard to fathom!)

4. Conduct of Mediation Proceedings

Sensibly, the Rules spell out the procedures for commencement of the mediation proceedings in cases where the parties have an existing negotiated mediation agreement (Art. 12) and where no prior mediation agreement exists (Art. 13).

At the commencement of the mediation proceedings, the Rules require the mediator to discuss the prospective proceedings with the parties, including the language of communication, exchange of written statements and documents, duration of proceedings and whether the mediator is to proactively offer a proposal for settlement (Art.21.2). The Rules also confirm that the parties are free to agree to such procedural matters and that such agreement shall be binding upon the mediator.

1) These disclosure requirements were added to the arbitration rules 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

While experienced parties would be aware of the typical conduct of mediation proceedings, spelling them out explicitly provides welcome visibility to inexperienced parties regarding the expected mediation process. Of particular importance is whether the mediator will offer a proposal for settlement—which translates into whether a facilitative or evaluative approach is to be taken in the proceedings.

As above noted, Japan has a long-standing tradition of evaluative mediation developed in the practice of judicial settlement by judges in the Japanese court system. While each judge differs in their approach to these proceedings, most typically the judge would assume an evaluative approach. The judge' s views are generally well respected by the parties owing to the judge' s expertise and, of course, the judge' s non-negligible "clout" to render a formal judgement if the parties fail to reach agreement.

Although Japanese practitioners are familiar with the evaluative approach, it is well known that a facilitative, interest-based approach is gaining prevalence in global mediation practice. It is therefore important to align the parties' expectations regarding which type of approach would be taken in order to enable an effective proceeding.

While there are pros and cons to both approaches, personally I believe the increased use of a facilitative approach would be valuable in assisting parties to think outside the box of the immediate dispute at hand, and arrive at a settlement that is most in tune with their true interests through an analysis encouraged through a facilitative process.

5. Admissibility of Evidence in Other Proceedings

A key addition to the revised Rules—which is not widely found in Japanese civil procedures—is a "without prejudice" provision. This provision prohibits the parties from using as evidence in any future judicial proceedings oral or written statements made in an attempt to settle the dispute in the mediation proceedings, including the proposal to conduct the mediation, admissions as to specific matters, proposals for settlement, and views expressed in respect thereof (Art. 24.2).

The Rules provide specific carveouts for the permitted use of such statements (e.g., in disputes regarding the validity of the settlement agreement itself) (Art. 24.3 to 24.5). These provisions are generally modelled after the UNCITRAL Mediation Rules (Art. 7) and are a distinct aspect of the new Rules.

Because the Japanese Civil Procedure Law does not contain a "without prejudice rule" found under common law, these provisions seek to replicate the substance of this rule by incorporating it into the parties' mediation agreement. The intended objective is to allow the parties to candidly discuss their settlement proposal without fear of their statements being used against them if a settlement is not achieved.

Given the paucity of legal precedents in this area in Japanese jurisprudence, there may be limitations in the extent to which these rules would be honored in subsequent judicial proceedings.

6. Arbitral Award Based on Settlement and the Singapore Convention

The new Rules address the issue of enforcement of mediated settlement agreements in two ways.

First, to meet the needs of parties who desire legal enforceability of their settlement agreement, the Rules allow the parties to appoint their mediator as arbitrator and have the arbitrator record the settlement in the form of an arbitral award (Art. 27).

It is rather unusual for parties to require such enforceability after they have gained enough mutual trust to reach a settlement, but enforceability may be desirable, for instance, if the settlement requires only one of the parties to make a recurring payment over an extended period of time.

Whether such form of award—generally referred to as a "consent award" or an "award on agreed terms" —is enforceable under the New York Convention may be subject to question. Possible issues may include whether the "consent award" qualifies as an "award," and whether the requirement of having a "valid arbitration agreement" is met if the arbitration agreement is concluded *after* a settlement has been reached. But despite these possible limitations, it is helpful to have an enabling provision for parties who desire such additional assurance.

Second, Japan is yet to become a signatory of the Singapore Convention on Mediation, adopted in 2018 and signed by 53 states, which enables the direct enforcement among its signatories of a mediated settlement agreement.

But to assist the parties in meeting the Convention' s requirement to show that the settlement agreement resulted from mediation, the Rules allow the parties to request that the mediator sign the settlement agreement as a witness and for the JCAA to attest that the mediation agreement resulted from mediation proceedings administered by the JCAA (Art. 26.2, 26.3).

Because the Singapore Convention does not require the settlement agreement to be entered into in a signatory state to be eligible for enforcement, holding the mediation proceedings in Japan would not hinder enforceability of a resulting settlement agreement in a signatory state. Nonetheless, it is hoped that Japan will eventually become a signatory to the Singapore Convention to increase the nation' s appeal as an international ADR center.

7. Mediator Remuneration

The new Rules provide a standard remuneration scheme for mediator remuneration: an hourly rate of JPY 50,000, with a 50% discount for mediator travel time (Art. 30.1). The Rules also allow the parties to agree to a separate remuneration scheme, indicating a "fixed-fee" and "success fee" -based schemes as examples (Art. 30.2).

Many professional mediators have their own established fee schedule, but providing a standard rate provides visibility of the possible fees and could facilitate the parties' decision to use mediation. The standard rate itself is reasonable and competitive with other mediation institutions in the Asia region. I have personally found that having a success fee component —for instance by retroactively applying an increased hourly rate in the event a settlement is reached—can be effective in aligning the parties and mediator' s interests. Indicating a

"success fee" scheme as an example in the Rules could encourage parties to propose such arrangement to the mediator to their mutual benefit.

8. Closing Remarks

The new JCAA Mediation Rules provide a practical, streamlined set of rules that effectively support the resolution of international disputes. The Rules along with the JCAA' s avid promotion of their use is hoped to increase the use of mediation to resolve international disputes in an expedited and mutually beneficial manner. As an advocate of mediation myself, I hope that the Rules will be a useful addition to the international business community's arsenal of peaceable means of dispute resolution.

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International Arbitration in Japanese Bankruptcy Cases

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Ⅰ. Introduction

1. Conflict between Bankruptcy Law and Arbitration Law

The Bankruptcy Law is a system in which collective resolution is made based on a majority decision and proportional payment (pro-rata) is made to creditors based on the amount of their claims from debtor' s estates, which cannot satisfy all creditors' claims. Arbitration law is a system based on individual consent between the parties. Therefore, it has been said that there is a gap between dispute resolution in a collective nature, which is the essential nature of bankruptcy law, and dispute resolution based on individual consent, which is the inherent nature of arbitration, and the two have not intersected until recent years.

2. Transformation in Insolvency Law - International Insolvency

In insolvency law, especially in international insolvency, we gradually realize the inefficiency of conducting collective resolution rendered by national courts. In the case of the insolvency of a multinational company group, the affiliated companies are located in multiple countries and as a result, the insolvency proceedings occur in multiple countries. This means that each insolvency court would independently decide how to deal with the common assets of the group companies and how to restructure them. This is not efficient for the rehabilitation of the group companies and /or maximizing the group's assets by selling the common assets as a whole and allocating them among the affiliates of the group. Further, if each insolvency court in each country were to implement this mission separately, there could be differences among the courts as to the allocation. Therefore it would be more efficient to resolve disputes based on a unified arbitral award. We gradually recognize the usefulness of using arbitral proceedings in the field of bankruptcy as well.

From this perspective, we will examine how arbitration proceedings can be used in Japanese bankruptcy cases.

Ⅱ. Characteristics of insolvency Laws in Japan

In general, there are four main types of bankruptcy procedures available under Japanese legislation: Bankruptcy under the Bankruptcy Act, Civil Rehabilitation under the Civil Rehabilitation Act, Corporate Reorganization under the Corporate Reorganization Act, and Special Liquidation under the Companies Act. Bankruptcy and Special Liquidation are procedures for liquidation and are designed to distribute debtor' s estate to creditors pro-rata, based on the dissolution of its business. Conversely, the procedures under the Civil Rehabilitation Act and the Corporate Reorganization Act are laws for business rehabilitation. But there are significant differences between these two procedures despite sharing the aim of business rehabilitation. Civil Rehabilitation is mainly a Debtor In Possession (DIP) -type procedure in which the existing management of the debtor stay in office to restructure the company[1)] , similar to Chapter 11 proceedings under the United States Bankruptcy Code. In the case of Corporate Reorganization, the bankruptcy court appoints a trustee to manage and control the company's assets, prepare a reorganization plan, and pursue the task of reorganizing the company. Another major difference between the two types of procedures is that only unsecured creditors are bound under the Civil Rehabilitation proceedings whereas both secured and unsecured creditors are bound under the Corporate Reorganization proceedings.

Concerning the requirements for filing for insolvency proceedings, for example, in Bankruptcy proceedings, if a company is in deficit (i.e., its liabilities exceed its assets) or insolvent (i.e., it is unable to pay its debts as they become due), the court will declare an order of commencement of the case and the company will enter into insolvency proceedings.[2)] The trustee appointed by the bankruptcy court has the obligation to terminate the debtor's business, sell the assets and collect the accounts receivable in order to maximize the debtor' s estate. Also, the trustee will investigate the existence and amount of claims filed by creditors,[3)] and make pro-rata payments from the debtor' s estate after the trustee completes such investigations. In the process, the trustee is granted special powers, such as avoidance powers under which unfair or preferential transactions implemented immediately before bankruptcy, such as partiality to creditors, could be denied and the property of the transaction could be returned to the debtor' s estate.[4)]

Ⅲ. Commencement of Insolvency Proceedings in Japan and Types of Involvement of Arbitration

1. In the past, the use of arbitration in insolvency proceedings in Japan was extremely rare and there were few precedents. However, with the enactment of the Act on Recognition and

1) See Article 38 (1)of the Civil Rehabilitation Act.
2) See Article 15,16 of the Bankruptcy Act.
3) See Article 117 of the Bankruptcy Act.
4) See Article 160 of the Bankruptcy Act.

Assistance of Foreign Insolvency Proceedings and the Civil Rehabilitation Act in 2000, and the revision of the Bankruptcy Act and the Corporate Reorganization Act in 2004, Japan has adopted the UNCITRAL Insolvency Model Law (“Model Law”) throughout its insolvency legal system. In this trend, Japan also shifted from the past territorialism to universalism (although with some limitations). Further, many international insolvency cases such as the Lehman case have come to involve the debtor’ s Japanese subsidiaries (group companies) and their creditors. Thus, Japanese practitioners and scholars specializing in insolvency have become interested in the efficiency of insolvency cases and the maximization of debtor estates through cooperation with other affiliates located in various countries in international insolvency cases of group companies. How to utilize the arbitration system in relation to insolvency cases has become an important issue in Japan.

2. Insolvency proceedings are commenced by an order of commencement of insolvency proceedings issued by the court. The intersection of arbitration proceedings with insolvency proceedings can be examined from four different aspects depending on the stage of the arbitration proceedings at the time the insolvency proceedings have commenced: (1) where an arbitral award has already been made prior to the commencement of insolvency proceedings; (2) where insolvency proceedings are commenced after arbitration proceedings are already in progress; (3) where an arbitration agreement has been reached between the parties before insolvency proceedings are commenced and there is an issue as to whether new arbitration proceedings can be initiated or not on the basis of the former arbitration agreement; and (4) where an arbitration agreement is established after the commencement of insolvency proceedings and there is an issue as to whether new arbitration proceedings can be initiated or not.

In this article, I would like to examine the cases described in items (1) to (3) in the foregoing where the arbitration agreement is made before the order of commencement of Bankruptcy proceedings under the Bankruptcy Act, which is the most widely used procedure for Japanese insolvencies among the insolvency procedures available under Japanese law.

Ⅳ. Cases in which an arbitral award has already been made before the order of commencement of bankruptcy

1. Enforcement of arbitral awards

In Japan, arbitration applies to civil disputes that can be settled between the parties.[5] If an arbitral award has been made for the civil dispute, and then one of the parties has been ordered to commence bankruptcy proceedings by the bankruptcy court, we can examine if one party can enforce the arbitral award against the adverse party.

5) Article 13(1) of the Arbitration Act provides that except as otherwise provided for in laws and regulations, an Arbitration Agreement shall be effective only when the subject thereof is a civil dispute (excluding disputes of divorce or dissolution of adoptive relation) which can be settled between the parties.).

(a) When a trustee enforces an arbitral award

When a court decides to commence bankruptcy proceedings, a trustee is appointed by the bankruptcy court at that time.[6] In Japan, experienced lawyers are appointed as trustees in bankruptcy. This trustee has the right to manage and dispose of the debtor' s estate and can collect claims belonging to the debtor' s estate.[7] Based on the arbitral award, the trustee has the right and obligation to execute the claim against the other party. The proceeds should be moved to the debtor' s estates.

(b) When a creditor executes the process based on an arbitral award

What about such cases as where a creditor executes the award when the adverse party (the debtor) to the arbitration fails to perform its obligation voluntarily? Before the adverse party enters into insolvency proceedings, individual enforcement of the arbitral award may be carried out in accordance with the arbitration laws of each country, the New York Convention (1958), the ICSID Convention(1966), or bilateral treaties.

However, once an order is issued to commence bankruptcy proceedings against the adverse party (the debtor), repayment should be conducted under the Claims Determination Procedure.[8] Under the Japanese Bankruptcy Act, i) a creditor files a proof of claims to the court, and then ii) the trustee would investigate the existence and amount of the filed claim, as well as the priority and subordination of the claim, and iii) the trustee would decide whether or not to approve or reject the claim. If the bankruptcy trustee recognizes the claim as a result of the investigation and the other filed creditors do not raise any objection, the claim is confirmed as a bankruptcy claim. Therefore, in practice, if a creditor does not file a proof of claim based on the arbitration decision at the court, he or she will not be able to receive anything in the distribution under the Bankruptcy Act.

2. Whether or not the arbitral award is a claim with Enforceable Title of Obligation etc.

Among the claims recognized, those with enforceable titles of obligation or final judgments are called "named claims", and the fact that claims which obtained the enforceable title of obligation before the commencement of bankruptcy proceedings are respected, and burden of proof regarding the existence or non-existence of claims, the amount of claims, and the priority or subordination of claims is shifted.[9] The Bankruptcy Act does not prescribe or specify the word "arbitral award" but includes the final judgment as to the "named claim." Therefore, it has been debated whether an arbitral award can become a named claim and the burden of proof can be shifted to the creditor. There is no case law in Japan. The majority opinion is that

6) See Article 31(1) of the Bankruptcy Act.

7) Article 78(1) of the Bankruptcy Act provides that where an order of commencement of bankruptcy proceedings is made, the right to administer and dispose of property that belongs to the bankruptcy estate shall be vested exclusively in a bankruptcy trustee appointed by the court.

8) See Article 111(1) of the Bankruptcy Act.

9) See Article 129(1) of the Bankruptcy Act. Makoto Ito et al., *Jokai Hasanho(2nd Edition)*, 2014, p.908, Katsumi Yamamoto et al., *Shin-Kihonho Comental*, 2014, 289).

an arbitral award becomes a named claim in the same way as a final judgment.[10)]

I agree with the majority opinion. The purpose of shifting the burden of proof is that it not only respects the status of the claim that can be immediately enforced but also the probability of the existence of the right.[11)] Also, the form of an arbitral award has been recognized as the same effect as a final and binding judgment under the Arbitration Act.[12)]

3. How to deal with cases where assets are located outside Japan

Under the Japanese Bankruptcy Act, based on the principle of universality mentioned above, assets outside Japan constitute the debtor' s estate,[13)] and the trustee is granted the right to manage and dispose of such assets. Therefore, if a debtor's assets exist outside Japan at the commencement of the bankruptcy case, they should not be disposed of without the permission of the trustee. However, in the context of international arbitration, if an arbitral award is made overseas and the adverse party would be subsequently ordered to commence bankruptcy, the creditor who wins the arbitration may realistically be able to execute on the bankrupt's overseas assets based on the New York Convention, etc.. This action may be executed in secret with the knowledge of the other party's bankruptcy, or it may be done in good faith without knowing of the bankruptcy. In cases where execution by the other party is in progress and has not yet been concluded, the trustee has the power and obligation to assert objections to the execution, such as a stay or revocation, to the foreign court that is conducting the execution.[14)] In such a case, the trustee must obtain approval from the relevant foreign court to be a representative of the foreign insolvency proceeding and undergo assistance procedures. The U.S. Bankruptcy Code, which adopted the Model Law, provides for procedures based on Chapter 15, and in Japan, based on the "Act on Recognition and Assistance of Foreign Insolvency Proceedings," which was adopted with reference to the Model Law, measures are provided for the recognition in Japan of representatives of foreign insolvency proceedings outside Japan and assistance in execution including debt collection.

In addition, if a creditor is unable to satisfy all of the claims recognized in an arbitral award by executing on assets abroad and files a proof of claim in Japan, the question arises as to how the trustee in bankruptcy will deal with the claim. In this regard, under the Japanese Bankruptcy Act, bankruptcy creditors who have received payment in a foreign country may file proofs of claim in the amount of their claims at the time of the decision to commence Bankruptcy proceedings, i.e., the amount of their claims before receiving payment from debtor's assets.[15)] However, he or she may not receive the final distribution until other bankruptcy creditors of the same rank receive the

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10) Makoto Ito, *Hasanho Minjisaiseiho (4th Edition)*, 2018,p.684

11) Junichi Matsushita, Insolvency Legal System and Arbitration(3), *JCA Journal 94/6*, 1994, p.33.

12) See Article 45(1) of the Arbitration Act. Hideo Saito et al., *Chukai Hasanho (Ge)*(Third Edition),2002,546. Professor Kazuhiko Yamamoto reports that in the discussion at the UNCITRAL General Assembly, arbitration is "substantially the same as litigation" and can be read as "procedure" even though there is no explicit text, Commentary on the UNCITRAL International Model Law (5), *NBL No. 636*, 1998, p.53.

13) See Article 34 of the Bankruptcy Act.

14) Ito, *Hasanho Minjisaiseiho*, p.267.

15) See Article 109 of the Bankruptcy Act.

same percentage of the distribution as he or she received from the overseas assets.[16] From the standpoint of fairness, this is called the "hotchpotch rule" because it helps to equate the collection of claims from overseas assets with the distribution from the debtor' s estate.

V. If an arbitration proceeding is commenced and an order to commence insolvency proceedings is made against one party, can the arbitration proceeding be continued thereafter?

1. Outcome of ordinary court proceedings in Japan

I will first explain how the court proceedings will be affected if bankruptcy proceedings are commenced against one party while court proceedings are pending between the parties. Under the Japanese Bankruptcy Act, when a decision to commence bankruptcy proceedings is made, the proceedings in which the bankrupt is one party are suspended.[17] Since the trustee is allowed to be a party to the lawsuit regarding the debtor' s estate, the trustee obtains standing to represent the debtor in filing a new lawsuit regarding the debtor' s estate after the commencement of the case.[18] The outcome of the discontinued lawsuit can be divided into two major categories.

First, if the lawsuit does not relate to bankruptcy claims, the trustee may take over the discontinued lawsuit.[19] This is the case, for example, when a bankrupt makes a claim against an account receivable. The trustee takes over the interrupted lawsuit and if the trustee wins the case, the estate will be multiplied.

Second, if the lawsuit concerns bankruptcy claims, the opposing party in bankruptcy will file a proof of claim with the court. As mentioned above, the claim determination procedures under the Bankruptcy Act provides for a simple and expeditious procedure for establishing claims. The trustee investigates the existence, amount, and priority of the filed claims, and if the filed claims are recognized, the claims are confirmed.[20] On the other hand, if the trustee does not recognize the claim, or if the bankrupt or other creditors would file an objection to the claim, a lawsuit to determine the claim would be initiated.[21] In this case, if litigation in court was ongoing prior to the commencement of Bankruptcy proceedings with respect to this claim for which the trustee does not recognize or to which the bankrupt or other creditors object, the case will be taken over.[22]

2. Dealing with cases where there is an arbitration proceeding already in progress before the commencement of bankruptcy

In such a case, how will arbitration already in progress prior to Bankruptcy be handled?

16) See Article 201(4) of the Bankruptcy Act.
17) See Article 44(1) of the Bankruptcy Act.
18) See Article 80 of the Bankruptcy Act.
19) See Articles 127 and 128 of the Act of Civil Procedure and Article 44(2) of the Bankruptcy Act.
20) See Article 118 of the Bankruptcy Act.
21) See Article 125 of the Bankruptcy Act.
22) See Article 117 of the Bankruptcy Act.

2.1 Will an arbitration agreement expire due to an order to commence the Bankruptcy case?

If the arbitration agreement expires due to the order to commence the Bankruptcy case, then the existence, amount, and nature of claims related to Bankruptcy claims will be determined by using the subsequent claim determination procedures. As for claims related to the debtor's property, the trustee will have to file a new lawsuit.

In this regard, the majority opinion is that the arbitration agreement does not expire and that the trustee is bound by the arbitration agreement entered into by the bankrupt.[23] The theory of lapse is not appropriate because it does not respect the arbitration agreement, and it excludes all other considerations without uniformly taking them into account.

2.2 Whether arbitral proceedings will be suspended or not

Arbitral tribunal should decide under the doctrine of kompetenz-kompetenz if the arbitral proceedings should be suspended or not. There is no provision under the Bankruptcy Act on whether or not arbitral proceedings are to be suspended.[24] The majority opinion suggests that it would be appropriate to read "a lawsuit" to include "arbitration" in "cases where a lawsuit is pending at the time of commencement of bankruptcy proceedings.[25] Under Article 20(1)(a), Article 21(1)(a) of the Model Law there is no mention of arbitration, but it is understood that arbitration is the same as litigation. In Hudson and others v The Gambling Commission the U.K. High Court also held that arbitration is included in legal proceedings.[26]

If arbitration proceedings would be suspended the trustee can take over the action discontinued under the same reasoning.

2.3 Whether claims can be determined by arbitration rather than by court proceedings or not

Is it possible to determine claims through arbitration rather than in court? There may be one case allowing the arbitral award to confirm the file of claims. However, it is quite old and the details are not clear.[27]

Failure to file a proof of claim will disqualify creditors from receiving a distribution in Bankruptcy proceedings. Therefore, in order to receive a distribution, a proof of claim must be

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23) Ito, *Hasanho Minjisaiseiho*, p.632, Hajime Kaneko et al., *Jokai kaisha Koseiho (chu)* 2001,p.729, Daisuke Shimaoka et al., *Bankruptcy and Litigation*, 2013, p. 484.

24) See Article 44(1) of the Bankruptcy Act.

25) Makoto Ito, "The Intersection of Bankruptcy Claims Determination Procedures, Foreign Litigation Procedures, and Arbitration Procedures," *Kinyu Houmu Jijo No. 2140*,p. 37, Aritoshi Fukunaga, *New Special contracts and Insolvency Act*, 1988, p. 217, Junichi Matsushita, Insolvency Legal System and Arbitration (2), *JCA Journal 194/5*, 1994, p. 17, Hamada-Tomimatsu, "Procedural Intersection of Domestic Insolvency and Foreign Arbitration," *NBL No. 1048*, p. 22.

26) In Hudson and others v The Gambling Commission (Re Frankice (Golders Green) Ltd [2010] EWHC 1299 (Ch) (6 May 2010).

27) Noboru Koyama, "A case in which a reorganization claim was settled by the arbitral award," *Jurist No. 1001*, 1992, p. 116.

filed at the court. The question is whether the filed claim has to be confirmed only by the court or whether the confirmation can be done through arbitration.

This became an issue in re Bresco case[28], where the opinion of the U.K. Supreme Court states that "Where there are real disputes between the company and third parties (who may be creditors or debtors) the insolvency code is inherently flexible as to the best means for their resolution. A disputed pending claim (in court proceedings or in arbitration) against the company (as at the cut-off date) may be allowed to continue by the liquidator or by the court supervising the insolvency process, as the best means of resolving the dispute," which should include arbitration in our discussion.

Professor Westbrook argues that bankruptcy courts should try to honor the arbitration agreements unless the arbitration will 1) be too slow, 2) cost too much, 3) involve something too important to the bankruptcy case, or 4) not likely to be enforceable under the NY Convention.[29]

The Japanese traditional theory that the determination of claims is in the exclusive jurisdiction of the courts has been prevailing until now. The rationale was that the determination of claims should be done by the national court, and/or that third party protection should be critical, i.e. not only the trustee but also other creditors (third party) could raise objections under this procedure.[30]

However, there is also a prevailing new theory that the determination of claims can be substituted by arbitration.[31] In my opinion, since the Act for the Promotion of the Utilization of ADR enacted in 2004 implemented the government's policy that "ADR should be expanded and encouraged for the purpose of its becoming an attractive option along with the court litigation,"[32] arbitration should be allowed in the determination of claims to the extent possible. We should consider that the intention of the parties who choose to agree to arbitration should be respected as much as possible. The validity of arbitration agreements should be honored as long as they do not impose a significant burden on the third party who objects to the claims.

2.4 A further problem is that even if arbitration can replace the claim determination procedure at the court, who decides which one to choose?

One opinion is that the court will make the decision[33] and another is that the trustee will make the decision.[34] However, even if the court would make the decision, it will ask the opinion to the trustee who knows the case much better than the court, and even if the trustee would make the decision, it will inevitably obtain the permission of the court, so the conclusion will be the same.

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28) Bresco Electrical Ltd (in liq) v Michael J Lonsdale (Electrical) Ltd [2020] UKSC 25, at paras 33 and 34.

29) Jay Westbrook, International Arbitration and Multinational Insolvency, *29 Penn St. Intl. L. Rev. 635* (2010).

30) Takashi Sonoo, "Notification of Claims and Investigation of Claims Regarding Foreign Claims," in *Investigation of Claims and Distributions by Trustees*, p. 614.

31) Ito,*The Intersection of Bankruptcy Claims*, p. 34, 37.

32) Judicial System Council Opinion, p. 35.

33) Etsuko Sugiyama, "Arbitration Agreement in Bankruptcy Proceedings," *Arbitration and ADR No. 10*, 2015, p. 10.

34) Hamada and Tominaga, *Procedural Intersection*, p.23.

2.5 Cases where arbitration proceedings were commenced in a foreign country and Bankruptcy proceedings were commenced in Japan and the arbitral award was ordered in the absence of a trustee

Even if a decision to commence Bankruptcy proceedings is issued in Japan while arbitration has been commenced, it may happen that the arbitration proceeding is continuing outside Japan without the involvement of the trustee, who has the capacity to be a party in the arbitration. This would cause the result that the trustee would be deprived of the right to participate in the arbitration and dispose of the debtor' s estate. Therefore, an arbitral award would be invalid and unenforceable.

