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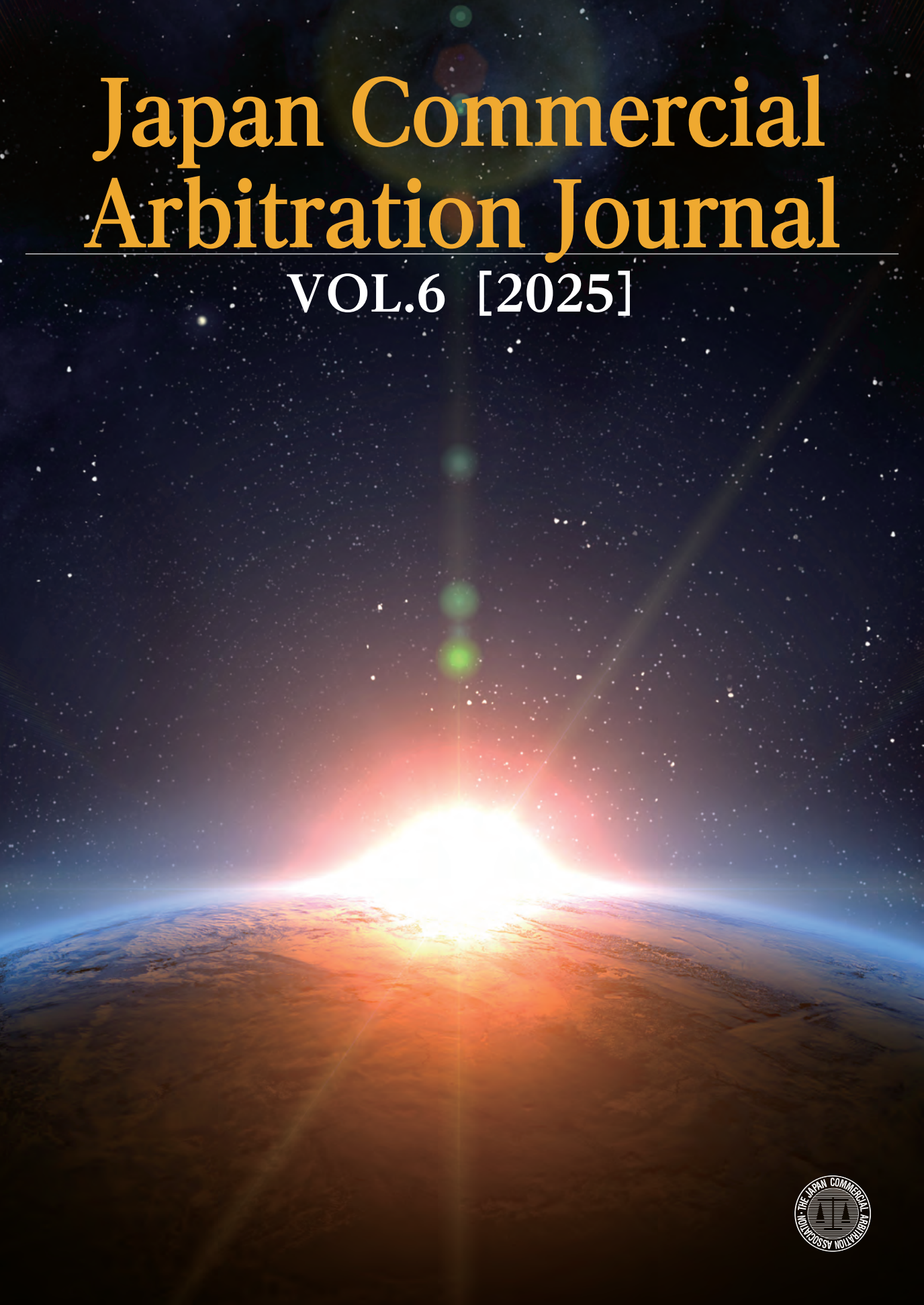

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JCAA in Action: Recent Developments and Its Global Engagement

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Introduction

With more than seventy years of institutional experience, the Japan Commercial Arbitration Association (JCAA) has steadily established itself as a reliable and internationally oriented arbitral institution. The JCAA has consistently refined its procedures, broadened its outreach and deepened its contributions to global norm-setting efforts in international dispute resolution.

This article introduces the JCAA's recent developments under three main themes: institutional events, global contributions, and case administration (2020 to 2024). Particular attention is given to how the JCAA balances efficiency and fairness in its arbitration services.

Ⅰ. Institutional Events and Global Outreach

In 2024, the JCAA organized the "*JCAA Arbitration Days,*" a three-day conference held at the historic Tsunamachi Mitsui Club in central Tokyo. Drawing over 700 participants in person and online from more than 30 countries and regions, the event served as the main highlight of the inaugural Japan International Arbitration Week. Two days of sessions were conducted in English and one in Japanese, underscoring the institution's international reach and domestic accessibility.

Over 50 speakers and panelists—including the members of the newly formed JCAA Advisory Board, legal practitioners, arbitrators, court judges and in-house counsels—shared their valuable insights. The English sessions on Day 1 and Day 2 covered the following topics:

Day 1:

・From Global to Local: The Evolution of Arbitration Practice in Japan
・Arbitration in Japan: A Cultural Connection
・Global Insights: Japan's Role in Shaping International Arbitration

Day 2:

- Of Arbitrators and Institutions: Working Towards a Better User Experience
- Institutions in Asia: Cooperating for Global Best Practices
- Insights from Japan and Beyond: Regional Enforcement
- Practical Uses, Ethical Considerations and Prospects of AI and other Technology in Arbitration
- GC and Management Insights: Best Practices on Crisis and Dispute Management

A concise and insightful recap of the English session is available on the Kluwer Arbitration Blog.[1)]

Based on the positive feedback received, the JCAA will host the "*JCAA Global Arbitration Forum 2025,*" a two-day conference in English scheduled for November 27 and 28 during the Japan International Arbitration Week 2025.

The JCAA has continued to strengthen its global outreach through participation in international events. For example, the JCAA participated the California International Arbitration Week 2025[2)] for the fourth consecutive year, where it hosted a panel titled, "*Behind the Scenes: The Reality of Navigating Disputes in the Fantasy World of the Gaming and Entertainment Industry.*" Drawing on actual JCAA-administered cases, including those involving online gaming and anime film production, the session explored the distinctive characteristics of disputes in the entertainment sector and cultural nuances between the United States and Japan. The panel attracted significant interest from participants and highlighted the JCAA's practical experience in this evolving sector.

From 2020 to 2024, the JCAA also participated as a speaker in verious conferences held overseas, including Thailand, Hong Kong, Berlin, Vienna, Washington, D.C., and San Fransico.

Ⅱ. Global Contributions

The JCAA has been actively participating in the UNCITRAL Working Group II discussions since 2024. UNCITRAL is central to efforts to harmonize international trade law. The UNCITRAL Working Group II focuses on dispute resolution, particularly arbitration and mediation.

A key topic currently under deliberation is the recognition and enforcement of electronic arbitral awards. Initiated jointly by Japan and other states, this proposal reflects growing global reliance on digital processes in arbitration and raises the question of whether an electronically signed award is enforceable across jurisdictions. The UNCITRAL Working Group II has been exploring how the New York Convention, UNCITRAL Model Law and other related

1) For Day 1, *see* https://arbitrationblog.kluwerarbitration.com/2024/12/16/2024-jcaa-arbitration-days-recap-day-1-japanese-arbitration-trends-and-practices/. For Day 2, *see* https://arbitrationblog.kluwerarbitration.com/2024/12/17/2024-jcaa-arbitration-days-recap-day-2-flexible-harmonization-and-cooperation-towards-best-practices/.

2) *See* https://calawyers.org/2025-california-international-arbitration-week/schedule/.

instruments can support the recognition of electronic awards across jurisdictions.[3)]

The JCAA joined the UNCITRAL Working Group II's sessions in Vienna (2024) and New York (2025). During these discussions, the JCAA shared its institutional experience with the issuance of electronic awards during the COVID-19 pandemic. The JCAA also offered comments on the draft texts prepared by the UNCITRAL secretariat. The JCAA's engagement in this process highlights its commitment to contributing meaningfully to the global legal framework for arbitration.

Ⅲ. Case Management Developments (2020 - 2024): Speed, Fairness, and Diversity

Between 2020 and 2024, the JCAA implemented several procedural reforms and institutional practices aimed at improving efficiency, ensuring fairness, and promoting diversity. Its case statistics from 2020 to 2024 illustrate how these goals are reflected in practice.[4)]

1. Speed and Efficiency

Under the 2021 Commercial Arbitration Rules of the JCAA, the revised Expedited Arbitration Procedures ("EAP") automatically apply to disputes involving claims of JPY 300 million (approximately USD 2 million) or less. By default, a sole arbitrator is appointed—most often by the JCAA in practice—and the final award must be rendered based on documents within only three or six months, depending on the value of the claim.[5)]

As of the end of 2024, 23 EAP cases have been administered by the JCAA, including one where the parties agreed to opt in despite the higher value of their claims of nearly JPY1 billion. Of the cases that concluded with a final award:

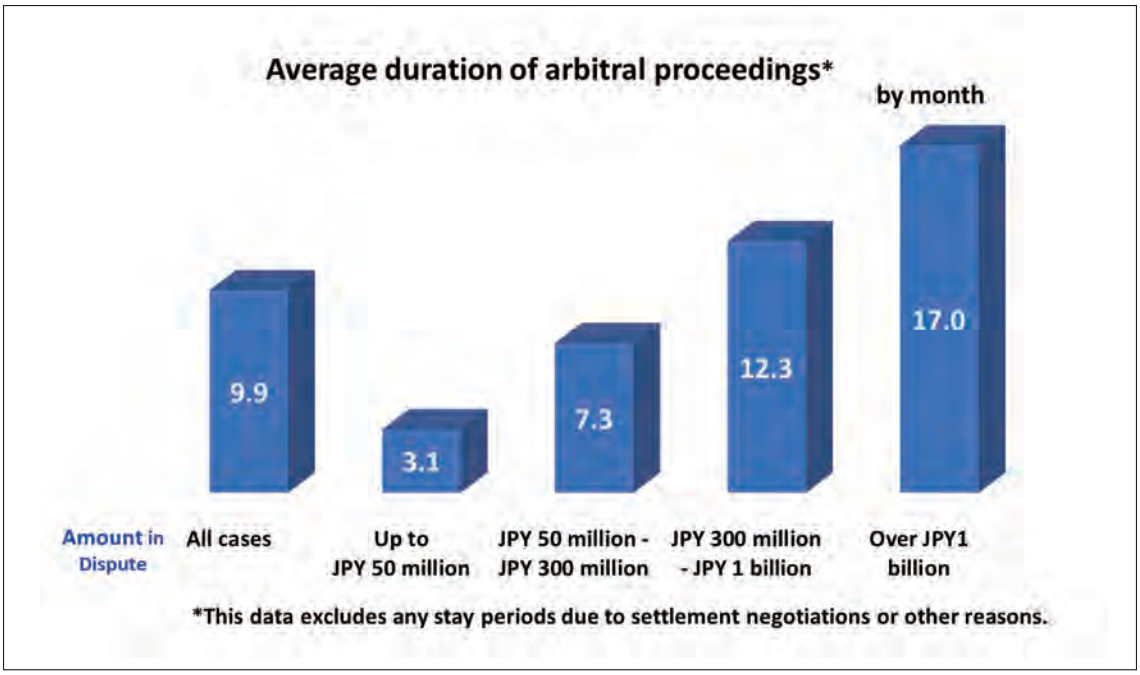
- 70% were completed within the prescribed time limits. The maximum extension was three months, which occurred during the COVID-19 pandemic and was agreed to by the parties due to exceptional circumstances beyond the control of both the parties and the tribunal.
- In 40% of international cases, oral hearings were held either in hybrid or fully remote formats, except for one case where all the counsel and the arbitrator were in Japan. In all of the cases, the JCAA arranged the venue and the necessary facilities for the conduct of smooth hearings for the parties.

Across all of the JCAA-administered arbitration cases from 2020 to 2024, the average duration from the constitution of the tribunal to the issuance of the final award is 9.9 months. This includes the time for the JCAA's internal review or scrutiny of the draft award. For high-

3) The working documents of UNICTRAL Working Group II are available at https://uncitral.un.org/en/working_groups/2/arbitration.

4) Recent statistics are available at https://www.jcaa.or.jp/en/arbitration/statistics.html.

5) *See* Part 2 of the JCAA Commercial Arbitration Rules.



value cases exceeding JPY 10 billion, the average duration is approximately 17 months, reflecting the complexity of such cases, which often involve document production and multi-day hearings.

As of the end of 2024, the JCAA administered 5 emergency arbitration proceedings, 4 of which were international and conducted in English. All emergency arbitrator decisions were rendered within the two-week limit specified under the JCAA Rules.[6)]

A distinctive feature of the JCAA's case management is its quick and comprehensive review of draft arbitral awards and emergency arbitrator's decisions. This internal review process is designed to verify the accuracy of information, enhance the clarity of the tribunal's reasoning, and promote enforceability under applicable legal standards. Recent records show:

- For final awards, scrutiny was typically completed within a week and in expedited cases, sometimes within a few days.
- For emergency arbitrator decisions, the JCAA completed its review within a day, or even half a day.

2. Neutrality and Fairness

In addition to the JCAA Secretariat's day-to-day oversight of proceedings to support procedural efficiency and fairness, recent years have seen enhanced neutrality in both the

6) *See* Article 77.4 of the JCAA Commercial Arbitration Rules.

language of the proceedings and appointment of arbitrators.

From 2020 to 2024, the JCAA has seen a notable increase in the use of English in international arbitration. 58% of international cases were conducted in English, either by agreement of the parties or as decided by the tribunal. In 2024 alone, this figure rose to nearly 80%. In contrast, disputes between Japanese and Chinese parties are often conducted in Japanese or Chinese, reflecting the parties' linguistic preferences and cultural considerations.

Even in cases where the parties appear to have agreed on Japanese as the language of arbitration, or where the contract was concluded in Japanese, the JCAA, as a matter of practice, attaches an English version of the notice for any non-Japanese party prior to the tribunal's decision on the language of the proceedings. This measure of linguistic fairness is intended to ensure that the party is fully informed of the process.

In international cases, 74% of sole arbitrators appointed by the JCAA were non-Japanese, and 35% of them resided outside Japan. This outcome reflects the JCAA's party-oriented approach to arbitrator appointments. When the parties do not agree on the appointment of a sole arbitrator, the JCAA typically presents both parties with a list of potential candidates. The parties are invited to rank the candidates and the JCAA then appoints arbitrators considering the parties' preferences. Moreover, the JCAA also generally incorporates the parties' perspectives into the list of candidates, including any request for neutral nationality of the arbitrator. By soliciting and confirming the parties' preferences both before and after the candidate selection, the JCAA ensures transparency and inclusiveness in its arbitrator appointment process.[7)]

For emergency arbitration, where appointments must be made within two business days, the JCAA generally proceeds with the appointment of the emergency arbitrator without seeking input from the parties due to time constraints. In making the appointment, the JCAA considers various factors, including neutrality, geographic location, legal background and availability. So far, for international cases, all emergency arbitrators to date have been non-Japanese.

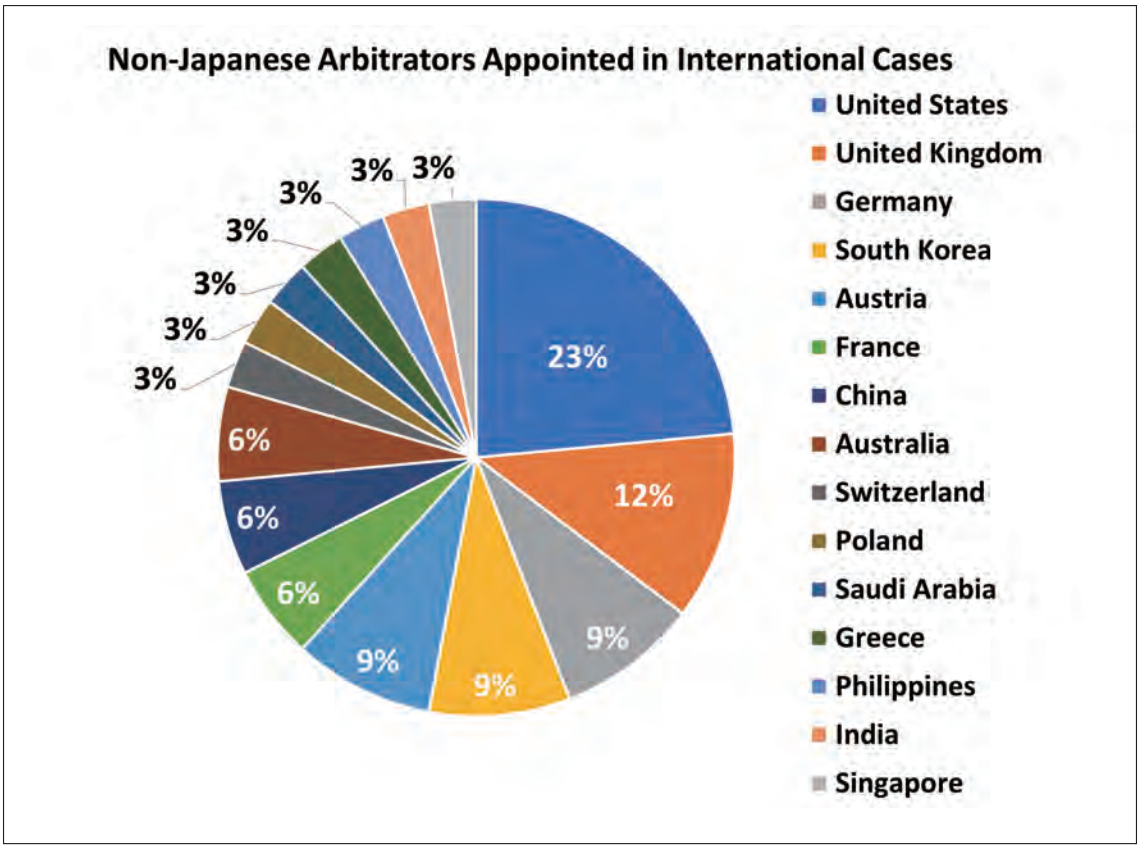
From 2020 to 2024, JCAA awards, rendered through fair and efficient proceedings, have been successfully recognized and enforced in a number of jurisdictions, including China, Vietnam, Indonesia, Thailand and Japan. This confirms the reliability and procedural soundness of JCAA arbitration across different legal systems.

3. Diversity

The JCAA's recent caseload reflects increasing diversity in arbitrator appointments, including emergency arbitrator appointments, particularly in terms of nationality, legal background, and prior experience with the institution.

Between 2020 and 2024, 41% of arbitrators appointed in international cases were non-Japanese. In English-language arbitrations, this figure was 64%. These non-Japanese

7) *See* Article 26.4 of the JCAA Commercial Arbitration Rules, which reinforces the neutrality of sole arbitrators.



arbitrators represented 15 different nationalities, reflecting a balanced mix of civil and common law traditions as well as geographic diversity.