In practice, however, if the claim being disputed at an arbitral tribunal outside Japan is a Bankruptcy claim, the arbitration proceedings may be continued without filing a proof of claim in Japan, and the author has had experience with such cases.

Note 180 of the UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation (regulating Article 20) explains the following situation: "Thus, article 20 establishes a mandatory limitation of the effectiveness of an arbitration agreement. This limitation is added to other possible limitations restricting the freedom of the parties to agree to arbitration that may exist under national law (e.g. limits as to arbitrability or as to the capacity to conclude an arbitration agreement). Such limitations are not contrary to the arbitration agreement). Such limitations are not contrary to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. However, bearing in mind the particularities of international arbitration, in particular its relative independence from the legal system of the State where the arbitral proceeding takes place, it might not always be possible, in practical terms, to implement the automatic stay of arbitral proceedings. For example, if the arbitration does not take place in either the enacting State or the State of the main proceeding, it may be difficult to enforce the stay of the arbitral proceedings."

As mentioned above, a creditor who fails to file a proof of claim under the Japanese Bankruptcy Act may be excluded from receiving a distribution from the debtor' s estate. The party can not execute an arbitral award against the trustee because the trustee is not a party to the proceedings.

However, as a consequence of the trustee not being able to participate in the arbitration, the bankrupt company (the debtor), not the trustee, still a party to the arbitration after the commencement of the bankruptcy case, would lose the case, and as a result compulsory execution against the overseas assets of the debtor company may, in fact, be carried out. Under such circumstances, the trustee in the Japanese Bankruptcy proceedings may be too busy to submit an objection promptly to the foreign execution at the foreign court. In such cases, the trustee may need to seek a conciliated solution with the permission of the Japanese court.

Ⅵ. Relationship between the power of trustee and arbitration proceedings

1. Exercise of Trustee's Specific Rights

In this section, we will assume a case where, after an arbitration agreement has been performed, an order of commencement of Bankruptcy is issued and a trustee exercises its powers of avoidance under the Bankruptcy Act[35] with respect to preferred transactions based on a contract between the debtor and the other party. In this case, since an arbitration agreement has been made between the parties, the question is whether or not the trustee is bound by this agreement and whether the trustee may exercise avoidance powers inside the arbitration proceeding without court litigation?

The subject of arbitration agreements are civil disputes that can be settled by the parties,[36] but it is also recognized that there are subjects that are inappropriate to be resolved by private arbitration by the parties. For example, the Bankruptcy Act provides for a trustee' s avoidance powers, the right of setoff,[37] the right to determine priority of Bankruptcy claims, etc., which are rights uniquely provided for to the trustee by the Bankruptcy Act from the viewpoint that the trustee represents the rights of all of the creditors. It is recognized that the priority of Bankruptcy claims, etc. is not in the nature contractual rights that can be freely agreed upon by the parties, but rather derived from mandatory law to protect common interests of society, and is not a right that can be freely disposed of by the parties because it is related to important public policies.[38]

Thus, even if the parties agree to arbitrate, there are claims that do not fall within the scope of the agreement. The majority opinion is that the trustee is not bound by the arbitration agreement because avoidance power is a special right specifically granted only to the trustee by the Bankruptcy Act and the nature of the right is different from the rights given by or to the bankrupt company.[39]

The United States Bankruptcy Court also previously held that not all bankruptcy disputes are arbitrable, but has recently changed its approach to determining which "core bankruptcy

35) Article 160 of the Bankruptcy Act provides that (1)The following acts (excluding acts concerning the provision of security or extinguishment of debt) may be avoided in the interest of the bankruptcy estate after the commencement of bankruptcy proceedings:
(i) An act conducted by the bankrupt while knowing that it would prejudice bankruptcy creditors; provided, however, that this shall not apply where the person who has benefited from said act did not know, at the time of the act, the fact that it would prejudice any bankruptcy creditor.
(ii) An act that would prejudice bankruptcy creditors conducted by the bankrupt after suspension of payments or filing of a petition for commencement of bankruptcy proceedings (hereinafter referred to as "suspension of payments, etc." in this Section) took place; provided, however, that this shall not apply where the person who has benefited from said act did not know, at the time of the act, the fact that suspension of payments, etc. had taken place nor the fact that the act would prejudice any bankruptcy creditor.

36) See Article 13(1) of the Arbitration Act.

37) See Articles 71 and 72 of the Bankruptcy Act.

38) Morio Takeshita, The Study On Litigation Agreement, *HogakuKyokai Zassi No81-4*, 1965, p. 377.

39) Kazuhiko Yamamoto, "Legislative Issues of Various Lawsuits in Bankruptcy Cases," in *Bankruptcy and Litigation*, 2013, note 21, p. 484.

issues" are discussed whenever issues are raised at the court.[40)]

In *re Larsen Oil* in Singapore, a clear distinction was made between disputes based on rights and obligations prior to insolvency and those arising in the course of the conduct of insolvency and insolvency-related laws and regulations.[41, 42)] In *re Tanning* in Australia, Justice Brennan and Dawson J. agreed on this approach.[43, 44)]

It should be noted, however, that the U.S. Bankruptcy Judge Hon. Allan L. Gropper stated that arbitration proceedings can be used for bankruptcy "core" disputes as long as the party who does not consent to arbitration would not be impaired.[45)]

In the past, the prevailing view was that arbitration agreements entered into by parties prior to the commencement of bankruptcy would not be applicable to such rights as can only be exercised by the trustee in bankruptcy after the commencement of the case, such as a preferential transaction. This is the case whether we call these rights inherent to the trustee or the core of the bankruptcy case, etc. It is true that the trustee, who is the representative of all creditors, has the discretion to invoke the trustee's inherent rights, such as avoidance powers. On the other hand, with regard to the determination of the facts that are the pre-condition for exercising avoidance powers, and the existence and amount of damages and restitution based on the exercise of avoidance powers as a cleanup resulting from the contract between the parties, it is rather within the scope of agreed arbitration to have the above dispute resolved between the parties. It may be suitable to use the arbitration process in some cases for smooth return of assets from the adverse party to the debtor' s estate or payment of compensation of damages if the exercise of avoidance powers would be allowed. It may be possible and useful for asking the arbitral tribunal to determine the facts based on the claims of the parties with their professional knowledge, experience, and efficiency. Compared to the case where the losing party would be reluctant to pay restitution or compensation for damages even if the trustee prevails in the litigation, an arbitral award, which results from a consensual process agreed to by the parties, would encourage voluntary performance and less time and money consuming method for resolution.

In addition, in exercising avoidance powers, it would be worthwhile considering a hybrid structure such as court proceedings with the combination of a partial arbitration proceeding. For example, the arbitration proceeding may be adopted for the determination of the facts and the court can have the task of determining whether or not the exercise of avoidance powers should be allowed based on the arbitration proceeding. Certain academics in the U.S.

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40) Arbitration and insolvency disputes: A question of arbitrability, *INSOL SPECIAL REPORT*, 2020, note 14.

41) Larsen Oil & Gas Pte Ltd v Petroprod Ltd [2011] SGCA21.

42) Arbitration and insolvency disputes: A question of arbitrability, *INSOL SPECIAL REPORT*, 2020, p. 15.

43) Tanning Research Laboratories Inc v O'Brien (1990) 91 ALR 180 (HCA) at paras 184 to 185.

44) However, In *re Nori Holdings* (Nori Holdings Ltd v Public Joint-Stock Co" Bank Otkiritie Financial Corporation" [2018] EWHC 1343(Comm)), which involved a Russian bank, the court took a different approach.

45) Allan L. Gropper, "The Arbitron of Cross-Boarder Business Insolvencies." https://s3.amazonaws.com/tld-documents.llnassets.com/0016000/16496/the%20arbitration%20of%20cross-border%20business%20insolvencies.pdf. p.229.

argue that a non-binding or semi-binding arbitration process would be better for cooperation between the court and arbitral tribunal. This asserts a structure in which the parties understand that they will need to comply with the arbitral awards as a general rule, but if they are dissatisfied with the award, they can appeal to the court, and the court will make its decision from its own standpoint, taking into account the reasons for the arbitration award.[46] While this structure seems not to be a formal arbitration structure we can examine if such a "quasi" arbitration approach would be realistic or not if the seat of arbitration is in Japan.

However, even if we adopt the traditional view that a trustee's inherent rights such as avoidance powers cannot be arbitrated under the existing arbitration agreement, it would be possible for the trustee to resolve disputes by entering into a new arbitration agreement with the creditor who benefited from the preferential transaction with the debtor company before commencement of bankruptcy proceedings.

2. Can the trustee reject the arbitration agreement?

Can a trustee reject an arbitration agreement when the adverse party submits request for arbitration stating that there exists an arbitration agreement between them ? Since Article 53 of the Bankruptcy Act provides an executory contract clause where the trustee has the right to assume or reject the contract it has been debated whether this article can be applied to an executory contract which includes arbitration agreements.[47]

Arbitral tribunal should decide under the doctrine of kompetenz-kompetenz if rejection of the executory contract by the trustee would be effective or not. We understand from a Japanese Supreme Court decision that the arbitration agreement clause is separable from its main contract.[48] Therefore we can say that the arbitration agreement stipulated in the contract is not subject to termination because the contents of the contract are separable. Article 13(6) of the Arbitration Act stipulates that a contract clause that includes an arbitration agreement will not prevent the arbitration agreement from being effective even if the contract clause other than the arbitration agreement is invalid or rescinded.[49] The purpose of this clause is that the independence of the arbitration agreement, and then this independence could extend to cases where the trustee rejects the executory contract because the parties' intention to settle the aftermath of the termination of the contract through arbitration should be the same and valid both under contract law and under the Bankruptcy Act.[50]

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46) Edna Sussman and Jennifer L. Gorski, "Capturing the benefits of Arbitration for Cross Border Insolvency Disputes" in Contemporary Issues in International Arbitration and Mediation, *The Fordham Papers 2012*, 2012, p. 170.

47) Article 53 (1) of the Bankruptcy Act provides that (1) if both the bankrupt and his/her counterparty under an executory contract have not yet completely performed their obligations by the time of commencement of bankruptcy proceedings, a bankruptcy trustee may cancel the contract or may perform the bankrupt's obligation and request the counterparty to perform his/her obligation.

48) Supreme Court, July 15, 1975, *Kinyu Houmu Jijo No. 767*, p. 32.

49) Article 13(6) of the Arbitration Act provides that in regard to a single contract containing an Arbitration Agreement, even if the clauses of the contract other than that of the Arbitration Agreement are not valid due to nullity, rescission, or for any other reasons, the validity of the Arbitration Agreement shall not be impaired automatically.

Ⅶ. Restrictions based on public policy

There are cases where public policy restricts arbitral awards. Although the concept of public policy representing the common interests of society differs from country to country, the Japanese Arbitration Act clearly states that this public policy may be a ground for setting aside an arbitral award or a ground for the annulment of enforcement under the arbitral award.[51] These provisions are in line with Article 36 of the Uncitral Model Law on International Commercial Arbitration(1985).

In relation to insolvency, especially in situations where recognition and assistance of foreign insolvency proceedings are provided, it is expected that recognition may be dismissed on the grounds that the court's disposition of assistance is contrary to public policy in Japan.[52]

Japanese courts issued several decisions regarding public policy in relation to arbitration.

In the Tokyo District Court decision of January 28, 2015,[53] the Tokyo District Court held that in Corporate Reorganization cases, disputes such as the nature and priority of claims and whether or not setoff is prohibited under the Corporate Reorganization Act are issues outside the scope of the arbitration agreement. To summarize the case, an arbitration agreement between the parties to the time charter contract had been made before issuing the order to commence corporate reorganization proceedings. The agreement includes that any dispute between the shipowner and the charterer (the debtor) would be referred to arbitration in London. The Tokyo District Court ruled that the above issues were not within the scope of the arbitral agreement because the above issues are inherent in the interpretation of the Corporate Reorganization Act of Japan, and that it is difficult for arbitrators who would be appointed in London to make an appropriate judgment about Japanese law, and that even under English law, it is not permitted to conduct arbitration proceedings against a bankrupt company except in special occasions.

This decision deals with a matter of priority of claims named common benefit claims, which is a special claim set forth in the Corporate Reorganization Act, and therefore deciding the priority of claims should be a matter beyond the scope of arbitral agreement. It also states that matters such as setoff in the Corporate Reorganization Act are beyond the scope of agreement in arbitration.

In the Tokyo District Court decision of June 13, 2011,[54] the Tokyo District Court held that

50) Junichi Matsushita, Insolvency Legal System and Arbitration (4), *JCA94/7*, 1994, p. 15, Sugiyama, *Arbitration Agreement*, p. 9.

51) See Article 44(1)(viii), Article 45(2)(ix) of the Arbitration Act.

52) Article 21(3) of the Act on Recognition and Assistance of Foreign Insolvency Proceedings provides that if any of the following items applies, the court shall dismiss with prejudice on the merits a petition for recognition of foreign insolvency proceedings: (iii) where it is contrary to public policy in Japan to render a disposition of assistance for the foreign insolvency proceedings pursuant to the provisions of the following Chapter.

53) *Hanrei Jihou No. 2258*, p. 100.

54) See Article 44(1)(viii) of the Arbitration Act. See *Jurist No. 1447*, p. 107 and *No. 1456*, p. 161.

"procedural public policy" is included in the public policy stipulated as a ground for setting aside an arbitral award. To summarize the issue in this case, in the final argument after the conclusion of the hearing by the arbitral tribunal, the sole arbitrator did not take into consideration the argument newly raised in the documents submitted by the respondent and determined that there was "no dispute" of the facts surrounding the case. The court held that "to render an arbitral award without determining important matters that the parties have legitimately and procedurally submitted and that may have an impact on the main text of the arbitral award... is, for the parties, tantamount to not having received the arbitral award, and trustworthiness in arbitration would be impaired. Under this condition, it would be contrary to the principle of the fairness of arbitration and against the procedural public policy of Japan.

In *re Manse Kogyo* the Supreme Court indicates that the compulsory execution of a claim for punitive damages included in an arbitral award is not permitted due to public policy in Japan.[55] The reason for the decision was that the system of punitive damages is intended to sanction the perpetrator of a highly malignant act by ordering the payment of additional compensation in addition to the compensation for the actual damage caused, for the purpose of preventing the perpetrator from making similar wrongful action in the future. On the other hand, Japan's tort compensation system is designed to compensate for the actual damages incurred by the victim, so allowing punitive damages is inconsistent with the basic principles of public policy and principles of Japan's tort compensation system.

Ⅷ. Conclusion

It is clear that there is an urgent need to examine the applicability of arbitration proceedings to Japanese insolvency cases in light of recent examples of insolvency cases involving international group companies.

The issues which I mentioned in this article are based on the premise that there is an arbitration agreement prior to the commencement of the insolvency case. We, however, recognize other cases, such as the Lehman case, where arbitration proceedings were commenced with a new arbitration agreement (protocol) after the commencement of the insolvency proceedings. The representative of the Japanese subsidiary did not participate in the protocol but was only indirectly involved as an observer of the protocol meeting. It would be possible for the parties to enter into an arbitration agreement after the commencement of the Bankruptcy case with the permission of the bankruptcy court and begin the (ad hoc)

55) The Supreme Court decision of July 11, 1997. See *Jurist No.1129*, p.106.

56) See Article 78(2)(xi) of the Bankruptcy Act.

57) Nortel's subsidiaries in Canada, the U.K., and the U.S. sold 3.7 billion U.S. dollars of intellectual property. They have disputed the allocation of the proceeds. While the U.S. and Canadian court decided that dispute should be settled at the court because there was no arbitral agreement between the subsidiaries the U.S. judge mentioned that arbitral tribunal could be used, if the arbitral agreement would exist, in the case of international insolvency. See Edna Sussman and Jennifer L. Gorskie, Capturing the Benefits for Arbitration for Cross Border Insolvency Dispute in Contemporary Issues in International Arbitration and Mediation *The Fordham Papers 2012*, p. 165.

arbitration proceedings in Japan.[56] In the Nortel case, the judge recognized that it was possible for multiple subsidiaries of Nortel to jointly sell common assets and decide the allocation of the sale proceeds among the above subsidiaries by arbitration.[57]

The use of arbitration in insolvency proceedings, especially in international insolvency proceedings, may become standard in the future. For reasons of space, I will leave the details of this to the next time.

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Impartiality and Independence Through Disclosure: Comparative Review of Recent Cases in Japan and England

Nishimura & Asahi[1)]

Natalie Yap

Ⅰ. Introduction and the purpose of disclosure

On 12 December 2017, about three years before the judgment of the English Supreme Court in *Halliburton Company v Chubb Bermuda Insurance* ("*Halliburton*") was handed down,[2)] the Japanese Supreme Court issued its decision in a case between Sanyo Electric Co. Ltd and Sanyo Asia Pte Ltd against Prem Warehouse LLC and Prem Sales LLC ("*Sanyo*").[3)]

Central to any case concerning arbitrator bias is an awareness that there may be unseen associations between an arbitrator and a party or a party' s counsel that consciously or unconsciously affect the arbitrator.

An arbitrator' s duty to disclose is intended to dispel any disquiet about such associations and serves two purposes: first, it helps an arbitrator avoid the appearance of bias, as the very act of withholding potentially relevant information could, of itself, give rise to an appearance of bias toward or against one of the parties. Second, keeping the parties properly informed of potentially relevant facts gives them an opportunity to consider the facts disclosed and decide what action, if any, is required as a consequence of the disclosure. Conversely, not disclosing such information deprives a party of that choice and may later provide grounds to challenge the arbitrator or the enforcement of any arbitration award published.

In this way, disclosure supports both party automony and the regime for challenging an arbitrator, a point noted by the Japanese Supreme Court in the *Sanyo* case:

> *The purpose of this obligation is understood as to secure the effectiveness of the system for challenging an arbitrator by allowing the parties to appropriately file a petition for a challenge by causing the arbitrator to disclose facts more broadly than facts constituting "reasonable grounds to doubt the impartiality or independence of the arbitrator," which are grounds*

1) The author thanks her colleague, Mr. Mihiro Koeda, for his comments.

2) https://www.supremecourt.uk/cases/docs/uksc-2018-0100-judgment.pdf

3) https://www.courts.go.jp/app/hanrei_en/detail?id=1558

for a challenge (paragraph (1), item (ii) of the same article).

This brief article focuses on specific points of the duty of disclosure applicable to arbitrators sitting in English and Japanese seated arbitrations, and compares the way the duty has been shaped in the two jurisdictions by the recent *Sanyo* and *Halliburton* cases.

Ⅱ. The nature of the disclosure obligation

Under both English and Japanese law, an arbitrator' s obligation to disclose certain facts and circumstances to the parties is a legal obligation deriving from statute.

In Japan, this duty is set out at Article 18 of the Japanese Arbitration Act (Act No. 138 of 2003).[4] Article 18(4) stipulates that the arbitrator' s duty continues for the "*course of the arbitration procedure*" , during which the arbitrator must disclose all relevant facts "*without delay*" , unless they have already been disclosed. This tracks the position which is set out at Article 12(1) of the UNCITRAL Model Law.

The English Arbitration Act 1996[5] (the "1996 Act") does not contain an equivalent stipulation, which is one reason why the English Supreme Court' s confirmation in the *Halliburton* case that the duty of disclosure is a legal duty, and not just a matter of best practice, is a welcome clarification. The court pronounced that the duty derives from the arbitrator' s statutory duty to act fairly and impartially[6] between the parties under Section 33 of the 1996 Act.[7] As with the Model Law position, the duty of disclosure under English law is a continuing one.[8]

Ⅲ. The content of the disclosure

It would defeat the true purpose of the disclosure and the challenge regimes if arbitrators were expected to disclose any and all facts or circumstances which arise or which become known to him or her during the course of the arbitration. The arbitrator' s duty of disclosure is not totally wide ranging and does allow the arbitrator to apply sensible filters.

For arbitrations seated in either England or Japan, an arbitrator must ask him or herself whether the facts or circumstances under consideration are those which *would, might* or *could* lead to the conclusion there was a possibility of bias or justify doubts as to the arbitrator' s impartiality or independence.

The Japanese Supreme Court decided that arbitrators presiding over Japanese-seated arbitrations must "*disclose facts more broadly than facts constituting "reasonable grounds to doubt the impartiality or independence of the arbitrator*" , but it was not decided on the facts

4) An unofficial translation is found here: http://www.japaneselawtranslation.go.jp/law/detail/?id=2784&vm=2&re=02

5) https://www.legislation.gov.uk/ukpga/1996/23/contents

6) *Halliburton*, at para. 81.

7) https://www.legislation.gov.uk/ukpga/1996/23/section/33

8) *Halliburton*, at para. 120.

of the *Sanyo* case how far beyond those grounds an arbitrator must go.

In *Halliburton*, the English Supreme Court found, *obiter*, that an arbitrator could avoid the appearance of bias by disclosing matters which "*could arguably*" [9] be said to give rise to a real possibility of bias. It does not matter if the facts or circumstances are later found to be innocent - at the time facts or circumstances become known to the arbitrator, he or she must consider whether an objective observer "*might reasonably*" consider those facts or circumstances to conclude a real possibility of bias:

> *In English law it is not necessary that the facts or circumstances which are to be disclosed **would** cause the fair-minded and informed observer to conclude that there was a real possibility that the arbitrator was biased. It is sufficient that they **might reasonably** cause the objective observer to reach that conclusion…. It follows that the obligation to disclose can arise in circumstances in which the objective observer, informed of the facts at the date when the decision whether to disclose is or should have been made ("the disclosure date"), might reasonably conclude that there was a real possibility of bias, even if at a later date, with the benefit of information which was not available at the disclosure date, the objective observer would conclude that there was not such a real possibility. (emphasis in the original).*

In both England and Japan, the cases do not dictate the limits on the obligation, or what did not have to be disclosed. However, following the guidance provided by the IBA Guidelines, Part 1, General Standard 3(d), if the arbitrator is in doubt about whether to disclose facts or circumstances, he or she ought to err on the side of caution and make disclosure:

> *Any doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure.*

Ⅳ. Objective or subjective perspective?

Is the arbitrator required to enquire into the minds of the arbitrating parties, or does he or she apply an objective standard?

The Japanese Supreme Court did not express a view on whether the arbitrator' s duty to disclose "*all the facts that would likely to give rise to doubts as to his/her impartiality or independence*" [10] was to be assessed from an objective or subjective viewpoint. The generality of the formulation above suggests that an arbitrator must consider both what the parties and what an objective bystander may consider to be relevant facts. This goes beyond General Standard 3 of the IBA Guidelines, which adopts a subjective approach:

9) At para. 70.

10) Article 18(4) of the Japanese Arbitration Act.

> *(a) If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator' s impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties, the arbitration institution or other appointing authority (if any, and if so required by the applicable institutional rules) and the co-arbitrators, if any, prior to accepting his or her appointment or, if thereafter, as soon as he or she learns of them.*

Under English law, the test is an objective one: the court is only concerned with how things appear objectively,[11] such that the facts and circumstances that must be disclosed are considered from the perspective of a "fair-minded and informed observer" :[12]

> *"The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."*

This is similar to the test of "justifiable doubts" adopted by the UNCITRAL Model Law Article 12(c) and IBA Guidelines, Part 1, General Standard 2(c), and requires objectivity and detachment in relation to the appearance of bias.[13]

Ⅴ. An arbitrator' s duty to search for facts or circumstances to disclose

The IBA Guidelines, where adopted, imposes a positive duty on arbitrators to make "reasonable enquiries to identify any conflict of interest" . The underlying intention appears to be that the arbitrator cannot be passive about the state of his or her knowledge, and must take reasonable steps to discover facts or circumstances:[14]

> *An arbitrator is under a duty to make reasonable enquiries to identify any conflict of interest, as well as any facts or circumstances that may reasonably give rise to doubts as to his or her impartiality or independence. Failure to disclose a conflict is not excused by lack of knowledge, if the arbitrator does not perform such reasonable enquiries.*

1. Position in Japan

In the *Sanyo* case, the Japanese Supreme Court espoused a legal duty to carry out investigations for relevant facts. The Court noted that the language of Article 18(4) of the Japanese Arbitration Act does not limit the facts to be disclosed to just those known to the

11) *Halliburton*, paras. 52 and 72.
12) *Halliburton*, para. 52.
13) *Halliburton*, para. 54.
14) Part I, General Standard 7(d).

arbitrator. As such, in addition to the facts that an arbitrator actually knows, he or she must disclose facts that can be ordinarily discovered by the arbitrator undertaking a reasonable investigation, carried out till the "*completion of the arbitration procedure*" :

> *Considering, in addition to the intention of Article 18, paragraph (4) of the Act as described above, the fact that the same paragraph does not limit the facts required to be disclosed to those that are known to the arbitrator, the arbitrator should be obligated to disclose to the parties facts that should ordinarily be found out by his/her investigation as to the presence of Facts Mentioned in Article 18, Paragraph (4) of the Act conducted to a reasonable extent.*
>
> *In addition, in light of the fact that the same paragraph does not limit the timing at which an arbitrator is obligated to disclose Facts Mentioned in Article 18, Paragraph (4) of the Act other than by merely stating "During the course of the arbitration procedure," and that the same paragraph only excludes facts "which have already been disclosed" from those required to be disclosed, an arbitrator should have the obligation of disclosure until completion of the arbitration procedure, whether or not any disclosure is requested by any of the parties.*
>
> *Therefore, in order for the arbitrator' s failure to disclose to the parties a Fact Mentioned in Article 18, Paragraph (4) of the Act to constitute a breach of the arbitrator' s obligation of disclosure imposed by the same paragraph, it is required that by the time of completion of the arbitration procedure: (i) the arbitrator had known the fact; or (ii) the fact should have ordinarily been found out by the arbitrator' s investigation conducted to a reasonable extent.*

What a "reasonable extent" entails depends on the facts, but does not appear to require an arbitrator to expend extraordinary efforts. In *Sanyo*¸ the Japanese Supreme Court considered whether the relevant fact could have been discovered through the conflict check system at the law firm that the arbitrator in question worked.