Appointment trends in three-member tribunals for English-language international cases also reflect increasing diversity:

- 40% of co-arbitrators appointed by Japanese parties were foreign nationals.
- 30% of co-arbitrators appointed by foreign parties were Japanese nationals.
- 65% of presiding arbitrators appointed by co-arbitrators were foreign nationals, all residing outside Japan. Japanese presiding arbitrators were appointed by co-arbitrators only when the co-arbitrators themselves were also Japanese.

Several tribunals were composed entirely of non-Japanese arbitrators residing abroad, while others featured a mix of nationalities and locations or were fully Japanese based in Japan. Most appointees were listed on the JCAA's non-binding Panel of Arbitrators, currently comprising of over 500 professionals, with three-quarters being foreign nationals representing over 50 nationalities.[8)]

The JCAA has also observed notable diversity in terms of prior experience with the institution. Nearly 45% of arbitrators appointed in international cases between 2020 and 2024 were serving in a JCAA arbitration for the first time at the time of their appointment. This proportion rose to nearly 60% among arbitrators appointed by the JCAA.

Conclusion

The JCAA continues to evolve as a procedurally sophisticated, internationally engaged arbitral institution. Through principled administration, procedural innovation, and proactive participation in international legal developments, the JCAA demonstrates its commitment to fairness, efficiency, and global harmonization.

As international arbitration grows more complex and interconnected, the JCAA stands out for its agility, adaptability, and user-oriented approach—offering a trusted and reliable platform for resolving disputes in a rapidly changing global environment.

8) *See* https://www.jcaa.or.jp/en/arbitration/candidate.html.

Management of Arbitration-Related Cases in the Tokyo District Court (Business Court)

Vice President of the Tokyo District Court (Former Division Chief Judge of the Civil Division 8 of the Tokyo District Court)

Kenya Suzuki

Ⅰ. Introduction

In April 2023, the Act for Partial Amendment of the Arbitration Act (Act No. 15 of 2023) was enacted to amend part of the Arbitration Act (Act No. 138 of 2003; the amended Arbitration Act is hereinafter referred to as the "Amended Arbitration Act"). First, the Amended Arbitration Act establishes provisions regarding provisional temporary restraining orders concerning arbitral proceedings conducted by arbitral tribunals, and also establishes provisions enabling civil enforcement based on provisional temporary restraining orders by obtaining an order of approval of execution from a Japanese court. Second, it provides that the jurisdiction of the Tokyo District Court and the Osaka District Court will be expanded in terms of the proceedings conducted by courts regarding arbitration proceedings. Third, it provides that the court will be able to omit the submission of a Japanese translation of an arbitral award, etc. prepared in a foreign language, when the court finds it appropriate, in proceedings such as those relating to a petition for an execution order of an arbitral award. The court is required to take necessary measures to comply with these new systems.

From April 2023, arbitration-related cases newly assigned to the Tokyo District Court were centrally assigned to the Intellectual Property Division (Civil Divisions 29, 40, 46, and 47) for intellectual property cases, and to the Commercial Division (Civil Division 8) for other cases. The Intellectual Property Division and the Commercial Division became the departments in charge of arbitration-related cases.

In this article, I would like to explain the management of arbitration-related cases at the Tokyo District Court (Business Court). After introducing the Business Court, I will explain the court's response to the amendment of the Arbitration Act, and then describe the proceedings of arbitration-related cases in the Commercial Division, which concentrates on arbitration-related cases in the Tokyo District Court. The opinions expressed in this article are the author's personal views.

Ⅱ. Business Court

1. The Birth of the Business Court

First, I would like to introduce the "Business Court," to which the Commercial Division and the Intellectual Property Division of the Tokyo District Court belong, which are in charge of arbitration-related cases. In October 2022, the Business Court was established in Nakameguro, Meguro-ku, Tokyo, for the first time in Japan to concentrate on business-related cases, such as intellectual property disputes, commercial and economic disputes, and business rehabilitation and bankruptcy cases. The Business Court comprises the Intellectual Property High Court, the Commercial Division (Civil Division 8), the Insolvency Division (Civil Division 20), and the Intellectual Property Division (Civil Divisions 29, 40, 46, and 47) of the Tokyo District Court.

The official name of the Business Court is "Intellectual Property High Court, Nakameguro Office of the Tokyo District Court." The name "Business Court" was chosen in reference to the "Business and Commercial Courts" that are commonly used in the United States and other countries for the courts handling commercial disputes, in order to make the name easy to use and understand internationally as a name that simply indicates the cases handled. The cases handled by the Business Court can be found on the "Business Court" page of the Court's website.

2. Concept of Business Court

The Business Court is intended to realize a "new court" that meets the needs of users, and to strengthen the international competitiveness of Japan's civil justice system by having the aforementioned divisions related to business cooperate with each other, actively pursue efficiency through digitalization, and further enhance and strengthen their expertise and internationality. With the cooperation of all parties concerned, it is expected to conduct trial management appropriate for a court that concentrates on business-related trials, and to pursue the future of civil courts in Japan.

The Business Court has three concepts: (1) Professionalism, (2) Speedy and Accessible, and (3) Internationality. The abovementioned divisions share these concepts and are implementing various initiatives to realize all three concepts as a unified whole. While the court and divisions which are specialized in the three business-related fields handle cases based on their respective expertise, in order to respond to the new era, they also aim to achieve even higher-quality proceedings and judgments overall for the Business Court by mutually collaborating across divisional boundaries and enhancing their knowledge and expertise.

This concept is illustrated in the figures at the end of this document, which can also be found on the "Business Court" page of the Court's website. The Business Court celebrated its first anniversary in October 2023. We will continue to work with all parties concerned to provide better judicial services and to ensure that the Court becomes a place of which we can be proud internationally.

Ⅲ. The Court's Response to the Amendments to the Arbitration Act, etc.

1. Amendments to the Arbitration Act and the Role of the Courts

As noted above, in April 2023, the Act for Partial Amendment of the Arbitration Act was enacted, and it is believed that this amendment was made against the background of the government's policy of making Japan an attractive place for arbitration by developing an arbitration law system that meets the latest international standards. It is also considered to be one of the important foundations for the revitalization of international arbitration in Japan that courts handle arbitration-related cases properly and promptly, and ensure predictability and legal stability regarding arbitration.

In April 2023, in accordance with the Act for Partial Amendment of the Arbitration Act, the "Act for Implementation of the United Nations Convention on International Settlement Agreements through Mediation" (Act No. 16 of 2023; hereinafter referred to as the "Convention Implementation Act") was enacted, which provides for necessary matters concerning the implementation of the United Nations Convention on International Settlement Agreements through Mediation, and the "Act for Partial Amendment of the Act on the Promotion of Use of Alternative Dispute Resolution" (Act No. 17 of 2023; hereinafter referred to as the "Amended ADR Act") was enacted, which provides for necessary matters to partially amend the Act on the Promotion of Use of Alternative Dispute Resolution (Act No. 151 of 2004; hereinafter referred to as the "ADR Act"). The court is required to take necessary actions regarding these laws as well.

2. Preparation of Supreme Court Rules in Light of Amendments to the Act

The first step in the preparation of the courts for the amendment of the Arbitration Act is the development of the Rules of the Supreme Court, including the amendment of the Rules of Procedure for Arbitration-Related Cases. According to the amendment of the Arbitration Act and the ADR Act, and the enactment of the Convention Implementation Act, the procedures for decisions to approve the enforcement of provisional temporary restraining orders (Article 24 (1) and (3), Article 47 (1) of the Amended Arbitration Act), decisions on an execution order of international settlement agreements (Article 2 (3), Article 5 of the Convention Implementation Act) and decisions on an execution order of specific settlements (Article 2 (v), Article 27-2 of the Amended ADR Act) have been established.

Furthermore, a new rule has been established concerning the procedures for decisions on an execution order of arbitral awards, etc. This rule allows for the unnecessary attachment of a translation of an arbitral award, etc. prepared in a foreign language (the proviso to Article 46 (2) and the proviso to Article 47 (2) of the Amended Arbitration Act, and the proviso to Article 5 (4) of the Convention Implementation Act). Therefore, it is required to establish the necessary rules in response to such procedures, and these rules, such as amendments to the Rules of Procedure for Arbitration-Related Cases, have been established.

3. Establishment of the Case Management System to Prepare for the Amended Act

In order to establish a specialized case-handling system in the courts and to further appropriate and expedite the procedures, the jurisdiction has been expanded to the Tokyo District Court and the Osaka District Court under the amended Arbitration Act (Article 5 (2), Article 8 (2) (ii), Article 35 (3) (iv), Article 46 (4) (iii), and Article 47 (4) (iii) of the Amended Arbitration Act). In December 2022, the Tokyo District Court revised its Rules on the Distribution of Cases in order to improve the system for hearing and deciding arbitration-related cases, based on the purpose of the amendment of the Arbitration Act and before the enforcement of the Act for Partial Amendment of the Arbitration Act. As a result, in the Tokyo District Court, arbitration-related cases, which had previously been widely distributed to the departments in charge of ordinary civil cases, were to be assigned to a department that would handle arbitration-related cases primarily from April 2023, with intellectual property cases being assigned to the Intellectual Property Division and other cases to the Commercial Division.

The number of arbitration-related cases pending before the Tokyo District Court was approximately 35 in the six years from 2017 to 2022, and the number of new cases received by the Tokyo District Court has generally remained between 3 and 10 every year. The number of arbitration-related cases pending before the Tokyo District Court accounted for less than 60% of all arbitration-related cases pending before all the courts in Japan, but the absolute number of cases assigned to one division per year was small, and the accumulation and sharing of knowledge and experience in court practice had not progressed.

As previously mentioned, as of April 2023, arbitration-related cases newly assigned to the Tokyo District Court were assigned to the Commercial Division and the Intellectual Property Division, both of which belong to the Business Court. The Business Court is seeking to realize a new court that meets the expectations of users by pursuing efficiency through digitization, further enhancing and strengthening its expertise and internationality, and improving the speed and efficiency of hearings and the quality of judgments. By consolidating arbitration-related cases in the Commercial Division and the Intellectual Property Division of the Business Court, we believe that we have established a framework for higher-quality hearings and judgments.

As the Department in charge of arbitration-related cases at the Tokyo District Court, we intend to accumulate knowledge, experience, and know-how by consolidating cases and to improve our expertise through further study. In order to do so, we believe that it is important to deepen our understanding of the actual practice of international arbitration as well as its theoretical aspects. Moreover, we would like to enhance our ability to handle arbitration-related cases as a whole by being conscious of sharing information with other courts regarding the knowledge and experience we have accumulated.

Ⅳ. Hearing of Arbitration-Related Cases in the Commercial Division

1. Role of Courts in Arbitration Proceedings

Arbitration proceedings are characterized by the fact that, based on the arbitration agreement between the parties, highly specialized and convenient proceedings can be conducted under the supervision of arbitrators appointed by the parties, but the execution order and annulment of arbitral awards depend on the authority and procedures of the courts, and for arbitration proceedings to truly function, it is essential that the court's authority be exercised properly and that the proceedings be conducted appropriately. We have heard that the attitude and efforts of the courts have a great influence on the selection of the place of arbitration in international arbitration, and we would like to keep in mind that Japanese court decisions are the foundation of trust in Japanese arbitral proceedings. Therefore, we would like to ensure appropriate and prompt hearings and judgments.

2. Hearing of Petitions for Execution Order of Arbitral Awards and Petitions to Set Aside Arbitral Awards, etc.

(a) The Approach to Hearings

A large number of arbitration-related cases pending before the courts are petitions for an execution order allowing civil enforcement based on an arbitral award and petitions to set aside an arbitral award. How these arbitration-related cases are heard is solely the decision of individual judicial panels on a case-by-case basis. However, as a general rule, if a Japanese court improperly dismisses a petition for an execution order of an arbitral award or improperly sets aside an arbitral award without fully understanding the structure and characteristics of the hearing and judgment of those cases, the Japanese court may have a reputation for not being "arbitration friendly." As a result, Japan will not be chosen as the place of arbitration in international transactions and Japanese companies may be disadvantaged.

We would like to conduct our hearings with an awareness of the finality and speed of arbitration and with an understanding of the structure of these cases, and the fact that we are not conducting an appellate review of arbitral awards. The existence or non-existence of grounds for refusal of recognition in a case requesting a decision for an execution order of an arbitral award, and the existence or non-existence of grounds for annulment in a case requesting annulment of an arbitral award are the key facts to prove. Therefore, in these arbitration-related cases, we believe that consideration should be given to promptly terminating the hearing and rendering a decision on those cases where it is determined that there are only allegations that request a substantive review of the arbitral award.

(b) Omission of the Attachment of Translation

The purpose of the recent amendment concerning the omission of the attachment of a translation of an arbitral award, etc. is considered to be that, from the perspective of reducing the burden on the parties, the court will permit the omission of the submission of a translation of an arbitral award, etc. made in a foreign language when the court finds it appropriate. Whether and to what extent the court will permit the omission of the submission of a

translation of an arbitral award, etc. will be determined by the court in each individual case after hearing the opinions of the respondent, based on the necessity of the case for a hearing.

In cases requesting a decision for an execution order of an arbitral award or requesting the annulment of an arbitral award, it is considered possible to omit the submission of a translation for those parts of the case for which a translation is unnecessary, based on the issues in the case, such as the specific grounds for refusal of enforcement or grounds for annulment at issue in the case. The necessity and scope of the translation to be submitted will be determined by the court on a case-by-case basis, but my personal impression is that there may be cases where the omission of a translation may be considered for many parts of an English document.

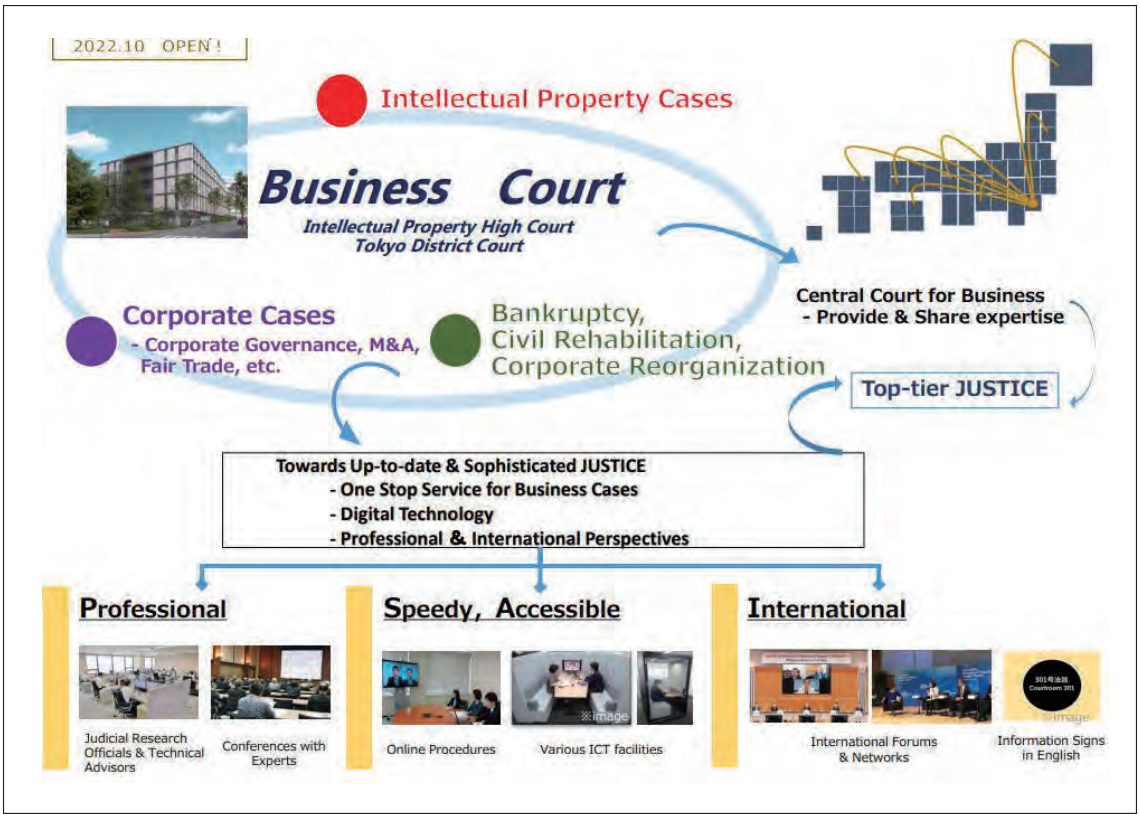
On the other hand, for example, in case of a petition for an execution order, if the court considers it necessary to precisely specify the scope in which compulsory execution is to be granted, the court may require the submission of a translation for the portion corresponding to the main text of the arbitral award. In order to smoothly connect to the subsequent compulsory execution, the identification of the contents of the title of obligation must be shared between the court and both parties so that there is no confusion, and in such cases, it seems that it may be rather useful to have a translation submitted for confirmation. Please understand that, in such cases and others, a Japanese translation may be requested for the "essential parts," so to speak, of the case in question.

(c) New York Convention (Convention on the Recognition and Enforcement of Foreign Arbitral Awards)

Articles 45 and 46 of the Arbitration Act will apply to the recognition and execution order of arbitral awards, and the New York Convention will also apply to the recognition and execution order of foreign arbitral awards. In situations where the provisions of the New York Convention and the Arbitration Act are similar, the interpretation of the New York Convention may also serve as a guide in the interpretation of the Arbitration Act. Therefore, we would like to be aware of international cooperation in the interpretation and operation of the New York Convention regarding the recognition and enforcement of arbitral awards by referring, for example, to the International Council on Commercial Arbitration's guide to the New York Convention for judges.

Ⅴ. Conclusion

A system has been established where court proceedings for arbitration-related cases, including international arbitration, are centrally handled by specialized divisions in the Business Court. As a division that specializes in arbitration-related cases, we would like to further improve the quality and predictability of our judgments by conducting hearings more promptly and efficiently, with an awareness of international cooperation in adjudicating arbitration-related cases. We are also conscious of information sharing with other courts and the external dissemination of information. As the infrastructure of the Japanese arbitration system, the Japanese courts will strive to contribute to making the Japanese arbitration system more attractive.



THE CONCEPT OF THE BUSINESS COURT

NAGASHIMA OHNO & TSUNEMATSU
長島·大野·常松 法律事務所

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Nadine Lederer

Director, International Civil Affairs Ministry of Justice of Israel

Itai Apter

Deputy Director Ministry of Justice of Republic of Korea

Jinah Park

Professor of Private International Law, University of Valencia

Carlos Esplugues[1,2)]

Ⅰ. Introduction

There are rapid developments in the field of international dispute resolution. Since the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) was adopted in 1958, the number of State parties has grown to over 170. Meanwhile, a number of instruments were developed through the United Nations Commission on International Trade Law (UNCITRAL), the guardian of the New York Convention, including the Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006, either of which has been adopted by a considerable number of States.

One of the recent significant achievements of the United Nations is the Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention) adopted in 2018 and open for signature since 2019. Although there is a relatively limited number of contracting States at this stage (17), it is expected that the Singapore Convention will become a robust framework that supports international transactions worldwide given the significant number of signatory States (59).

To look at the recent updates, the UNCITRAL Commission Session in July 2024 mandated Working Group II to work on arbitral awards in electronic form, after approving the proposal made by Germany, Israel, Japan, the Republic of Korea and Spain.

When it comes to the national environment, each country is endeavoring to pave the way for international businesses by developing their domestic laws most of the time with reference

1) The views expressed in this article reflect the personal opinions of the authors and do not necessarily represent the governments/ any organizations.

2) All of the authors are (or were) delegates of their respective countries at UNCITRAL Working Group II or Working Group VI.

to these instruments.

However, there are limited resources available to fully grasp the situation surrounding arbitration and mediation in each country.

This article aims to provide an overview of these environments in several countries through a comparative approach, and we hope it contributes to helping business users and practitioners gaining valuable perspectives when they enter into international contracts or become involved in international disputes.

Ⅱ. Japan

1. Legislative History of Arbitration and Recent Update

Japan's Arbitration Act dates back to the Civil Procedure Act of 1890 (1890 Act), where arbitration procedures were stipulated as a part of the Act. Although the civil procedure system underwent a major reform in 1996, the provisions on arbitration remained unchanged, with a few formalistic amendments, by which the 1890 Act was renamed to the Procedure for Public Notification and Arbitration Act. In 2003, the Arbitration Act was enacted as a standalone law, the contents of which were in line with the UNCITRAL Model Law 1985.

The Model Law was amended in 2006 to introduce new articles regarding interim measures. Until recently, however, the Arbitration Act had not incorporated those provisions. Meanwhile, the use of alternative dispute resolution mechanisms, especially for resolving international disputes, has remained stagnant among Japanese corporations, and there was a need to promote the more efficient use of these legal systems, such as arbitration and mediation among businesses.

On April 21, 2023, the 211th session of the Diet adopted the Act Partially Amending the Arbitration Act (Act No.15 of 2023), which came into force on April 1, 2024. The amendment of the Arbitration Act was part of the governmental initiative to invigorate arbitration by ensuring that arbitration procedures comply with global standards. This was achieved by introducing three categories of measures: (1) renewed provisions for interim measures, (2) relaxing the requirements for entering arbitration agreements and for the submission of Japanese translations to courts, and (3) extending the jurisdiction of courts in Tokyo and Osaka to arbitration-related applications.[3,4)]

2. International Mediation

The promotion of international mediation should be considered alongside the promotion of arbitration, as mediation is regarded as a significant dispute resolution mechanism, especially following the establishment of the Singapore Convention on Mediation in 2018. With this in mind, during the legislative process for amending the Arbitration Act, there was a discussion on adopting the Singapore Convention on Mediation, for which the necessity of establishing an

3) Miyazaki, F. (2024). "Overview of the amendment to Japan's Arbitration Act." *Japan Commercial Arbitration Journal*, Vol. 5, The Japan Commercial Arbitration Association (JCAA).

4) An overview of the Acts is also available at: https://www.moj.go.jp/EN/MINJI/m_minji07_00006.html

implementing act thereof was pointed out. There was consideration of how to justify the novel mechanism that grants enforceability to international mediation, as it could lead to unprecedented consequences for parties who sought only an amicable solution. To strike a balance between parties' procedural rights and strengthening the reliability of reconciliation agreements, in acceding to the Singapore Convention, Japan declared the reservation in accordance with Article 8 (b), which provides an opt-in mechanism for parties. This enabled Japan to become a State party of the Singapore Convention at an early stage, making it the 12th country to join the convention.[5)]

3. Governmental Initiatives

These two recent legislative updates were achieved as part of Japan's initiatives to invigorate arbitration and mediation, which also involve non-legislative activities led by the government policy. The government policy was revised in 2024, and here are the highlights of two key approaches in the new policy: maintaining and developing the international community's trust in international arbitration and mediation, and developing human resources.

(1) International Community's Trust in ADR

It has been said that Japan lags behind in arbitration, with businesses tending to overly rely on court procedures to resolve international disputes, rather than ADR. This perception may be shared by foreign users and practitioners, giving the impression that Japan is not necessarily an arbitration-friendly country.

In order to promote the use of arbitration and mediation, it is necessary to gain international recognition and trust in these methods as fair and appropriate dispute resolution practices for businesses, offering timely and effective services. As such, increasing awareness of the benefits of arbitration and mediation among business users and practitioners is essential. From this perspective, the Ministry of Justice, in cooperation with the Japan Commercial Arbitration Association (JCAA), the Japan Association of Arbitrators (JAA), and the Ministry of Economy, Trade and Industry, held "Japan International Arbitration Week" from November 18 to 22, 2024.[6)] This occasion marked the first full-scale international event for the promotion of arbitration conducted by the Ministry of Justice in collaboration with both the public and private sectors, with various sessions organized in cooperation with overseas arbitration and mediation organizations. Throughout these sessions, there were valuable discussions on the characteristics and differences between civil law and common law procedures, and how that gap can be bridged. The effective practice of combining mediation and arbitration was another key highlight, contributing to faster and more cost-effective dispute resolution.

Plans have also been made to hold the second Japan International Arbitration Week from November 25 to 29, 2025. To further these efforts in promoting arbitration and mediation, collaborative initiatives are underway with ministries in other countries, such as Singapore, the Republic of Korea and Germany, by participating in the discussions at arbitration and

5) https://www.mofa.go.jp/press/release/pressite_000001_00258.html

6) https://www.moj.go.jp/EN/kokusai/m_kokusai06_00008.html

mediation forums in each jurisdiction.

(2) Efforts to Develop Human Resources

In promoting efforts to revitalize international arbitration, it is important that more legal practitioners recognize its usefulness and develop the skills essential to its professional application, thereby broadening the pool of skilled human resources. At the same time, it is crucial to nurture arbitration practitioners who are particularly well-versed in international arbitration and can serve as true experts in the global community. With this in mind, the Ministry of Justice has been conducting arbitration-related lectures and elective practical training programs in international arbitration for a wide range of young people, including university students and legal apprentices, and has also been working with overseas arbitration-related organizations to develop human resources for practitioners.

4. Way Forward

Japan is committed to continuing efforts to promote international arbitration and mediation throughout the world. As part of these efforts, in January 2025, the Government of Japan signed a memorandum with the United Nations to support the program activities of the UNCITRAL Regional Centre for Asia and the Pacific. This is expected to contribute to further promoting and enhancing understanding of international legal instruments.

Finally, it is worth mentioning that the credibility of arbitration and mediation derives from a stable and reliable court system. As stated above, businesses in Japan tend to choose court procedures to resolve disputes, which is the flip side of the same coin—namely, the high expectation of finding a satisfactory resolution to disputes, underpinned by judges and court staff who are highly skilled, impartial, precise, and always mindful of what constitutes the best resolution for the parties before them. It is also noteworthy that the Business Court was established in 2022, enabling the accumulation of knowledge and expertise in arbitration-related cases. Furthermore, fully digitalized court proceedings will become available by 2028. By supporting ADR systems, Japan's robust legal environment—including its judiciary—is expected to facilitate more effective cross-border dispute resolution.

Ⅲ. France

1. International Commercial Arbitration

French law on international commercial arbitration was codified in 1980 and 1981 in the civil procedure code[7]. The last general reform dates back to 2011[8] but the law has been amended several times since then for specific purposes[9]. In this context, France participated

7) Decrees n° 80-354 of 14 May 1980 and n° 81-500 of 12 May 1981.

8) Decree n° 2011-48 of 13 January 2011.

9) For example, in 2019 for online arbitration (law n° 2019-222 of 23 March 2019 on programming 2018-2022 and justice reform) or recently in 2024 to increase the jurisdiction of the Paris international commercial chamber in international arbitration matters (law n° 2024-537 of 13 June 2024 aimed at increasing business financing and the attractiveness of France).

to the development and adoption of UNCITRAL Model Law on International Commercial Arbitration in 1985 and its revision in 2006.

French international arbitration law offers both flexibility and legal certainty. While the rules are based on the autonomy of the will of the parties and promote the autonomy of the arbitration process, they provide support for the arbitration process at every stage. They also ensure the recognition and enforcement of arbitral awards with rules based on the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, but sometimes with a more liberal approach[10].

The Paris Court of Appeal includes an international commercial chamber responsible for handling international business litigation, including international commercial arbitration. The chamber celebrated its 5th anniversary in 2023. It complements the international chamber of the Paris Commercial Court, in operation since 1995. The concentration of jurisdiction in this specialized chamber offers to the parties procedural rules adapted to international litigation and a coherent body of rulings published on the Paris Court of appeal's website, with summaries in French, English and sometimes Spanish and Chinese. The jurisprudence of the chamber sets high standards for the respect of public policy[11] and due process[12].

Paris has also the honour of being the seat of the International Court of Arbitration of the International Chamber of Commerce, which has celebrated its 100th anniversary in 2023 and is booming with 890 new cases in 2023, the average amount at stake in these new cases being 65 million US dollars.

In order to meet the new challenges in international commercial arbitration, the then French Minister of Justice, Eric Dupond-Moretti, announced the creation of a working group at the 2024 Paris Arbitration Week, with the task of assessing the current applicable provisions and drafting proposals to modernize French law on international commercial arbitration. On 12 November 2024, Didier Migaud, the former French Minister of Justice, launched the first session of this working group, gathering lawyers, judges, representatives of arbitration institutions, professors and practitioners, with the support of the French Ministry of Justice. The findings of the working group are to be published in March 2025.

2. Mediation

The act of 8 February 1995 is the first French major legislation on mediation[13]; since then, different reforms have enhanced mediation in French law, as a genuine alternative to litigation[14].

10) In accordance with article VII of the Convention.

11) See for example the decision of the first civil chamber of the *Cour de cassation* dated 23 March 2022 (n° 17-17.981), regarding money laundering.

12) See for example the decision of the first civil chamber of the *Cour de cassation* dated 28 September 2022 (n° 21-21.738), regarding impecuniosity of the parties.

13) Law n° 95-125 of 8 February 1995 on the organization of courts and civil, criminal and administrative procedure.

14) For example, the laws n° 2016-1547 of 18 November 2016 on the modernization of justice for the 21st century and n° 2019-222 of 23 March 23 2019 on justice programming and reform and decree n° 2023-357 of 11 May 2023 on the mandatory preliminary attempt at mediation, conciliation or participatory proceedings in civil matters.

In order to anchor the amicable settlement reflex among practitioners, the Ministry of Justice has launched in 2023 a proactive and coordinated public policy on amicable settlement in civil matters, with a project to overhaul the rules contained in the civil procedure code on amicable dispute resolution and to adopt innovative provisions in these matters.

A team of amicable settlement ambassadors has been created, gathering judges, lawyers and academics tasked with disseminating a professional culture of amicable settlement, by touring French courts with the support of the French Ministry of Justice.

The national mediation council was also launched and published its first report in November 2024, including ideas to modernize mediation.

French law on mediation is based on the European Union law and specifically on the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters[15]. This Directive promotes high qualification of mediators, enforceability of mediated agreements through the application to a court, confidentiality of mediation (with the reserve of public policy) and modifications of the statute of limitations during the mediation process.

France is not a party to the Singapore Convention adopted on 20 December 2018.

Ⅳ. Germany

1. General Overview

The 10th book of the German Code of Civil Procedure includes the German arbitration law.[16] In its current version, it entered into force on January 1st, 1998 and is to a large extent based on the UNCITRAL Model Law from 1985. With the adoption of the UNCITRAL Model Law, it was intended to make German law more user-friendly and to align it with international practice in order to make it easily accessible to foreign users and to attract more cases.[17] One of the main deviations from the UNCITRAL Model Law concerns the fact that the German arbitration law applies to both national and international proceedings. Moreover, its application is not limited to commercial disputes but it applies to all types of arbitration.[18]

German courts are very arbitration-friendly. They usually take a supportive and pro-enforcement approach. They are also neutral as evidenced by recent empirical data: grounds for non-enforcement or annulment have been found for 4.24% of domestic awards, whereas this number is even lower for foreign awards (3.94%).[19]

Apart from arbitration, also other alternative dispute resolution methods play an important role in Germany, including mediation. In 2017, the Law on the Promotion of Mediation and

15) The implementation of the Directive was not limited to cross-border situations.

16) An English translation of the German arbitration law is available at: https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p3535

17) Böckstiegel/Kröll/Nacimiento, in: Nacimiento, Kröll, et al. (eds.), *Arbitration in Germany: The Model Law in Practice*, 2nd ed. 2015, Part I, para. 3 et seq.

18) Ibid., para. 12.

19) Wolff, *Die deutsche Justiz im Wettbewerb der Schiedsstandorte: eine Erhebung zur Spruchpraxis der Gerichte*, German Arbitration Journal (Zeitschrift für Schiedsverfahren – SchiedsVZ) 2021, VOL 19, Issue 6, p. 328, 336.

other Out-of-Court Dispute Resolution Methods (Gesetz zur Förderung der Mediation und anderer Verfahren der außergerichtlichen Konfliktbeilegung) entered into force which transposes the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.[20] Like any other Member State of the European Union, Germany has not signed the Singapore Convention yet.

2. Arbitral Institutions and Other Organizations

In Germany, both ad hoc and institutional arbitrations are allowed. The German Arbitration Institute (DIS) is the leading institution in Germany for the administration of arbitrations and other alternative dispute resolution proceedings.[21] In 2023, the DIS administered 191 proceedings of which 180 were arbitrations.[22] Of these arbitration proceedings, 31% were conducted in English. Munich, Frankfurt, Hamburg, Düsseldorf and Cologne were among the most popular German seats.

Other renowned arbitral institutions include, inter alia, the Asian European Arbitration Centre (ASEAC)[23] in Hamburg and the new Arbitration Court at the German Chamber of Commerce and Industry (SGH)[24] which was launched in December 2024. The German Maritime Arbitration Association (GMAA)[25] in Hamburg does not conduct any proceedings itself, but it promotes alternative dispute resolution procedures in the maritime industry and provides relevant regulations and procedural information in this respect.

3. Initiatives

The German arbitration community is very active. To highlight a few recent initiatives: In 2024, the DIS and its initiative of young arbitration practitioners (DIS40) jointly launched the German Arbitration Digest (GAD) which provides English summaries of relevant arbitration-related decisions of the German Federal Court of Justice (Bundesgerichtshof) and the Higher Regional Courts (Oberlandesgerichte) and thereby seeks to make German case law internationally available.[26]

Since 2022, the Berlin Dispute Resolution Days (BDRD) have been taking place annually in September.[27] The DIS, the German Federal Ministry of Justice and Consumer Protection and the Humboldt-Universität zu Berlin with its International Dispute Resolution master program

20) Wagner/Kamp, in: Campbell (ed.), *International Mediation*, 2020, p. 171 et seqq. provide a comprehensive overview on the legal framework for mediation in Germany.

21) The website of the DIS is available at: https://www.disarb.org/en/

22) The latest DIS statistics are available at: https://www.disarb.org/en/about-us/our-work-in-numbers

23) The website of the ASEAC is available at: https://www.aseac-arbitration.com

24) The website of the SGH is available at: https://schiedsgerichtshof.de; the SGH's Rules of Arbitration are also available in English: https://schiedsgerichtshof.de/wp-content/uploads/2025/02/ENG_Arbitration-Rules_SGH_Nov-2024.pdf

25) The website of the GMAA is available at: https://www.gmaa.de/en/

26) More information on GAD and English summaries of German court decisions are available on the DIS website: https://www.disarb.org/en/resources/german-arbitration-digest

27) The BDRD website is available at: https://www.berlin-dispute-resolution-days.de. In 2025, the BDRD took place from 8 – 11 September.

are the organizers. The different conferences and events taking place during the BDRD demonstrate the relevance and importance of dispute resolution made in Germany, gathering practitioners, judges, lawyers, academics, government officials and representatives of other relevant stakeholders from all around the world in Germany's capital Berlin to discuss topical issues and exchange insights on various aspects of dispute resolution.

Similar to the BDRD, the Hamburg International Arbitration Days (HIAD)[28] take place annually and consist of a multitude of events, fostering collaboration and knowledge-sharing within the field of international arbitration with in-depth discussions, workshops, and networking opportunities for international arbitration practitioners.

Every two years, the DIS and the German Federal Ministry of Justice and Consumer Protection jointly organize a conference in Karlsruhe which aims at fostering the dialogue between the state court judiciary and the arbitration community.[29]

4. Outlook

There are more promising initiatives in the pipeline. Moreover, efforts have recently been undertaken to reform the German arbitration law with the aim to align it with modern needs, to consider the changes made in the revised UNCITRAL Model Law from 2006, to enhance its efficiency and to promote Germany as an arbitration venue.[30] The draft bill had already reached a very advanced stage in the parliamentary process, but due to the premature end of the 20th legislative period, the reform has unfortunately fallen into discontinuity. It remains to be seen when this project will be taken up again in the new legislative period.[31]

In a nutshell, the draft bill included, inter alia, new provisions on electronic awards, dissenting opinions, publication of awards, remote hearings, multi-party arbitrations, form requirements for arbitration agreements and the submission of English documents in German-language arbitration-related court proceedings. As another key feature, the draft bill provided for the jurisdiction of Commercial Courts in arbitration-related matters, such as enforcement and annulment proceedings.

As a matter of background, the Act to Promote Germany as a Forum for Legal Proceedings by Introducing Commercial Courts and English as a Court Language in Civil Jurisdiction (Gesetz zur Stärkung des Justizstandortes Deutschland durch Einführung von Commercial Courts und der Gerichtssprache Englisch in der Zivilgerichtsbarkeit) entered into force on April 1st, 2025. Under this new act, so-called Commercial Courts are introduced at designated Higher Regional Courts for certain types of disputes with the option to conduct the proceedings entirely in English.

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28) The HIAD website is available at: https://hamburgarbitrationdays.de/

29) A summary of the conference, which took place on June 29, 2023, is available at: https://legalblogs.wolterskluwer.com/arbitration-blog/german-federal-ministry-of-justice-and-dis-conference-2023-convergence-of-arbitration-and-litigation/ In 2025, the conference took place on 26 June.

30) An English translation of the first draft bill is available at: https://www.bmj.de/SharedDocs/Downloads/DE/Gesetzgebung/RefE/RefE_Modernisierung_Schiedsverfahrensrecht_2024_EN.pdf?__blob=publicationFile&v=3

31) The elections for a new German government took place on February 23, 2025.