It would appear at first blush that because the obligation under Japanese law continues for the duration of the arbitration and disclosure must be volunteered to the parties "without delay" under Article 18(4), arbitrators in Japanese-seated arbitrations are expected to run and repeat periodical conflict checks and any other reasonably accessible searches for the duration of the arbitration, up to the publication of the award. To this point, there appears to be a distinction between those arbitrators who belong to organisations using a conflict check system, and those who do not, perhaps because they practice independently or in an organisation that does not require conflict checks. The *Sanyo* case provides guidance insofar as it relates to arbitrators who are also practising lawyers. Upon remittance to the Osaka High

Court as the court below, it was decided in *Sanyo* that if the law firm to which the arbitrator belongs has established a conflict-check system which is typical of one used by other law firms, and provided the arbitrator had properly implemented the searches, the arbitrator would have satisfied the requirement to conduct continuous, reasonable searches. On the facts, the court found that the arbitrator' s firm, US law firm King & Spalding, had established a conflict check system comparable with that of other large US law firms, and that the arbitrator had duly recorded the parties' names into the system. As such, because the conflict check system would have identified any conflicts, the arbitrator was found to have satisfactorily conducted reasonable and continuous searches. It was found, in any event, that as a matter of fact, the arbitrator could not have discovered the relevant fact even through the proper implementation of the conflict check system.

Arbitrators who are not required to use a conflict check system would be prudent to carry out periodical conflict checks and document or log these checks in the event they are called upon to prove they had complied with their duty.

2. Position in England

As things stand, there is no positive English law requirement that arbitrators undertake searches of facts or circumstances that may affect their independence or impartiality. In *Halliburton*, the English Supreme Court did not find it necessary to express a concluded view on whether an arbitrator would be required to make reasonable enquiries as to facts and circumstances, but did not rule this out as a possibility:

> *An arbitrator can disclose only what he or she knows and is, as a generality, not required to search for facts or circumstances to disclose. But I do not rule out the possibility of circumstances occurring in which an arbitrator would be under a duty to make reasonable enquiries in order to comply with the duty of disclosure…*

The English Supreme Court did not adopt the obligation to make reasonable enquiries into English law as advocated by the IBA Guidelines, Part I, General Standard 7(d), but noted that this was good practice:[15)]

> *It is not necessary in the context of this appeal to express a concluded view on whether this statement of good practice is also an accurate statement of English law, but I do not rule out that it might be.*

Ⅵ. Advance disclosure

The duty of disclosure is not discharged by a disclaimer or blanket representation as to a

15) At para. 20, above.

future state of affairs.

In the *Sanyo* case, the arbitrator submitted a statement to the JCAA that there was a future possibility that lawyers at King & Spalding may represent clients with a conflicting interest to any of the parties:

> *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."*

The Japanese Supreme Court found that this statement did not satisfy the duty of disclosure as it was "an abstract statement to the parties that there is a possibility of occurrence of events that will constitute Facts" . It was therefore not excluded as past disclosure under Article 18(4). The Court' s finding underscores the active and continuous nature of the arbitrator' s duty under Japanese law, which accords with the IBA Guidelines, Part I, General Standard 3(b):

> *An advance declaration or waiver in relation to possible conflicts of interest arising from facts and circumstances that may arise in the future does not discharge the arbitrator' s ongoing duty of disclosure under General Standard 3(a).*

The English Supreme Court did not decide the point, but it is submitted that the fair-minded and informed observer contemplated by the English test would not consider a general statement about possible conflicts, made at the outset of the arbitrator' s appointment, to be a disclosure of facts for the purposes of satisfying the arbitrator' s continuing duty of disclosure.

Ⅶ. Comment and conclusion

What is clear from the two cases is that an arbitrator' s disclosure is for the parties' benefit but also for the arbitrator' s protection. No arbitrator wishes to have their appointment tainted by suggestions of non-disclosure and to have their conduct scrutinised, even if he or she is finally exonerated, as in both the *Sanyo* and *Halliburton* cases.

Yet the solution is not to over-disclose facts, given the nuances of an arbitrator' s circumstances and possible obligations of confidentiality. Further, he or she may quite understandably not wish to encourage unwarranted challenges by making disclosure of facts that may be used tactically by a party.

Recognising that the duty falls first and foremost on the arbitrator, it will be interesting to see if the arbitration institutions step in to develop guidelines or protocols to go some way in helping arbitrators implement systems for disclosure or to manage the scope or frequency of disclosure.

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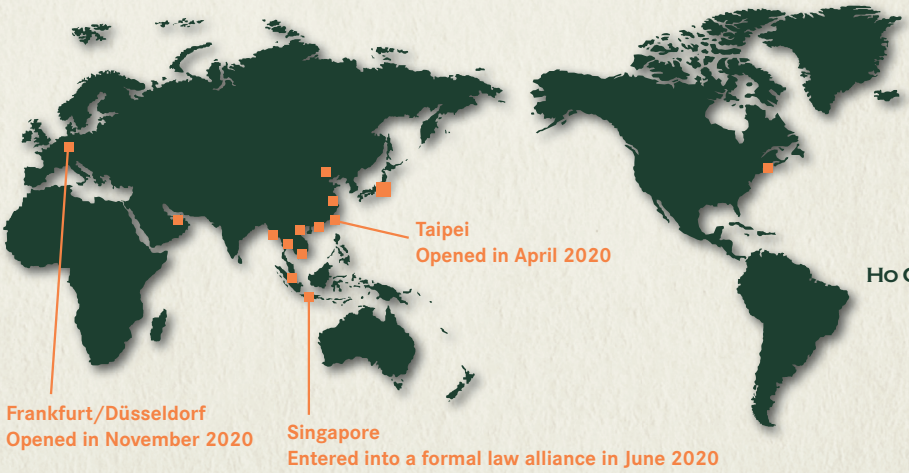

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Current State of Intellectual Property Dispute Resolution Systems in Japan

Attorney-at-law, Nagashima Ohno and Tsunematsu

Kenji Tosaki

Intellectual property disputes in Japan have traditionally been handled by way of litigation. However, the framework for settling intellectual property disputes has expanded in recent years, with the establishment of an arbitration institution specializing in intellectual property disputes and the commencement of the handling of intellectual property mediation proceedings by the Tokyo District Court. With respect to intellectual property litigation, on-site inspections became available in 2020 and a bill to enable the submission of an amicus brief in relation to a pending patent infringement lawsuit has been proposed and is under discussion by the Diet. In this article, I will outline the current status of each intellectual property dispute resolution system in Japan and discuss what types of disputes are suitable for each system.

Ⅰ. Intellectual Property Mediation

Intellectual property mediation is an intellectual property dispute resolution system that was newly launched on October 1, 2019 by the Tokyo District Court. The Osaka District Court has handled intellectual property mediation cases since 1999, and started applying a revised framework that harmonizes with the practices by the Tokyo District Court to its intellectual property mediation practices on October 1, 2019. From October 1, 2019 to September 30, 2020, 11 intellectual property mediation cases were filed with the Tokyo District Court.[1)] Intellectual property mediation is not a newly created system, but a new way of using existing systems. Nevertheless, as the Intellectual Property Divisions of the Tokyo District Court, which have ample experience in intellectual property litigation, have declared that they would take the lead in administering the new practice, it is now considered one of the available options to settle an intellectual property dispute.

1) Ken Nakadaira, et al. "Overview of Cases of the Intellectual Property High Court and the Intellectual Property Divisions of the Tokyo District Court and the Osaka District Court (FY2019) [Translated from Japanese.]" Hōsō Jiho (Lawyers Association Journal) (in Japanese)

A. Flow of intellectual property mediation proceedings

The flow of intellectual property mediation proceedings is roughly as follows.[2)]

First, the Petitioner submits a written petition for mediation and relevant evidence, and the Respondent submits a written answer and relevant evidence. The arguments and relevant evidence are submitted on or before the first session. The first session is held approximately six weeks after the petition for mediation is filed. During the session, the mediation committee may instruct the parties to supplement their arguments and evidence, and ask the parties about their intentions as to the terms and conditions of a settlement agreement. The interval between sessions is about three weeks to one month and a half. The mediation committee will, in general, orally disclose its impressions of issues by the third session. In the event that the parties reach a settlement agreement, the official mediation record in which the agreement is recorded shall have the same effect as a judicial settlement (Article 16 of the Civil Mediation Act). Even if the parties are not likely to reach an agreement, the court may, ex officio, make a decision necessary for resolution of the case (Article 17 of the Civil Mediation Act). This decision is referred to as an "Article 17 Decision." When an objection to an Article 17 Decision is not filed, the decision shall have the same effect as a judicial settlement (Article 18(5) of the Civil Mediation Act). On the other hand, when an objection is filed against an Article 17 Decision, the decision loses its effect (Article 18(4) of the Civil Mediation Act).

If the parties fail to reach an agreement, or if the petition for mediation is withdrawn, the parties will consider whether to continue further negotiations between the parties and whether to resolve the matter by way of litigation or preliminary injunction proceedings. Even if a lawsuit or a petition for preliminary injunction is filed after the mediation proceedings, the mediation record is not handed over to the court for reference in the lawsuit or preliminary injunction proceedings, and the lawsuit or preliminary injunction proceedings are presided over by a judge other than a judge who served on the mediation committee. However, when an Article 17 Decision is made in the mediation proceedings, the impressions of a mediation committee judge who served on the mediation committee may be expressed in the Article 17 Decision. For this reason, as a practical measure, if a party believes that the Article 17 Decision indicates an impression favorable to the party, the party will consider submitting such decision in the lawsuit or preliminary injunction proceedings as evidence.

B. Features of Intellectual Property Mediation

The key features of intellectual property mediation are as follows:

(a) A mediation committee consisting of three persons in total, i.e., one judge from the Intellectual Property Divisions and two experts, such as lawyers and patent attorneys with extensive experience in intellectual property cases, presides over the proceedings.

(b) The proceedings are not open to the public.

(c) The purpose is not to obtain a judgment from a third party but to resolve the dispute

2) https://www.courts.go.jp/tokyo/saiban/l3/Vcms3_00000618.html (in Japanese, last checked on May 6, 2021)

through negotiation.
(d) Intensive dialogue takes place from the first session, and the views of the mediation committee are disclosed within about three sessions, in principle.
(e) An agreement on jurisdiction must be reached in advance in order to hold the proceedings before a district court.

As mediation proceedings are held to resolve a dispute through negotiation and reaching an agreement on jurisdiction is necessary, it would be difficult to submit a highly contested dispute for intellectual property mediation. In addition, as it is an expeditious procedure in which the views of the mediation committee are disclosed within about three sessions, in principle, only disputes with relatively few and straightforward issues are suitable for intellectual property mediation. For this reason, disputes that are submitted to courts in conventional intellectual property lawsuits are not suitable for intellectual property mediation proceedings. Rather, for certain disputes that conventionally have not been brought before courts and have been resolved through out-of-court negotiation between the parties, intellectual property mediation would be an additional option.

The fee for filing a petition for mediation is calculated according to the value of the subject matter for which mediation is sought, as with the fee for filing a lawsuit, and the amount of the fee for filing a petition for mediation is around 40 to 50% of that of the fee for filing an equivalent lawsuit (Article 3(1) and row 14 of the Appended Table 1 of the Act on Costs of Civil Procedure).

Ⅱ. Intellectual Property Arbitration

There are two arbitration institutions that specialize in intellectual property disputes in Japan: (a) Japan Intellectual Property Arbitration Center and (b) Tokyo International Intellectual Property Arbitration Center (IACT).

A. Japan Intellectual Property Arbitration Center

The Japan Intellectual Property Arbitration Center (hereinafter referred to as the "Center") is an arbitration institution specialized in intellectual property disputes that commenced operations in April 1998.[3] The Center publishes statistics on the total number of applications for mediation and arbitration per year and the percentage of each of the applications for mediation and arbitration among all applications. The average number of applications for mediation and arbitration is approximately seven per year, and the percentage of the applications for arbitration among all applications is 4%.[4] Thus, the total number of arbitration cases from the start of operations in April 1998 through 2018 is estimated to be approximately six.

3) https://www.ip-adr.gr.jp/eng/history/ (last checked on May 6, 2021)
4) https://www.ip-adr.gr.jp/outline/case-ctatistics/ (in Japanese, last checked on May 6, 2021)

1. Flow of Intellectual Property Arbitration by the Center

The flow of intellectual property arbitration by the Center is roughly as follows:

The Applicant files a written application for arbitration (Article 14 of the Rules for Arbitral Proceedings) and the Center shall appoint arbitrators (Article 15(2) of the Rules for Arbitral Proceedings). The Arbitral Tribunal consists of three arbitrators, comprising at least one lawyer and one patent attorney (Article 5 of the Rules for Arbitral Proceedings). The arbitrators shall be selected by the Center from among the arbitrator candidates, but if the parties wish to do so, each party shall appoint one arbitrator, and the Center shall appoint the third arbitrator from among the arbitrator candidates (Article 7 of the Rules for Arbitral Proceedings). However, the Center may dismiss the application if it determines that it is not proper to continue the arbitral proceedings (Article 15(3) of the Rules for Arbitral Proceedings). The Respondent shall submit a written answer no later than the date designated by the arbitrators (Article 16(1) of the Rules for Arbitral Proceedings). At the first hearing, the Arbitral Tribunal and the parties shall make efforts to create a plan for the arbitral proceedings, and shall cooperate in order for the proceedings to be conducted as planned after the schedule for the proceedings has been set (Article 20(1) of the Rules for Arbitral Proceedings). The arbitral proceedings aim to be completed within six months from the first hearing and within three hearings (Article 20(2) of the Rules for Arbitral Proceedings). The parties are to submit documentary evidence with the application or the answer (Articles 14 and 16 of the Rules for Arbitral Proceedings), and the Arbitral Tribunal may, if necessary, advise the parties to present evidence (Article 23 of the Rules for Arbitral Proceedings). There is no specific provision as to when a party may be advised to present evidence and it is left to the discretion of the Arbitral Tribunal. The Arbitral Tribunal may decide to terminate the arbitral proceedings if the Applicant fails to present evidence in accordance with the direction of the Arbitral Tribunal (Article 24(1) of the Rules for Arbitral Proceedings), and if the Respondent fails to present evidence in accordance with the direction of the Arbitral Tribunal, the Arbitral Tribunal shall continue the arbitral proceedings without treating it as the Respondent' s affirmation of the Applicant' s allegations (Article 24(2) of the Rules for Arbitral Proceedings).

If a party fails to produce documentary evidence, the Arbitral Tribunal may make the arbitral award on evidence collected up until such time, unless there is justifiable cause for not submitting documentary evidence (Article 24(3) of the Rules for Arbitral Proceedings). A party may, before submitting any documentary evidence, propose that particular portions of such documentary evidence should be kept secret and should not be disclosed to the other party, and if the Arbitral Tribunal so approves, the Arbitral Tribunal shall not disclose such portions to the other party (Article 25 of the Rules for Arbitral Proceedings). The arbitral award shall have the same effect as a final and binding judgment (main clause of Article 45(1) of the Arbitration Act). Compulsory execution based on an arbitral award shall be made by filing a petition with the court for an execution order and obtaining an execution order (Article 46 of the Arbitration Act). When the execution order becomes final and binding, the arbitral award becomes a title of obligation (Article 22(vi)-2 of the Civil Execution Act).

An appeal against an arbitral award can be made only in exceptional cases (Article 44 of the Arbitration Act).

2. Main Features of the Intellectual Property Arbitration by the Center

The main features of the intellectual property arbitration by the Center are as follows:

(a) The Arbitral Tribunal consists of three arbitrators, comprising at least one lawyer and one patent attorney.

(b) The proceedings are not open to the public.

(c) The arbitral proceedings aim to be completed within six months from the first hearing and within three hearings, and as an appeal cannot be filed in practice, the dispute can be resolved promptly (the inability to appeal is a common feature of arbitration).

(d) Certain portions of the documentary evidence may be kept secret so that they are not disclosed to the other party.

(e) An arbitration agreement is required (a common feature of arbitration).

Since an arbitration agreement is required and the arbitral proceedings aim to be completed within six months from the first hearing and within three hearings, matters to be brought to the intellectual property arbitration by the Center would necessarily be those where there is a contractual relationship between the parties or where there has been a preliminary negotiation between the parties and the issues are arranged to a considerable extent even though there is not a contractual relationship between the parties. Consequently, the types of disputes suitable for intellectual property arbitration by the Center are considered to be similar to those suitable for intellectual property mediation. Intellectual property arbitration by the Center may be an appropriate option in the cases where the amount of the dispute is not sufficiently high to institute a lawsuit but a simple and prompt decision by a third party is desired. Major costs for the arbitral proceedings are a filing fee of JPY 100,000 (+ tax), a hearing fee of JPY 100,000 (+ tax), and a fee for the preparation of the arbitral award of JPY 200,000 (+ tax) (Articles 42(1), 43 and 44(1) of the Rules for Arbitral Proceedings).

B. International Arbitration Center in Tokyo (IACT)

The International Arbitration Center in Tokyo (hereinafter referred to as the "IACT") is an arbitration institution specialized in intellectual property that commenced operations in 2018. The IACT focuses on resolving complex international intellectual property disputes, in particular, disputes related to Standard Essential Patents (SEPs), with former intellectual property judges from major nations joining the list of arbitrators.[5) 6)]

1. Flow of Intellectual Property Arbitration by the IACT

The flow of intellectual property arbitration by the IACT are roughly as follows:

The Claimant first sends a notice of arbitration to the IACT Secretariat and the Respondent

5) https://www.iactokyo.com/ (last checked on May 6, 2021)

6) Frequently Asked Questions, No. 1 (https://www.iactokyo.com/faq (last checked on May 6, 2021))

(Article 3 of the IACT Arbitration Rules[7]). The Respondent submits a response to the notice of arbitration within 21 days of the receipt of the notice of arbitration (Article 4 of the IACT Arbitration Rules). The number of arbitrators is three in principle (Article 7 of the IACT Arbitration Rules). Arbitrators are chosen from the world' s major jurisdictions, and many arbitrators have been involved as judges in a number of complex cases, including Randall R. Rader, former Chief Judge of the U.S. Court of Appeals for the Federal Circuit, and Ryuichi Shitara, former Chief Judge of the Intellectual Property High Court, or have been involved in and played a key role in legislation. The standard language of the proceedings is English (Article 21, Paragraph 1 of the IACT Arbitration Rules), but Chinese, Japanese, German, and Korean can be selected as the language to be used in the proceedings.[8] After the arbitral tribunal is constituted, the arbitral tribunal shall establish the provisional timetable of the arbitration. The provisional timetable shall provide that the decision shall be made no later than twelve months after the establishment of the arbitral tribunal, except for good cause (Article 19, Paragraph 4 of the IACT Arbitration Rules). The Claimant shall, within the time determined by the arbitral tribunal, submit a statement of claim stating the content of the claim (Article 22 of the IACT Arbitration Rules), and the Respondent shall, within the time determined by the arbitral tribunal, submit a statement of defense stating its response to the statement of claim (Article 23 of the IACT Arbitration Rules).

Each party shall be responsible for proving the facts upon which its arguments are based, and the arbitral tribunal may at any time require the parties to produce evidence (Article 29, Paragraphs 1 and 3 of the IACT Arbitration Rules). There is no specific provision as to when the arbitral tribunal can require the parties to produce evidence and it is left to the discretion of the arbitral tribunal. However, the IBA (International Bar Association) has established the Rules on the Taking of Evidence in International Arbitration[9] and these Rules may be applied with the agreement of the parties or by the discretion of the arbitral tribunal.[10]

Under the IBA' s rules, a party may require the opposite party to produce documents in the possession of the opposite party by specifying the documents, indicating the relevance and importance (Articles 3.2 and 3.3 of the Rules on the Taking of Evidence in International Arbitration). Upon receipt of the request to produce, the party to whom the request to produce is addressed may object to the arbitral tribunal on the grounds of lack of relevance or importance or excessive burden to produce (Article 3.5 of the Rules on the Taking of Evidence in International Arbitration). If the party to whom the request to produce is addressed does not object or if the arbitral tribunal dismisses the objection and orders the party to produce the document(s), it must produce the document(s)[11] (Articles 3.4 and 3.7 of the Rules on the

7) https://0f06c889-dcdb-4e92-8dfd-345401b7ce4d.filesusr.com/ugd/345c69_59c1eb6c62da419fba9500943049c294.pdf (last checked on May 6, 2021)

8) Frequently Asked Questions, No. 5 (https://www.iactokyo.com/faq (last checked on May 6, 2021))

9) Downloadable from the following URL: https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Default.aspx (last checked on May 6, 2021)

10) Mugi Sekido "Measures in relation to International Arbitration for Japanese Companies (No. 27) [Translated from Japanese.]" Shoji Homu Portal (in Japanese, last checked on May 6, 2021)

Taking of Evidence in International Arbitration).

If the party invited by the arbitral tribunal to produce evidence fails to produce it within the established period of time without sufficient cause, the arbitral tribunal may make an award based on the evidence before it (Article 31, Paragraph 3 of the IACT Arbitration Rules). Under the IBA' s rules, if a party who has not objected to a request to produce fails to produce the document without satisfactory explanation, or if a party ordered by the arbitral tribunal to produce a document fails to produce the document, the arbitral tribunal may infer that the document would be adverse to the interests of that party (Article 9.6 of the Rules on the Taking of Evidence in International Arbitration). The effect of the arbitral award and the compulsory execution based on it are the same as described in 1 above with respect to the arbitration by the Center. In addition, there are more than 150 Contracting States to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), and a party can enforce arbitral awards in those Contracting States. If there is any material error in the award, a party may submit a request for review of the award by a supervisory panel for substantive scrutiny, and the supervisory panel may issue a recommendation to the arbitral tribunal to amend the award (Article 40 of the IACT Arbitration Rules).

2. Main Features of Intellectual Property Arbitration by the IACT

The main features of intellectual property arbitration by the IACT are as follows:

(a) The arbitral tribunal consists of three arbitrators, in principle; and there are many experienced arbitrators, including former intellectual property judges from major countries.

(b) The proceedings are not open to the public.

(c) In principle, the decision shall be made within 12 months of the establishment of the arbitral tribunal.

(d) An arbitration agreement is required (a common feature of arbitration).

Since an arbitration agreement is required, matters to be brought before the IACT in intellectual property arbitration would naturally be those where there is a contractual relationship between the parties. As the IACT focuses on resolving disputes related to Standard Essential Patents (SEPs), the IACT also intends to invite disputes related to SEPs where there is no contractual relationship between the parties. Dealing with disputes related to SEPs necessitates advanced and intensive expenditure and efforts, such as involvement of experienced attorneys specialized in intellectual property disputes, communicating the technical details to the arbitral tribunal in as comprehensible a way as possible, and collection of the appropriate materials needed to calculate the amount of royalties under the FRAND terms. If it is not the ultimate goal of the patentee to obtain an injunction and if the parties want to resolve the dispute in a short period of time, it would be beneficial for the parties to select an arbitration before the IACT so that they can obtain a final conclusion in about a year.

11) The party shall produce the documents to the other parties and, if the arbitral tribunal so orders, to it (Articles 3.4 and 3.7 of the Rules on the Taking of Evidence in International Arbitration).

Another advantage of arbitration by the IACT is that disputes involving patents spanning several jurisdictions can be resolved together. The filing fee for arbitration by the IACT is USD 2,000, and the hourly fee of each arbitrator is approximately USD 1,000 (Annex to the IACT Arbitration Rules).

Ⅲ. Intellectual Property Litigation

A. Main Features and Problems of Intellectual Property Litigation in Japan

As mentioned in I and II above, it is generally understood that bringing small intellectual property disputes to courts for litigation or preliminary injunction proceedings is not a reasonable decision in light of the time and money required, and that complex international intellectual property disputes, may be better settled through intellectual property mediation or intellectual property arbitration than through litigation or preliminary injunction proceedings before courts, in light of the timelines and jurisdictional limitations of such litigation or preliminary proceedings. However, in Japan, litigation is the main means of resolving intellectual property disputes.

The main features of intellectual property litigation, in contrast to intellectual property mediation and intellectual property arbitration, are as follows:

(a) A panel of judges with extensive experience in intellectual property proceedings examines the case, and a technical assistant supports the judges in technical matters.

(b) The proceedings are open to the public.

(c) In many cases, the first instance phase takes about one to one-and-a-half years, and the losing parties are entitled to file an appeal.

(d) No agreement is required in advance between the parties.

Compared to intellectual property litigation in many of other countries or regions, intellectual property litigation in Japan takes a shorter time and the decisions of the courts are generally of a stable nature. On the other hand, when compared with the United States and Germany, in which a large number of intellectual property litigation cases are handled, an insufficiency of decisions by the courts means that it sometimes take a considerable time for judicial theories on new legal issues to be established. In addition, attention is drawn to the difficulty of collecting evidence in intellectual property litigation in Japan: the means of collecting evidence from others is limited; while the collection of evidence on the manufacture and sale of business-to-business products and of evidence on the methods used by the defendant are often considered to be difficult. With regard to the means of collecting evidence, the lawmakers intended to improve such means through the introduction of the document production order system (Article 105 of the Patent Act) and the introduction of the protective order system (Article 105-4 *et seq*. of the Patent Act). However, it was considered that there were still not sufficient means, and so the on-site inspection system was introduced by the 2019 amendment of the Patent Act.

B. Flow of On-site Inspection Procedures

In an action regarding intellectual property infringement, a party can file a request for on-site inspection.

A petition for on-site inspection can be granted when the following requirements are met (Article 105-2(1) of the Patent Act):

(a) It is deemed necessary to collect evidence by checking, operating, measuring, experimenting, or taking other measures with regard to, documents, equipment, or any other objects (documents, etc.) possessed or controlled by the opposite party, in order to determine whether or not certain facts exist.

(b) There are reasonable grounds to suspect that the Respondent has infringed the patent.

(c) It is expected that the Petitioner will not be able to collect such evidence by itself or by any other means.

(d) The case is not found to be one where it is inappropriate to order an on-site inspection due to the excessive time needed for collection of the evidence, the excessive burden on the party to be inspected, or other circumstances.

The Petitioner shall state in the written petition, among others, (i) matters that are sufficient to identify the documents, etc. to be inspected; (ii) the location of the documents, etc.; (iii) the contents of the measures to be taken; and (iv) the matters to be inspected (Article 105-2(2)(ii) of the Patent Act and Paragraphs 1 and 2 of Article 1 of the Rules on Procedures for On-site Inspections under the Patent Act (hereinafter referred to as the "Rules on On-site Inspection")). In order to issue an on-site inspection order, the court shall hear the opinion of the Respondent (Article 105-2(1) of the Patent Act). The on-site inspection shall be conducted by an inspector designated by the court (Paragraphs 1 and 2 of Article 105-2-2 of the Patent Act). The inspector shall, in advance, notify the court of the date, time and place of the on-site inspection to be implemented and the court clerk shall notify the parties of those matters (Paragraphs 1 and 2 of Article 5 of the Rules on On-site Inspection).