Ⅴ. Israel[32)]

1. Legislative History in International Arbitration

Israel has historically recognized arbitration as a useful method for resolving disputes, becoming the first state in the world to ratify the New York Convention in 1959.[33)] In 1968, Israel adopted the Arbitration Law, which remains in force today despite undergoing various amendments over the years. Israel further strengthened its international dispute resolution framework by ratifying the Convention for International Centre for Investment Disputes (ICSID) in 1983.[34)] In 2019 the Attorney-General issued guidelines for governmental bodies to guide them in including international arbitration clauses in contracts with foreign parties.[35)]

Almost 60 years later, after establishing its domestic arbitration framework, In February 2024, Israel adopted the International Commercial Arbitration Law (ICAL). This new legislation adopted the UNCITRAL Model Law on International Commercial Arbitration, aligning Israel's arbitration framework with internationally accepted standards.[36)] The law aims to enhance the predictability and efficiency of international arbitration proceedings and ancillary measures strengthening Israel's reputation as a reliable seat for international arbitration.

Key features of the ICAL include:

- **Scope of Application:** The law applies exclusively to international commercial arbitration, differentiating it from domestic arbitration proceedings.[37)]
- **Judicial Support and Supervision:** Israeli courts are authorized to support international arbitration proceedings, including appointing arbitrators when necessary, under certain circumstances.[38)]
- **Competence-Competence:** The ICAL incorporates the competence-competence principle, allowing arbitral tribunals to determine their own jurisdiction. Israeli courts may review such jurisdictional decisions, but the tribunal can continue proceedings during the court's review.[39)]

32) The author (Itai Apter) thanks Yali Lazar, student researcher at the Israel Ministry of Justice, for her invaluable contribution to the preparation of the section on Israel.

33) Justice Haim Cohen, who was at the time the Israeli Attorney-General personally participated in the negotiations of the Convention in the United Nations office in New York. For a history of his involvement in the negotiation see Yehuda Cedric Sabbah, Itai Apter, *Israel's Accession to the New-York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1959)* Roots in Law (in Hebrew) (2019), https://www.gov.il/BlobFolder/reports/roots_1959/he/roots_1959.pdf

34) For a discussion of Israel's accession to the ICSID Convention see Dana Daybog, Shimrit Sharabi, *The Entry into Force of the ICSID Convention for Israel*, Roots in Law (in Hebrew) (2019), https://www.gov.il/BlobFolder/reports/roots_1983_1/he/roots-1983-1.pdf.

35) Attorney General Guidelines 10.200 on the Submission of the State to Foreign Law, Foreign Courts, and International Mechanism for Resolution of Disputes in Commercial International Contracts (2019).

36) Asaf Niemoj and Samantha Nataf, "Israel: Adoption of the New International Commercial Arbitration Law based on the UNCITRAL Model Law", Jus Mundi (May, 2024).

37) § 3, ICAL.

38) Ibid, § 12.

39) Ibid; § 17 International Commercial Arbitration – Israel joins the ranks of the Model Law Jurisdictions, United Nations - UNCITRAL (Feb. 29, 2024); Bar-Natan Z. and Kapeliuk D., International Arbitration 2024, Chambers And Partners (Aug. 22, 2024)

- **Interim Measures:**[40] The ICAL empowers tribunals to grant interim measures, which Israeli courts are authorized to enforce, regardless of the seat of the arbitration.[41]
- **Recognition and Enforcement:** The ICAL explicitly provides that foreign arbitral awards shall be recognized and enforceable in Israel, with limited grounds for refusal, such as public policy (this was the state of affairs for decades beforehand, resulting from Israel's accession to the New-York Convention, but the ICAL codified it explicitly for the first time in primary legislation).[42]

Alongside the ICAL, the 1978 Regulations for the Implementation of the New York Convention (Foreign Arbitration) are currently the only regulations specifically pertaining to international arbitration proceedings. According to the ICAL, until the Minister of Justice issues regulations for its implementation, the 1968 Regulations for Procedure for Arbitration shall apply, *mutatis mutandis*.[43] In January 2025, the Ministry of Justice published draft regulations for the ICAL.[44]

2. International Mediation

Israel has embraced international mediation as an important dispute resolution tool with its ratification of the Singapore Convention in 2025. Israel played an important and active role in the negotiations on the Convention in UNCITRAL Working Group II.[45]

In 2024, Israel adopted an amendment to the Courts Law, 1984 to enable the ratification of the Singapore Convention.[46] The amendment authorizeds Israeli courts to recognize and enforce international mediated settlement agreements, provided they meet the criteria set out in the Singapore Convention. The law requires that the parties to the international mediated settlement agreement explicitly agree to the application of the Singapore Convention,[47] corresponding to the reservation Israel submitted to the Convention under Article 8.1(b).[48]

In July 2025, the regulations for the implementation of the Singapore Convention were published, completing the required legal frame work.[49]

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40) Ibid; International Commercial Arbitration - Israel joins the ranks of the Model Law Jurisdictions, United Nations - UNCITRAL (Feb. 29, 2024); Bar-Natan Z. and Kapeliuk D., International Arbitration 2024, Chambers and Partners (Aug. 22, 2024)

41) § 18-28, ICAL.

42) Ibid, 45 Section II(3) of the New York Convention; Daphna Kapeliuk, "Israel Adopts the International Commercial Arbitration Law: Will the Courts Play Along?", Kluwer Arbitration Blog (Mar. 7, 2024).

43) ICAL § 47(b).

44) https://www.tazkirim.gov.il/s/legislativeworkactivity/a13KC000000PlbaYAC/%D7%94%D7%A4%D7%A6%D7%94-%D7%9C%D7%94%D7%A2%D7%A8%D7%95%D7%AA-%D7%A6%D7%99%D7%91%D7%95%D7%A8?language=iwγ

45) For elaboration on Israel's role and the negotiations of the Convention in general see Itai Apter, Roni Ben-David, *Chronicles of the Singapore Convention – An Insider View* in The Singapore Convention on Mediation – A Commentary on the United Nations Convention on International Agreements Resulting from Mediation (Guillermo Palao, ed. 2022), 1-39.

46) Courts Law (Amendment 103), 1984.

47) The Courts Law, § 79 C (9),

By adhering to the Singapore Convention, Israel has positioned itself as a supportive jurisdiction for international mediation, encouraging parties to resolve cross-border disputes amicably while ensuring that settlement agreements are enforceable across borders in States parties to the Convention.

3. Government Initiatives

Israel's recent steps are part of a broad government initiatives to promote the use of international arbitration and international mediation by parties to international transactions with Israeli counterparts. The efforts to join the different international legal frameworks and to impact their design are supported and facilitated by strong cooperation between government officials and the private sector, reflecting the needs of Israeli stakeholders in this context. Examples of such efforts include the following:

- **Working with Private Sector:** The Ministry of Justice engages closely with key stakeholders to develop frameworks addressing the needs of the international arbitration community in Israel. This includes roundtables on private-commercial international law, participation in private sector initiatives, and continuous consultations in respect of the relevant legislative steps in respect of international arbitration and mediation.
- **Participation in the Design of International Frameworks:** Israel plays an active role in UNCITRAL working groups and other global forums working on the development of international frameworks to promote international arbitration and international mediation. One notable example is work on the recently adopted UNCITRAL SPEDR (Specialized Express Dispute Resolution) model clauses, based on a proposal by Israel and Japan for the development of a tool to support dispute resolution in the high-tech industry.[50)]
- **Training:** Ministry of Justice officials make presentations in training courses for lawyers, conferences and academic activities focusing on international arbitration and international mediation. These presentations emphasise key elements in the legislative frameworks and the relevant international instruments.

4. Way Forward

Israel places a high value on the use of international arbitration and international mediation for resolution of cross-border commercial disputes as detailed above. At the same time, not all disputes can be resolved by such ADR means. In this context, the Ministry of Justice is

48) According to the government decision on the ratification of the Convention, government bodies must obtain the approval of the Deputy Attorney-General (International Law) for concluding international mediated settlement agreements in relation to transactions with a value exceeding 5 million NIS (approx. 26.8 million USD). Government Decision on the Ratification of the Singapore Convention, 2388 from 12 November, 2024. For elaboration on the reservations mechanism in the Singapore Convention see Itai Apter, Coral Henig-Muchnik, Reservations in the Singapore Convention – Making the "New-York Dream" Come True, 20 Cardozo Journal of Conflict Resolution 1267 (2019).

49) Court Regulations (Regulations for the Implementation of the Singapore Convention on International Mediated International Settlement Agreements Resulting from Mediation), 2025.

50) Possible future work in the field of dispute resolution in international high-tech related transactions Proposal by the Governments of Israel and Japan, A/CN.9/997 (2019).

working on legislation to enable ratification of the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgements and the 2005 Hague Convention on Choice of Courts Agreements both of which Israel signed in 2021.

Alongside these efforts, Israel plans to continue to actively engage in the work in UNCITRAL and other forums focused on international dispute resolution.

The Israel Ministry of Justice will continue working closely with other government bodies and private sector partners to place Israel as an active leading participant in creating supportive global legal frameworks for international trade. Israel aims to create the conditions that would facilitate it becoming a regional and global hub for intentional dispute resolution coming full circle from its historic accession to the New York Convention in 1959.

Ⅵ. Republic of Korea

1. Legislative History Regarding Arbitration

The legal framework governing arbitration in Korea can be divided into two key pieces of legislation: the Arbitration Law and the Arbitration Industry Promotion Law.

(1) The Arbitration Law

The Arbitration Law was legislated in 1966 as export-oriented economic development led to the need for swift and fair resolution of trade disputes. What is notable is that unlike other civil law countries, Korea established its Arbitration Law as a standalone law separate from the Civil Procedure Law.

Upon joining the New York Convention in 1973, the Arbitration Law was amended accordingly. To concentrate and strengthen international commercial arbitration capabilities, the Korean Commercial Arbitration Board, also known as KCAB, was established as an independent entity during this time.

The Arbitration Law was once again amended in 1999 to meet international standards. The revised Arbitration Law fully adopted the 1985 UNCITRAL Model Law on International Commercial Arbitration, such as incorporating provisions that ensure equality between the parties in arbitration procedures. However, a few adjustments were made to suit the Korean legal system. For example, Korea opted not to recognize stateless arbitration.

The Arbitration Law(Act No. 14176, May 29, 2016) evolved into its current form in 2016, adopting the 2006 UNCITRAL Model Law on International Commercial Arbitration. In response to the development of the IT industry and electronic commerce, electronic documents are now accepted as an arbitration agreement. The current Arbitration Act also streamlined the enforcement process of foreign arbitral awards by allowing an enforcement decision instead of requiring a court judgment.

(2) Arbitration Industry Promotion Law

In order to foster the arbitration industry, Korea enacted the Arbitration Industry Promotion Law in 2016. Based on this law, the government establishes and carries out a five-year plan with the goal of positioning the country as the leading arbitration hub in Northeast Asia. The current five-year plan from 2024 to 2028 pursues the following four key strategies: (1)

enhancing arbitration infrastructure, including the establishment of an ODR system, (2) attracting international arbitration cases, (3) consolidating domestic arbitration systems, and (4) strengthening the foundation of the arbitration industry.

2. International Mediation and Accession to the Singapore Convention

Alongside the efforts to activate arbitration, Korea endeavors to promote international mediation as well. In this sense, Korea signed the Singapore Convention in August 2019 and the Ministry of Justice launched a task force composed of mediation experts, such as professors and legal practitioners, in March 2021 to develop the necessary implementation legislation.

The T/F held its 1st meeting in March 2021 and its 2nd meeting in December 2022. However, further discussions were put on hold due to disagreements on the legislative method, the outbreak of the pandemic, and more. We resumed the operation of the T/F in September 2024.

As the T/F strive toward the common goal of enacting legislation that is most suitable for Korea's legal system, disagreements occasionally arise. One example is the scope of the implementation legislation. Some argued that the implementation legislation should only apply to international commercial mediation. Others saw this as an opportunity to legislate a Civil Mediation Law as Korea has yet to enact a law that overhauls the overall processes of private mediation.

Though the latter approach has its merits, the T/F recognized that it may prolong the legislative process and increase the likelihood of objections from various sectors. Thus the T/F agreed to take a phased approach. That is, an implementation law that solely applies to mediation covered by the Convention will be enacted first. Discussion on the overall organization of private mediation system, including the enactment of the Civil Mediation Law, will soon follow.

In addition, the T/F is exploring ways to achieve a balance between the implementation legislation and related systems such as orders for payment, arbitral awards, and deeds of execution. The T/F will also debate the qualifications and duties of mediators, mediation procedures, and so on.

Such discussions will take place in the monthly T/F meetings. We believe a draft bill will be developed by the end of 2025. A roundtable discussion will follow to incorporate expert opinion from both academia and the private practice. We aim to submit the bill to the National Assembly in the first quarter of 2026.

3. Government's Initiatives and Way Forward

The newly established International Legal Affairs Department, focusing on enhancing national capabilities on international legal services, aims to foster international arbitration and mediation industry. The department organizes an annual ADR Conference in collaboration with UNCITRAL, ICC, and KCAB, providing a platform to discuss the current status and future of ADR. With UNCITRAL-RCAP, we hold a Special Session each year to raise awareness of ADR

among public officials from developing countries in the Asia-Pacific region. The 13th ADR Festival held last year concentrated on cultivating an Asian-style ADR, attracting more than 200 experts.

Moreover, the department has been providing training program for young legal professionals in the form of "Global Fellowship Program". The department also keeps close ties with international organizations and neighboring countries by dispatching an international legal expert to UNCITRAL RCAP and supporting the development of Cambodia's mediation framework. We are committed to continuing such efforts to advance effective international dispute resolution systems.

Ⅶ. Spain[51,52)]

1. Legislative History on ADR and Current Regulation

The institution of arbitration is already present in Spain in the *Siete Partidas* of Alfonso X the Wise of Castile (13th century) and is also accepted as a way to solve disputes in Article 280 of the first Spanish Constitution, of 1812. Despite this legal presence, its use in practice has historically been very limited in the country and modern legislation on the subject has only been in place since 1988.

Arbitration is now regulated by Law 60/2003, of 12.03, on Arbitration, which was reformed in 2011 (LA). Mediation, on the other hand, is essentially governed by Law 5/2012, of 07/06, on Mediation in Civil and Commercial Matters (LM).

2. Arbitration Law

The LA is based on the UNCITRAL Model Law on International Commercial Arbitration (ML), in its original version of 1985. According to Article 1(1) of the LA, it applies, as a general rule, to arbitrations whose place of arbitration is within Spanish territory, whether domestic or international, without prejudice to the provisions of treaties to which Spain is a party - essentially the New York Convention and the Geneva Convention of 1961 on International Commercial Arbitration - or of those few laws which may contain special provisions on arbitration.

The solutions offered are in line with the so-called monist position. That means that the LA contains a common regulation of domestic and international arbitration in Spain, with a minimum of rules that deal with the peculiarities of international arbitration, which refer to certain specific issues, as follows.

(1) International Character of Arbitrations Conducted in Spain

51) This contribution is written in the framework of the research project Justicia sostenible en estado de mudanza global (JUSOST) - CIPROM 2023-64 (GV)

52) For a general view of the situation of ADR in Spain, consider, S. Barona Vilar (ed.), Comentarios a la Ley de Arbitraje - Ley 60/2003, de 23 de diciembre, tras la reforma de la Ley 11/2011, de 20 de mayo, Madrid, Civitas, 2011, 2nd ed. and S. Barona Vilar, Mediación en asuntos civiles y mercantiles en España, Valencia, Tirant lo Blanch 2013.

Article 3(1) of the LA essentially reproduces the mandate of Article 1(3) of the ML. The only significant difference relates to letter (c) of the latter provision, which is made more objective by stating that the arbitration is international if "the legal relationship from which the dispute arises affects the interests of international trade" (Art. 3(1)(c) of the LA).

(2) The Law Governing the Arbitration Agreement and the Arbitrability of the Disputes

Unlike many other national laws, the LA includes in its Article 9(6) a provision that specifically refers to the law governing the arbitration agreement (and to the arbitrability of the dispute) in order to ensure that the arbitration agreement will always be valid and the dispute arbitrable. The provision states that "in the case of international arbitration, the arbitration agreement shall be valid, and the dispute shall be arbitrable, if it meets the requirements of the rules of law chosen by the parties to govern the arbitration agreement, or of the rules of law applicable to the substance of the dispute, or of Spanish law". The reference to "legal rules", rather than to "rules of law" as in the ML, is to be understood as endorsing the potential application of the *Lex mercatoria*.

(3) The Law Applicable to the Merits of the Dispute

According to Article 34(1) of the LA, the arbitration shall always be governed by law and not by equity, unless the parties expressly agree otherwise. In this sense, Article 34(2) of the LA recognizes the possibility for the parties to choose the "rules of law" they wish to apply, whether one or more, state law or not. If the parties are silent, the so-called direct option is adopted and the arbitrators will apply the "rules of law" which "they consider appropriate".

(4) Recognition and Enforcement of Foreign Arbitral Awards in Spain

Finally, Article 46(2) of the LA states that, in the absence of more favourable international agreements, the recognition and enforcement of foreign arbitral awards shall be governed by the New York Convention, which, according to Article I(3) thereof, has universal character in Spain. The exequatur procedure is governed by Articles 41 et seq. of Law 29/2015, of 30.07.2015, on International Legal Cooperation in Civil Matters.

3. International Mediation

Spain is not a party to the Singapore Convention. It has not even signed it and is unlikely to do so in the future. The LM implements in Spain Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

Unlike other European legislation, the LM deals with the effects in Spain and outside of Spain of the agreements reached in cross-border mediation, assuming, as in many other European countries, that the agreement reached has the force of a contract. Therefore, it is not an enforceable title and this status will only be achieved when it is incorporated in a public document or approved by a judge in a judgment.

Article 25 of the LM distinguishes between mediation settlements reached in Spain and intended to produce effects outside the national territory, and those entered outside Spain and intended to be enforced here.

(1) With regard to the first situation, the third paragraph of Article 25 of the LM states that if

the settlement reached in the framework of a mediation is to be enforced in another State, whether or not it is a Member State of the European Union, in addition to the registration of the agreement in a notarial deed, it is necessary to comply with any requirements that may be imposed by the international conventions to which Spain is a party and the rules of the European Union.

(2) With regard to mediation settlements reached outside Spain, three situations can be distinguished.

(A) For those originated in a Member State of the European Union, the provisions of the several EU instruments on recognition and enforcement apply.

(B) For those from outside the EU, the provisions of any existing conventions on the subject, which are binding on Spain are applicable: actually, none.

(C) For the rest of mediations settlements, the LM distinguishes between those that are enforceable in their country of origin, which, in accordance with Article 27(1) of the LM, will be subject to the exequatur regime provided for in the aforementioned Law 29/2015. And those that do not have this effect, which, according to Article 27(2) of the LM, can only be enforced in Spain "after being authenticated by a Spanish notary at the request of the parties or by one of them with the express consent of the others". In any event, Article 27(3) of the LM adds that 'the foreign document may not be enforced if it is contrary to Spanish public policy'.

4. The Future

Spain maintains a clear position in favor of ADRs. Article 5(1) of the recent Organic Law 1/2025, of 01/02, on Measures for the Efficiency of the Public Justice Service, makes it a 'procedural requirement' in the civil order to 'previously have recourse to one of the appropriate means of dispute resolution provided for' in the terms set out in the provision.

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The Prospects and Challenges for International Commercial Arbitration

Professor of Law, University of Sydney
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Ⅰ. Overview

Survey and other evidence typically identify many advantages of international commercial arbitration (ICA) over cross-border litigation. This explains why ICA is overwhelmingly the most preferred dispute resolution mechanism included in international commercial contracts (and even investment treaties).[1)]

However, ICA faces growing challenges. The comparative advantage of enforceability of arbitration agreements and awards is threatened by new Hague Conventions for enforcement of judgments, and by the Singapore Convention for enforcing mediated settlements, although these instruments still have few ratifications. Neutrality and related expertise of arbitrators encounter problems such as burgeoning challenges to arbitrators and the emergence of international commercial courts, notably in Singapore. Confidentiality in arbitration is not uniform and anyway can increase unpredictability, as well as making it harder for users to assess if arbitrators and lawyers provide good value for their services. Limited discovery of documentary evidence and other flexibility in arbitration procedures is offset by the proliferation and hardening of "soft law" instruments and standardised practices. The lack of

＊) From April 2026, cross-appointed as the senior tenured Professor of Anglo-American Law at the University of Tokyo. This is a footnoted, updated and lightly edited version of a transcript from my judicial training lecture organised by the Legal Training and Research Institute, hosted at the Tokyo Facilities for Arbitration Hearings, on 5 March 2025. Powerpoints (in English and Japanese) are available via https://japaneselaw.sydney.edu.au/2025/03/the-promises-and-pitfalls-of-international-commercial-arbitration/, and this article's headings broadly follow those in the slides. I am grateful for the opportunity to deepen longstanding engagement with the Japanese judiciary, especially to the main organisers Judges Ariko Horiuchi, Masataka Nakagawa and Shinpei Takazakura, plus the (anonymous) judges who also provided excellent questions (some addressed in summary below) before and during the lecture. I also thank Dr Nobumichi Teramura for feedback on an earlier version and the Powerpoints. Manuscript versions of most of my works cited below are freely available via http://ssrn.com/author=488525.

1) Queen Mary University of London ("QMUL", with White & Case) *2025 International Arbitration Survey: "The Path Forward: Realities and Opportunities in Arbitration"* at https://www.qmul.ac.uk/arbitration/research/2025-international-arbitration-survey/ pp. 5-6 (Chart 1); Julien Chaisse and Luke Nottage (eds) *International Investment Treaties and Arbitration Across Asia* (Brill, 2018).

appeal for error of law promises finality in awards but arbitration overall is not much quicker, cheaper or more amicable than litigation of commercial disputes.

This presentation elaborates such promises and pitfalls of ICA nowadays. It considers what could be done to improve the environment for ICA generally, and in the context of countries like Japan and Australia that have struggled to attract ICA cases – despite the growth across Asia.[2] A major focus is on measures to address proliferating costs and delays.[3]

Ⅱ. Advantages of ICA (including Surveys)

Some may be aware that Mr Yoshihiro Takatori and former Judge Takashi Sonoo in 2020 gave a talk at Japan's Legal Training and Research Institute about ICA. Mr Takatori's textbook cited actually mentions some of the advantages of arbitration including confidentiality, flexibility, speed, low cost, neutrality, expertise and enforceability of arbitration awards through the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[4]

There have also been some empirical studies of those advantages compared to international litigation asking users, including lawyers and in-house counsels. One of the studies (by Dr Christian Buhring-Uhle) mostly asked people in the traditional centers for arbitration in the Western world, so in Europe, North America and so on.[5] That's summarised in Table 1 below,[6] the right-hand column. You can see that one of the major advantages is the neutrality of the forum. In the 1990s, 78% of respondents identified that as a top advantage of arbitration compared to litigation. Also highly ranked is expertise of the arbitrators. But if you go down the column, you can see 69% of respondents appreciate treaties to make arbitration agreements and awards enforceable across borders.

If you move to the next column to the left, you can compare results from a study done by Professor Shahla Ali from the University Hong Kong University about 10 years later, where her respondents included more from Asian countries. You can see that treaties allowing

2) Tony Andriotis, Giorgio Fabio Colombo et al "Cooperating on Disputes — Moving towards a Stronger Cooperative Foundation for the Settlement of Disputes in Asia" 1 *Japan Commercial Arbitration Journal* 21 (2020); Luke Nottage, Shahla Ali, Bruno Jetin and Nobumichi Teramura (eds) *New Frontiers in Asia-Pacific International Arbitration and Dispute Resolution* (Wolters Kluwer, 2021); QMUL, ibid, pp. 6-10 (Charts 2-5).

3) Background and these proposals are elaborated in the 6th ADR Address in the Supreme Court of New South Wales (transcript and Powerpoints at https://disputescentre.com.au/supreme-court-of-new-south-wales-adr-address-2023/), with a version published as Luke Nottage "Cross-Fertilisation in International Commercial Arbitration, Investor-State Arbitration and Mediation: The Good, the Bad and the Ugly?" 50(3) *Monash University Law Review* 1 (2024) at https://tinyurl.com/3y5z5y84.

4) Yoshihiro Takatori, *Kigyokan Funso Kaisetsu no Tessoku (The Iron Rules of Resolving Commercial Disputes)* (Chuo Keizaisha, 2021) pp. 70ff.

5) See also Luke Nottage (Noboru Kashiwagi trans.) "*Kokusai Shoji Chusai to Lex Mercatoria no Hensen* [The Vicissitudes of Transnational Commercial Arbitration and the Lex Mercatoria]" 113 *Ho no Shihai* 100 (1999).

6) Adapted from Luke Nottage, *International Commercial and Investor-State Arbitration: Australia and Japan in Regional and Global Contexts* (Elgar, 2021) p. 186 (Table 6.1). Asterisks indicate statistically significant differences at the 99 per cent confidence level (multiple responses possible).

Table 1: Advantages of ICA over International Litigation

Response – 'highly relevant' or 'significant'	Main region of Practice	
	East (Ali)	West (Bühring-Uhle)
Forum's neutrality	88 (%)	78 (%)
Forum's expertise	83	76
Results more predictable	36	42
Voluntary compliance*	42	24
Treaties ensure compliance abroad	85	69
Confidential procedure*	76	56
Limited discovery	47	56
No appeal	64	58
Procedure less costly	36	20
Less time consuming*	57	35
More amicable	52	35

enforceability of the awards was seen by 85% as a major advantage of arbitration. You might think, why is there a difference between stakeholders in Asia compared to those in Europe and America? One reason is within Europe there is a regime for enforcing foreign judgements within European countries. Arbitration to that extent doesn't have such a big advantage over litigation in Europe, at least now. But in other parts of the world – in the Americas, in Asia – this enforceability of arbitration awards through the New York Convention is probably the most important advantage. So I'd like to start looking at that more closely.

Ⅲ. Enforcement of Arbitration Agreements & Awards: New York Convention & Model Law

Consider a map of the world showing the states that have ratified the New York Convention.[7] Japan was one of the very early ones, in 1961. Congratulations to its Foreign Ministry, Ministry of Justice and perhaps some judges seconded to such ministries, to get Japan to be one of the early ratifying countries at a time when arbitration wasn't very well known and used around the world. Japanese court judgments have also been comparatively consistent in applying the Convention, and related ICA principles.[8] More of these judgments should be translated into English.

The purpose of that Convention was actually to start a new regime, a new field, to make it easier for particularly commercial firms to conduct trade and eventually investment across

7) See https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=4&menu=671&opac_view=-1.

borders by having an effective dispute resolution mechanism through private arbitration. And now over 170 states, including almost all trading nations, are part of this regime.

Because I know Japanese judges have to usually work in many fields and not just deal civil cases, but also criminal cases and administrative law cases and so on, let me summarise the two most important articles in the New York Convention.

Article II essentially says that, for example in Japan, if a court is faced with an agreement of parties to have arbitration with the seat overseas, say in Singapore or Geneva or maybe Sydney, Australia, the Japanese court will have to stay its proceeding. So litigation can't continue in the Japanese court and this gets the arbitration started overseas. This is the first stage of the life cycle of an arbitration.

Article V regulates the final or third stage of the process because it deals with enforcement of the award which the arbitrators have completed and given. This requires a court to enforce that foreign seated arbitration award, except if there are again problems with the arbitration agreement establishing the jurisdiction of the arbitrators, or if there are serious procedural violations - no notice of arbitration was given or there were very serious public policy objections to the process. Also, if it was a type of dispute which the enforcing court will not recognize as something that private arbitrators can decide on, or otherwise is against substantive public policy.

Yet these are very narrow grounds for refusing enforcement of a foreign seated arbitration award. The exceptions do not include an error of law made by the arbitrators, which of course is a traditional ground of appeal in a court litigation system. And these limited grounds for enforcing awards were chosen deliberately in that New York Convention regime because it was felt that parties wanted "a one-stop shop", one process where they could choose arbitrators and get a decision which then can't be appealed because that would take extra time and cost.

There are also some other features of the treaty regime allowing reservations so that you only enforce awards from other member states of the Convention, and Japan has taken that reservation.[9] This was quite important in the early days to encourage more countries states to ratify the convention, but now as we've seen, almost all countries have ratified, so that limitation is far less important.

The other reservation countries can make is to only enforce awards that are commercial. That is still much more important because states instead like Korea or India[10] have made that reservation. Also the treaty doesn't define what is commercial. That's left to national law, if at

8) Luke Nottage and Albert Monichino, "International Commercial Arbitration Developments in Model Law Jurisdictions: Japan Seen from Australia" [2013] 1 *International Arbitration Law Review* 34-45; Naoshi Takasugi "Setting Aside of Arbitral Awards under the Japan Arbitration Act — Recent Decisions by the Japanese Courts" 1 *Japan Commercial Arbitration Journal* 50; Luke Nottage and Nobumichi Teramura, "History of Arbitration in Japan" in John Ribeiro and Lars Markert (eds) *Arbitration in Japan* (Wolters Kluwer, forthcoming 2026).

9) See https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2.

10) For recent case law on how India's "commercial" reservation applied regarding enforcement in Australia which (like Japan) had not made such a reservation, reversing the first-instance judgment and refusing enforcement (but on appeal to the apex High Court of Australia), see *Republic of India v. CCDM Holdings*, LLC [2025] FCAFC 2 at https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/full/2025/2025fcafc0002.

all. And so there is still some variation amongst states about the scope of that commercial reservation.

You might ask: what about the middle or second phase of the arbitration? The New York Convention doesn't directly regulate that. So in 1985, a United Nations agency (UNCITRAL) created a Model Law template for legislation on arbitration to be introduced worldwide in different countries, to try to promote uniform understandings and a quicker, better process for arbitration in this middle phase.

This regime was also very respectful of party and private autonomy. So almost all provisions in the Model Law template say expressly or impliedly that parties are free to change those provisions. They are mostly default rules, not mandatory provisions. However, there are mandatory provisions about arbitrator neutrality and basic procedural justice, equal treatment and a reasonable opportunity to be heard by the tribunal.

The Model Law also included some provisions about enforcing international arbitration agreements and also awards either from overseas or at the seat (Articles 35-36). It listed similar limited grounds as the New York Convention for refusing enforcement. There is still no possibility under this Model Law template for parties to appeal on the basis the tribunal made an error of law.

In addition, Article 34 of the Model Law has an extra provision which allows a party that lost the arbitration to proactively seek to set aside or annul the arbitration award at the agreed seat court, rather than waiting under the New York Convention regime (or Model Law Articles 35-36) for an enforcement application and then seeking to resist enforcement.

Now this Model Law template has been adopted by 96 states (encompassing 126 jurisdictions) – not as many as the New York Convention, but it's also a very successful international instrument.[11] Australia adopted the Model Law for international arbitrations in 1989, and then from 2010 the different states of Australia expanded it to domestic arbitration but with some variations. Because this is not a treaty, you can change some provisions. So Australia allows, under limited circumstances, parties to agree to have an appeal for error of law in a domestic arbitration.[12] Japan in 2003, as you know, introduced the Model Law for both international and domestic arbitrations as part of the justice system reform initiatives.[13]

Ⅳ. Competition from Courts

That's the little introduction or refresher for the international arbitration regime. Now getting back to our question about what are the advantages of ICA compared to litigation. What happens if instead we have no arbitration agreement by parties, but instead parties are litigating cases in national courts?

Some states are quite generous and willing to give stays of litigation proceedings if parties

11) See https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status

12) Compare eg *Commercial Arbitration Act 2010* (NSW) s34A with *International Arbitration Act* (Cth) and see generally Luke Nottage and Richard Garnett (eds) *International Arbitration in Australia* (Federation Press, 2010).

13) Arbitration Law (No. 138 of 2003). See generally Nottage, *supra* n. 6 pp. 89-93; Nottage and Teramura, *supra* n. 8.

can be shown to have agreed on the jurisdiction of a foreign court. And some states will enforce those judgments quite readily, with only limited exceptions. But if you compare the arbitration regime I've just outlined, even those states have a bit more discretion left to the courts. And there are some countries which are very restrictive about enforcing foreign judgments, in fact do not allow it at all. For Asia I give as examples Indonesia, Thailand and Vietnam.[14] So if you are a party and have a commercial transaction in those countries and you want to be able to enforce a binding decision, getting a court judgment from another country is useless. You need to have an arbitration agreement to be able to enforce then the private arbitrator's award.

1. Hague Choice of Court Convention

The Hague Conference on Private International Law is a body that promotes international treaties, and in 2005 they agreed on the Hague Choice of Court Convention, which tried to replicate the basic features of the New York Convention regime. If you had particularly an exclusive jurisdiction clause agreed by parties, this Convention regime allowed the judgement to be enforced in other countries that acceded to this convention, with only very limited exceptions as in the New York Convention (Articles 8 and 9). It also had a provision for stay of proceedings at the first stage to stop litigation in a non-chosen court.

But this regime also allows for reciprocity reservation and, most importantly, it has had very few ratifications.[15] Australia hasn't yet ratified, Japan hasn't yet ratified. And it's been now almost 20 years. This Convention hasn't really had too much extra impact.

And even if gradually, like with the New York Convention, this Convention started to have more member states, it's only like the New York Convention in regulating the start of the proceedings – to get the litigation started in one chosen court – and the enforcement of that court's judgement. It doesn't regulate the middle phase, which still would give international arbitration an advantage.

2. International Commercial Courts

This is why we are, I think, seeing the emergence of international commercial courts. So countries like Singapore in 2015, and China in 2018, have created courts that specialize in international commercial disputes.[16] In those proceedings, they're trying often to replicate some of the features of international arbitration. They thereby try to make it more attractive for parties to choose to have an exclusive jurisdiction clause choosing those jurisdictions for their disputes and to make litigation a more attractive competitor with international arbitration.

If we look at the Singapore International Commercial Court (SICC), we find that as well as Singaporean judges, they have part-time foreign judges, including from Australia, and from

14) Adeline Chong, "Moving towards Harmonisation in the Recognition and Enforcement of Foreign Judgment Rules in Asia" 16(1) *Journal of Private International Law* 31 (2020).

15) See https://www.hcch.net/en/instruments/conventions/status-table/?cid=98.

16) Zhengxin Huo and Man Yip "Comparing the International Commercial Courts of China with the Singapore International Commercial Court" 68(4) *International and Comparative Law Quarterly* 903 (2019).

Japan - Professor Yasuhei Taniguchi was the first to be appointed to that court from Japan.[17] This creates more neutrality, more expertise on those courts, just like or similar to what you would have with an international arbitration tribunal.

Also in the SICC, parties can agree to limit appeals, so it becomes a one-stop shop. Otherwise, if they don't agree, it still can be appealed to the Singapore Court of Appeal, which is staffed only by Singaporean judges. But parties can limit the appeals, unlike a normal Singapore High Court procedure for domestic litigation. The parties can further request confidentiality of the procedures in the SICC and they can agree to adopt rules of evidence different from Singaporean law, which again is creating some flexibility like we find in international arbitration. Parties can use foreign lawyers as long as there's no Singaporean connection. So if all the parties are foreign, there's no Singaporean law applicable. Then parties can just argue the cases in the SICC using foreign lawyers, again like arbitration.

In addition, because it's a court, the SICC can add some features of litigation which are not so easily created in arbitration – including joining a third party to the dispute even if they don't agree. Whereas an arbitration we have to find ways, usually through careful drafting of arbitration clauses and/or arbitration rules subject to consent, to bring in parties who are not initially otherwise going to be involved in resolving the dispute.[18]

So this creates a very attractive court, and its features are more flexible and internationalist than the China International Commercial Court.[19] But even in the Singaporean case, it's very rare for parties to be choosing this court instead of ICA. It seems that everyone is still so used to arbitration, they can't see any great advantage for trying this new procedure and choosing the SICC. Yet if it does become more popular – and Singapore's Court is a very credible, strong competitor[20] – it would put more pressure on international arbitration to improve.

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17) See https://www.pmo.gov.sg/Newsroom/appointments-reappointments-singapore-international-commercial-court; and SICC News, Issue 26 (February 2021) via www.sicc.gov.sg

18) Compare also IAA s. 7(4) (expanding the New York Convention regime by allowing application for a stay of litigation also by "a person claiming through or under a party" to the arbitration agreement) and s. 24 (an add-on to the Model Law allowing consolidation of arbitrations but only if parties agree), discussed respectively in Richard Garnett "Third Parties and International Commercial Arbitration: Reframing the Debate" 47(1) *Melbourne University Law Review* 154 (2024) and Mark Lewis "Consolidation and Third-party Joinder in International Commercial Arbitration" 33(1) *Australian Dispute Resolution Journal* 28 (2024). Compare the interesting Sapporo District Court judgment of 8 February 2022 (on file with the author) involving a stay extended to a non-signatory.

19) See also generally Man Yip and Giesela Rühl (eds) *New International Commercial Courts: A Comparative Perspective* (Larcier Intersentia 2024).

20) The Court also hears cases related to international arbitrations, such as the Singapore-seated ICC arbitration of *Tata, Ircon & Mitsui v. Dedicated Freight Corridor Corporation of India*. The Japanese company in a construction consortium for a railway project in India largely prevailed in an award rendered by a tribunal comprising three retired Indian judges. However, a recent Court judgment (written by Roger Giles IJ, part-time international judge from Australia) set aside the award for apparent bias after finding that the tribunal's chair had self-plagiarised from another award in an earlier related arbitration. See *DOI v. DOJ & 2 Ors* [2025] SGHC(I) 15 via https://www.judiciary.gov.sg/singapore-international-commercial-court/hearings-judgments/judgments. Another of his awards was also set aside for this reason in an earlier judgment of the Singapore International Commercial Court, upheld recently by the Court of Appeal which moreover identified the chair as former Chief Justice of India Dipak Misra. See *DJP & 2 Ors v. DJO* [2025] SGCA(I) 2 via https://www.judiciary.gov.sg/judgments/judgments-case-summaries.

V. Neutral and Expert Arbitrators

So far we've been thinking about the advantage of arbitration for enforceable awards, through the New York Convention regime and Model Law, with limited competition slowly emerging for international litigation. What about the second main advantage, which is the arbitrators: particularly by creating a neutral forum, and with expertise in the subject matter?