The inspector may (i) enter the factory, etc. where the documents, etc. subject to the on-site inspection are located; (ii) ask the inspected party questions or request that the inspected party present documents, etc.; or (c) conduct equipment operations, measurements or experiments or take measures permitted by the court as necessary for the on-site inspection (Article 105-2-4(2) of the Patent Act). The inspected party shall cooperate as necessary for the on-site inspection (Article 105-2-4(4) of the Patent Act) and if the inspected party does not comply with the inspector' s request without a justifiable reason, the court may find the Petitioner' s argument regarding the facts to be proved by the on-site inspection to be true (Article 105-2-5 of the Patent Act). There are no criminal penalties for not cooperating with the on-site inspection or not complying with the inspector' s requests. The inspector shall prepare a report (an inspection report) on the results of the on-site inspection and submit it to the court (Article 105-2-4(1) of the Patent Act). The inspection report shall identify the documents, etc. subject to the inspection, the date and time the inspection was commenced and the date and time it was completed, the place the inspection was conducted and the result of the inspection (Article 6(3) of the Rules on On-site Inspection). The court shall first

send a copy of the inspection report to the inspected party (Article 105-2-6(1) of the Patent Act). The inspected party may, within two weeks from the date of receipt of the copy of the inspection report, file a petition for the inspection report to not be disclosed in whole or in part to the Petitioner (Petition for Non-Disclosure) (Article 105-2-6(2) of the Patent Act) and the court may, if there are justifiable reasons, decide not to disclose the inspection report in whole or in part to the Petitioner (Article 105-2-6(3) of the Patent Act). If the court finds that it is necessary to hear the opinions of the counsel, employees or assistants-in-court of the Petitioner for the purpose of determining whether or not there are justifiable reasons, the court may disclose the inspection report to the counsel of the Petitioner or with the consent of the party who was inspected, to the employees of the Petitioner or the assistants-in-court of the Petitioner (Article 105-2-6(4) of the Patent Act). There are no special provisions in the Patent Act or in the Rules on On-site Inspection about what kind of circumstances constitute a "justifiable reason." However, if trade secrets are included in the inspection report, it would normally constitute a "justifiable reason." If a Petition for Non-Disclosure has not been filed within the two week period or if a decision on a Petition for Non-Disclosure has become final and binding, the Petitioner may request a certified copy of the inspection report with the parts that were not allowed to be disclosed excluded (Article 105-2-7(1) of the Patent Act). No one other than the Petitioner and the inspected party may view the inspection report or request a certified copy thereof (Article 105-2-7(2) of the Patent Act).

C. How to Deal with Patent Infringement Actions in Light of the Possibility of On-site Inspections

On-site inspections are expected to be useful tools for proving infringement in cases where it is difficult for the patentee to collect evidence. However, the extent to which on-site inspections are useful depends on how the courts handle the requirements for ordering them, in particular, the probability requirement that "there are reasonable grounds to suspect that the Respondent infringed on the patent."

Regarding this point, Judge Tatsubumi Sato of the Tokyo District Court states that the probability of satisfying the constituent elements to be proved through the on-site inspection is not required to have an on-site inspection order issued. He further states that, if a method patent consisting of processes A through D is at issue and there is no dispute over the fulfillment of constituent elements A and D but there is a dispute over the fulfillment of constituent elements B and C, as constituent elements B and C are the subject of the on-site inspection, the probability requirement would be met if it would be difficult to prove constituent elements B and C without the on-site inspection.[12] Judge Sato' s comments are in line with the purpose for which the on-site inspection system was introduced and from a practical point of view, this system will be operated in line with these comments.

There may be problems if a method patent is at issue but there is a dispute over the

12) Tatsubumi Sato "Outline of On-site Inspection Proceedings and Issues in Their Operations [Translated from Japanese]" Law and Technology, No. 87, 58-66, 62 (in Japanese)

fulfillment of all of the constituent elements and all of the constituent elements are to be proved through the on-site inspection. In such case, a petition for an on-site inspection without proof by the patentee would likely be determined to not satisfy the probability requirement as it would be an exploratory attempt to collect evidence.[13] With respect to constituent element A of a method patent consisting of processes A through D, if the patentee demonstrates by a written statement of an employee of the patentee that only three kinds of processes - A1, A2 and A3 - are the possible processes that the defendant uses and that it is probable that the defendant uses process A1 from the viewpoint of the defendant' s own patent application, the equipment possessed by the defendant and economic reasonableness, the issue is whether the patentee satisfied the probability requirement and if it is determined that the patentee did not do so, what the patentee can do to satisfy the probability requirement would then be the issue.

Further, the extent to which the court may find the Petitioner' s argument regarding the facts to be proved by the on-site inspection to be true if the inspected party does not comply with the inspector' s request without a justifiable reason pursuant to Article 105-2-5 of the Patent Act should be carefully observed. A similar finding may also be made if a party does not comply with a document production order. However, since the inspected party can file a Petition for Non-Disclosure if trade secrets are included in the inspection report, which functions as a mechanism to maintain the confidentiality of trade secrets of the defendant, courts will not need to be too hesitant to find the Petitioner' s argument to be true if the inspected party does not comply with the inspector' s request compared to if a party does not comply with a document production order.

It should be noted that, if the defendant is likely to falsify, conceal or destroy its documents or other items, the patentee cannot rely on the on-site inspection system because the court must hear the opinion of the Respondent in order to issue an on-site inspection order and notice must be given to the inspected party in respect of the date, time and place of the on-site inspection to be implemented. In such cases, the patentee will need to consider using preservation of evidence (Article 234 et seq. of the Code of Civil Procedure). However, it is extremely difficult to use preservation of evidence for documents or other items that include trade secrets because although a party can file a petition for preservation of evidence and can attend the preservation proceedings, preservation of evidence contains almost no mechanism for the protection of trade secrets.

Although this system is not an easy and simple system and practitioners need to make efforts to be able to utilize this system, the on-site inspection system is expected to serve as an important tool for making Japanese intellectual property litigation more user-friendly.

13) Tatsubumi Sato "Outline of On-site Inspection Proceedings and Issues in Their Operations [Translated from Japanese]" Law and Technology, No. 87, 58-66, 61-62 (in Japanese)

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Recent Court Decisions on International Adjudicative Jurisdiction in Japan

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Ⅰ. Introduction

Japan amended its Code of Civil Procedure (CCP) in 2011 and introduced rules on international adjudicative jurisdiction.[1)] The amended CCP has been in force since April 1, 2012. This paper first introduces the Supreme Court' s first decision applying the amended provisions of the CCP and then presents trends in case law on the issues raised in the decision. Next, this paper provides comments on the relationship between the amended CCP and choice of court agreements.

Ⅱ. Supreme Court decision

1. Supreme Court' s decision of March 10, 2016[2)]

This is a case in which a Japanese court declined to exercise international jurisdiction over a dispute between a Japanese corporation (and its chairperson) and a Nevada corporation.

(a) Summary of facts

X2 was the chairperson for company X1 (a Japanese corporation) and also a director of company Y (a Nevada corporation). X1 primarily engaged in the business of development, manufacture, and sale of gaming machines, while Y had a gambling license in Nevada and its main business was to operate a casino. Company A (a Nevada corporation) was a subsidiary of X1 and held around 20 percent of Y' s total outstanding shares.

In 2011, Y' s Compliance Committee engaged a U.S. law firm to investigate whether X2 was involved in misconduct that could have threatened the maintenance of Y' s gaming license. The law firm submitted a report (hereinafter, the "Report") to the Commission stating that X2 and the related persons appeared to have repeatedly violated the U.S. Foreign

1) The general introduction of this amended code can be found in Jun Yokoyama, Private International Law in Japan, (2017), pp.133-143

2) Minshu Vol. 70 No. 3 p.846. The English translation of this decision is published in the Japanese Yearbook of International Law vol.60, p.488(2017) and at https://www.courts.go.jp/app/hanrei_en/detail?id=1450

Corrupt Practices Act (FCPA).

On February 19, 2012, Y posted an article in English on its website. The summary of the article (hereinafter, the "Article") is as follows.

1) The Report has shown that X2 and the related persons, in an attempt to gain profit for themselves, engaged in inappropriate activities on at least thirty-six occasions over a period of around three years in a manner that is clearly in violation of the FCPA and in extreme disregard of Y' s code of conduct.

2) On February 18, 2012, Y' s board of directors, by a unanimous decision of all directors except X2, determined that Company A, X1, and X2 had acted inappropriately under Y' s articles of incorporation, and adopted a resolution to compulsorily redeem Y' s shares then held by Company A.

On February 19, 2012, Y filed an action in the state court of Nevada against Company A, X1, and X2 to obtain a declaratory judgment that Y had acted legally and in good faith in accordance with the articles of incorporation and to seek damages for X2' s breach of fiduciary duty. In response, on March 12, 2012, Company A and X1 filed counterclaims against Y and its directors in the same action in the Nevada court (hereinafter, Y' s action and counterclaims are collectively referred to as the "U.S. Action"), alleging invalidity of the resolution of Y' s board of directors, and demanding, among other things, suspension of the execution of the resolution. The counterclaims also sought payment of damages.

In August 2012, X1 and X2 filed an action against Y in the Tokyo District Court, seeking tort damages for defamation on the basis that X1' s and X2' s reputation had been impaired by the Article that Y posted on its website.

Neither the Tokyo District Court nor the Tokyo High Court exercised international jurisdiction to adjudicate the matter in Japan, and the appeal of X1 and X2 ensued.

(b) Summary of decision

The Supreme Court of Japan first pointed out that posting the Article on Y' s website could impair the reputation of X1 and X2 in Japan and admitted that a court of Japan could have jurisdiction for this action (Article 3-3 (viii) of the CCP). Based on this premise, the Supreme Court then examined whether there were "special circumstances where, if a court of Japan conducts a trial and renders a judicial decision in the matter, it would harm the equity between the parties or impede the well-organized progress of court proceedings" (Article 3-9 of the CCP). The Court noted that the U.S. Action, which was already pending at the time of filing of this action, was a case between Y, on one side, and A, X1, and X2 on the other side, regarding the measures taken by Y, including the compulsory redemption of Y' s shares held by A (which was a subsidiary of X1, where X2 serves as a director and chairperson) on the ground that X2 and the related persons had repeatedly committed acts in violation of the FCPA. On the other hand, in the action in Japan, X1 and X2 sought tort damages against Y, alleging that their reputation had been impaired by the Article, which described matters such as the developments leading to the compulsory redemption mentioned above. The Supreme Court thus held that this action in Japan was related to a dispute derived from the dispute in the U.S. Action. The Court further noted that the U.S. Action had much overlap with the

action in Japan in terms of facts and legal issues and that the evidence on the main issues in controversy was mostly located in the U.S. Furthermore, parties including X1, X2, and Y appeared to have expected that any dispute arising out of or in relation to Y' s management to be resolved, litigated, or otherwise handled in the U.S. Indeed, X1 and X2 had not only responded to the U.S. Action but had also filed counterclaims. X1 and X2 would not face an excessive burden even if they were to file an action anew in the U.S. to assert the claims that they raised in the action in Japan. Meanwhile, among other things, in light of the fact that the evidence was mainly located in the U.S., it would be unduly burdensome to Y if all such evidence was to be examined in a court in Japan. Considering all of these circumstances, the Supreme Court concluded that "special circumstances" that "would harm equity between the parties or impede the well-organized progress of court proceedings" as prescribed in Article 3-9 of the CCP, exist this case, if a Japanese court exercised jurisdiction.

2. Remarks

(a) Special jurisdiction in tort and infringement of personality rights

According to Article 3-3 (viii) of the CCP, courts in Japan have international jurisdiction if the tort was committed in Japan. The place where the tort was committed can mean either the place where the harmful events giving rise to the damage occurred, or the place where the damages occurred. However, when the harmful events occurred outside of Japan and only the damages occurred in Japan, Japanese courts do not have international jurisdiction if the tortfeasor could not expect the consequence of his/her conduct to have an impact in Japan at the time of the event.[3)]

In the decision discussed above, the Supreme Court found that the damages occurred in Japan, but did not explain in detail why it decided so. It appears that the Supreme Court simply affirmed the decisions rendered by the lower courts.[4)] In the first instance, the Tokyo District Court made the following findings of facts: the Article stated that X2 and the related persons had engaged in violations of the FCPA on multiple occasions, and, because its contents were accessible from within Japan as a result of Y' s publication of the Article on the Internet, it is fair to conclude that the resultant defamation and damages to the reputation of X1 and X2 occurred in Japan. Moreover, according to the decision rendered by the Tokyo District Court on October 21, 2013 (Minshu vol. 70 no. 3 p. 890, the English translation of this decision can be found in the Japanese Yearbook of International Law, vol. 57, p. 531 [2014]), it was ordinarily foreseeable that the Article may be viewed in Japan and may damage the reputation of X1 and X2 once published. This finding was affirmed in the second instance by the Tokyo High Court in its decision on June 12, 2014 (Minshu vol. 70 no. 3 p. 913).

Among the other published cases applying the amended CCP, the ones concerning the infringement of personality rights (including defamation and infringement of privacy), as the

3) For special jurisdiction in tort in the Japanese CCP in general, see Nozomi TADA, INTERNATIONAL CIVIL JURISDICTION BASED ON THE PLACE OF THE TORT, Japanese Yearbook of International Law, vol.55, p. 287 (2012)

4) Dai YOKOMIZO, Case Comments, JURISTO (Jurist) No.1517, p. 131

case discussed above did, include (1) Tokyo District Court' s decision on June 20, 2016 (LEX-DB 25535498), (2) Tokyo District Court' s decision on November 30, 2016 (Hanrei-Taimuzu no. 1438 p. 186), and (3) Tokyo District Court' s decision on February 15, 2017 (LEX-DB 25553745). All these rulings relate to cases of infringement of personality rights by articles published on the Internet. Moreover, in all of these cases, Japan was the place where the consequences of such infringement occurred and, therefore, jurisdiction based on the tort could exist. All of these courts found Japan to be the place where the consequences of infringement of personality rights occurred on the basis that the articles were distributed on the Internet and could be read in Japan. Two of these cases emphasized that the articles at issue were written in Japanese (cases (1) and (3)), but in the Supreme Court case above and case (2), the articles posted on the Internet were written in English. Therefore, it is fair to say that the language of the allegedly defamatory article did not have a significant impact on the Japanese courts' decision on where the damages occurred in Japan.[5] From these cases, the mere accessibility of a website would suffice in determining special jurisdiction based on torts. While one may argue that allowing tort-based jurisdiction simply because an article distributed on the Internet is accessible from Japan can result in overbroad jurisdiction, in practice, for Japan to have jurisdiction based on tort, the occurrence of consequences in Japan must be ordinarily foreseeable, which limits the exercise of the jurisdiction.[6] Further, dismissal based on the special circumstances, as described below, will also prevent excessive exercise of jurisdiction.

(b) Exception clause as "special circumstances"

Article 3-9 of the CCP provides:

3-9 Dismissal without Prejudice Due to Special Circumstances

Even when the Japanese courts have jurisdiction over an action (except when an action is filed based on an agreement that only permits an action to be filed with the Japanese courts), the court may dismiss the whole or part of an action without prejudice if it finds that there are special circumstances because of which, if the Japanese courts were to conduct a trial and reach a judicial decision in the action, it would be inequitable to either party or prevent a fair and speedy trial, in consideration of the nature of the case, the degree of burden that the defendant would have to bear in responding to the action, the location of evidence, and other circumstances.

This provision is consistent with Japanese case law before the amendment of the CCP.[7] The factors to be considered under this Article 3-9 include the nature of the case, degree of

5) Yoshimasa Furuta, Case Comments, MEDIA HANREI HYAKUSEN(Collected Cases in Media Law), 2nd eds., p. 251(2018)

6) Naoshi Takasugi, Case Comments, JURISTO(Jurist) no.1505, p.314(2017)

7) Masato Dogauchi, NEW JAPANESE RULES ON INTERNATIONAL JURISDICTION : GENERAL OBSERVATION, Japanese Yearbook of International Law vol.54, p.275(2011). A description of case law before the amendment can be found in Yoshihisa Hayakawa, LIS PENDENS, Japanese Yearbook of International Law vol. 54, pp.327-328(2011).

burden on the defendant, and location of the evidence. However, this list is not exhaustive, and courts may consider other factors when evaluating the special circumstances under this Article 3-9. Obviously, this obscures the criteria for exercising jurisdiction by Japanese courts.

In the decision discussed above, the Supreme Court examined the degree of burden on the defendant and the location of the evidence mainly because there was a related action between plaintiffs and the defendant in the U.S. court and that the Japanese plaintiffs X1 and X2 actively responded to that action.

Among the published cases applying the amended CCP, eleven decisions declined to exercise jurisdiction based on the existence of such special circumstances, including the judgment of the Supreme Court and the lower courts in the case discussed above. Existence of these special circumstances is to be evaluated on a case-by-case basis, but there are few published judicial precedents after the amendment of the CCP and the factors to be considered are not always clear. Nevertheless, it is possible to discern certain trends based on the published judicial precedents. First, as is in the case discussed above, pending related or identical proceedings in a foreign country are an important factor to be considered in determining the existence of special circumstances. Similarly, the Yokohama District Court' s decision on August 6, 2014 (Hanrei Jiho no.2264, p.62), Tokyo District Court' s decision on July 27, 2017 (Saibansho website), Intellectual Property High Court' s decision on December 25, 2017 (Saibansho website, second instance decision for the Tokyo District Court' s decision on July 27, 2017), and Tokyo District Court' s decision on January 24, 2018 (Hanrei Taimuzu, no.1465, p.250) all found special circumstances to exist and declined to exercise jurisdiction in Japan because identical or related proceedings were pending in other countries. In other words, in Japanese courts, the issue of lis pendens is an important factor to be considered in determining the existence of special circumstances,[8] even though there is no explicit language in the text of the CCP governing lis pendens in the international context. Second, in some judicial precedents, the fact that foreign law governed the action was a factor considered in determining the existence of special circumstances. In the Tokyo District Court' s decision on February 22, 2013 (LEX-DB 25510985), in which the ownership of real estate in Shanghai was disputed, the court emphasized that Chinese law would be the governing law and acknowledged the existence of special circumstances for declining to exercise jurisdiction, even though the defendant was domiciled in Japan. Another example is the Tokyo District Court' s decision on July 14, 2016 (2016WLJPCA07148030), where the court noted that there was some basis to exercise international jurisdiction in principle because the defendant owned real estate in Japan,[9] but nevertheless declined to exercise jurisdiction based on the existence of special circumstances because the governing law of the merits was Chinese law and there was a significant amount of evidence in China. Looking at court practices before the amendment of the CCP, one could discern a high correlation between the governing law being a foreign law and the refusal to exercise jurisdiction by Japanese courts.[10] This tendency has

8) Yoshihisa Hayakawa, *op.cit*., p. 332

9) According to the CCP, Japanese courts have jurisdiction over a defendant who owns a sizable property in Japan if the action is a claim for the payment of monies. (Art. 3-3 (iii))

been maintained in the jurisprudence on the existence of special circumstances even after the amendment of the CCP. Nevertheless, from a theoretical perspective, it is generally accepted that whether the governing law is foreign law should not be taken into account in evaluating the existence of special circumstances or the jurisdiction of Japanese courts.[11] In this regard, it will be necessary to carefully monitor future trends in case law.

Ⅲ. Choice of court agreements and the amended CCP

1. Provisions of the amended CCP and its temporal applicability

Article 3-7 of the CCP provides:

(1) Parties may establish, by agreement, the country in which they are permitted to file an action with the courts.

(2) The agreement as referred to in the preceding paragraph is not valid unless it is made regarding actions that are based on a specific legal relationship, and executed by means of a paper document.

(3) If Electronic or Magnetic Records (meaning records used in computer data processing which are created in electronic form, magnetic form, or any other form that is otherwise impossible to perceive through the human senses alone; the same applies hereinafter) in which the content of the agreement is recorded are used to execute the agreement as referred to in paragraph (1), the agreement is deemed to have been executed by means of a paper document and the provisions of the preceding paragraph apply.

(4) An agreement that an action may be filed only with the courts of a foreign country may not be invoked if those courts are unable to exercise jurisdiction by law or in fact.

(5) An agreement as referred to in paragraph (1) which covers Consumer Contract disputes that may arise in the future is valid only in the following cases:

(i) if the agreement provides that an action may be filed with the courts of the country where the Consumer was domiciled at the time the Consumer Contract was concluded (except in the case set forth in the following item, any agreement that an action may be filed only with a court of such a country is deemed not to preclude the filing of an action with a court of any other country);

(ii) if the Consumer, in accordance with said agreement, has filed an action with the courts of the agreed-upon country, or if an Enterprise has filed an action with the Japanese courts or with the courts of a foreign country and the Consumer has invoked said agreement.

(6) An agreement as referred to in paragraph (1) which covers Individual Civil Labor Dispute that may arise in the future is valid only in the following cases:

(i) if the agreement is made at the time a labor contract ends, and establishes that an action

10) Toshiyuki Kono et al. KOKUSAI SAIBANKANKATSU NI KANSURU HANREINO KINOUTEKIBUNSEKI (Functional Analysis on Japanese Case Law on International Jurisdiction), NBL, no. 890, p.74(2008)

11) Yasushi Nakanishi, ATARASHII KOKUSAISAIBANKANKATSU KITEI NI TAISURU SOURONTEKI HYOUKA(General Remarks on the New Japanese Rules on International Judicial Jurisdiction), KOKUSAI SHIHO NENPO(Japanese Yearbook of Private International Law), no.15, p.17(2013).

may be filed with the courts of the country where the place that the labor was being provided as of that time is located (except in the case set forth in the following item, an agreement that an action may be filed only with the courts of such a country is deemed not to preclude the filing of an action with the courts of any other country);
(ii) if the worker, in accordance with said agreement, files an action with the courts of the agreed-upon country; or if the enterprise files an action with the Japanese courts or with the courts of a foreign country and the worker invokes said agreement.

Although this Article 3-7 sets forth the requirements for choice of court agreements, it only applies to agreements concluded after the amended CCP came into force, that is, after April 1, 2012 (Article 2(2) of the Supplementary Provisions of the CCP). For this reason, there are very few published cases in Japanese courts that have been decided based on Article 3-7. From this viewpoint, a series of judicial precedents in the MRI International case, which has become widely known as an investment fraud case, can provide an overview of the position of Japanese case law regarding choice of court agreements.

2. MRI International case

In this case, MRI International, an investment company, which was a Nevada corporation, approached and sold financial products to consumers residing in Japan only through its Japanese branch. However, the funds collected were not invested or returned to the consumers. The financial product sales contracts between the consumers and MRI International included a jurisdiction clause providing for exclusive jurisdiction and venue in the state court of Nevada. The majority of such consumer contracts were signed before April 1, 2012. The victims (the consumers) filed multiple proceedings seeking damages against MRI International in Japanese courts, but the courts' decisions on the validity of the choice of court agreement were divided. There was no question that the exclusive choice of court agreements concluded on or after April 1, 2012 is invalid based on Article 3-7 (5) above because these agreements are consumer contracts under Japanese law, and this point has been confirmed by multiple judicial precedents (Tokyo District Court' s decision, January 27, 2015 (LEX-DB 25524077), Tokyo District Court' s Decision, March 22, 2017 (LEX-DB 25554104), Tokyo District Court' s decision, March 30, 2017 (LEX-DB 25550954), Tokyo District Court' s decision, August 22, 2018 (LEX-DB 25556780)). However, for the agreements concluded before April 1, 2012, (a) some decisions held that the choice of court agreement is valid even though it is part of a consumer contract, and declined to exercise jurisdiction based on the choice of court agreement (Tokyo District Court' s decision on January 14, 2014 (Hanrei Jiho, no. 2217, p.68)), while (b) some other decisions invalidated the choice of court agreement based on violation of public policy because the agreement imposed a heavy litigation burden on the consumers, and agreed to exercise jurisdiction in Japan based on the consumers' domicile in Japan[12] (Tokyo High Court' s decision on November 17, 2014 (Hanrei Jiho

12) CCP prescribes Japanese courts have jurisdiction over the action brought by a consumer against an enterprise when the consumer's address is in Japan at the time of filing of the action or the conclusion of the consumer contract (Article 3-4(1) of the CCP).

no.2243, p.28, the second instance decision to the Tokyo District Court' s decision on January 14, 2014), Tokyo District Court' s decision on March 22, 2017 (LEX-DB 25554104), Tokyo District Court' s decision on March 30, 2017(LEX-DB 25550954), Tokyo District Court, July 11, 2018 (LEX-DB 25556612), Tokyo District Court' s decision on August 22, 2018 (LEX-DB 25556780). In addition, (c) some decisions held the choice of court agreement to be valid, but exercised jurisdiction in Japan because another choice of court agreement providing for litigation in Japan was reached in the subsequent U.S. lawsuit between MRI International and certain consumers (Tokyo District Court' s decision on January 27, 2015 (LEX-DB 25524077), Tokyo District Court' s decision on January 17, 2017 (LEX-DB 25538647), Tokyo District Court' s decision on January 19, 2017 (LEX-DB 25538330)). Of course, the facts are not exactly the same in all proceedings, but it is interesting to note that the court decisions on the validity of the choice of court agreements differed even though the language of the clause was probably identical or highly similar across the agreements.