Now, of course we could choose a foreign court like the SICC, or we could choose a court in another country which is diplomatically neutral, like Switzerland. But even though most countries have a separation of powers, so the courts are independent of the other branches of government, it's always possible that the legislative and executive branches and the constitutional arrangements can change. Hong Kong recently is struggling somewhat because there is a growing perception, at least, that the mainland Chinese influence in Hong Kong is getting stronger. And there's a concern that eventually this will affect the independence of the judiciary even in commercial matters. So that's a recent example of why parties perhaps still prefer to choose arbitration where they can choose their own arbitrators and avoid mostly any contact with the seat courts to run their procedure to get their award, which then they can enforce typically outside that seat – in another country where the losing party has assets.

Also, you can choose arbitrators as individuals who you think will be most neutral in particular cases. Although when you have three arbitrators there is still the slightly unusual tradition, if you like, of each party appointing or nominating an arbitrator and then those arbitrators typically trying to agree on a presiding arbitrator. You might say the co-arbitrators perhaps bring at least some perception of bias in favor of the party that appoints them, but because each party is doing this and they have to still agree on the third arbitrator overall, the tribunal is typically seen as neutral.

As well as neutrality, you can choose arbitrators who have subject matter expertise. However, it's interesting that over the last 25 years we see fewer and fewer arbitrators who are, for example, engineers or experts in non-legal fields. Basically lawyers – and in the common law tradition former judges, or in the civil law tradition sometimes still professors – have come to dominate the field as arbitrators (and more generally, eg in arbitral institutions and organisations).[21] This dominance may not be ideal, as it means that the procedure then has to bring in experts on matters of evidence more perhaps than in the past.

There are also more challenges to arbitrators nowadays, and most arbitrations these days are conducted through arbitration institutions. So usually then they deal first with challenges to the neutrality of the arbitrators. These challenges are increasing because perhaps we have a lot more arbitration disputes and therefore more parties and more lawyers who are not necessarily familiar with arbitration. We have arbitrators who perhaps less experienced, less

21) See Luke Nottage, Nobumichi Teramura and James Tanna "Developing Diversity in Diversity Discourse: Remembering Non-Lawyers in Arbitration" in Shahla Ali, Giorgio Colombo et al (eds), *Diversity in International Arbitration: Why It Matters and How to Sustain It* (Elgar, 2022) 101, with a longer version at: https://ssrn.com/abstract=3926914 and summary at https://arbitrationblog.kluwerarbitration.com/2022/04/03/declining-professional-diversity-in-international-arbitration/.

confident. So that's part of the reason I think for more challenges to arbitrators.[22)]

That's probably going to increase because we have these pressures to achieve a generational change in arbitrators and that includes things like more diversity, particularly gender diversity.[23)] So we have a lot more new arbitrators starting to deal with cases and maybe that too creates more chance of challenges. Related to that, if there's more chance of challenges to arbitrators, arbitrators start to become more cautious in the way they run proceedings.[24)] They've become more conservative and that means more delays and more costs because they don't want to be challenged.

Ⅵ. Confidentiality (Mostly) in ICA

The third advantage over international litigation, you might remember, is confidentiality. Indeed, Mr Takatori in 2012 had put that as the top advantage[25)] – perhaps more from a Japanese company's perspective. And generally, in the survey of more Asian respondents summarised in Table 1 above, note that confidentiality was even higher ranked than in the Western countries – perhaps because there are more family-linked companies and/or government-linked companies in Asia. Having a procedure which is private but also confidential, meaning you can't disclose any information about the arbitration, is anyway overall seen as an advantage compared to litigation.

Now the New York Convention says nothing about confidentiality. Nor does the Model Law, but it's one of the areas where most countries, when they enact legislation based on the Model Law, have added something in the legislation to provide for confidentiality – because they recognize that parties appreciate and choose arbitration over litigation significantly for this reason.[26)] Some countries in the common law tradition, like Hong Kong and Singapore, don't put it in the legislation, but it's developed through common law – by case law development. Singapore unusually extends confidentiality to arbitration-related court proceedings.[27)]

22) See also generally Natalie Yap, "Impartiality and Independence Through Disclosure: Comparative Review of Recent Cases in Japan and England" 2 *Japan Commercial Arbitration Journal* 58 (2021).

23) Shahla Ali, Giorgio Colombo et al (eds), *Diversity in International Arbitration: Why It Matters and How to Sustain It* (Elgar, 2022).

24) Miyuki Watanabe "Due Process in Arbitration - How to Mitigate Due Process Paranoia?" 5 *Japan Commercial Arbitration Journal* 55 (2024). Yet courts in Model Law jurisdictions like Hong Kong, then Singapore, and then Australia, have generally come to give quite extensive deference to procedural decisions by international arbitrators: see Luke Nottage, "Deference from National Courts to Tribunals on Issues of Procedure at the Post-Award Stage" in Franco Ferrari and Friedrich Rosenfeld (eds) *Deference in International Commercial Arbitration* (Wolters Kluwer, 2023) 141.

25) *Supra* n. 4.

26) See generally Caroline Kenny "Confidentiality in International Commercial Arbitration: Is it an Accepted Principle, and if so, Should the Model Law Regulate it?" (2023) JSD thesis, Monash University (2023), at https://tinyurl.com/h45fxzpz.

27) Hence the party names anonymized in the Singaporean judgments cited *supra* n. 20, although the arbitrators' names may be disclosed if challenged or the award set aside. Japanese judgments generally anonymise party names, so this could be a comparative advantage in promoting Japan for arbitration as well.

Japan, when it adopted the Model Law in 2003, didn't add automatic confidentiality related to arbitration. And you might think that is therefore a problem or reason why arbitration hasn't expanded so much in Japan. But actually for international arbitrations, most in Japan are covered by institutional arbitration through the Japan Commercial Arbitration Association (JCAA) or the Tokyo Maritime Arbitration Commission for maritime disputes. And those rules add extensive confidential obligations on the parties.[28)]

In fact, most arbitration rules around the world are similar. The two biggest exceptions are probably the International Chamber of Commerce (ICC) and the Stockholm Chamber of Commerce, where there are only confidentiality obligations on the arbitrators and the institution managing the arbitration, but not on the parties. So there's more scope for a party to disclose information about the arbitration. Part of the reason could be that in those institutions, they still have a lot of cases involving government entities – where there exist in their home jurisdiction some publicity requirements to disclose to their citizens if they're involved in disputes. But even in the ICC regime, in early stages of the arbitrations, the arbitrators will ask the parties if they want to add confidentiality obligations on the parties to keep things confidential. And quite often that is agreed by the parties.

Is confidentiality good or bad? We had a question about this in the list of questions sent to me before this lecture. I'm not sure who put that good question, but confidentiality to me is a two-edged sword. On the one hand, it might encourage the arbitrators to write shorter awards because they only have to write for the parties and their lawyers. They don't need to write an award that's going to be in the public domain, and so might have to explain more what's going on and the reasoning and the facts and so on. They just need to write enough for the parties to understand why a decision has been reached. Also, confidentiality should mean that you can manage your procedures more efficiently because you don't need to worry about public looking in and saying why didn't you allow that evidence or why didn't you do this.

On the other hand, confidentiality seems to be a contributing factor in practice to more costs and delays in arbitration. I think the reason is it's very hard to assess whether the arbitrators, and particularly the lawyers in the arbitration who generate most of the costs of an arbitration, are the best value for money - because you can't observe them. If you're a judge, anyone can come to your courtroom, for example, and observe you. In fact, it happens in Australia – and sometimes people thereby get an idea of what judge is like for certain types of cases. If they get that judge, they might settle more than when assigned another judge. Or people ask around. But you can't do that in a confidential arbitration proceeding. You can't observe the arbitrators, or lawyers, in action.

So you have to decide which lawyer to use based on secondary evidence, like word of mouth recommendations from other people, seeing them at arbitration conferences, reading articles they published and so on. But you haven't necessarily seen them as advocates in

28) Luke Nottage, "Confidentiality versus Transparency in International Arbitration: Asia-Pacific Tensions and Expectations" 16(1) *Asian International Arbitration Journal* 1 (2020).

arbitration proceedings like you might have seen a lawyer in a courtroom.

Another problem with confidentiality is the awards and other decisions made during the arbitration. If they're confidential, you don't have so much basis for predicting outcomes and therefore reaching settlements.

Overall, confidentiality has good sides and bad sides. However, perhaps we are more aware of the bad sides now for confidentiality even within commercial arbitration – let alone investor-state arbitration, implicating more public interests[29] – and it's contributing to the costs and delays that people complain about with arbitration.

Ⅶ. Flexible Procedures in ICA

The fourth advantage of arbitration is flexible procedures. As I've said, you can agree on rules of evidence, timelines, all sorts of flexibilities which you can't typically agree on in a litigation process - where everything is decided by civil procedure law and court rules.[30]

You can choose language arrangements, you can choose all sorts of procedural matters and, for example, you can limit the scope of applications for pre-hearing documentary evidence. So the International Bar Association (IBA) has from 1999 developed a set of guidelines which arbitrators typically choose to adopt, usually with agreement of the parties, to determine the matters around evidence. However, there is some criticism that the IBA (so-called "soft law") guidelines are becoming quite hard and also are a little bit too slanted towards common law approaches. We have a competing set of rules, the Prague Rules of 2018, which are trying to promote more civil law tradition features, including more proactive arbitrators.[31]

But as far as I know, also talking to lots of arbitration practitioners, it's very unusual for arbitrators and parties to agree on this alternative set of Prague Rules because it's new – and lawyers and arbitrators don't usually want to risk trying something new. Also, if it works too well, it could lead to their cases being shorter and cheaper. And so maybe this is not so attractive for lawyers, even though it should be attractive for the parties!

However, we do find the JCAA's 2019 Interactive Arbitration Rules picking up some concepts that resonate with the Prague Rules, but of course influenced also by Japanese court litigation practice and German practice. If the parties choose the Interactive Arbitration Rules of the JCAA, they can get early clarification of issues by the tribunal – a type of case management procedure familiar in Japanese courts. And also before the evidentiary hearing, the tribunal can give its preliminary views, which might shorten or result in not having to have a hearing –

29) Nottage, *supra* n. 6, pp. 202-209. Public interests are also increasingly implicated in ICA, with the balance between condidentiality and transparency then perceived as the biggest challenge: see QMUL, *supra* n. 1, pp. 21-26 (Chart 16).

30) Interestingly, however, Japan and some other countries are starting to experiment with allowing parties to choose fast-track or other innovative procedures. See Shusuke Kakiuchi, "Increasing Complexity, Adaptation of Proceedings and Litigation Agreements" in Anna Nyland and Antonio Cabral (eds) *Shaping Civil Litigation Through Procedural Agreements* (Eleven, 2024) 149.

31) Rekha Rangachari and Kabir Duggal, "Different but Similar?: Comparing the IBA Rules on the Taking of Evidence with the Prague Rule" 37(3) *Arbitration International* 631 (2021).

and perhaps even an early settlement.[32] However, again, it seems this set of Rules and these provisions for more proactive arbitration case management have not yet been adopted much by the parties.[33]

It seems that such soft law developments, particularly from the International Bar Association, have become like a de facto norm in arbitration. So the flexibility of arbitration compared to litigation has diminished over time. We also find arbitration institutions producing a lot of guidelines, sample documents for lawyers and arbitrators to use in arbitrations etc. This is good for new arbitrators and lawyers, but on the other hand means that arbitration becomes quite rigid and less flexible.[34] Artificial Intelligence is already being used to review documentary evidence, for example, and is expected to help reduce costs and delays.[35] But it currently has technical limitations, and it would better for arbitrators for example pro-actively to help refine issues to limit production of irrelevant evidence.

Ⅷ. Lack of Appeal for Error of Law

Finally, remember there's a fifth advantage of ICA, which is a lack of appeal for error of law. It seems that this remains the preferred approach for the parties and even lawyers. There are a few arbitration institutions that have developed an optional arbitration appeals mechanism. An older example is the National Grain and Feed Association.[36] This originated in the United States and deals with disputes about wheat and other grains and so on. A lot of those disputes are factual, not legal disputes. Even though you have a lot of repeat players and very experienced arbitrators, sometimes they make a factual error and so you can appeal to another arbitral tribunal. But this is a very unusual type of arbitration. Usually there are complex legal issues and parties generally are happy to choose their arbitrators and live with one award without possibility of appealing, even if it turns out to be arguably in error.

In New Zealand, where I'm from originally, we have an set of rules where parties can appeal to other arbitrators, but the main selling point for those is extra confidentiality.[37] Especially for parties, particularly in domestic arbitrations, appealing to a court which is still allowed for some types of error of law – whereupon confidentiality generally is lost. This facility is there to say you can still keep the arbitration appeal confidential by going to arbitrators instead of courts. So the arbitration appeals option is linked to the confidentiality advantage.

32) Aiko Hosokawa "New Arbitration Rules Based on the Civil Law Tradition — The 2018 DIS Arbitration Rules, the Prague Rules, and the JCAA Interactive Arbitration Rules" 1 *Japan Commercial Arbitration Journal* 11 (2020); Shintaro Kato and Aoi Inoue "Evaluation of the Interactive Arbitration Rules of the JCAA from the Perspective of Japanese Court Practices" 2 *Japan Commercial Arbitration Journal* 3 (2021).

33) But see Masato Dogauchi, Shinji Ogawa and Jieying Peng "New Style of Arbitration —The First Case under JCAA Interactive Arbitration Rules" 3 *Japan Commercial Arbitration Journal* 7 (2022).

34) Nottage, *supra* n. 3, Part III; Nobumichi Teramura, *Ex Aequo et Bono as a Response to the 'Over-judicialisation' of International Commercial Arbitration* (Wolters Kluwer, 2020) especially chapter 1.

35) QMUL, *supra* n. 1, pp. 27-33 (especially Charts 18 and 19).

36) Rule 7, available (with arbitration awards), via https://www.ngfa.org/arbitration-overview/.

37) AMINZ Arbitration Appeals Tribunal, available via https://www.aminz.org.nz/arbitration.

Overall, parties seem to be still preferring to have no appeal for error of law, let alone error of fact. However, and this was another one of the questions provided to me before this lecture, I think it's true that this becomes a contributing factor to why arbitration becomes more protracted and expensive. Because if you only have one shot, one chance, especially the lawyers don't want to lose. So they devote a lot more time and cost to try to get the result in their favour.

However, another reason I think is not often discussed in public arbitration conferences, but privately many lawyers and arbitrators would agree with me. Another problem is that the lawyers and many arbitrators under rules of arbitration institutions like the London Court of International Arbitration (LCIA) operate on a time charge or billable hours model, and even subconsciously this can lead to less incentive to try to resolve cases quickly. I don't think we can blame the preference in the legislation for lack of appeal for error of law for causing the majority of the cost and delays. Probably there are also some issues with the way law firms operate increasingly on this billable hours basis, which exacerbates this problem.

Ⅸ. Prospects for Improving Arbitration

1. Enforcement: Combining with Mediation

How can we try to improve the attractiveness of ICA?[38] My first suggestion is ironically that we need to try to create more competitors for cross-border enforcement. Particular countries like Australia and Japan should ratify the Hague Convention and think about creating, if not a full sort of international commercial court, at least some features of the Singapore International Commercial Court. For example, Japan has already created a Business Court, a division of the Tokyo District Court aggregating its arbitration cases, and the Arbitration Act was amended in 2023 so judges could accept awards without translation into Japanese.[39] So that's the sort of development and thinking about how to make courts more user friendly for international parties. Including perhaps some elements of procedures in English even for international litigation would be a way to make it a more credible alternative to arbitration. And this can lead to arbitration having to work harder to keep down costs and delays.

A second suggestion is to promote med-arb clauses in international contracts, meaning multi-tiered agreements for dispute resolution where the parties first have to try to mediate disputes before they go to arbitration.[40] Again, Japan has a good start here because you have the Japan International Mediation Centre with rules, based in Kyoto.[41]

38) Background and proposals are elaborated in Nottage, *supra* n. 3. Compare also QMUL, *supra* n. 1, pp. 15

39) Commentary suggested such linguistic flexibility could be expanded further: Kazuaki Nishioka, "How Can International Arbitration in Japan Take Flight?" 53 *Journal of Japanese Law* 255 (2022) via https://www.zjapanr.de/index.php/zjapanr/issue/view/125. See also Kazuaki Nishioka, "Recent Amendment of Japanese Arbitration Law: A Bright Future Waiting for Japan?" 42(3) *ASA Bulletin* 519 (2024).

40) Anselmo Reyes and Weixia Gu (eds) *Multi-tier Approaches to the Resolution of International Disputes* (Cambridge University Press, 2021).

41) James Claxton, Luke Nottage and Nobumichi Teramura "Developing Japan as a Regional Hub for International Dispute Resolution: Dream Come True or Daydream?" 47 *Journal of Japanese Law* 109 (2019); Haruo Okada, "JIMC-KYOTO —An Attractive Option for International Mediation" 1 *Japan Commercial Arbitration Journal* 67 (2020).

But I think you need to build up a culture where the first instinct of the parties and even the lawyers if there's a commercial dispute is to go to an independent mediator who privately supplies mediation services to try and resolve the dispute. Japan doesn't have that sort of "industry", if you like, unlike say Australia since the 1990s where many former judges, practicing lawyers and professors were trained as mediators. And because litigation is expensive, and courts encourage at least an initial attempt with discussion about mediation, many disputes are being resolved at that early stage by private mediation.

We need to encourage that shift domestically and then it becomes easier to negotiate an international contract where that mediation step is included. At the moment around Asia, countries like India also don't have much commercial mediation outside courts. In their international contracts they don't include many med-arb provisions. So we need to build up that development and we find it a lot more in Australian companies or Singaporean, English and American companies, because at home they're used to resolving disputes through privately supplied mediation services.

Related to that, we need to encourage ratification of the 2018 Singapore Mediation Convention, which attempts to replicate for the New York Convention enforcement of settlement agreements.[42] And Japan is again ahead here because you've already ratified it, unlike Australia and many others which have only signed it.[43] Japan should be taking a sort of leadership role, encouraging other countries to actually not just sign this treaty, but bring it into more practical effect by ratifying.

Finally, there's an issue that has cropped up particularly in several common law jurisdictions in recent years. This is if parties have agreed on a multi-tiered arbitration clause, and have first attempted or arguably attempted mediation, but one party says you haven't conducted that step properly or sufficiently.[44] The big question that's arising is who decides that question. Is it a matter of a question of jurisdiction, so arbitrators cannot decide – it has to be courts that decide? Or is it a question about the admissibility of the claim? So that implies that the arbitrators can decide this question.

The tendency in recent cases in Hong Kong and earlier in England is now to say it's a question of admissibility of the claim, so it's a matter for the arbitrators. If they make a mistake about this and they incorrectly say the mediation step, for example, has been sufficiently completed so the claim is admissible and they go on to give an arbitration decision, then just like any other part of the arbitration decision – it can't be reviewed by a court because it's an error of law. And under the Model Law, modern arbitration legislation, that's not a sufficient ground for a court to overturn an award.