3. The Shimano case

Additionally, *Shimano v. Apple* was a case in which there were some interesting judicial decisions that may inform the application of the amended CCP regarding the interpretation of a choice of court agreement, even though the case itself did not apply the amended CCP. The matter was between plaintiff Shimano Manufacturing Co. Ltd. and defendant Apple Inc. In that case, Shimano, a Japanese supplier of Apple, a California corporation, filed a lawsuit against Apple in a Japanese court for civil damages, alleging that Apple suddenly suspended its orders for the manufacture and supply of product parts, which continued for years, and that Shimano was forced to respond to unreasonable demands for price reductions and rebate payments. Shimano' s contract with Apple included a clause providing for exclusive jurisdiction in the state or federal courts of Santa Clara County, California whether or not the dispute is caused by or in connection with this Contract. As the contract between Shimano and Apple was concluded before April 1, 2012, the amended CCP was not applicable to this choice of court agreement. The Tokyo District Court ruled that the clause was invalid and expressed the opinion that, even under the pre-amendment CCP, there was a requirement that the choice of court agreement needs to be based on a certain legal relationship, as provided in Article 3-7 (2) of the pre-amendment CCP. According to the District Court, the clause in the Apple-Shimano contract had no limitation other than that the dispute be between Apple and Shimano and thus it was difficult to discern the underlying specific legal relationship with respect to which the clause covers.[13] However, on appeal, the Tokyo High Court ruled that the jurisdiction and venue clause was valid because, when one construes this clause as a whole, it was clear that the choice of court agreement applies at least to the disputes over the contract at issue. The High Court explained that, although admittedly the choice of court agreement could be partially invalid to the extent that it seeks to cover *all* disputes between Apple and Shimano, this observation should not have any effect if applied to disputes related to the

13) Tokyo District Court's decision on February 15, 2016, LEX-DB 25542763.

contract.[14] As mentioned above, although these decisions in the Shimano case did not apply the amended CCP, they discuss the matters relevant to the amended CCP and are expected to affect future court practices regarding the interpretation of Article 3-7 of the amended CCP.

Ⅳ. Conclusions

This paper provides an overview of the judicial precedents of Japanese courts after the amendment of the CCP applying the amended CCP or its underlying spirit in cases where international jurisdiction was at issue. So far, there are some interesting cases, but case law is not yet well established regarding the amended CCP. In addition to the issues raised in this paper, there are many jurisdictional bases that require interpretation guidelines, such as jurisdiction based on the place of performance of an obligation (Article 3-3 (i) of the CCP) and activity-based jurisdiction (Article 3-3 (v)). Courts, practitioners, and commentators should continue to monitor the trends in case law.

14) Tokyo High Court's decision on July 22, 2020, D1-Law 28283185

Enforcement in Japan of Foreign Judicial and Extra-judicial Instruments

Yoshimasa Furuta*

Ⅰ. Introduction

In September 2020, the Japanese Minister of Justice commissioned the Legislative Council to consider possible amendments to the Arbitration Act and other related statues. Since then, the Legislative Council has been extensively deliberating measures to make (i) interim measures issued by an arbitral tribunal enforceable, so that the Arbitration Act will match the 2006 Model Law and (ii) settlement agreements resulting from private mediation enforceable, so that Japan is ready to join the Singapore Mediation Convention.

This Article will outline the current procedure to enforce a foreign court judgment or arbitral award in Japan (Chapter II), and discuss possible reforms to the current procedure (Chapter III).

Ⅱ. Outline of the current procedure to enforce foreign judicial and extra-judicial instruments

1. "Title of Obligation"

Under the Civil Execution Act of Japan (Act No. 4 of 1979; "CEA")[1] as it presently exists, one must have a so-called "title of obligation" ("*Saimu Meigi*" in Japanese) in order to initiate a civil enforcement procedure. A "title of obligation" is an instrument that satisfies all legal requirements for enforceability. Article 22 of the CEA lists the various forms that a "title of obligation" may take, including various domestic instruments such as court orders and judgments, instruments prepared by a Japanese notary public, and a court-recorded settlement resulting from court mediation (Article 16 of the Civil Conciliation Act (Act No. 222

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1) English translation can be found at: http://www.japaneselawtranslation.go.jp/law/detail/?id=70&vm=&re=

of 1951). It also includes judgments of foreign courts and arbitral awards (regardless whether the seat of arbitration was in Japan or abroad) under certain conditions, as addressed in further detail in the following sections.

2. Foreign judgments

Foreign court judgments can be enforced in the courts of Japan pursuant to Article 24 of the CEA, which provides that:

(1) An action seeking an execution judgment for a judgment of a foreign court shall be under the jurisdiction of the district court having jurisdiction over the location of the general venue of the obligor, and when there is no such general venue, it shall be under the jurisdiction of the district court having jurisdiction over the location of the subject matter of the claim or the seizable property of the obligor.
(2) An execution judgment shall be made without investigating whether or not the judicial decision is appropriate.
(3) The action set forth in paragraph (1) shall be dismissed without prejudice when it is not proved that the judgment of a foreign court has become final and binding or when such judgment fails to satisfy the requirements listed in the items of Article 118 of CCP.
(4) An execution judgment shall declare that compulsory execution based on the judgment by a foreign court shall be permitted.

An "execution judgment" is a court judgment authorizing civil execution or enforcement procedure based on a foreign court judgment. Thus, in order to enforce a foreign judgment in a Japanese court, one must prove that the foreign judgement has become final and binding and satisfies the requirements under Article 118 of CCP. That article states:

A final and binding judgment rendered by a foreign court is valid only if it meets all of the following requirements:

(1) the jurisdiction of the foreign court is recognized pursuant to laws and regulations, conventions, or treaties;
(2) the defeated defendant has been served (excluding service by publication or any other service similar thereto) with the requisite summons or order for the commencement of litigation, or has appeared without being so served;
(3) the content of the judgment and the litigation proceedings are not contrary to public policy in Japan;
(4) a guarantee of reciprocity is in place (addressed further in section III.1.(a) below).

If a Japanese court finds that the foreign judgement satisfies all of the requirements above, it will grant an execution judgment for the foreign judgment. Upon becoming final and binding, such an execution judgment constitutes a "title of obligation" under Article 22 (iv) of the CEA on which one can initiate a civil enforcement procedure for immediate execution.

3. Arbitral award

Regarding the enforcement of an arbitral award in Japanese courts, Article 46 of the Arbitration Act of Japan (Act No. 138 of 2003)[2)] provides that a competent Japanese court shall

grant an "execution order" , which is functionally comparable to an execution judgment while being somewhat less burdensome to obtain, procedurally (addressed further in section III.1.(b) below), for an arbitral award, unless it finds that any of the following conditions exist, i.e.:

(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 (or if said designation has not been made, the laws and regulations of the country to which the place of arbitration belongs);

(iii) the party did not receive notice required under the laws and regulations of the country to which the place of arbitration belongs (or 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 party was unable to defend itself in the arbitration procedure;

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

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

(vii) according to the laws and regulations of the country to which the place of arbitration belongs (or if the laws and regulations applied to the arbitration procedure are laws and regulations of a country other than the country to which the place of arbitration belongs, said other country) the Arbitral Award is not final and binding, or the Arbitral Award has been set aside or its effect has been suspended by a judicial body of that country;

(viii) the 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

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

This list is substantially identical to the grounds for refusing recognition or enforcement of an arbitral award as provided for in Article 36(1) of the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law")[3] .

In sum, if a Japanese court finds that any of the grounds set forth above apply, it will decline to issue an execution order for the arbitral award. But if none of the grounds apply, the court will issue such execution order which, upon becoming final and binding, will constitute a "title of obligation" per Article 22 (vi)-2 of the CEA, on which a civil enforcement procedure can be initiated.

2) English translation can be found at: http://www.japaneselawtranslation.go.jp/law/detail/?id=2784&vm=&re=

3) https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration

Ⅲ. Possible reforms to the current procedure to enforce foreign judicial and extra-judicial instruments

1. Foreign judgment

(a) On “guarantee of reciprocity”

In July 2019, the Hague Conference on Private International Law adopted the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (“Hague Judgment Convention”)[4] . Under Japanese law, the provisions in Article 118 of the CCP largely align with the provisions of the Hague Judgment Convention, with one exception noted below. For instance, with regard to the requirement under Article 118 (i) of the CCP (indirect jurisdiction of the foreign court), Article 5 of the Hague Judgment Convention provides a detailed basis for indirect jurisdiction. With regard to Article 118 (ii) & (iii) of the CCP (proper notice & public policy), Article 7 of the Hague Judgment Convention provides for substantially the same grounds for refusal. However, as for Article 118 (iv) of the CCP (guarantee of reciprocity), there is no equivalent provision in the Hague Judgment Convention. In other words, it is not permissible under the Hague Judgment Convention to refuse recognition & enforcement of a foreign judgment on the ground of the lack of guarantee of reciprocity. Accordingly, if Japan is to join the Hague Judgment Convention, Article 118 (iv) of the CCP must be deleted.

In addition, when a business entity is to enter into an international business transaction, it is common practice in Japan for parties to procure a legal opinion regarding enforceability of a foreign court judgment that might be obtained in the event of a dispute arising from that transaction. Under the current regime, in light of Article 118 (iv) of the CCP, Japanese lawyers must investigate and understand whether equivalent systems and requirements exist in the courts of a certain foreign country which may render the judgment relating to that transaction, inasmuch as “guarantee of reciprocity” is to be judged by comparing whether or not a Japanese judgment of the same kind shall be recognized and enforceable in the foreign country under conditions that do not differ in any material respect from the conditions prescribed in Article 118 of the CCP (Judgment of the Supreme Court of Japan dated June 7, 1983, Minshu Vol. 37, No. 5, page 611). This is a time consuming, costly and difficult task. As a result, more often than not, such legal opinions omit discussion of the issue of “guarantee of reciprocity”, which leaves a gap of uncertainty regarding the central issue which they are intended to address—i.e., the judicial enforceability of a foreign judgment relating to contractual obligations in Japan. This introduces an element of precariousness in international business transactions with entities in Japan that may add a layer of friction to such dealings.

In the first place, it is said that the purpose of requiring a “guarantee of reciprocity” is not to pursue justice among private entities, but is based on the "principle of equality between sovereign states", i.e., originated from the traditional notion under the international public law that has been already abandoned in many jurisdictions. Application of such a principle to

4) https://www.hcch.net/en/instruments/conventions/full-text/?cid=137

judicial treatment of purely commercial transactions introduces an element of uncertainty that may well have undesirable effects in trade and commerce with Japanese businesses. . From this viewpoint, it would be better to delete sub-provision (iv) of Article 118 of the CCP.

(b) "Execution judgment" or "execution order"

To enforce a foreign judgment in Japan, one needs a final and binding "execution judgment" ("*Shikko hanketsu*" in Japanese), while for enforcement of an arbitral award in Japan, one needs a final and binding "execution order"("*Shikko kettei*" in Japanese). Under the CCP, the procedure for obtaining a "judgment" is much heavier and more time-consuming than the procedure for an "order" . While Article 82 of the Constitution of Japan requires a "judgment" procedure to adjudicate the substantive rights and obligation of the litigants (Judgment of the Supreme Court of Japan dated June 30, 1965, Minshu Vol. 19, No. 4, page 1089), in the case of an "execution judgment", the court may only adjudicate whether a foreign judgment can be recognized in Japan, and it cannot adjudicate the substantive rights and obligation of the litigants. Therefore, it is just a matter of legislative policy whether the enforcement of a foreign judgment requires "execution judgment" or "execution order".

Before the current Arbitration Act took effect in 2004, a final and biding "execution judgment" was required to enforce an arbitral award in Japan. As the Arbitration Act changed "execution judgment" to "execution order" for an arbitral award, it is desirable and sensible to change "execution judgment" to "execution order" for a foreign judgment as well.

2. Foreign court-recorded settlement

Under the CCP, when the litigants have reached an amicable settlement before the judge, the settlement terms are recorded in the court record. As discussed the above, once recorded in the court record, such a court-recorded settlement is readily enforceable. By contrast, such a settlement recorded or otherwise simply approved in a foreign court is not enforceable in Japan, as it does not qualify as a "judgment of a foreign court" as provided for in Article 22 (vi) of CEA nor "document that has the same effect as a final and binding judgment" as provided for in Article 22 (vii) of CEA. That said, however, in cases where a settlement is approved by a foreign judge and registered as a court judgment as a matter of judicial process (such as a "consent decree" in the United States), it qualifies as a "judgment of a foreign court" as provided for in Article 22 (vi) of CEA and can be enforceable in Japan if it meets the requirements under Article 118 of CCP (see, e.g., Judgment of the Tokyo District Court dated January 26, 2017, 2017 WLJPCA01268002 (consent decree of the U.K. family court), Judgment of the Tokyo District Court dated March 19, 1957, Kaminshu Vol. 8, No. 3, Page 525 (consent decree of the California state court).

From a substantive view point, it is a rather technical difference between a consent decree and other type of court-recorded settlement, and the degree of the judge' s involvement during settlement discussion may not be categorically different. That being the case, it may not be sensible to distinguish them in terms of enforceability. Incidentally, Article 11 of the Hague Judgment Convention provides that "Judicial settlements (transactions judiciaires)

which a court of a Contracting State has approved, or which have been concluded in the course of proceedings before a court of a Contracting State, and which are enforceable in the same manner as a judgment in the State of origin, shall be enforced under this Convention in the same manner as a judgment." As such, it would be worth considering to make a settlement recorded or otherwise simply approved in a foreign court enforceable in Japan.

3. Enforceability of interim measures issued by an arbitral tribunal

Articles 17A to 17I of the Model Law (as amended in 2006) provide, among other things, that interim measures issued by an arbitral tribunal shall be recognized and enforced by a competent court as long as certain requirements are met. The Arbitration Act of Japan lacks equivalent provisions, having been enacted 2003, before the 2006 amendments to the Model Law.

In June 2017, Cabinet Office of the Government of Japan published "Basic Policy on Economic and Fiscal Management and Reform 2017," [5] which declared that "the government will ... develop a foundation to activate international arbitration, including in sports events" . In February 2018, the Japan International Dispute Resolution Center ("JIDRC") was incorporated, which now operates state-of-the-art arbitration facilities in Tokyo and Osaka[6] . In June 2019, the Japanese Ministry of Justice entrusted JIDRC to implement the Five Year Program to Activate International Arbitration. From FY2019 to FY2023, the JIDRC will advance a variety of measures to:

(1) Educate and train prospective arbitrators, arbitration counsel, and other necessary human resources;
(2) Enhance awareness among the business community on international arbitration; and
(3) Launch and operate new arbitration hearing facilities in Tokyo.

In May 2020, the Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers (Act No. 66 of 1986; "Gaiben Act") was amended to enlarge the scope of "international arbitration cases" for which foreign lawyers can act as counsel cases in Japan.

These are welcome and positive developments, reflecting a pro-arbitration drive in Japan. Given the spirit and intentions of this trend, it is now time to amend Arbitration Act to match the 2006 Model Law in providing for interim relief granted by arbitrators in matters seated in Japan to be directly enforceable in the country' s courts.

4. Settlement agreement resulting from private mediation

In December 2018, the United Nations General Assembly adopted the United Nations Convention on International Settlement Agreements Resulting from Mediation (the "Singapore Mediation Convention")[7] . Under this convention, a settlement agreement resulting from private mediation shall be enforced by any competent court, unless the court finds any of the

5) English translation can be found at: https://www5.cao.go.jp/keizai-shimon/kaigi/cabinet/2017/2017_basicpolicies_en.pdf

6) https://idrc.jp/en/

7) https://www.singaporeconvention.org/

grounds to refuse enforcement as provide for in Article 5 thereof.

In Japan, under the current CEA, a settlement agreement resulting from private mediation is not readily enforceable in Japan, unless it is recorded in (a) a notarial deed prepared by a Japanese notary public with a statement to the effect that the obligor will immediately accept compulsory execution (Article 22 (v) of CEA), or (b) a court record of a judicial settlement (Article 22 (vii) of CEA). When the Act on Promotion of the Use of Alternative Dispute Resolution (Act No. 151 of 2004; "ADR Act") was enacted in 2004, it was discussed whether a settlement agreement resulting from private mediation should be readily enforceable or not. It was decided at that time that the situation was premature, and so far, the ADR Act has not been amended yet to incorporate this change.

Accordingly, in practice, where a settlement agreement resulting from private mediation needs to be enforceable, the parties to the settlement agreement would have it recorded in (a) a deed notarized by a Japanese notary public or (b) a court record of a Japanese court. This practice, however, is not necessarily feasible for an international business mediation. First, as for a notarial deed, the scope of enforceability is limited to "a claim for payment of a certain amount of money or any other fungible thing or a certain amount of securities" and does not cover other types of relief such as specific performance that may be included in a mediated settlement. Second, to have the settlement agreement recorded as a court record, one must first file a petition for mediation with a Japanese court (Article 2 of the Civil Conciliation Act), or file a petition for settlement with a Japanese court (Article 275 of CCP). In either case, the court will set a hearing date for settlement, which will usually be several weeks after the filing. Third, both the notarial deed and the court record must be written in Japanese.

In November 2018, the Japan International Mediation Center in Kyoto ("JIMC-Kyoto")[8] was officially launched. JIMC-Kyoto is the first international mediation center in Japan and provides world-class mediation services for various kinds of cross-border disputes between foreign and Japanese parties. In May 2020, the Gaiben Act was amended to allow representation by foreign lawyers in international mediation cases in Japan. In September 2020, the Singapore Mediation Convention entered into force.

Under these circumstances, the time has come for Japan, at least in relation to international commercial mediation, to make settlement agreements resulting from private mediation inherently enforceable, and to join the Singapore Mediation Convention.

Ⅳ. Conclusion

As outlined in this article, there are a number of amendments to Japanese law that should be discussed and adopted in furtherance of the country' s recent trend in promoting and developing the field of international dispute resolution, especially international arbitration and mediation. It is envisaged that the necessary bills can be submitted to the National Diet as soon as late 2021 and it is hoped that they can be established as law in the near future.

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

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Judicial Decisions and Open Data in Japan

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Ⅰ. The necessity of open data in judicial decisions

The term "open data", while not defined, was [first] used in Japan in the 2012 e-Government Open Data Strategy adopted by the Strategic Headquarters for the Promotion of an Advanced Information and Telecommunications Network Society (IT Strategic Headquarters)[1] . The objective of this Strategy was three-fold: (i) to improve transparency and reliability of public administration, (ii) to promote public participation and cooperation between the public and private sectors, and (iii) to revitalize the economy and improve administrative efficiency through the secondary use of public data. Open data is an established international strategy, having been pursued in the United States[2] and the EU[3] since early 2000.

The term "open data" tends principally to cover data held by administrative agencies, whether legislative or judicial, and an open data strategy requires that such data be made widely available to the public. In particular, legal information such as laws and regulations must be freely accessible to the general public under the principle of popular sovereignty. This is partly to enable the sovereign to control the content of laws, but also because, theoretically, members of the public must know in advance the content of any law that acts as a normative constraint on their actions. In particular, criminal law, which is governed by the legal principle of legalism for crime and punishment[4] , is based on the fundamental premise that the actor should know the law in advance.

The legal information contemplated here is not limited to legal texts of the Japanese Constitution, legislation, and various subordinate laws, but also includes factors that affect the

1) http://www.kantei.go.jp/jp/singi/it2/pdf/120704_siryou2.pdf

2) Transparency and Open Government, Memorandum for the Heads of Eexecutive Departments and Agencies. https://obamawhitehouse.archives.gov/the-press-office/transparency-and-open-government

3) The European Union Open Data Portal (EU ODP) https://data.europa.eu/euodp/en/home

4) Article 39 of our Constitution stipulates that no person shall be held criminally liable for an act which was lawful at the time it was committed.

interpretation and application of those laws. The factors referred to in the legislative process are key to interpreting the meaning of the law as are court precedents.

Thus, such information must be freely accessible to the public, who are sovereign and the addressees of the law—i.e., they must be considered open data.

Free access to legal information also contributes to the enhancement of Japan' s credibility with foreign countries. This can be an effective tool to attract foreign trade and investment into Japan, as well as to expand Japan's presence in international arbitration forums. The coronavirus pandemic has forced a reassessment of global strategy, but when foreign trade and business activity eventually recovers, transparency, as well as fairness of the Japanese legal system, will be strategically important.

In addition, judicial decisions should be open data, so that this can be used as a basis for AI analysis. For example, a committee for research on online dispute resolution[5] has recommended that "There is a strong need to open up the data from civil judgments so that it can be used as big data".

Ⅱ. Open data methods

1. Machine reading and Free access

The definition of open data was clarified in the 2017 Basic Guidelines for Open Data[6] issued by the IT Strategic Headquarters. According to these guidelines, open data must be made available to the public for easy use (processing, editing, redistribution, etc.) through the internet, or through other means in a form that meets the three conditions of secondary use, machine readability, and free use.

An example of providing legal information as open data in Japan is the e-government website for providing legal data[7] . This site satisfies the definition of open data and provides all legal data in XML format free of charge, as well as bulk data of all laws and ordinances, and a legal API (Application Programming Interface) to facilitate secondary use in a form suitable for machine reading. The provision of such open data has led to the development of private-sector applications for the use of legal data on smartphones, which are being used in various ways.

An English translation of Japanese laws is available on the site administered by Ministry of Justice, Japan. This site, "Japanese Law Translation"[8] provides a considerable amount of legal data for free, although not in an XML format.

Similarly, the availability of court judgments on the court websites has increased after the judicial system reforms. Now, in principle, the Supreme Court' s official case-law collection, its quasi-official case-law collection, the High Courts' case-law collection, intellectual property case-law collection, and some other important decisions are open to the public[9] . However,

5) This is an organization of Ministry of Justice. http://www.moj.go.jp/content/001332396.pdf

6) Revised version was published at: https://www.kantei.go.jp/jp/singi/it2/kettei/pdf/20190607/siryou10.pdf

7) https://elaws.e-gov.go.jp

8) http://www.japaneselawtranslation.go.jp/

documents are generally formatted as a scanned PDF of the paper original, and although full-text search is possible, it is not XML-based and does not provide an API. So that these sites can convert these documents into XML with standard tags, submissions should be required to be made in a natively digital format.

The website of the Supreme Court of Japan also provides a summary of the Court' s decisions in English[10)] . Although this service is a notable and welcome development, it has not been positively publicised. In addition, for the time being, translations are limited to recent cases.

A further challenge to the vision of openness in legal data in Japan is the relatively low rate of reporting of court judgments. Only a small fraction of the cases decided are actually reported, even in Japanese. Since there are various types of trials, it is difficult to ascertain the numbers with accuracy. However, as per the Annual Report of Judicial Statistics, while the number of completed cases (excluding duplicates and special appeals) of the civil and administrative cases of the Supreme Court in 2018 was 2,902, the number of judgments reported on the court website was only 32 (1.1%). The number is slightly higher in private databases, but even so, the number of Supreme Court civil and administrative judgments available on the Westlaw Japan[11)] case database is only 121 (4.17%). As for the high courts and district courts, although the number of cases reported is more, the number of cases that have been decided is also larger. In percentage terms, 1.02% of the civil and administrative cases of the high courts are published on the court website, and 2.79% on Westlaw Japan. In the case of district court cases, the reporting rate is only 0.05% on the court website and 0.83% in Westlaw Japan.

The definition of open data makes no mention of the amount of data, but if we start from the premise that judicial precedents ought to be considered open data, so that they can be accessed as examples of how to interpret and apply the law, and also to develop related industries through secondary use, then it is clear that the reporting rate of judgments should be increased dramatically. Conventional publication of judicial precedents tends to focus on particularly important judgments, since these serve as precedents or as practical references. Similarly, private publishers and database companies also select and publish the most important precedents from their own perspectives. However, open data should, in principle, cover all, or a majority of, the judicial precedents, while being open and available to the public, with exceptions for non-disclosure under special circumstances only.

2. Protection for trade secrets and privacy

While judicial precedents are public property and should be widely available to the general public, many cases that go to trial contain large amounts of private information, and in some cases, trade secrets. Currently, the case records of civil trials can be inspected by anyone

9) https://www.courts.go.jp/app/hanrei_jp/search1

10) https://www.courts.go.jp/app/hanrei_en/search

11) This database company is a joint ventrue by the Westlaw and New Japan Law (Shin Nihon Hoki). https://go.westlawjapan.com/

(Article 91, Japanese Code of Civil Procedure[12]), but if certain grounds are *prima facie* alleged, the inspection can be restricted (Article 92, same Code[13]). Nondisclosure orders granted in cases which concern trade secrets, or private information that should be protected.

In addition, although this article does not make a distinction between criminal and civil cases, a criminal conviction is, by itself, information about the defendant's criminal record. Criminal conviction records are held by the local government and investigative agencies, and are not, in principle, public. Indeed, there is a law that mandates publication of criminal records in cases that have been disposed of, but with strict restrictions[14] . A comprehensive disclosure of criminal convictions would be tantamount to disclosing information on criminal records. In addition, criminal judgments are sometimes issued on an anonymous basis. In such cases, if the arrest of the person concerned is reported under his or her real name, it is quite easy identify the individual, defeating the purpose of an anonymous judgment. Case records of criminal cases disposed of are also limited by extensive grounds for nondisclosure, unlike civil cases.

For reference, recent French law provides a general policy for open data about judicial decisions in civil, administrative and criminal procedures[15] . A report[16] of policy submitted by Professor Loïc Cadiet analyzed widely and deeply the merit and risk of open data policy in judicial decisions, and proposed legislation to allow the disclosure of all judicial decisions, but with anonymization and some sensitive information sealed. The French government made some laws to realize this proposal in 2019[17] .

Therefore, under the current legal framework, it is generally difficult to make criminal judgments open to the public. On the other hand, for civil judgments, where open data is the default rule, some measures must be taken to protect privacy and trade secrets, such as

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12) Any person may file a request with the court clerk to inspect a case record.

13) If the party to a case makes a prima facie showing of the following grounds, the court, at the petition of said party, may rule to limit the persons that may request to inspect or copy the part of said case record in which the relevant confidential information is entered or recorded, that may request to be issued an authenticated copy, transcript, or extract of that part of the case record, or that may request to reproduce that part of the case record (hereinafter referred to as "Inspection, etc. of the Confidential Portion") to the parties to the case:

(i) a material piece of confidential information about the private life of a party is entered or recorded in the case record, and a third party's Inspection, etc. of the Confidential Portion of the case record would be substantially detrimental to that party's social life;

(ii) a trade secret (meaning a trade secret as prescribed in Article 2, paragraph (6) of the Unfair Competition Prevention Act;

14) Act about the terminated criminel procedure records. Article 4 provide its openess to the public but with restrictions.

15) This policy is based on the article 20 of the Act for Digital republic (Loi no 2016-1321 du 7 octobre 2016 pour une République numérique).

16) Loïc Cadiet, «L'open data des décisions de justice», Rapport à Madame la garde des Sceaux, ministre de la Justice, 2017. This report is published at the French Supreme Court website: https://www.courdecassation.fr/venements_23/relations_institutionnelles_7113/archives_9896/ministere_justice_8545/decisions_justice_8546/

17) Loi n° 2019-222 du 23 mars 2019 de programmation 2018-2022 et de réforme pour la justice. This law is followed by the decree: Décret no 2020-797 du 29 juin 2020 relatif à la mise à la disposition du public des décisions des juridictions judiciaires et administratives.

partial confidentiality, anonymization, or limiting the scope of disclosure according to the attributes of the user. The use of XML technology is necessary for this purpose. These are likely to be expensive to implement, as, even if the cost of digitization can be ignored (since judicial decisions are usually in digital format), the procedures for XML conversion and confidentiality measures will likely be costly.

Ⅲ. Open data a work in progress in Japan

The Japanese civil judicial system has been navigating the process of digitalization[18] . Until 2019, lawyers and judges worked only with paper-based or face to face communication. Even now, all judicial decisions are issued on paper and physically signed by the judges. After 2019, digital communication has been partly allowed and electronic filing system will be introduced totally or partly. This change, a necessary condition for the open data policy, is currently underway, and is expected to be fully implemented by 2025.

More recently, a new public-private framework has been instituted for the creation of open data on civil judgments. Called the "Project Team to Study the Creation of Open Data on Civil Judgments", this body has been established under the Legal Research Foundation of the Japan Federation of Bar Associations[19] . With an unprecedentedly wide range of participants, including lawyers, legal researchers, information analysis experts, and the relevant ministries and agencies, especially judges, a practical project, including a demonstration experiment, has been launched.

It is hoped that the study will progress in the right direction, and realize the ideal of open data of judicial precedents, with the minimum necessary protections. This will go a long way in improving Japanese legal culture and its transparency.

18) See. Yasutaka Machimura, Information Technology and Civil Justice in Japan, 86 Seijo Law Review, 361, available at http://id.nii.ac.jp/1109/00005748/

19) https://www.jlf.or.jp

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Introduction of IT in Civil Court Procedures in Japan

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Ⅰ. Outline

(1) Status Quo

In Japan, under the Code of Civil Procedure, which was enacted in 1996 and enforced in 1998, courts may conduct preparatory proceedings, which are pre-trial proceedings for arranging issues and discussing evidentiary matters, in a way that enables the court and both parties to communicate with one another at the same time through audio transmissions if one of the parties appears in person before the court on that date of the proceeding. In “written preparatory proceedings” which are proceedings for arranging issues and discussing evidentiary matters through the submission of briefs or other writings without the appearance of the parties, the judge may consult both parties in a way that enables the court and both parties to communicate with one another at the same time through audio transmissions. When examining a witness who resides in a distant location, the court may examine the witness so as to enable communication with the witness through audio and visual transmissions.

The amendment of the Code of Civil Procedure in 2004 created a provision enabling online submissions. However, online submissions have not yet been authorized due to the lack of Supreme Court rules on this issue, except with respect to the ‘demand procedure’ which is conducted by court clerks.

Therefore, a plaintiff who wishes to file a suit must bring the written complaint to the court counter or send it by mail. During the proceedings, parties may submit documents to the court using facsimile, in addition to bringing them directly to the court counter or sending by mail. Case records are also in paper form.

(2) Current Movement

In response to the government's "Future Investment Strategy 2017", the “Commission for IT Adoption in Court Procedures" under the Cabinet Secretariat, released a report titled “IT Adoption in Court Proceedings – Towards the Realization of the Three E” in March 2018.[1)] The

report discussed the adoption of e-court, e-filings, and e-case management in a step-by-step fashion in three phases. The e-court component would be realized in phases 1 and 2 through the expansion of the use of IT tools and the amendment of laws. During phase 3, civil court procedure would allow e-filings and e-case management using a new IT court system.

According to the report, in phase 1, IT tools such as web conferences would be used proactively to the extent possible under the current law. Courts throughout the country have been carrying out this proposal, expanding the use of web conferences which has resulted in the efficient arrangement of issues and evidence in civil cases. This expansion of web conferences in the court context has been utilized, coincidently, as a measure to mitigate the effects of the Covid-19 pandemic.

Further, in response to consultation with the Minister of Justice, the expert committee of the Judicial Council began to study and deliberate in 2020 with the aim of preparing a report on an amendment of the Code of Civil Procedure for the Judicial Council.[2, 3] The committee is expected to release its final report by early 2022. After the Minister of Justice receives the reply from the Judicial Council, the government is expected to submit a bill for the amendment of the Code of Civil Procedure to the Parliament in 2022.

This amendment of the Code of Civil Procedure is supposed to deal with various IT issues, such as web-based oral arguments without parties appearing before the court, online filings and online services utilizing the case management system, examination of documentary evidence by way of inspecting the electronic data filed with the system, and judgments uploaded to the system.

Ⅱ. E-court

(1) Phase 1

As stated above, e-court is the main subject of phases 1 and 2.

In phase 1, judges, court clerks and lawyers are all expected to implement what is possible under current law as provided in the Code of Civil Procedure. Specifically, phase 1 is expected to actively involve IT tools such as web conferences to arrange issues and evidence of the cases. The parties and judges can exchange audio, video, electronic files, etc., in both or multiple directions using the Internet in web conferences.

Nine courts (the Intellectual Property High Court and the District Courts of Tokyo, Osaka, Nagoya, Hiroshima, Fukuoka, Sendai, Sapporo, and Takamatsu) began to use IT tools, such as web conferences, in preparatory proceedings for arranging issues and evidence in February

1) The government's "Future Investment Strategy 2018" approved the approach reported by the Commission.

2) Prior to the consultation, in December 2019, the "Study Group on IT adoption for Civil Court Procedures" issued its final report "Toward the realization of IT Court", which analyzed many legal aspects which could involve various legal issues.

3) In March 2020, the Liaison Committee of Relevant Ministries and Agencies on the Promotion of Reform of the Civil Justice System compiled the "Promotion of Civil Justice System Reform", stating that it is necessary to consistently promote IT adoption of civil court procedures from the standpoint of realizing a civil justice system with high international competitiveness.

2020, a move that was followed by five district courts (the District Courts of Yokohama, Saitama, Chiba, Kyoto, and Kobe) in May, and thirty-seven district courts in December. Consequently, all of the main offices of the fifty district courts throughout the country began to use IT tools for arranging issues and evidence until the end of 2020. This operation will be expanded to branch offices of district courts throughout the country in 2021. In all, these IT tools were used in around 6,200 civil cases in January 2021.[4)]

In this phase 1, a web conference for arrangement of the issues and evidence of the case may proceed with a judge in the courthouse and attorneys for both parties somewhere else such as their offices, or, as is permitted under the current law, a judge and one of the attorneys in the courthouse with the other attorney somewhere else.

It seems that many lawyers involved in such proceedings feel comfortable with the ability to smoothly communicate through the web conferencing system, which saves time and cost for court appearances.[5)]

(2) Phase 2

Phase 2 assumes that both parties are able to use web conferences to conduct oral arguments and preparatory proceedings without appearing before the court, which is not allowed under the current Code of Civil Procedure. Under the current law, parties may not present their case without appearing before the court on the date for oral argument except on the first date, and preparatory proceedings should be held with appearance of at least one party. Therefore, in phase 1, consultation by "written preparatory proceedings" , which can be conducted without both parties appearing would be used in lieu of web conferencing. However, this use of written preparatory proceedings is not as the law expected. In addition, parties who wish to settle their cases must use other types of proceedings to reach a settlement because parties may not come to a settlement by written preparatory proceedings.

The expert committee of the Judicial Council is now considering an amendment of the Code of Civil Procedure which would enable courts to hold dates for oral argument and preparatory proceedings without in-person appearances. This amendment would make civil litigation proceedings more expeditious without impacting fairness. In that case, the date for oral argument would be conducted in an open court where parties appear on screen, consistent with the Constitution of Japan which mandates that a date for oral argument be conducted publicly.

Ⅲ. E-filings and E-case management

(1) Overall Concept

In phase 3, which would have to be implemented by amendment of the Code of Civil

4) See, Civil Affairs Bureau of the Ministry of Justice, Supplementary Explanation to the Interim Draft for Amendment of the Code of Civil Procedure, etc. (Introduction of IT), Feb. 2021, at 55.

5) See, Kazuhiko Yamamoto, et al., Discussion on Introduction of IT into Civil Court Procedures – Current Situation and Issues in the Phase 1, Jurist 1554, Feb. 2021, at 58-72.

Procedure and the Rules of Civil Procedure, parties would be able to file a complaint and submit other documents online to the court utilizing the case management system (e-filing). Case records would be electronically prepared, which could be accessed online by the parties, and dates for oral argument would be also designated with electronic data without using paper (e-case management). Judgments would be uploaded to the case management system.

The case management system should be user-friendly, and an IT support system should be created to deal with digital divides. In other words, it is necessary to ensure each person will not be hindered from getting sufficiently involved in the proceedings even when he or she is not familiar with IT. This is especially important given that civil litigation may be filed, answered, and conducted by a party pro se in every court in Japan.

(2) New Proceedings Implementing IT

If the amendment of the Code of Civil Procedure is completed in line with the report of the Study Group and current deliberations of the expert committee of the Judicial Council, the new proceedings utilizing IT tools would proceed as follows:

First, the plaintiff would be able to file the complaint online with the court. An issue now being discussed is whether the online filing should be mandatory or optional. Options are (i) a fully mandatory system in which plaintiffs will not be allowed to file paper complaints except where there are unavoidable grounds for doing so; (ii) a mandatory system for attorneys whereby attorneys may not file a complaint on paper but plaintiff pro se can file a complaint either online or on paper; or (iii) a fully optional system, in which the plaintiff can choose filing online or on paper.

Second, the parties will be able to pay the filing fee and other fees online.

Third, the service to the defendant of the complaint and the summons regarding the first date of oral argument should be printed in paper form and sent by mail, in principle. That said, a system is under consideration whereby the complaint and summons are served by uploading them to the case management system with notification to the defendant's email address which has been provided to the court previously.

Fourth, in proceedings for the arrangement of issues and evidence, each party is not required to appear in the courthouse and instead may attend the date for the proceedings online from their office or home.

Fifth, the court can examine witnesses outside of court using web conferences if it is difficult for the witness to appear before the court or when the consent of the parties is obtained.

Sixth, the parties would be able to reach a settlement using web conferences during the course of the proceedings without appearing before the court.

Seventh, the court makes a judgment in electronic form, renders it in the public courtroom, and uploads it to the case management system.

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Collective Redress to Recover Consumer Damage in Japan —Present system and the direction of its amendment—

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Ⅰ. Introduction

On November 24, 2020, the new directive on representative actions for the protection of the collective interests of consumers was endorsed by the European Parliament[1] . Many European countries have already adopted legislation to realize collective redress through judicial procedure[2] . The U.S. is famous for its class action scheme[3] . Other countries such as Brazil and Canada also have such legislation[4] . Japan is no exception to this worldwide trend and is now equipped with collective redress schemes for both injunction and remedy of damage for the sake of the consumers.

This essay focuses on the latter and addresses its problems and examines possible solutions. I argue that Japan' s new system has faced a fatal situation from the outset and is in urgent need of emergency "surgery" if it is to flourish.

I begin with an outline of the present system (II.), then examine its problems and the direction of the possible amendment to address such problems (III.), and lastly drawing out some conclusions based on the examination (IV.).

Ⅱ. The Japanese scheme for collective redress to recover consumer damage

Collective redress for consumer damage was established by the new enactment of 'Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers' ('Consumer Procedure Special Measures Act' ; and,

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1) See https://data.consilium.europa.eu/doc/document/ST-9573-2020-REV-1/en/pdf (English).

2) See Stefaan Voet, *'Where the Wild Things Are'. Reflections on the State and Future of European Collective Redress* in Anne L.M. Keirse & Marco B.M. Loos (eds.), Waves in Contract and Liability Law in Three Decades of Ius Commune (Intersentia, 2017) at 105, 109 (English).

3) *Id* at 106.

4) Paul G. Karlsgodt (ed.), World Class Actions (Oxford University Press 2012) at 56, 121 (English).

hereafter, 'CPSMA')[5] on December 4, 2013, which went into effect on October 1, 2016[6] . This new procedure is said to be modeled after the Brazilian and French models[7] .

The aim of the new procedure by CPSMA is the monetary redress of the damage suffered by a considerable number of consumers.

1. Standing

The standing to use this procedure is limited to entities called 'Specified Qualified Consumer Organizations' (hereafter 'SQCOs') (Art. 3.1, 65.1 of CPSMA). They are Qualified Consumer Organizations (hereafter 'QCOs')[8] that meet further requirements and are approved by the Prime Minister to use this procedure (Art. 2.10, 65.4～6). On the respondent side, basically, only the enterprise which is alleged to have caused the damage shall be the defendant (Art. 3.3 of CPSMA), excluding the directors of such enterprises.

2. Structure of the procedure

The procedure consists of two stages. The first stage is the Litigation Seeking Declaratory Judgment on Common Obligations. It is a litigation seeking declaratory judgment as to the existence of the cause common to wronged consumers (such as the existence of an unlawful act on the side of the enterprise that caused damage to consumers). The judgment as the result of this litigation shall be binding on the defendant enterprise, all the SQCOs including the plaintiff and the affected consumers who take part in the second stage (Art. 9 of CPSMA)[9] .

The second stage is the Proceeding for the Determination of Claims. This is a proceeding to determine the existence and the amount of the claim each affected consumer has against the damaging enterprise. This stage is twofold: 1) Simple Determination Proceeding; and 2) Proceeding of Litigation after the Objection.

The first step, Simple Determination Proceeding, is a procedure before the court but is less burdensome and more simplified than the ordinary court proceeding and proceeds as follows: 1) commencement of proceeding upon the petition by the SQCO which was the plaintiff in the first stage, followed by 2) filing of claims of affected consumers by this SQCO, then followed by 3) approval or disapproval of this claim by the defendant enterprise (if the defendant approves the claim, the procedure for this claim ends here), ending in 4) the decision by the

5) English translation of this law can be obtained by http://www.japaneselawtranslation.go.jp/law/detail/?vm=04&re=01&id=2727. Last date of visit: 09/03/2021.

6) For more details of the procedure, see Shouhishachou Shouhishaseidoka (ed.), Ichimonn Ittou Shouhisha Saiban Tetsuzuki Tokureihou (Shoujihoumu, 2014) (Japanese); Yamamoto, Kazuhiko, Kaisetsu Shouhisha Saiban Tetsuzuki Tokureihou (Koubundou, 2d ed., 2016) (Japanese) (hereafter 'Yamamoto'); *id*, *Special Proceedings for the Collective Redress for Property Damage Incurred by Consumers — About So-Called "Japanese Class Action"*, The Japanese Yearbook of International Law 169 (2018) at 61 (English) (here after 'Yamamoto'); Machimura Yasutaka, Shousetsu Shouhisha Saiban Tetsuzuki Tokureihou (Minjihoukenkyukai, 2019) (Japanese).

7) See Yamamoto, *supra* note 6 at 173; Yamamoto, *supra* note 6 at 58, 63.

8) QCOs are consumer organizations given qualification by the prime minister to file collective injunction lawsuit to protect consumers according to the Consumer Contract Law, etc. As of March 9, 2021, there are 21 QCOs in Japan.

9) This means that the judgment to decline the plaintiff's petition doesn't bind the consumers since there would be no second stage procedure to be commenced. Yamamoto, *supra* note 6 at 173.

presiding court to determine the (non-)existence and the amount (if any) of the filed claims. Only the SQCO who filed the petition to open this first step can file the claims of each affected consumer on his/her behalf and it requires delegation by him/her to do so.

When an objection is filed against the above-mentioned decision by the court, the second stage goes to the second step (when no objection is filed, the procedure ends there and the claim will be final): Proceeding of Litigation after the Objection. In this procedure, the existence and/or the amount of the claim which became the target of the objection shall be tried in the ordinary court proceeding. Standing to file an objection against the decision ending the first step and to start this litigation is given to the defendant enterprise, the petitioner SQCO, and the target consumer whose claim was the object of determination.

3. Possibility of settlement

The possibility of settlement in the procedure is also twofold. In the first stage (Litigation Seeking Declaratory Judgment on Common Obligations), the plaintiff SQCO and the defendant enterprise can only settle the case with a stipulation when they agree on the existence or the non-existence (of part) of the common cause (Art. 10 of CPSMA). It is not possible to settle the case by agreeing on the amount of payment for each affected consumer in the first stage[10] . In the second stage, the plaintiff SQCO and the defendant enterprise can reach a settlement on the amount of payment for each consumer who participates in the procedure.

4. Structure as “opt in”

The basic concept here is the “opt-in” system, which has always been the bottom line for the collective realization of rights in Japanese Civil Procedure. The idea here is to facilitate the delegation of power by the consumers by making it possible for the consumers to decide after the possibility of winning becomes quite certain by the favorable judgment in the Litigation Seeking Declaratory Judgment on Common Obligations[11] .

Ⅲ. Evaluation of the present system

1. Overview.

We must say that usage of collective redress scheme for damage is very low. As of June 1,

10) Yamamoto, *supra* note 6 at 187; YAMAMOTO, *supra* note 6 at 188-195; SHOUHISHACHOU SHOUHISHASEIDOKA, *supra* note 6 at 54.

11) Yamamoto, *supra* note 6 at 178.

12) Two of them reached a (partially) favorable judgment for the plaintiff which went final and are currently under the first step of the second stage. One is Tokyo District Court Judgment on March 6, 2020, Shouhishahou News 124 (2020) at 308 (Japanese). See also Matsuda Tomotake, *Shouhisha Saiban Tetsuzuki Tokureihou niyoru Kyoutsu* Gimu *Kakuninn Soshou Dai-ichigou (Toukyochisai Hanketsu) no Kaisetsu*, NBL 1167 (2020) at 50 (Japanese). The other is Saitama District Court Judgment on February 26 2021 (http://saitama-higainakusukai.or.jp/topics/pdf/210226_01_01.pdf. Last date of visit: 01/06/2021)(Japanese). One of the other LSDJoCO suits was dismissed by Tokyo District Court with a judgment on May 14 2021 (reason: not meeting the requirement of predominance. See 2. (a) below) and is currenty under appeal. The last one is still pending in the first instance.

2021, seven and a half years from the enactment of CPSMA, and four years and 8 months from its enforcement, there are only three SQCOs in Japan and there has only been four cases of Litigation Seeking Declaratory Judgment on Common Obligations filed by SQCOs[12] .

The reason could be attributed to two factors. One is that the system is too restrictive. The other is that the financial foundation of consumer organizations, which form the basis of SQCOs, is very week.

2. Restrictive nature of the procedure

The restrictive nature of the procedure appears in two manners.

(a) Safeguards

The collective realization of rights entails the risk of abuse. Safeguards are necessary if abusive lawsuits are to be suppressed. But there is a dilemma in the sense that the more safeguards you create, the more difficult the usage of the procedure will be. The Japanese collective redress scheme for damage equips itself with as many safeguards as possible from the viewpoint of a) the entity qualified to pursue the procedure on the plaintiff side, b) the objective scope of the procedure and c) allocation of the cost.

As for a), only the SQCOs, which turn out to be as few as three at present, have such qualification and not the affected consumers. There is also a double restriction in the sense that SQCOs must be QCOs first[13] .

As for b), only monetary claims with the base of consumer contract can be filed (Art. 3.1 of CPSMA) and damage on life or physical body, mental damage, consequential damage and lost profits are excluded from the damage that can be recovered (Art. 3.2 of CPSMA)[14] . Also, tort claims cannot be based on special laws that relax the conditions for such claims (Art. 3.1.5 of CPSMA).

Predominance is also a requirement for the claims to be lawfully accepted (Art. 3.4 of CPSMA). The requirement of predominance means that the issues necessary to clarify the cause common to the affected consumers (which shall be examined in the first stage) need to predominate compared to the issues unique to each affected consumer (which shall be examined in the second stage)[15] .

As for c), it is of note that the cost of giving individual notice to the affected consumers of the ongoing procedure which takes place in the beginning of the second stage to gather their delegations to file their claims is borne by the SQCO side[16] . The cost of notice can be prohibitively high in the cases with many affected consumers, and since the cost of each notice is fixed, the proportion of the notice fee is bound to be high if the amount of the claim of the affected consumers is low. By the guideline of supervision set forth by the Consumer Affairs Agency[17] , the SQCOs are required to pay to the delegating consumers at least half of

13) Yamamoto, *supra* note 6 at 172.

14) Yamamoto, *supra* note 6 at 173.

15) Yamamoto, *supra* note 6 at 173.

16) Shouhishachou Shouhishaseidoka, *supra* note 6 at 110.

17) https://www.caa.go.jp/policies/policy/consumer_system/collective_litigation_system/about_qualified_consumer_organization/guidelines/pdf/guidelines_190201_0003.pdf (last date of visit: March 9 2021) (Japanese).

the amount of their claims as the result of the procedure. The fact that SQCOs must bear the cost of notice works as a restraint when SQCOs decide on the cases to put forward with this procedure, combined with the fact that SQCOs have scarce financial resources[18] .

(b) Restrictive possibility of settlement in the first stage

As explained above (*supra* II.3.), the parties can only enter into settlement about the existence or the non-existence of the common obligation and cannot make a settlement over the concrete claims of affected consumers at the first stage. The reason for this regulation is attributed to the structure in which the first stage only deals with the abstract obligation of the defendant enterprise common to the affected consumers and the plaintiff SQCO is not empowered by law nor each affected consumer to dispose of his/her concrete claim[19] . But those who participated in the legislation admit that this regulation significantly undermines the possibility of settlement in the first stage[20] . It is said that empirical data from overseas show that most cases of collective redress end with settlement and the possibility of settlement is one of the keys to the success of the procedure[21] . The limitation on the first stage settlement works as a formidable obstacle against the success of this procedure.

3. Weakness of financial foundation of the consumer organizations in Japan

The scale of consumer organizations in Japan is quite small and most of the QCOs are said to have much fewer than 1000 members[22] . QCOs that have more than 10 million yen (approximately 90,000 US$) in deposits are few. The activity of QCOs are almost 100% dependent on the volunteer work of the participants including lawyers[23] .

The fact that consumer organizations (including SQCOs) have scarce financial resources means that if a SQCO fails to recover the cost of the procedure, such as the cost of notice[24] , that it had to pay during the course of the procedure, it could be detrimental to the existence of the organization, so that SQCOs cannot risk bringing such cases to justice in which the amount or the possibility of recovery is low[25] .

4. Necessity for amendment

All the analysis shown before in this chapter shows the necessity for change if the system intends to work. In fact, lawmakers themselves seem to have anticipated this dysfunction to some extent and put a review clause in the law, which stipulates the obligation on the part of the government to review the regulations of the law including the objective scope of the procedure considering the situation of consumer damage and the performance by SQCOs,

18) Machimura, *supra* note 6 at 160-163. See also *infra* 3..

19) Shouhishachou Shouhishaseidoka, *supra* note 6 at 54; Yamamoto, *supra* note 6 at 189.

20) Yamamoto, *supra* note 6 at 189.

21) *Id* at 188-189; Yamamoto, *supra* note 6 at 187.

22) Machimura, *supra* note 6 at 26.

23) Isobe Kouichi, *Tekikakushouhishadantai heno Kitai to Kadai*, Houritsu no Hiroba 69-12 (2016) at 29 (Japanese).

24) See *supra* 2. (a).

25) Machimura, *supra* note 6 at 165-166.

etc., and to take appropriate measures based on the review when it deems necessary (Art. 5 of the Supplementary Provisions of CPSMA).

In light of this review clause, there have been two proposals for the amendment of the law from the side of protectors of consumers: one is a joint proposal by the three SQCOs[26] and the other is by the Japan Federation of Bar Associations[27]. To pick up aspects of the proposals that are of interest to this article[28], the following deserve attention:

1. To allow the settlement in the first stage in which the parties agree that the defendant pay a certain amount of money to those affected consumers who participate in the second stage without clarifying the existence of the common obligation,
2. To abolish the limitation of the objective scope of the procedure explained in 2. (a) above,
3. Expansion of standing on the defendant side to include the directors of the damaging enterprise who are co-responsible,
4. To make the defendant bear the cost of notice in the second stage, and
5. Introduction of the opt-out system.

5. Prospect of amendment

The above-mentioned proposals can be classified into (a) measures to increase the possibility of settlement in the first stage (:1.) and (b) measures to loosen the safeguards (:2, 3, 4, 5.).

(a) Amendment to allow monetary settlement in the first stage (1.)

In order to enhance the workability of the procedure, allowing the SQCOs and the defendant enterprise to enter at the first stage into a settlement that resolves the claims of the affected consumers who participate in the second stage without clarifying the existence of the common obligation seems to be of urgent necessity, considering that the workability of settlement is the key for the success of this procedure[29] and that there is said to be a strong demand in practice for such settlement[30].

Settlements in the first stage that include the resolution of individual clams can also be theoretically justified. The main reason for denying the possibility of such settlement in the

26) Made public on July 2 2019. http://www.coj.gr.jp/iken/pdf/topic_190716_01.pdf (last date of visit March 9 2021) (Japanese).

27) Made public on July 16 2020. https://www.nichibenren.or.jp/document/opinion/year/2020/200716.html (last date of visit: March 9 2021) (Japanese).

28) The other proposed amendments are: 6) allowing SQCOs not to commence the 2nd stage or to give individual notice when the property of the defendant enterprise is expected to be too scarce or when it agrees to make self-repayment, 7) giving SQCOs the right to file for bankruptcy of the damaging enterprises, 8) obligating the respondent enterprises to report the status of self-repayment when it agrees to do so with the SQCOs outside of the procedure, 9) allowing the settlement to pay to a third public interest body, 10) obligating the administrative body to provide SQCOs with information over the respondent enterprises, such as the location of their properties, 11) expansion of the plaintiff measures to collect evidence, 12) introduction of IT into the procedure, 13) development of collective ADR conducted by National Consumer Affairs Center and introduction of IT into it.

29) See *supra* 2. (b).

30) Yamamoto, *supra* note 6 at 192 n. 160.

present law was the lack of empowerment of SQCOs to dispose of consumers' rights, but this settlement can be legally constructed and justified as a contract for the benefit of a third person, which will have effect on the consumers only if and when they take part in the second stage, even if the plaintiff SQCO is not empowered at the time of the settlement[31] .

(b) Amendments to loosen the safeguards

(i) Abolishment of the objective limitation (2.) and expansion of the defendant standing (3.)