But other countries, including perhaps Singapore (it's not quite clear yet), are saying if the parties have agreed to mediation before arbitration, it means the arbitrators have no

42) See Atsushi Fukuda and Takahito Kawahara "Overview of the Development of International Mediation Legislation in Japan with the Singapore Convention on Mediation" 5 *Japan Commercial Arbitration Journal* 35 (2024)

43) See https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status.

44) See also Takanori Kawashima "Multi-Tiered Dispute Resolution Clauses: Effects of Non-Compliance with Pre-Action/Pre-Arbitration ADR Clauses" 5 *Japan Commercial Arbitration Journal* 47 (2024).

jurisdiction to decide whether the mediation has been completed. So essentially the court would have to decide that. Maybe this is an area where there should be even some legislation to clarify this question This is because there are pros and cons of either way of deciding which of the courts or the arbitrator should be deciding this sort of question of compliance with the pre-arbitration steps.[45)]

2. Arbitrators, Confidentiality, Procedural Flexibility and Fees

On arbitrators, if we're thinking about how to maximize this advantage of choosing your own arbitrators to resolve dispute, I think we need to restore more professional diversity. So find ways to involve not just lawyers in arbitrations and arbitration institutions and arbitrator events, but also involve engineers, accountants, experts in non-legal fields – to make them actually work as again as arbitrators and be giving direction to arbitration rule amendments and even arbitration law reforms and so on.

In a civil law tradition, like in Japan, we should be encouraging judges when they retire to become arbitrators. And that means coming to lectures like this to learn about arbitration. Think about arbitration all through your career because when you retire at 65, you're still young in Japan, and you can't usually work much as a lawyer, and you can't get a job in most universities due to their own mandatory retirement ages. So arbitration is a very useful next career. Common law judges – usually because they were lawyers before they became judges, and sometimes even working as arbitrators before they became judges – often, when they retire, become arbitrators. But there's no reason why we shouldn't see more civil law tradition, including Japanese, former judges being arbitrators.

Yet because arbitrations are confidential, usually we also need these former-judge arbitrators to show that they know a lot more about arbitration by giving lectures, attending conferences, judging practice arbitrations for students[46)] and so on. Also I think that's another way of encouraging arbitration. The former judges who become arbitrators, particularly from the civil law traditions, have got skills in how to settle disputes and run disputes efficiently. This is a big advantage to restore to arbitration.

Thirdly, on confidentiality, because it's a double-edged sword, we need to have somewhat more transparency. We should be publishing redacted anonymized awards. JCAA for example should think about publishing some of its awards. Even now they could do it with consent of the parties, but then agree to redact or anonymize the party names and other information. Then we can see the quality of the reasoning, and also get some ideas for how procedural as well as substantive law matters are resolved in these cases.

In addition, institutions should publish at least some anonymised procedural decisions like

45) See further Nottage, *supra* n. 3, Part V.

46) Such as the very successful INC negotiation and arbitration moot competition held in Tokyo around November since 2005: https://www.negocom.jp/eng/. See also usefully an opening speech given in the first-ever Japan International Arbitration Week held in November 2024, by Judge Kenya Suzuki responsible for the arbitration cases in the new Business Court, reported by Bruno Savoie et al at https://arbitrationblog.kluwerarbitration.com/2024/12/16/2024-jcaa-arbitration-days-recap-day-1-japanese-arbitration-trends-and-practices/.

challenges to arbitrators. Hopefully this would lead to fewer challenges because parties and the lawyers can predict what's going to happen if they make a challenge, initially through the institution before it may go on to a court challenge. The LCIA in London has already been doing this.[47)]

Fourthly, thinking about flexibility in procedures, I think we need to encourage competitors to the IBA instruments – so promote the Prague Rules or particular provisions in the Prague Rules when we draft arbitration rules. We can also be more proactive in "Arb-Med", so encouraging parties to reach an early settlement thanks to proactive involvement of the tribunal.

When I was on the drafting committee (for 20 years) for the Australian Centre for International Commercial Arbitration (ACICA), we tried to introduce a set of Arb-Med provisions actually based on provisions that are in the law for domestic arbitrations in Australia – a very sort of conservative set of provisions around arb-med requiring double party consent (whereby parties first agree to Arb-Med, but then must again if mediation fails before reverting to arbitration). Even that was not acceptable to more common law conservative legal thinkers in the Australian community, despite this being the compromise found in legislation since 2010 for domestic arbitrations.[48)]

By contrast, the notion of an adjudicator actively encouraging settlement is very much in the civil law tradition – specifically the German and Japanese sub-tradition. Maybe Japan has a special opportunity to promote rules, and say that this is an option, which is actually encouraged if you have arbitration in Japan – although of course with initial party consent.[49)]

And finally, there's a trend slowly starting to have more arbitrations where they're not only expedited but even documents-only. The 2025 Singapore International Arbitration Centre Rules, like others including JCAA and the ACICA rules, have a set of procedures for an expedited arbitration if the value is below a certain amount - quite a large amount now. But if it's below an even smaller amount, $1 million in Singapore, which is quite a large claim, the starting point is no hearings and only documents, which could have a dramatic increase on savings and time.[50)] That's something also that I think could be encouraged.

The final general recommendation is we try to find ways to limit billable hours charged particularly by lawyers and for arbitrator fees. An ideal rule for arbitrator fees, if you're thinking as a system and from the parties' perspective, is actually something like the JCAA Arbitration Rules where the arbitrators charge an hourly fee within a range, but where there is a total cap on the fees based on the amount in dispute.[51)] Of course, from an arbitrator's point of view, it's not so attractive! I've heard of some arbitrators who don't necessarily like to

47) See https://www.lcia.org/challenge-decision-database.aspx.

48) Luke Nottage, Julia Droesti and Robert Tang "The ACICA Arbitration Rules 2021: Advancing Australia's Pro-Arbitration Culture" 38(6) *Journal of International Arbitration* 775 (2021).

49) See also Junya Naito and Motomu Wake "Potential for a New Arb-Med in Japan" 4 *Japan Commercial Arbitration Journal* 73 (2023).

50) Rule 13 and Schedule 2, via https://siac.org.sg/siac-rules-2025.

51) See also generally Kazuhiro Kobayashi "Scope, Amount and Sharing of Arbitration Expenses and Court Costs in Japan" 4 *Japan Commercial Arbitration Journal* 53 (2023).

run arbitrations in the JCAA because they feel they're not getting as paid as much compared to a pure hourly fee rate, say in the LCIA, or a fee based only on the amount in dispute, like in the ICC or Singapore International Arbitration Centre.

But I think the JCAA rule is actually the one that most limits or caps total fees and should be actively promoted. And I don't think you will find the JCAA really has any trouble attracting maybe younger but still very experienced or capable arbitrators even at these lower fees. Nowadays there are a lot more people who are trained in arbitration, have worked as lawyers or been professors, and who are happy to take some sort of arbitrator work even if it's not highly paid.

But most of the fees, as I've said, are for lawyers and expert witnesses. One thing I've written about is perhaps capping in advance the amount of their fees that can be sought and charged in the arbitration based on the amount of dispute. It's very rare to see this in arbitration rules, but there was an arbitration institution in Australia for domestic disputes that used this for a while.[52)]

In most arbitration rules there's a provision saying that you can only claim, if you're successful, a reasonable amount of the winning party's lawyer's fees. But unlike, say in court litigation in Australia, the arbitrators just include in the award the full amount of the lawyer's fees, unless there's some dispute about whether there's some forgery about the number of hours or something. They never say the lawyer's hourly rate is unreasonable! And I think that's because if they do that, they won't get appointed as arbitrator again by those lawyers. But maybe that's something which could be enforced. You're only supposed to allow the winning party to claim a reasonable amount of lawyer's fees.

Finally, most international arbitrations have a rule now or in in practice where the winning party claims its own lawyer and expert witness fees in proportion to how much it succeeded in the arbitration. So it's not like in Japan where basically even if you win, you can't claim any lawyer's fees from the other side, except in a limited amount for tort cases. The problem with that is that it maybe encourages parties to build up too many lawyer's fees thinking that, if we win, we can claim the full amount back from the losing party.

To minimize that problem in court litigation in England and Australia, we have this *Calderbank* or "sealed offer" mechanism where a party can make an offer to settle the dispute confidentially – not disclosed initially to the court. If the offeree doesn't accept that offer and the court ends up awarding an amount of damages favourable to the offeree but which is less than the offer, the amount offered in compromise, then the extra lawyer fees incurred after that by the winning party (the offeree) cannot be claimed from the losing party. So this encourages reasonable offers of settlement. It's interesting this is possible in international arbitration and would make a lot of sense to reduce costs. But it's extremely rare to find it in practice and no arbitration rules provide for this. Yet it's something that could also be added.

52) Nottage, *supra* n. 3, Part III.

X. Conclusions

Those are some of my suggestions for improving ICA, incorporating some Japanese perspectives and productive engagement with the judiciary. The focus should be on reducing costs and delays, which surveys have long identified as no longer a significant advantage compared to cross-border litigation. The aim is to enhance ICA's traditional main advantages: enforceability, neutral and expert arbitrators, confidentiality, and flexible procedures – including around fees.

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Impact of the Amendments to the Arbitration Act in 2023 and the Enactment of the Act to Implement the Singapore Convention on Mediation on Practice

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Ⅰ. Introduction

On April 1, 2024, the "Act Partially Amending the Arbitration Act" (Act No. 15 of 2023, hereinafter referred to as the **"Act Amending the Arbitration Act"**), "Act to Implement the United Nations Convention on International Settlement Agreements Resulting from Mediation" (Act No. 16 of 2023, hereinafter referred to as the **"Implementation Act"**) and "Act Partially Amending the Act on Promotion of Use of Alternative Dispute Resolution" (Act No. 17 of 2023, hereinafter referred to as the **"Act Amending the ADR Act"**) came into force.[1)] On the same day, the "United Nations Convention on International Settlement Agreements Resulting from Mediation" (hereinafter referred to as the **"Singapore Convention"**) entered into force for Japan.[2)]

The previous version of the Arbitration Act of Japan (Act No. 138 of 2003; enacted on July 25, 2003; effective on March 1, 2004; hereinafter referred to as the **"Previous Arbitration Act"**) was based on the Model Law on International Commercial Arbitration formulated by United Nations Commission on International Trade Law (UNCITRAL) (hereinafter referred to as the **"Model Law"**) prior to the amendments of 2006 (hereinafter, the amended Model Law is referred to as the **"Model Law in 2006"**). After a few decades, the Previous Arbitration Act was finally amended to align with the Model Law in 2006, and provisions and relevant legal systems regarding an arbitral tribunal's interim measures were introduced to enhance the efficiency and the effectiveness of international arbitrations in Japan (hereinafter, the

* The author acknowledges and appreciates the assistance of his colleague Karin Shiota in the preparation of this article, which is based on his article in Japanese on JCA Journal Vol.71 No.11, with some updates since the publication of the Japanese article.

1) Those Acts were enacted in the Diet on April 21, 2023, and promulgated on April 28, 2023.

2) The United Nations General Assembly passed a resolution to adopt the Singapore Convention on December 20, 2018, and the Singapore Convention came into force on September 12, 2020. The Lower House in Japan approved to accede to the Singapore Convention on May 12, 2023, and the Upper House also approved on June 9, 2023. On October 1, 2023, Japan deposited the instrument of accession to the Singapore Convention and the Singapore Convention entered into force for Japan after 6 months, i.e., on April 1, 2024.

Arbitration Act amended in 2023 shall be referred to as the **"Amended Arbitration Act"**).

The purpose of acceding to the Singapore Convention and enactment of the Implementation Act is to enhance the effectiveness of mediation, which is now increasingly recognized as a means of effectively and efficiently resolving international commercial disputes, and to promote its use by granting enforceability to settlement agreements resulting from international mediation.

The Act Amending the ADR Act grants enforceability to *"Tokutei Wakai"* settlement agreements, which are reached by the parties pursuant to the private dispute resolution procedures certificated under the ADR Law.[3] The Singapore Convention and the Implementation Act grant enforceability only to settlement agreements resulting from international mediation.

This article explains the expected impact of the enactment of the Act Amending the Arbitration Act and the Implementation Act on practice from the perspective of an international arbitration practitioner, and to the extent relevant to this point, discusses issues that have arisen in the course of practice under the previous legal system and the practical significance of the measures taken prior to the enactment of these Acts, which were conducted to revitalize international arbitration and international mediation in Japan.

Ⅱ. Impact of the Act Amending the Arbitration Act on Practice

1. Issues Remediated through the Enactment of the Previous Arbitration Act and Remaining Issues

Prior to the enactment of the Previous Arbitration Act, the provisions regarding arbitral procedures (Part 8) in the previous Code of Civil Procedure (Act No. 29 of 1890), which existed prior to the enactment of the new Code of Civil Procedure (Act No. 109 of 1996) and the Act Regarding Public Notice to Interested Parties and Arbitral Procedures (referred to as the **"Original Arbitration Act"**), were the arbitration law in Japan.[4] This old arbitration law was made based on the provisions regarding arbitral proceedings in the German Code of Civil Procedure in the 19th century, and it was recognized as a "relic of the 19th century," which was criticized as discouraging parties from using international arbitration in Japan, and symbolizing how behind the Japanese arbitral legal system was, in comparison with the global standard. The Previous Arbitration Act, enacted in 2003, was a completely new arbitration act. It was enacted as a single independent act on arbitration and was made based on the Model Law, the global standard of the time. The enactment of the Previous Arbitration Act

3) Article 2, item (v) of the Act Amending the ADR Act.

4) Provisions regarding public notice to interested parties and arbitral procedures in the previous Code of Civil Procedure and the Act Regarding Public Notice to Interested Parties and Arbitral Procedures are substantially the same: When the previous Code of Civil Procedure was amended, other provisions regarding civil procedure, civil execution and civil provisional remedy were deleted (they became independent acts), and only the provisions regarding public notice to interested parties and arbitral procedures were left behind, and the previous Code of Civil Procedure was renamed the “Act Regarding Public Notice to Interested Parties and Arbitral Procedures”.

brought a sense of ease to foreign arbitrators, counsel and parties, as it was mostly based on the Model Law at the time in terms of international commercial arbitration, except for some limited matters,[5] and was compatible with the arbitration acts in other countries which have well-developed legal systems for arbitration. In addition, the enactment of the Previous Arbitration Act resulted in less burden of the parties with respect to time and costs. Under the Original Arbitration Act, all court decisions in cases relating to arbitration were made by judgement. Thus, for example, if a party would like to challenge an arbitrator, it had to commence a lawsuit, which takes a long period of time. Under the Previous Arbitration Act, on the other hand, all court decisions for arbitration-related cases were made by orders,[6] which significantly expedited all procedures. Costs were also cut down: for example, the cost to file a petition for an execution order on an arbitral award is a nominal fixed filing fee,[7] as opposed to what would have been imposed for filing of a complaint for execution judgment under the Original Arbitration Act, which was calculated based on the amount of the claim and could be very substantial. Further, the amendments to the Foreign Lawyers Act in 1996, prior to the enactment of the Previous Arbitration Act, allowed foreign-qualified attorneys to represent parties in "international arbitration cases" to a certain extent. As a result, the number of global standard arbitrations in which the language is English increased.

Before the 2006 amendments to the Model Law, the Previous Arbitration Act included some of the ideas that were discussed in the UNCITRAL Working Group on Arbitration, which started in 2000, as discussions on amendments to the Model Law in the Working Group were under way at the time. For example, Article 13, paragraph (4) of the Previous Arbitration Act states that an arbitration agreement made via electronic communications shall be deemed to be made in writing, as most of the member states of UNCITRAL agreed to this idea in principle.[8] On the other hand, the Previous Arbitration Act did not grant enforceability to interim measures by arbitral tribunal, as it was still under discussion in the UNCITRAL Working Group on Arbitration at the time, and it was considered to be premature to grant enforceability to interim measures by arbitral tribunal in the Previous Arbitration Act as there were still issues to be considered, such as what kind of measures could be the object and how to treat measures which do not fit the framework of provisional measures in Japan.[9]

However, given that the Model Law was amended in 2006, and grants enforceability to interim measures by arbitral tribunal, Japan should have started considering alignment with the Model

5) For example, the Previous Arbitration Act includes a provision that an arbitral tribunal cannot attempt settlement without the parties' approval, in writing, in principle (Article 38, paragraphs (4) and (5)), and a provision that if the parties fail to designate rules of law applicable to the substance of the dispute, the arbitral tribunal shall apply the laws of a State which has the closest relationship to the civil dispute that has been referred to the arbitration procedure and which should be directly applied to the case (Article 36, paragraph (2)), while the Model Law provides that the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable (Article 28, paragraph (2)).

6) Article 6 of the Previous Arbitration Act.

7) The filing fee is 4,000 yen (Appended Table 1, paragraph (8)-2, of the Act on the Costs of Civil Proceedings).

8) Koichi Miki and Kazuhiko Yamamoto eds. *The Theory of the New Arbitration Act and Practice*, Yuhikaku (2006): 61

9) Masaaki Kondo et al. *Arbitration Act of Japan*. Shojihomu (2003): 117

Law in 2006, to show that the Arbitration Act in Japan aligned with global standards.[10)]

2. Adoption of the Model Law in 2006

Although it would have been preferable if Japan was to adopt the Model Law in 2006 sooner than later, not all the countries adopted the 2006 amendments immediately, even though they had arbitration acts based on the original Model Law prior to the 2006 amendments. It depended on each individual country how and to what extent they incorporated the amendments in their arbitration acts. UNCITRAL acknowledges that Hong Kong and Korea have arbitration acts complying with the Model Law in 2006,[11)] but the tone of the provisions regarding interim measures and the scope to which they grant enforceability are different between them. For example, Hong Kong has substantially the same provisions as the Model Law in 2006 in its Arbitration Ordinance, but Korea does not have provisions regarding preliminary orders (Article 17B of the Model Law in 2006), and grants enforceability to interim measures by arbitral tribunal only when the seat of arbitration is Korea.[12)] On the other hand, UNCITRAL does not acknowledge Singapore, known as a premier arbitration hub, as having an arbitration act complying with the Model Law in 2006, but its International Arbitration Act provides that (i) in case the seat of arbitration is Singapore, the arbitral tribunal may order any party to take interim measures pursuant to part 2, Article 12, paragraph (1), and the interim measures shall be recognized and enforced in Singapore pursuant to part 2, Article 12, paragraph (6) and that (ii) in case the seat of the arbitration is outside of Singapore, interim measures under the arbitral proceedings are considered part of a normal "Arbitral Award" pursuant to part 3, Article 27, paragraph (1), and shall be recognized and enforceable in Singapore.[13)] Therefore, it can be said that it was unavoidable to take some time to examine how other countries and jurisdictions comply with the Model Law in 2006 and consider how and to what extent Japan should incorporate the amendments to the Model Law in 2006 in a way to suit to the Japanese legal system.[14)] Japan now has the Amended Arbitration Act which is recognized as complying with the Model Law in 2006, which was drafted after extensive discussions in the Arbitration Law Subcommittee of the Legislative Council[15)] and the Study Group Concerning Revision of Arbitral Legal System.[16)] It delivers an important message that the Arbitration Act in Japan now aligns with global standards. In addition, the 2023

10) See, Hiroyuki Tezuka and Yutaro Kawabata. New Trends in International Commercial Arbitration and Modernization of the Arbitration Law. *Freedom and Justice*, 67(7) (2016): on and after 14.