Among the proposed abolishment of the objective limitation of the scope of the procedure, abolishing the exclusion of special law tort claims seems justifiable since the lawmakers' reason to adopt this limitation saying that inclusion of it would disrupt the balance of interest between the parties[32] is too obscure and the criticism that the provisions of the special laws about tort only deal with the material aspect which is not touched by the new procedure[33] seems more persuasive.

But the proposal to abolish other limitations (allowing only monetary claims with the base of a contract, exclusion of certain types of damage) seems difficult to follow. The reason for such limitation comes from the two-stage structure of the procedure with the one-sided effect of the judgment in the first stage only to the benefit of the affected consumers[34] . Because of these two features, the defendant enterprise bears a heavy burden in the sense that it will have difficulty in assessing the total amount of disadvantage caused by losing at the first stage, and even if the defendant puts maximum effort and wins the first stage, it still cannot avoid being sued by individual consumers. From this, the lawmakers decided to allow only those cases where the defendant can relatively easily foresee the total amount of payment caused by the loss at the first stage, and excluded the kinds of damage the amount of which is highly dependent on each affected consumer[35] . Without change of such basic structure, it is difficult to justify the sort of amendment to include the kinds of cases and damage which make proper estimation of the financial damage difficult for the defendant enterprise. So total abolishment of the objective limitation seems difficult to implement. The only way possible shall be acknowledging the sorts of case that ensure such defendant' s estimation one-by-one[36] .

By the same reason, the proposal to expand the defendant standing to include the directors of the enterprises (3.) shall also be difficult to follow because, as much as the practical necessity to include directors in the procedure is recognizable since there is a tendency in malicious enterprises to escape compensation by moving the ownership of the assets of the enterprise to individual directors[37] , lawmakers intentionally limited the standing to the enterprises by deciding that only enterprises, whose overwhelming status in relation to the

31) Kakiuchi Shusuke, *Kyoutsu Gimu Kakuninn Soshou oyobi Kan-i Kakutei Tetsuzuki ni Okeru Wakai*, Hou no Shihai 182 (2016) at 82 (Japanese).

32) Shouhishachou Shouhishaseidoka, *supra* note 6 at 29; Yamamoto, *supra* note 6 at 104.

33) Machimura, *supra* note 6 at 40-41.

34) See *supra* note 5 with the corresponding text.

35) Yamamoto, *supra* note 6 at 179-182; Yamamoto, *supra* note 6 at 93-95.

36) Yamamoto, *supra* note 6 at 187.

37) Machimura, *supra* note 6 at 63 n. 121.

consumers is acknowledged by the Consumer Contract Act to justify the special treatment of consumers in the material law, can be forced to endure the procedure with heavy burden on the defendant side[38] .

But the limitation of the objective scope of the procedure indicates that the interests that this law purports to protect are not purely limited to those of the affected consumers. As written above, necessity for limitation comes from the two-stage structure and the one-sided effect of the judgment. And the predominance of the common issue[39] is required to ensure that the second stage is expeditious and not burdensome. All these aim to facilitate the participation of the affected consumers. This means that the lawmakers decided to realize the facilitation of the consumers over the sacrifice of the full recovery of each consumer. But there has been no indication that such decision is optimal and indispensable for the protection of the affected consumers. The lawmakers' decision seems difficult to justify if you only count the affected consumers as the object of protection by the law, but becomes easier to justify if you include the public interests of the consumers (or society) as a whole to enjoy a sound and safe market, since by limiting the scope of the recovery and making the procedure simple and easy to use, it shall be easier to litigate the problematic acts of enterprises using this procedure, which works to enhance the de facto effect on enterprises to improve their behavior[40] .

(ii) Re-allocation of the cost of notice (4.) and introduction of opt-out system (5.)

This recognition of public interest as the aim of the procedure shall work to facilitate the justification of the proposals to allocate the cost of notice to the defendant (4.) and to introduce an opt-out system (5.).

As for the cost of notice, the lawmakers decided against making the defendant bear it because the cost of notice was categorized as the cost of gathering the plaintiffs and therefore cannot be included in the cost of the procedure[41] . But there is already an indication that considering the fact that the notice takes place after the court' s recognition of the common obligation, it is fair to make the defendant bear its cost[42] . In addition to that, recognizing the stake of public interests in the procedure shall make it possible to categorize the cost of notice not as the cost of gathering the plaintiffs but as the necessary cost of the procedure since the procedure will not stand without the participation of the affected consumers.

There are several ways to realize the opt-out system (including establishing a special one stage opt-out track for cases with small claims), but the introduction of the opt-out principle in the second stage maintaining the basic two-stage structure with the one-sided effect of the judgment seems justifiable, although there are several details that require clarification[43] . This is since the one-sided effect of the first-stage judegment on the consumers alleviates the

38) Yamamoto, *supra* note 6 at 183, n. 51.

39) See *supra* 2. (a).

40) See the explanation by Yamamoto, *supra* note 6 at 171, 185 n. 60, 188.

41) See YAMAMOTO, *supra* note 6 at 275.

42) *Ibid*.; MACHIMURA, *supra* note 6 at 171.

43) It shall be necessary to establish the rule to calculate the total amount of the claims of the affected consumers to be recovered by the procedure. It is also necessary to establish a rule as to the treatment of the claim of the affected consumers who didn't opt out but didn't come to collect the money from the SQCOs either.

negative effect of the opt-out system on the affected consumers as it decreases the possibility of plaintiffs losing the case. And here also, the recognition of the public interests in the procedure works to justify the introduction of such amendment, since it presents a factor as the basis to force the disadvantages resulting from "opt-out" system (exercise of the right without express consent and possibility of losing the case) on the side of the affected consumers[44] .

(iii) the order of implementation of the amendments

Among these possible amendments, it would be advisable to start with 3. (making the defendant bear the cost of notice), because it is presently said to be the tightest bottleneck that is hindering the effectiveness of the procedure. If this does not change the situation, then consideration of the "opt-out" system should proceed[45] .

6. Financial basis of SQCOs.

The weak financial basis of SQCOs was also one of the big reasons to hinder the use of the procedure, which also requires change and such change cannot be realized without governmental commitment such as subsidy. Here again, the recognition of the public interests to be realized by the procedure works as the theory to back up such special treatment of SQCOs[46] .

Ⅳ. Conclusion

The procedure for collective redress of consumer damage is now facing a deadly situation and in need of serious surgery if it is to survive[47] . The surgery to abolish the limitation on the objective scope of the procedure seems difficult to implement as long as the basic structure of the present system is untouched, but maintaining this structure opens the way to recognize public interests as an important stake of this procedure. This would pave the way for the re-allocation of the cost of notice, which should be the first of the "surgeries" that should take place. Another surgery which is of urgent necessity is expanding the possibility of settlement in the first stage and nothing practical or theoretical is preventing this.

Along with that, effort should be given to strengthen the financial foundation of the SQCOs or QCOs in general through governmental commitment, which shall also be justified by the

44) For a theoretical analysis, see Hatta Takuya, *Shouhisha Saiban Tetsuzuki Tokureihou no Toujishatekikaku no Kanten karano Bunseki*, in: Chiba Emiko et al. (eds.), Shudanteki Shouhisharieki no Jitsugen to Hou no Yakuwari (Shoujihoumu, 2014) at 390-391 (Japanese).

45) Scholars point out the expansion of the plaintiff standing to include the affected consumers as a possible item for amendment (see Yamamoto, *supra* note 6 at 186-187; Yamamoto, *supra* note 6 at 324; Machimura, *supra* note 6 at 158), but it should come into consideration after the 2 amendments mentioned in the text turn out to be insufficient.

46) See Machimura, *supra* note 6 at 171-172, 178; Yamamoto, *supra* note 6 at 186.

47) The highly restrictive nature of the present Japanese system has its reasons in that, without it, the new system would have been impossible even to have emerged in light of the strong anxiety and opposition posed by the business community. But it is not to be denied that this restrictive nature is causing the near-death situation of the present system and needs changes.

recognition of the public aspect of the procedure.

Japanese consumer collective redress still has a long way to go. Japan took an important step forward by enacting this procedure. Now is the time to take another leap forward to make it work for consumers.

Managing Investment Disputes with Mediation

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International investment treaties create favorable conditions for foreign investment. They commonly provide that states will not discriminate in favor of domestic investors and that investments will be treated in accordance with international standards independent of domestic laws. These commitments and others would have little practical relevance without an effective means of resolving disputes over compliance. Arbitration between investors and the foreign states hosing their investments has become a leading means of dispute resolution.

There are more than 3,000 treaties with investment protections.[1)] Japan has concluded 30 bilateral investment treaties and an additional 19 treaties with investment provisions, most containing arbitration clauses.[2)] These treaties endow Japanese investors with special rights and also expose Japan to claims by foreign investors. Japan-affiliated investors have brought at least eight arbitrations under investment treaties[3)] while Japan is a respondent in one arbitration at the time of this writing.[4)] Japan has meanwhile continued to conclude new investment treaties with arbitration clauses even as investment treatymaking has slowed in other parts of Asia.

The number of investor-state arbitrations has risen steadily over the past thirty years to a total of more than 1,100 cases.[5)] Geopolitical events, including a financial crisis in Argentina

1) United Nations Conference on Trade and Development (UNCTAD), Investment Policy Hub, International Investment Agreements Navigator at https://investmentpolicy.unctad.org/international-investment-agreements. This website is the source for data about treaties cited in this article.

2) The figures in this citation do not include treaties that have been signed but not ratified. All figures cited in this article where accurate as of 1 March 2021.

3) Cases by Japan-affiliated investors include *Macro Trading Co, Ltd v. People's Republic of China* (ICSID Case No. ARB/20/22), *SMM Cerro Verde Netherlands B.V. v. Republic of Peru* (ICSID Case No. ARB/20/14), *Itochu Corporation v. Kingdom of Spain* (ICSID Case No ARB/18/25), *Bridgestone Americas, Inc and Bridgestone Licensing Services, Inc v. Republic of Panama* (ICSID Case No ARB/16/34), *Eurus Energy Holdings Corporation v. Kingdom of Spain* (ICSID Case No ARB/16/4), JGC Corporation v. Kingdom of Spain (ICSID Case No ARB/15/27), *Nusa Tenggara Partnership BV and PT Newmont Nusa Tenggara v. Republic of Indonesia* (ICSID Case No ARB/14/15), and *Saluka Investments BV v. The Czech Republic* (UNCITRAL).

4) *Japan faces its first known investment treaty arbitration, as UNCITRAL tribunal is quietly put in place to hear Asian energy investors' claims*, Investment Arbitration Reporter, 3 February 2021.

and a rollback of renewable electricity incentives in Spain, have sparked rafts of claims. Some speculate that the COVID-19 pandemic may have the same effect. Emergency measures taken by states to mitigate the effects of the pandemic and subsequent measures to promote economic recovery, which could have discriminatory effects on investors, may expose states to arbitrations.[6)]

Mediation offers a means to settle investment disputes that may be more efficient and private than arbitration. Even where settlement is not possible, mediation may be used to simplify arbitrations by disposing of some claims or points of contention between disputants. This article provides a survey of investor-state mediation with an emphasis on the flexible use of mediation and the conditions that contribute to successful mediations.

1. Promotion of Investment Mediation

The experience of three decades of investment arbitration practice has led to criticisms of the system. Many commentators argue that arbitration proceedings are too long and costly,[7)] and some argue that private arbitrators should not sit in judgment over states.[8)] The reckoning has encouraged stakeholders to consider how mediation might be used to avoid or simplify investment arbitrations.

The International Centre for Settlement of Investment Disputes (ICSID), an institution of the World Bank, administers most investor-state dispute resolution proceedings. While ICSID has conducted 819 arbitrations at the time of this writing, the center' s conciliation services have only been used in 13 cases.[9)] There is little public information available about mediations occurring outside of the ICSID system because mediations tend to be confidential.

There have been a variety of recent efforts to respond to the low rate of reported investment mediations by promoting mediation through legal,[10)] regulatory,[11)] and institutional [12)] means. States including China, Indonesia, Malaysia, and Singapore have meanwhile committed to prioritize mediation for investment disputes. These initiatives coincide with a rise in interest in international commercial mediation punctuated by the conclusion of the Singapore Convention on mediation[13)] and the publication of a revised model law meant to encourage the

5) UNCTAD, Investment Dispute Settlement Navigator: full data release as of 31 July 2020 at https://investmentpolicy.unctad.org/investment-dispute-settlement.

6) See, eg, *Peru warned of potential ICSID claims over covid-19 measures*, Global Arbitration Review, 9 April 2020.

7) Eg, *Damages and costs in investment treaty arbitration revisited*, Global Arbitration Review, 14 December 2017 (noting that the median length of arbitration proceedings was 4 years and 4 months with median costs of approximately USD 4.2 million for claimants and USD 3.4 million for respondents for arbitrations from 2013 to May 2017).

8) Eg, United Nations Conference on Trade and Development, *IIA Issues Note: Reform of Investor-State Dispute Settlement: in Search of a Roadmap* (No. 2, June 2013), page 9.

9) ICSID case information at https://icsid.worldbank.org/cases/case-database.

10) Eg, Indonesia-Australia Comprehensive Economic Partnership Agreement (entered into force on 5 July 2020).

11) Eg, International Bar Association Rules for Investor-State Mediation, Article 14.23(1).

12) Eg, *ICSID's Role in Advancing Investor-State Mediation* at https://icsid.worldbank.org/news-and-events/blogs/icsids-role-advancing-investor-state-mediation.

modernization and harmonization of domestic legislation on mediation.[14)]

2. Comparative Benefits of Mediation

Where successful, mediation tends to be more time and cost efficient than arbitration and is more likely to preserve relations between disputants. These comparative benefits are particularly resonant in investment disputes because investment arbitration tends to be protracted and costly and because investments may take many years to realize, making sustained working relations important. Mediation may also be an attractive alternative to arbitration because it is more likely to be confidential.

Mediation may otherwise offer comparative advantages over unmediated settlement negotiations. Disputants that are unwilling to negotiate directly may be open to correspond through the medium of a mediator. Mediators may, in turn, improve communications by shifting the focus from legal arguments to the parties' long-term interests and by assisting with risk analysis of claims and defenses. A mediator who understands the different perspectives of investors and states may also be able to address misunderstandings that have contributed to disputes.

3. Mediation Processes

Mediation is practiced and denominated differently across jurisdictions. Mediators, for example, differ in their willingness to express opinions on the merits of disputants' arguments. They may also have procedural preferences, for instance, about joint and separate meeting with parties and the use of co-mediation. The lack of consistency extends to the terminology used to describe the process.

3.1 Mediation

"Mediation" is a broad term that describes the use of a person or persons to help disputants negotiate more effectively. Mediation rules tailored to investment disputes, including those published by the International Bar Association[15)] and draft rules published by ICSID,[16)] do not

13) United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention), United Nations Commission on International Trade Law (UNCITRAL), Report of UNCITRAL, Fifty-first session, U.N. Doc. A/73/17 (2018) at Annex I (Singapore Convention). This treaty facilitates the cross-border enforcement of mediated settlement agreements. See, eg, J. Claxton, *The Singapore Convention for Mediation: From Promotion to Workable Standards by Way of New York*, 42 Comparative Law Yearbook of International Business 2020.

14) Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation of the United Nations Commission on International Trade Law, Annex II, United Nations, General Assembly Resolution 73/199, United Nations Convention on International Settlement Agreements Resulting from Mediation, U.N. Doc. A/RES/73/199.

15) IBA Rules for Investor-State Mediation (2012) at https://www.ibanet.org/MediaHandler?id=C74CE2C9-7E9E-4BCA-8988-2A4DF573192C.

define mediation or proscribe a detailed mediation process. Article 8 of the IBA Rules stipulates that "mediation shall be conducted in accordance with the parties' wishes and with the assistance of the mediator" while Article 20(3) of the ICSID Rules calls on the mediator and parties to draw up a procedural protocol together.

This open-textured approach leaves the features of the mediation process to the discretion of mediators and disputants. Mediators are thus free to be more or less evaluative of the disputants' positions and may determine the nature and sequence of meetings with parties subject to the parties' preferences. This approach is consistent with the rules of mediation published by dispute-resolution institutions including the Japan Commercial Arbitration Association[17] and the Japan International Mediation Center-Kyoto.[18]

3.2 Conciliation

Both "conciliation" and "mediation" are used to describe facilitated negotiations. "Conciliation" in common usage sometimes suggests a process that is more regulated and comparatively formal. Yet there is a modern trend, visible in the Singapore Convention and in United Nations reports,[19] to de-emphasize differences between the terms. More relevant is that mediators and conciliators do not have the power to impose decisions on disputants as do arbitrators and judges. Any settlement reached in mediation will be on terms that the disputants voluntarily set for themselves.

Provisions for conciliation in investment treaties commonly refer to conciliation rules promulgated by ICSID, which endow that conciliation process with distinctive features.[20] ICSID Convention conciliations are facilitated by three-member conciliation commissions[21] that issue reports at the close of the proceedings which may include recommendations to the parties.[22] The rules also provide procedures for challenging the jurisdiction of conciliation commissions and for disqualifying conciliators.[23] Some commentators speculate that these features have discouraged parties from resorting to ICSID conciliation because the process is similar to ICSID arbitration but offers no binding resolution at the end of the proceedings.

3.3 Mixed-Mode Procedures

There is growing interest in combining the best features of mediation and arbitration into a single dispute-management system.[24] Hybrid models may take various forms with different

16) ICSID, Working Paper #4, Proposals for Amendment of the ICSID Rules, Vol. 1 Feb 2020, ICSID Mediation Rules.

17) JCAA, Commercial Mediation Rules 2020, Article 21.

18) JIMC-Kyoto, The Institutional Mediation Rules, 2018, Article 5.

19) Eg, UNCITRAL Working Group II, Dispute Settlement, Report of 68th session, 5-9 February 2018, 2018A/CN.9/WG.II/WP.205, page 4 (evidencing a lack of emphasis on distinctions between conciliation and mediation by replacing the former term with the latter because "mediation" is "a more widely-used term").

20) ICSID maintains both the ICSID Convention Conciliation Rules and the ICSID Conciliation (Additional Facility) Rules. The conditions for jurisdiction under the rules are different.

21) ICSID Convention Conciliation Rules, Rules 2-5.

22) ICSID Convention Conciliation Rules, Rules 30 and 32.

23) ICSID Convention Conciliation Rules, Rules 9 and 29.

levels of integration. Tiered dispute resolution clauses are already used in treaties, for example, to encourage disputants to attempt mediation before arbitration. Mediation can also be used in parallel with arbitration. There may be particular occasions over the course of arbitration when settlement comes within closer reach that are conducive to mediation, perhaps after the disputants' positions have been brought into sharper focus by memorials and evidence but before resources have been spent on document production and hearings.

Some encourage even greater integration between mediation and arbitration. The same person or persons might act both as arbitrator and as mediator of the same dispute as is common in some domestic jurisdictions. This process is often criticized on the grounds that parties may not speak openly with a mediator who could latter judge their dispute. Another proposal is that a standing mediator with access to party evidence and hearings be made available to mediate claims and issues as arbitration progresses.[25)]

4. Commencing Mediation

Consent is a cornerstone of mediation. The process is voluntary in the sense that parties are not required to resolve their disputes in the course of mediation. The decision to mediate is also voluntary in most circumstances. There are, however, some investment treaties that give either investors or states the choice to commence mediation as a right.[26)]

4.1 Mandatory Mediation by Investors

Empirical evidence suggests that investors support mandatory mediation before arbitration.[27)] A number of investment instruments, mostly older generation treaties, include recourse to conciliation under ICSID conciliation rules or rules published by the Nations Commission on International Trade Law (UNCITRAL).[28)] The effect of these provisions is that conciliation is mandatory at the option of investors.

Japan has concluded an unusually high number among Asian states of treaties with provisions for ICSID conciliation. However, there is reason to presume that investors will not

24) Eg, T. Stipanowich, *Arbitration, Mediation and Mixed Modes: Seeking Workable Solutions and Common Ground on Med-Arb, Arb-Med and Settlement-Oriented Activities by Arbitrators* (2020), Harvard Negotiation Law Review, Forthcoming, Pepperdine University Legal Studies Research Paper No. 2020/25 at https://ssrn.com/abstract=3689389.

25) Eg, J. J. Coe Jr., *Toward a Complementary Use of Conciliation in Investor-State. Disputes - A Preliminary Sketch* (2005) 12 UC Davis Journal of International Law & Policy 7, page 42.

26) On compulsions to mediate generally, see J. Claxton, *Compelling Parties to Mediate Investor-State Disputes: No Pressure, No Diamonds?* (2020) 20 Pepperdine Dispute Resolution Law Journal 78.

27) School of International Arbitration, Centre for Commercial Law Studies, Queen Mary University of London and the Corporate Counsel International Arbitration Group, *2020 QMUL-CCIAG Survey: Investors' Perceptions of ISDS* (2020) at page 24 (indicating that 34% of respondents "somewhat favour" mandatory mediation prior to arbitration while 30% "strongly favour" mandatory mediation).

28) Eg, Agreement between the Government of the Republic of Singapore and the Government of the Socialist Republic of Vietnam on the Promotion and Protection of Investments (entered into force on 25 December 1992) providing for proceedings under the UNCITRAL Conciliation Rules (1980) in Article 13.2.

avail themselves of this option in light of the features of ICSID conciliation previously considered and also because these treaties give investors the choice of arbitration or conciliation.[29] An investor choosing conciliation on these terms may be understood to forgo the right to arbitrate. The effect would be that the investor has no way to resolve a dispute under the treaty if conciliation does not result in settlement.

4.2 Mandatory Mediation by States

Treaties tend not to give states the right to compel investors to mediate their claims. Two treaties concluded in 2020, however, provide that the states party to the treaties have the right to require investors to attempt conciliation as a pre-condition to arbitration.[30] Investors making claims under these treaties do not have the same right to compel conciliation.

These mandatory conciliation provisions do not provide procedural details or refer to conciliation rules. It is also unclear what disputants must do to satisfy the condition, namely whether meeting with a conciliator to discuss the process is enough or whether further steps must be taken.[31] As a consequence, disagreement about compliance will be a matter for arbitrators to decide where the underlying dispute proceeds to arbitration.

4.3 Mediation by Agreement after a Dispute Arises

Investors and states can plainly agree to mediate their disputes even where mediation is not included as an option in investment treaties. Yet even where mediation is in the shared commercial interest of the disputants, it may be difficult to reach agreement to mediate once a dispute has arisen.

Empirical evidence suggests that states are more likely to resist settlement than investors. Respondent states may reject mediation because they see political risk in agreeing to make voluntary payments to a complaining foreign investor. States may prefer instead to leave the claims to be judged by arbitrators, thereby shifting responsibility for the outcome.[32] Relatedly, media attention and fear of public criticism may harden the resolve of states to proceed to arbitration.[33] There may also be internal administrative obstacles including onerous procedures for obtaining budgetary approval for settlements.[34]

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29) Eg, Japan and Turkey Agreement concerning the reciprocal promotion and protection of investment (with protocol)(signed on 12 February 1992), Article 11.1.

30) Indonesia-Australia Comprehensive Economic Partnership Agreement (entered into force on 5 July 2020), Article 14.23(1) and the Hong Kong-United Arab Emirates Bilateral Investment Treaty (entered into force on 6 March 2020)(HK-UAE BIT), Article 8(3).

31) The Indonesia-Australia Comprehensive Economic Partnership Agreement provides that a state "may initiate a conciliation process" in Article 14.23(1) while the Hong Kong-United Arab Emirates Bilateral Investment Treaty provides that a state may "submit[ed] to the competent authorities of that Contracting Party or arbitration centres thereof, for conciliation" in Article 8(3).

32) S. Chew, L. Reed and J. Christopher Thomas, *Report: Survey on Obstacles to Settlement of Investor-State Disputes*, National University of Singapore Centre for International Law Working Paper 18/01 (September 2018) (NUS Report), page 13.

33) NUS Report, pages 17-19.

34) NUS Report, page 19.

5. Conditions for Successful Mediations

The feasibility of mediation will largely depend on the circumstances of a dispute and the attitudes of the disputants. The availability of supporting resources may also contribute to determining whether mediation will be attempted and whether it will be successful.

5.1 Time to Mediate

Investment treaties tend to encourage amicable dispute resolution by providing that investors must wait a determined time after a dispute has arisen before commencing arbitration. This waiting period offers disputants an opportunity to negotiate out from under the cloud of imminent arbitration. Some treaties expressly encourage disputants to mediate during the waiting period or even before the start of the waiting period.[35)]

If the waiting period in a treaty is too short, parties may be discouraged from attempting mediation before arbitration. Timing may be particularly determinative where states face investor claims for the first time as they may not have systems in place to identify, assign, and evaluate those claims. Time may also be needed to secure a budget and appoint outside counsel, possibly requiring a public tender. The implication of these factors is that the waiting period may be easily exhausted before a respondent state is able to meaningfully respond to claims.

The duration of the waiting periods varies across investment treaties. About 85% of Asian investment treaties concluded over the past decade provide a waiting period of six months measured from notice of a dispute.[36)] A treaty between Hong Kong and the United Arab Emirates that entered into force in 2020, for example, provides for a waiting period of up to 12-months and a dedicated 6-month period for conciliation[37)] triggered by a formal notice of claims.[38)]

Several of Japan' s recent treaties, by contrast, provide for a six-month waiting period measured from "events giving rise to the claim" .[39)] These treaties do not require investors to notify respondent states that the waiting period has begun but rather require that notice of the intention to arbitrate be given at least 90 days before a request for arbitration can be filed.[40)] The combined effect of these provisions is that states facing investor claims under

35) Eg, Proposal for a Council Decision on the conclusion of the Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam of the other part (signed on 30 June 2019), Article 3.29.

36) J. Claxton, *Faithful Friend and Flattering Foe: How Investment Treaties Both Facilitate and Discourage Investor–State Mediation*, 2020 Asian Journal on Mediation 34, page 39.

37) Hong Kong-United Arab Emirates Bilateral Investment Treaty (entered into force on 6 March 2020), Articles 8(3) and 8(5).

38) Hong Kong-United Arab Emirates Bilateral Investment Treaty (entered into force on 6 March 2020), Article 8.2.

39) Eg, Agreement between Japan and Georgia for the Liberalisation, Promotion and Protection of Investment (signed on 29 January 2021), Article 23.6; Agreement between Japan and the Republic of Armenia for the Liberalisation, Promotion and Protection of Investment (entered into force on 15 May 2019), Article 24.4; Agreement between the Argentine Republic and Japan for the Promotion and Protection of Investment (signed on 12 January 2018), Article 25.4.

these treaties may be unaware of pending arbitration until receipt of notice of the intention to arbitrate only three months before the filing of arbitration. This may have the practical effect of undermining the prospects of mediation before any arbitration.

5.2 Access to Information

Mediation may be unlikely where a claimant investor does not provide sufficient information about its claims to enable the respondent state to perform a meaningful risk analysis. Further to this point, a state may be unable to secure a budget for mediation internally if the quantum of the claims is uncertain or unsupported by evidence. The effect of a lack of information may be that the prospects for mediation are greater after arbitration has begun and information is exchanged, though adversarial posturing of the disputants at that point may make agreement difficult to achieve.

Many investment treaties require investors to provide information about their claims to respondent states before arbitration is possible. The bilateral investment treaty between Hong Kong and the United Arab Emirates considered above obligates investors to specify the factual and legal basis of claims as well as the provisions of the treaty alleged to have been breached, the remedy sought, and the quantum of damages claimed.[41] These details must be provided with the notice that triggers the commencement of the waiting period. Other treaties require different types of information including supporting documentation,[42] details about how claims will be funded,[43] evidence to demonstrate that an investor has jurisdiction under the relevant treaty,[44] and proof that the activity that gave rise to the dispute qualifies as an investment under the treaty.[45] Such details may assist states in the evaluations of claims and make mediation more likely before arbitration where the information is received early in the evolution of a dispute.

5.3 Qualified Mediators

Investor-state disputes oppose the private interest of businesses with the public interests of states. The involvement of states as parties raises a number of issues less common in commercial mediations including political accountability and concerns about the legal impact of any settlement on future state practice. State agents may also face complicated procedures

40) Agreement between Japan and Georgia for the Liberalisation, Promotion and Protection of Investment (signed on 29 January 2021), Article 23.5; Agreement between Japan and the Republic of Armenia for the Liberalisation, Promotion and Protection of Investment (entered into force on 15 May 2019), Article 24.3; Agreement between the Argentine Republic and Japan for the Promotion and Protection of Investment (signed on 12 January 2018), Article 25.3.

41) Hong Kong-United Arab Emirates Bilateral Investment Treaty (entered into force on 6 March 2020), Article 8.2.

42) Eg, Agreement Between Hungary and the Kingdom of Cambodia for the Promotion and Reciprocal Protection of Investments (entered into force on 30 August 2017), Article 8.2.

43) Eg, Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments (entered into force on 30 August 2017), Article 15.5(a)(ii).

44) Eg, Australia–China Free Trade Agreement (entered into force on 20 December 2015), Art 9.11.1(1)(a).

45) Eg, Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments (entered into force on 30 August 2017), Article 15.5(b).

to authorize any settlement agreement. Such conditions underscore the importance of selecting a mediator or mediators who understand the perspectives of both investors and states.

There are various ongoing efforts to build capacity among international investment mediators. A United Nations group working on investment-dispute reform has affirmed the importance of increasing the number of mediators who understand international investment disputes.[46] A compendium of stakeholders, including ICSID, has meanwhile been offering investment mediation trainings online and at locations around the globe.[47]

5.4 Procedural Framework

The provision of arbitration in investment treaties almost invariably provides investors with the choice of different sets of procedural rules. By contrast, most investment treaties do not mention mediation by name, and very few provide rules of mediation with the exception of provisions for ICSID conciliation. This may leave questions among disputants about the nature of the mediation process that may affect their perceptions about the standing of mediation as a means of dispute resolution compared with arbitration.

A small number of treaties provide rules of mediation procedure and mediator codes of conduct to support the mediation process.[48] At the institutional level, ICSID is preparing a set of mediation rules, mentioned above, that have fewer procedural formalities than its conciliation rules and that are available for use by a wider range of disputants.[49] UNCITRAL is mean while revising its rules of conciliation for the first time since they were published in 1980.[50] Such regulatory initiatives should clarify the mediation process and affirm its legitimacy in the minds of potential users.

5.5 Flexible Use of Mediation

Mediation outcomes may improve where disputing parties take advantage of the inherent flexibility of the mediation process. Mediation can be a mode of dispute resolution but also a means of simplifying and expediting arbitrations by settling claims and issues short of global settlement. Mediation can likewise be used flexibly over time before, during, and even after arbitration as a means of avoiding litigation over the enforcement of arbitration awards.

A forthcoming report on the use of mediation after arbitration suggests that settlement

46) UNCITRAL Working Group III, Virtual Pre-Intersessional Meeting, 9 Nov 2020 background paper "The Way Forward for Mediation as a Reform Option for ISDS", paragraphs 127-129.

47) The trainings are offered with the support of ICSID, the Centre for Effective Dispute Resolution, the International Mediation Institute, and the International Energy Charter. See the ICSID website at https://icsid.worldbank.org/news-and-events/news-releases/investor-state-mediator-training.

48) Eg, European Union-Singapore Investment Protection Agreement (signed on 15 October 2018) Article 3.4(1), Annex 6 and Annex 7; and European Union–Vietnam Investment Protection Agreement (signed on 30 June 2019) Article 3.31(1), Annex 8 and Annex 10.

49) ICSID, Working Paper #4, Proposals for Amendment of the ICSID Rules, Vol. 1 Feb 2020, ICSID Mediation Rules.

50) UNCITRAL Note A/CN.9/WG.III/WP.190, paragraph 39 at https://undocs.org/en/A/CN.9/WG.III/WP.190.

rates are high while arbitration is underway, particularly where mediation is used early in the arbitration process.[51] Consistent with these findings, some treaties remind disputants that mediation can be used at any time.[52] Leading institutions also encourage disputants keep the flexibility of the mediation process in mind in recommendations and guidelines.[53]

The flexibility of mediation has particular potential in online proceedings, which have become common for cross-border disputes in the time of the COVID-19 pandemic. Without the need for all parties to be physically present at the same place at the same time, mediation hearings can be convened, reconvened, and separated into smaller meetings more easily.[54] This versatility may remove practical obstacles to mediation and enable greater customization of the process.

6. Conclusion

Investment mediation can be used to avoid arbitration or to make arbitration more cost and time efficient. The likelihood of mediation of a given dispute will depend on its particular features and also, perhaps, the attendant resources available. ICSID' s promulgation of mediation rules and ongoing investment mediator trainings may help to fill any gap. Provisions for dispute resolution in investment treaties can also encourage mediation with waiting periods and provisions that seek to ensure that states are informed about the claims against them at an early stage in the dispute-resolution process.

Party assumptions about the proper timing and role of mediation may also be a factor in its frequency. The potential of mediation to avoid arbitration is widely recognized. Attention has been shifting among some to the use of mediation after arbitration is underway, the use of hybrid systems that combine arbitration and mediation,[55] and the use of mediation to manage disputes before they turn into claims.[56] These applications may improve the prospects for mediation in a wider range of circumstances.

51) Mediation in Arbitration: Insights from the London Chamber of Arbitration and Mediation/Herbert Smith Freehills Survey, 2 February 2021 at https://hsfnotes.com/adr/2021/02/02/mediation-in-arbitration-insights-from-the-london-chamber-of-arbitration-and-mediation-herbert-smith-freehills-survey.

52) Eg, European Union-Singapore Investment Protection Agreement (signed on 15 October 2018), Article 3.4(1).

53) Eg, International Energy Charter, Guide on Investment Mediation, Section 2.1 (stating that under the Energy Charter Treaty disputants "are free to agree to use good offices, structured negotiation, mediation or conciliation using existing mechanisms or even agreeing on a tailor-made mechanism".

54) See, eg, J. Claxton, *The Latent Blossoming of Remote Mediation*, Kluwer Mediation Blog, 16 December 2020 at http://mediationblog.kluwerarbitration.com/2020/12/16/the-latent-blossoming-of-remote-mediation.

55) Eg, the Mixed Mode Task Force of the International Mediation Institute. See https://imimediation.org/about/who-are-imi/mixed-mode-task-force.

56) UNCITRAL Note A/CN.9/WG.III/WP.168, paragraph 22 at https://undocs.org/en/A/CN.9/WG.III/WP.168

Utilizing Third-party Funding in Japan —Issues Regarding the Attorney Act and the Basic Rules on the Duties of Practicing Attorneys

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Ⅰ. Foreword

Third-party funding ("TPF") in the world of legal disputes has grown increasingly prevalent. TPF involves financers who provide legal fees and other expenses to potential claimants of disputes and, in the case of success, receive a certain portion of the economic benefit as a return on their investment.

TPF has developed from the perspective of facilitating access to the legal system, especially in common law jurisdictions where litigation costs tend to be high. In recent years, the importance of TPF has increased in international arbitration,[1)] where costs borne by the claimant are likely to be huge due to arbitrators' remuneration and the general rule of international arbitration whereby the legal fees and expenses are borne by the losing party. Potential claimants may hesitate to commence arbitration because of concern over such costs. TPF can reduce such hesitation.

Because of the importance of TPF, it is fair to say that potential users of arbitration (e.g., parties who negotiate an arbitration clause) would view the legality of TPF and the transparency of regulations regarding TPF as one of the important factors to choose the place of arbitration.[2)] In common law jurisdictions, traditionally, TPF was regarded illegal as it fell within the tortious act of champerty or maintenance. But there is an international trend to legalize TPF through court precedents or legislation. For example, Singapore and Hong Kong (frontrunners in Asia in terms of inviting international arbitration), have resolved uncertainty about legality through legislation.

The Japanese government has consistently recognized the importance of international arbitration. In 2017, it established the "Liaison Conference of Relevant Ministries and

1) Tatsuya Nakamura, *Daisansha-Shikinteikyō to Chūsai-Tetsuzuki* (*Third-party Funding and Arbitration Proceedings*), Kokushikan-Hōgaku Vol. 50 (2017), p. 1.

2) See, Aoi Inoue, *Third Party Funding in International Arbitration—The perspective from Japanese Law*, JCAA Newsletter No. 39 (2018), pp. 4-5; and Michihiro Nishi, *Third Party Funding no Shikumi to Kokusai-Chōryū (Mechanism and International Trends of Third-party Funding*), Business-Hōmu June 2019, p. 123.

Agencies for the Invigoration of International Arbitration" ("Liaison Conference") to develop a necessary foundation for the strengthening of international arbitration in Japan. Furthermore, in the "Follow-up to the Growth Strategy" (the Japanese Cabinet decision on July 17, 2020), it was decided to "accelerate the review of arbitration-related legislation with a view to invigorate international arbitration," and the Legislative Council of the Japanese government established the Arbitration Law System Subcommittee on September 17, 2020.

As for TPF, in "Possible Measures for Invigoration of International Arbitration" (2018), the Liaison Conference mentioned the study of the utilization and regulation of TPF as one of the possible measures to strengthen international arbitration to which a Japanese company is a party. However, since then, we have not come across any public information stating that the government has proceeded with any organized studies on TPF.

We are of the opinion that TPF can be an important and useful tool to enable parties access to international arbitration and, therefore, should be introduced in Japan. That said, there are several legal and ethical issues that need to be addressed before doing so. Specifically, the application of laws and regulations such as *Bengoshi Hō* ("Attorney Act") and rules on ethics, described in *Bengoshi Shokumu Kihon Kitei* (the Basic Rules on the Duties of Practicing Attorneys; "Basic Rules on the Duties") issued by the Japan Federation of Bar Associations ("JFBA") should be carefully reviewed, so that the activities concerning TPF are not in contravention of existing laws and regulations.

As the business of TPF is new to Japan, current laws and regulations including the Attorney Act and the Basic Rules on Duties do not assume its existence. In this sense, there are limitations to examine the legal and ethical issues regarding TPF under existing laws and regulations. However, it may be worth examining the issue of legality for the sake of future discussions. From such perspective, this paper examines the following issues based on the premise that three parties (TPF users who are (potential) claimants; TPF providers; and *Bengoshi* (attorneys registered in Japan, hereinafter, "Attorneys") are involved in the usage of TPF:

- The legality of TPF under Japanese law (Section Ⅱ. below); and
- Issues in relation to the Basic Rules on Duties (Section Ⅲ. below).

Ⅱ. The legality of TPF under Japanese law

In general, the following three provisions are cited when the legality of TPF under Japanese law is discussed:[3)]

3) See, Nakamura, *supra* note 1, pp. 34-35; Inoue, *supra* note 2, pp. 3-5; Daniel Allen & Yuko Kanamaru, *The Third Party Litigation Funding Law Review: Japan*, (https://thelawreviews.co.uk/edition/the-third-party-litigation-funding-law-review-edition-4/1235490/japan); Nobuhisa Hayano, *Nihon deno Chūsai-Tetsuzuki ni okeru Third Party Funding no Katsuyō nitsuite (About Utilization of Third-party Funding in Arbitration Proceedings in Japan)*, ADR Forum Vol.7 (2021), pp. 64-70; and Tom Glasgow et al., *Nihon ni okeru Third Party Funding no Jissenteki na Katsuyō ni mukete (For Practical Utilization of Third-party Funding in Japan)*, Business Law Journal July 2019, pp. 64-65.

- Article 72 of the Attorney Act (Prohibition of the provision of legal services by non-Attorneys);
- Article 73 of the Attorney Act (Prohibition against the enforcement of assigned rights as a business); and
- Article 10 of the Trust Act (Prohibition of Trust for Suit).

Whether or not TPF violates these provisions will ultimately depend on the specific facts such as the content of each individual TPF contract between the TPF user and the TPF provider, and the circumstances concerning the particular TPF such as the acts of the TPF provider. However, at least as long as the TPF provider only provides funds to the TPF user and the TPF provider receives a share of the economic benefit that the party receives from the outcome of the dispute, it is unlikely that the TPF provider is regarded as violating Article 72 or 73 of the Attorney Act or Article 10 of the Trust Act.[4)]

There are several issues that should be examined as to whether TPF would violate the above provisions. First, some TPF contracts allow TPF providers to intervene in the decision-making process regarding the disputes such as acceptance of settlement agreement or deciding on the content (terms and conditions) of the settlement agreement.[5)] Such intervention by the TPF provider in the decision-making process may be regarded as a violation of the Attorney Act because it falls within handling of legal affairs (Article 72) or assignment of the rights in dispute (Article 73).[6)] Considering such risk of violation, without a legislative solution, it would be questionable whether the legality of a TPF provider' s intervention in the decision-making process on the dispute settlement can be guaranteed.

Second, Article 72 of the Attorney Act prohibits non-Attorneys from appraising legal cases for the purpose of obtaining compensation. There is a question as to whether examining and assessing the prospect of the dispute subject to a TPF contract may constitute a violation of Article 72 of the Attorney Act. Although the internal review and appraisal by and within the TPF provider would not fall under the definition of "appraisal," [7)] providing the results to the TPF user may be regarded as "appraisal" for the "purpose of obtaining compensation" as it relates to the TPF business, even if the "appraisal" itself is free of charge.

Third, Article 72 of the Attorney Act also prohibits "act[ing] as an intermediary" of legal service "for the purpose of obtaining compensation." Therefore, if a TPF provider intervenes between a TPF user and its Attorney "for the purpose of obtaining compensation" and is involved in the making of a retainer agreement between a TPF user and its Attorney, the TPF provider may violate Article 72 of the Attorney Act and, further, the Attorney may violate Article 27 of the Act (the latter will be explained in detail in Section Ⅲ. (2) below).

Even if the TPF provider is not compensated from "act[ing] as an intermediary" *per se*, it

4) See *Id.*

5) See Hayano, *supra* note 3, p. 71.

6) See Inoue, *supra* note 2, p. 4; Nishi, *supra* note 2, p. 123; Hayano, *supra* note 3, p. 68; and Tom Glasgow et al., *supra* note 3, p. 65.

7) See Hayano, *supra* note 3, pp. 67-68.

should avoid being involved in the making of a retainer agreement between the TPF user and its Attorney, because such act could be regarded as "act[ing] as an intermediary for the purpose of obtaining compensation."[8] On the other hand, if the TPF provider only "introduces" the TPF user to an Attorney, it would not be considered as "act[ing] as an intermediary."

Ⅲ. Issues in relation to the Basic Rules on Duties

(1) Introduction

The Basic Rules on Duties, along with the Attorney Act, establish the code of ethics and conduct for Attorneys. Attorneys are prohibited from acting in violation of the Attorney Act and the Basic Rules on Duties. It should be highlighted, however, that even if an Attorney is regarded as violating the Basic Rules on Duties, it does not mean that the Attorney is automatically subject to a disciplinary action by the Bar Association. The legal ground for the Bar Association to impose a disciplinary action on an Attorney is Article 56, Paragraph 1 of the Attorney Act, and a disciplinary action is imposed based on the determination of whether the Attorney has substantively "impaired his/her own integrity" under Article 56, Paragraph 1 of the Attorney Act.[9] Therefore, even in cases where an Attorney' s act is not clearly identified as a violation of an individual provision of the Basic Rules on Duties, the Attorney could be subject to a disciplinary action as long as the Attorney is deemed to have engaged in "impairing his/her own integrity." [10]

Therefore, in the following, we will focus on how the specific provisions of the Basic Rules on Duties regulate TPF and Attorneys' involvement with TPF, and will also refer to the possibility of a disciplinary action based on the application of Article 56, Paragraph 1 ("impairing his/her own integrity") to the act of the Attorney.

(2) Article 27 of the Attorney Act and Article 11 of the Basic Rules on Duties

Article 27 of the Attorney Act prohibits an Attorney from "undertak[ing] cases referred to by a person who is in violation" of Articles 72 or 73 of the Attorney Act.[11] Article 11 of the Basic Rules on Duties further broadens this regulation under the Attorney Act, and prohibits Attorneys from "accept[ing] a referral of a client from a person who has violated the provisions of [Articles 72 or 73] of the Attorney Act or a person who has reasonable grounds to be suspected that he/she has violated these provisions, using such person in violation. . . ."

A TPF provider tends to have a chance to refer a (potential) TPF user to an Attorney because, by its nature, a TPF provider has established contact with a TPF user who needs an Attorney for legal proceedings. Nevertheless, even if an Attorney recognizes that the referring

8) See Hayano, *supra* note 3, p. 68.

9) See the Ethics Committee of the Japan Federation of Bar Associations, *Kaisetsu Bengoshi-Shokumu-Kihon-Kitei (Commentary on the Basic Rules on the Duties of Practicing Attorneys)*, Preface and p. 221 (3rd ed. 2017).

10) See *Id*., p. 18.

11) We do not refer to Article 74 here because of its irrelevance to this article.

person is a TPF provider, it does not necessarily mean that the Attorney recognizes the referring person has violated Articles 72 or 73 of the Attorney Act.

As for the requirement of "us[ing] such person," the mere involvement of an Attorney in the representation of a dispute financed by a TPF provider would not be regarded as "us[ing] such person." However, if an Attorney induces a potential client together with a TPF provider, or is involved in the making of a TPF contract between the TPF provider and the TPF user, such action could be regarded as "us[ing] such person."

(3) Article 12 of the Basic Rules on Duties

Article 12 of the Basic Rules on Duties prohibits an Attorney from "apportion[ing] fees in respect of his/her duties between a person who is not an Attorney."

As already mentioned, the TPF provider will receive a share of the economic benefit that the TPF user obtains from the outcome of the legal dispute. If the TPF user pays both the "share" to the TPF provider and "fees" to the Attorney separately, it would be difficult to deem that the Attorney "apportion[s] fees in respect of his/her duties" with the TPF provider. Even if the Attorney is also a party to the TPF contract and the client (TPF user), the Attorney and the TPF provider agree on the distribution of economic benefits should the client win the case, such arrangement—as long as the share to the TPF provider and the fees to the Attorney are clearly divided—cannot be deemed to immediately violate Article 12 of the Basic Rules on Duties. However, for the avoidance of doubt, it is preferable that an Attorney should refrain from being a party to the TPF contract and should receive its fees directly from the client (TPF user).

(4) Article 13 of the Basic Rules on Duties

Article 13 of the Basic Rules on Duties prohibits an Attorney from "pay[ing] any compensation or any other consideration for a referral of a client" (Paragraph 1) and "receiving compensation or any other consideration for a referral of a client" (Paragraph 2).

A violation of Paragraph 1 of this Article should be found when there is a link between the referral of a client by a TPF provider and the compensation paid by an Attorney or vice versa. However, even if such link is not clearly found, it may be regarded as falling under "impairing his/her own integrity" under Article 56, Paragraph 1 of the Attorney Act. Accordingly, it is advisable to avoid schemes in which the Attorney directly pays money to the TPF provider or vice versa (including legal fees).

(5) Article 14 of the Basic Rules on Duties

Article 14 of the Basic Rules on Duties prohibits an Attorney from "encourag[ing] or utiliz[ing] fraudulent transactions, violence or other illegal or unjust acts." If the conduct of a TPF provider constitutes a violation of the Attorney Act, a violation of this Article may be triggered in cases where an Attorney, knowing the TPF provider' s violation, assists the TPF provider in the making of the TPF contract.

The fact that an Attorney knew of the illegality of the "act" is a prerequisite for the violation

of this Article.[12] However, even if the Attorney—due to negligence—did not know about the existence of illegality or injustice, and the Attorney has encouraged or utilized the illegal or unjust act, the Attorney may be regarded as falling under "impairing his/her own integrity" under Article 56, Paragraph 1 of the Attorney Act.[13]

(6) Article 15 of the Basic Rules on Duties

Article 15 of the Basic Rules on Duties prohibits an Attorney from "engag[ing] in, or participat[ing] in, any business which is contrary to public policy or any other business which undermines integrity." A violation of this Article would not be established unless a TPF provider' s business is contrary to public policy and, furthermore, an Attorney is involved in the management of the TPF provider' s business.

(7) Article 22 of the Basic Rules on Duties

Article 22 of the Basic Rules on Duties requires that an Attorney "shall perform his/her duties respecting the client' s intention with regard to the purpose of the engagement."

When TPF is used, there may be disagreements between the client and the TPF provider as to, e.g., whether to commence settlement negotiations, accept a settlement proposal or what terms should be included in the settlement agreement. As a matter of course, the client of the Attorney is the TPF user, not the TPF provider. The Attorney should always respect the intention of the TPF user, and not the TPF provider' s intention. Prioritizing the intention of the TPF provider over the client' s may constitute a violation of this Article.

(8) Article 23 of the Basic Rules on Duties

Article 23 of the Basic Rules on Duties prohibits an Attorney from "divulging to others or utilizing any confidential information which may come to his/her knowledge in the course of duties with respect to the client without justifiable grounds." [14]

Since a TPF provider has an interest in the outcome of the legal dispute it has funded,[15] it often asks or even demands an Attorney to report on the substantive and procedural progress of the dispute. Because responding to such request would constitute divulging "confidential information" to others, an Attorney needs justifiable grounds (e.g., the client' s consent) to do so, or otherwise the Attorney' s actions may violate Article 23.[16]

(9) Article 25 of the Attorney Act and Articles 27 and 28 of the Basic Rules on Duties

Article 25 of the Attorney Act and Articles 27 and 28 of the Basic Rules on Duties prohibit an Attorney from undertaking certain types of cases from the perspective of conflicts of interest

12) See the Ethics Committee of the Japan Federation of Bar Associations, supra note 9, p. 32

13) See *Id*.

14) Article 23 of the Attorney Act also stipulates the Attorney's duty of confidentiality. The following discussion would also apply to the Attorney's duty of confidentiality to the client under the article.

15) See Tom Glasgow et al., *supra* note 3, p. 61.

16) See the Ethics Committee of the Japan Federation of Bar Associations, *supra* note 9, p. 62.

vis-à-vis the client.

As stated in (7) above, for an Attorney representing a TPF user, the TPF provider is not a "client" (similarly, for an Attorney representing a TPF user' s counterparty, the TPF provider is not a "counterparty"). Therefore, with regards to the relation between an Attorney and a TPF provider, the mere fact that an Attorney represents a party of a case in which TPF is used does not itself trigger the restriction of Article 25 of the Attorney Act and Articles 27 and 28 of the Basic Rules on Duties. However, when TPF is used in a dispute, an Attorney should be careful about conflicts of interest among the parties and the TPF provider, considering the possible application of Article 56, Paragraph 1 of the Attorney Act which provides for "impairing his/her own integrity."

Ⅳ. Conclusion

To reiterate, TPF has increased in importance in relation to international arbitration, and its role is expected to increase even more in the future. To achieve the Japanese government' s goal of invigorating international arbitration in Japan, the utilization of TPF will be an important factor.

As outlined in Sections Ⅱ. and Ⅲ. above, it would be imprudent to assume that TPF is entirely prohibited under the current laws and regulations in Japan including the Attorney Act and the Basic Rules on the Duties. However, the uncertainty surrounding TPF' s legality will be an obstacle in the entry of TPF providers and procurement of its services in the Japanese market. In addition, because Attorneys play an important role in the type of disputes in which TPF is utilized such as international arbitration, clear rules and regulations regarding the involvement of Attorneys should be introduced to avoid the risk of Attorneys being exposed to a violation of the Attorney Act and the Basic Rules on Duties. Consequently, we opine that specific legislation regarding TPF would be necessary to ensure the legality of TPF. Further, it would be desirable for the JBFA to establish certain rules such as guidelines for the interpretation of the Basic Rules on Duties as they are applied to TPF.

It is our sincere desire that this paper will aid future discussions surrounding TPF and its legality in Japan.[17)]

17) The authors would like to thank Mr. Teruoki Ninomiya for his invaluable comments.

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A Message from JCAA

President

Kazuhiko Bando

It is our pleasure to publish the second volume of the Japan Commercial Arbitration Journal this September. We would like to extend our thanks to all contributors to this journal.

This journal features articles on the JCAA' s rules, international commercial arbitration, mediation and litigation with special focus on Japan. It aims to introduce the latest trends in arbitration, mediation and litigation in Japan. It would be our great delight if you find this journal helpful.

In 2021, with the kind collaboration of renowned experts in arbitration, the JCAA has amended the JCAA Arbitration Rules and launched the new Appointing Authority Rules. We believe these rules will further streamline the dispute resolution process. Also, we would like to take this opportunity to express our gratitude to everyone who contributed to these rules.

We will continue to do our utmost to take our services to the next level, and your continued support will be vital to our success.

The Japan Commercial Arbitration Association (JCAA)

www.jcaa.or.jp