11) See, https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status [Accessed on March 21, 2025]. (b) Indicates legislation based on the text of the Model Law in 2006.

12) See, Shojihomu, ed. Report of the Study Group Concerning Revision of Arbitral Legal System. *Bessatsu NBL*, 172 (2020): Chapter 1, Section 1-1 (2) and Report on Investigation about Legislation in Other Countries.

13) The Study Group Concerning Revision of Arbitral Legal System "Report on Investigation about Legislation in Other Countries": 36.

14) For example, the Model Law in 2006 provides that if the court finds that the interim measure is incompatible with the powers conferred upon the court, unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance (Article 17I, paragraph (1), item (b)(i)). It is not clear whether the Japanese Courts have or are appropriate to have such power under the Japanese legislation.

amendments to the Arbitration Act include some provisions to enhance the effectiveness and efficiency of international arbitration in Japan, which are not included in the Model Law, and the Japanese judiciary system has been prepared to enhance the effectiveness of court cases related to international arbitration. Japan has made significant progress, and these changes are expected to improve the use of arbitration and enhance the attractiveness and credibility of Japan as a situs for arbitration from a legal perspective.

3. Impact on Practice

(a) Amendments to provisions regarding interim measures by arbitral tribunal

An amendment that is significant in practice is that the types of interim measures are now clearly stipulated in the Amended Arbitration Act, just like the Model Law in 2006. It has now become clear that arbitral tribunals may order anti-suit injunctions[17] and preservation of evidence[18] as interim measures, which was not clear under the Previous Arbitration Act.

In addition, under the Amended Arbitration Act, unless the court finds the existence of any of the narrowly defined grounds for refusal to enforce the interim measures issued by arbitral tribunal, the court will issue an enforcement approval order, and where that order becomes final and non-appealable, the party seeking for enforcement is allowed to enforce the interim measures. The Previous Arbitration Act also included provisions relating to interim measures by arbitral tribunals,[19] but those interim measures were not enforceable. Thanks to this amendment, the practical usefulness of interim measures by arbitral tribunals has significantly improved.

Further, when there is a final and non-appealable enforcement approval order regarding an order for interim measures (limited to the orders to take measures stated in Article 24, paragraph (1), item (i), (ii), (iv) and (v) of the Amended Arbitration Act) and the court finds that the party who received the order for interim measures violates or is likely to violate it, the court may order the party to pay a certain amount of money pursuant to Article 49, paragraph (1). This order is called "order for payment of penalty" and the other party can carry out a civil execution with the "order for payment of penalty", which is a title of obligation.[20] The order for payment of penalty can be issued at the same time as the issue of

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15) The Arbitration Law Subcommittee of the Legislative Council was established pursuant to the Consultation 112 ordered by the Minister of Justice dated September 17, 2020, and "Draft Outline of Amendments to the Arbitration Act" was prepared in October 2021.

16) See, the Study Group Concerning Revision of Arbitral Legal System "Report on Investigation about Legislation in Other Countries".

17) The arbitral tribunal's order to prohibit actions to delay and disturb the arbitral proceedings, such as commencing and continuing proceedings in a foreign court, which is in violation of the arbitration agreement, could be included in arbitral tribunal's order "to prohibit actions that cause harm or prejudice to the proceedings in the arbitral proceedings" (Article 24, paragraph (1), item (iv) of the Amended Arbitration Act).

18) Orders "to prohibit actions such as disposing, erasing or altering evidence necessary for the proceedings in the arbitration procedure" are included in interim measures (Article 24, paragraph (1), item (v) of the Amended Arbitration Act).

19) Article 24, paragraph (1) of the Previous Arbitration Act.

20) Article 22, item (iii) of the Civil Execution Act.

an enforcement approval order, in which case the order for payment of penalty is not finalized until the enforcement approval order is finalized.[21] This new system was introduced in order to enhance the effectiveness of certain types of interim measures that do not fit the methods in Japan, such as direct enforcement or enforcement through substituted performance. The court may order payment of a certain amount of money that is found to be reasonable (if the court only finds that the party is likely to violate the order, an order to pay a certain amount of money subject to the violation of the order), taking into consideration the content and nature of the interest that would be harmed by the violation of the order for interim measures and also in what manner and to what extent that interest would be harmed.[22] Thus, for example, if the other party files or continues a lawsuit in a foreign court contrary to the arbitration agreement, or is about to destroy or conceal evidence, and thus violates the order for interim measures, the party can enforce the interim measures in the courts in Japan, after obtaining an enforcement approval order and an order for payment of penalty, which is a title of obligation.

Even under the Previous Arbitration Law, it was considered possible for a party to file a petition for an order for a provisional remedy in courts in Japan even if the parties agree to resolve disputes through arbitration.[23] However, the prevailing view is that a Japanese court could not make an anti-suit injunction, i.e., an order prohibiting overseas litigation as a provisional order, and even if such order was issued, it was doubtful whether it would be possible to enforce it under the civil execution system in Japan. Regarding preservation of evidence, the general way to preserve evidence under the Code of Civil Procedure in Japan is that enforcement officers go to the other party's office, take photos of medical records of hospital, make copies of company's internal documents, etc., but it was not expected to take such actions against foreign parties located outside of Japan. It was also doubtful whether it was possible to make an order to prohibit destruction or concealment of evidence, and even if such a preservation order was issued, it was not expected to be enforceable.

The Amended Arbitration Act strengthens the effectiveness and efficiency of arbitration proceedings by granting enforceability to orders such as anti-suit injunctions, orders to prohibit obstruction of arbitral proceedings and orders for preservation of evidence, which were difficult to be obtained and/or enforced under the Previous Arbitration Act.

(b) Amendments to Court Procedures in Arbitration-Related Cases

One of the amendments that are considered to have a significant impact on practice, other than those in response to the Model Law in 2006, is that the Amended Arbitration Act provides the Tokyo District Court and the Osaka District Court with special additional jurisdiction over arbitration-related litigation such as a petition for an execution order on an arbitral award, petition for setting aside an arbitral award, and petition for an enforcement approval order for interim measures.[24] In addition, a petitioner is now able to omit, subject to the court's approval, submission of a translation of all or part of the arbitral award in a foreign

21) Article 49, paragraph (2) of the Amended Arbitration Act.

22) Article 49, paragraph (1) of the Amended Arbitration Act.

23) Article 15 of the Previous Arbitration Act.

language in some arbitration-related cases such as petition for execution order of an arbitral award and petition for enforcement approval order for interim measures.[25)]

Arbitration-related cases pending at the Tokyo District Court used to be assigned to more than 30 departments in order, and each department handled arbitration-related case only once a year or less. The Tokyo District Court has now established a system to build experience and develop expertise in arbitration at the Business Court in Nakameguro, established in 2022. It is expected that the arbitration-related cases will be handled by the judges at the Business Court more promptly and appropriately.

Ⅲ. Practical Impact of Enactment of the Domestic Act to Implement the Singapore Convention

1. Significance of Acceding to the Singapore Convention

The Singapore Convention promotes the use of mediation, which is becoming increasingly important as an alternative to time consuming and costly litigation and arbitration, by granting enforceability to settlement agreements resulting from international mediation. As of March 25, 2025, there were 57 signatories, of which 18 have already ratified and approved, including Japan.[26)]

In the Arbitration Law Subcommittee of the Legislative Council, there were discussions that it could be advantageous for Japanese companies if Japan were not to accede to the Singapore Convention.[27)] Unlike the New York Convention, the Singapore Convention does not allow the Signatories to make a reciprocity reservation that they will apply the Singapore Convention only to the settlement agreements made in the territory of another Signatory state. Thus, even if Japan did not accede to the Singapore Convention, the Signatories of the Singapore Convention are obliged to grant enforceability in their states to settlement agreements resulting from international mediation, and to allow the settlement agreements resulting from international mediation by Japanese parties to be enforced, under the Singapore Convention. In other words, if Japan remained a non-signatory to the Singapore Convention, Japanese parties can avoid execution against their assets located in Japan, as settlement agreements resulting from international mediation are not enforceable in Japan, while being able to enforce settlement agreements resulting from international mediation

24) Article 5, paragraph (2); Article 46, paragraph (4), item (iii); and Article 47, paragraph (4), item (iii) of the Amended Arbitration Act.

25) Article 46, paragraph (2) proviso; Article 47, paragraph (2) proviso of the Amended Arbitration Act.

26) See, https://www.singaporeconvention.org/ [Accessed on April 10, 2025]. The accession by Costa Rica, the most recent Contracting Party to adhere to the Singapore Convention, was effected on March 25, 2025, and the Convention will enter into force for Costa Rica on September 25, 2025. It is described that Japan has "signed" and "ratified" the Singapore Convention, but strictly speaking, Japan has not "signed" nor "ratified" the Singapore Convention; Japan has "acceded to" the Singapore Convention and deposited the instrument of accession after obtainment of the "approval" by the Diet.

27) The minutes of the 3rd meeting of Arbitration Law Subcommittee of the Legislative Council: 6-7; the minutes of the 8th meeting: 24-27.

against the other party if the assets are located in a Signatory country. This "free rider" theory was discussed during the deliberations, but in such a one-sided and unequal situation, foreign parties, who are in disputes with Japanese companies, would hesitate to choose mediation as a means to resolve disputes. In order to promote mediation as an alternative to litigation and arbitration, Japan and many other countries need to abandon such free rider theory and cooperate to establish a framework where settlement agreements resulting from international mediation are enforceable in many countries. That said, it seemed that many countries would take time to ratify the Singapore Convention, particularly where they want to see how the U.S., the EU and its member states, and other major economic countries acted, and it was pointed out that if Japan ratifies the Singapore Convention ahead of other G7 countries, that fact might allow parties from other countries to take advantage, as free riders.

In addition, settlement agreements resulting from domestic mediation (as a form of alternative dispute resolution) relating to the share of expenses arising from marriages and child support were not enforceable in Japan when the other party did not fulfill the obligations set forth in the settlement agreement. This practical inconvenience was pointed out and there were voices in favor of granting enforceability to certain types of settlement agreements resulting from domestic mediation.[28] Considering that, it was difficult to take an option that only grants enforceability to settlement agreements resulting from international mediation. On the other hand, it was also not realistic to grant enforceability to all categories of settlement agreements resulting from domestic mediation in principle (i.e., unless there are grounds for refusal of execution as stipulated in the Singapore Convention), given that various categories of parties and mediation organizations are involved in domestic mediation, unlike international mediation.[29] It was also discussed that the parties' intention needs to be confirmed more clearly in order to grant enforceability to settlement agreements resulting from domestic mediation.[30]

Given such situation, Japan decided to accede to the Singapore Convention, enacted the Implementation Act and granted enforceability to certain types of settlement agreements resulting from international mediation (except for consumer cases and labor-related cases) as provided in the Singapore Convention, on the basis that Japan makes a declaration of reservation that it adopted the opt-in method (the Singapore Convention and the Implementation Act applies only when the parties agreed to apply the Singapore Convention or the Implementation Act), but not the opt-out method (the Singapore Convention does not apply only when the parties agreed not to apply the Singapore Convention), which is the default rule of the Singapore Convention. The ADR Act was amended to grant enforceability to settlement agreements resulting from domestic mediation, but only those resulting from mediation in mediation proceedings managed by ADR organizations certified in the amended ADR Act, and only when the parties agreed to the enforceability of the settlement agreement

28) The minutes of the 14th meeting of Arbitration Law Subcommittee of the Legislative Council: 23-24.

29) The minutes of the 1st meeting of Arbitration Law Subcommittee of the Legislative Council: 30, 42-43; the minutes of the 3rd meeting: 4, 7-8, 11, 22; and the minutes of the 8th meeting: 8, 10.

30) The minutes of the 9th meeting of Arbitration Law Subcommittee of the Legislative Council: 26-33.

within the mediation proceedings.

It is important to grant enforceability to settlement agreements resulting from mediation and to recognize and enforce settlement agreements via a prompt, simplified procedure, because filing a lawsuit or a request for arbitration to force the other party to fulfill its obligations under a settlement agreement is a costly and time-consuming procedure; in addition, in the context of international disputes, the language issue makes it difficult to use *"Sokketsu Wakai,"* a form of settlement prior to the filing of an action, or *"Shikko Shosho,"* a certificate to prove a cause of action, prepared by a notary.[31] Recently, the use of Arb-Med has been increasing, which is a hybrid mediation-arbitration approach where a mediator, who is independent from arbitrators, presides over the mediation proceedings in the middle of an arbitration case. In order to enforce the settlement agreement reached in this procedure, the parties would have to go back to the arbitration proceeding after they reach an agreement, and obtain a consent award from an arbitral tribunal. However, under the Singapore Convention and the Implementation Act, there is no need to obtain a consent award by arbitral tribunal, because the parties' settlement agreement itself in the mediation proceeding has become enforceable.[32] [33]

Although it might be difficult to see how acceding to the Singapore Convention will enhance and promote international mediation in Japan, because settlement agreements resulting from international mediation located in Japan and settlement agreements by Japanese parties are enforceable in Signatory countries even if Japan does not accede to the Singapore Convention, Japan's decision will encourage other countries to accede to and ratify the Singapore Convention, and it is significant for Japan to be recognized as a leading country in international mediation, especially because Japan has abundant experience with dispute resolution via mediation and settlement agreements.

2. Efforts to Promote the Use of Mediation after Acceding to the Singapore Convention

In some cases, even though Japanese companies request for international mediation, the foreign opposing party does not agree to use international mediation as a means of dispute resolution.

If the opposing party is concerned that settlement agreement resulting from mediation is

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31) Only Shikko Shosho with regard to a claim for payment of a certain amount of money or any other fungible thing or a certain amount of securities (Article 22, item (v) of the Civil Execution Act) is enforceable. This is also a problem.

32) Consent Award is a type of arbitral award: therefore, for example, in an ICC arbitration, the Court scrutinizes a consent award like normal arbitral award, which takes time.

33) In Arb-Med, the arbitrator sometimes plays a role as a mediator with the parties' agreement in some civil law arbitrations, but there is an argument that the settlement agreement from such mediation would not be enforceable, because such mediation does not meet the definition of "mediation" in the Singapore Convention, which is "a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons (the "mediator") lacking the authority to impose a solution upon the parties to the dispute" (emphasis added) (Article 2, paragraph (3) of the Singapore Convention; Article 2, paragraph (1) of the Implementation Act).

not enforceable, then Japan's accession to the Singapore Convention and enactment of the Implementation Act would help to dispel the uneasiness.

If the opposing party does not agree to a tiered dispute resolution clause because it considers that it would be a waste of time and money to engage in mediation proceedings if mediation fails, Arb-Med could be a solution. In an Arb-Med proceeding, the parties would have already exchanged their request for arbitration and answer and an arbitral tribunal would have been constituted (in some cases, the parties could have exchanged their first round of submissions, e.g., the statement of claim and the statement of defense). Then a mediation proceeding is commenced with an independent mediator and if the mediation fails, the arbitral proceeding restarts without delay. Arb-Med would reduce the risk of mediation being used to delay the proceeding, and make it possible for parties to discuss the disputed points based on more detailed analysis, as they may have a better idea as to how the arbitral tribunal will understand the case at the time of the discussion. Thus, there could be more possibility to reach a settlement agreement in Arb-Med than in mediation prior to filing an arbitration or litigation.

In addition, some U.S. inhouse lawyers argue that it is meaningless to have a mediation before document production, as it is impossible to evaluate the claim and risk appropriately without discovery or document production. Japanese companies find mediation attractive as they can avoid document production, which takes a lot of time and costs. Thus the U.S. inhouse lawyers' argument is not very familiar to Japanese companies. However, the best thing about mediation is that the parties can customize procedures to remove any concerns that either party has. For example, the parties could decide to disclose documents of limited type and time related to the selected major disputed points in the document production. Also, they could decide to examine only a few (e.g., two) witnesses from each party, who are related to the most important disputed points, and hold a one-day deposition. There are some real examples in which the parties elaborated on the procedures like above and were able to resolve the dispute relatively early.

Even if the parties find it difficult (i) to select a single mediator to whom parties with different backgrounds and cultures can agree, and (ii) to get internal approval to accept a proposal made by a mediator who was selected as a compromise, the parties still could use a mediation organization and request that it choose two mediators, taking into account the parties' different cultures and legal backgrounds. For example, under the JIMC (Japan International Mediation Center in Kyoto)-SIMC (Singapore International Mediation Centre) Joint Protocol, a mediation usually is performed by two co-mediators, one appointed by JIMC and the other appointed by SIMC, unless the parties agree otherwise.[34] The two mediators are fair and neutral as they are selected by the mediation organization. If the parties have similar background and an affinity with at least one of the mediators, it would be easier for them to talk with the mediators, and it would be more comfortable for them to accept the proposal agreed by the two mediators. There is an example where a big arbitration case

34) Article 3, paragraph (2) of the JIMC-SIMC Joint Protocol.

between a Japanese Party and an Indian Party was resolved in relatively short period of time through mediation, presided by a Japanese mediator appointed by JIMC and an Indian Singaporean mediator appointed by SIMC. In this way, mediation makes it possible for parties to adopt best procedures, taking into account the parties' mindsets, their preference and the nature of the case. As Japan has now acceded to the Singapore Convention and enacted the Implementation Act, it is expected that Japanese practitioners will have more opportunities to contribute to enhancing the effectiveness of international mediation.

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Case Study: Petition for a Ruling on Arbitral Tribunal Jurisdiction under Article 23, Paragraph 5 of the Arbitration Act of Japan

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Ⅰ. Introduction

Many countries have adopted the principle of "Kompetenz – Kompetenz" whereby the arbitral tribunal can independently rule on the question of whether it has jurisdiction. The UNCITRAL Model Law on International Commercial Arbitration (hereinafter referred to as the "Model Law"), which has been adopted in 126 jurisdictions as of May 31, 2025, has also adopted the said principle (Article 16). The Arbitration Act of Japan[1)] has also adopted the Model Law and allows the arbitral tribunal to rule on its own jurisdiction (Article 23, paragraph (1)). Specifically, if the ruling of the arbitral tribunal is that it does not have jurisdiction, then it decides to end the arbitration proceedings (*Id*., paragraph (4), item (ii)). Conversely, if its ruling is that it has jurisdiction, then it may continue the arbitration proceedings and make an arbitral award which states that it has jurisdiction (*Id*., paragraph (4), item (i)), or the arbitral tribunal may make an independent decision that the arbitral tribunal has jurisdiction before an arbitral award (*Id*.). If the arbitral tribunal makes such independent decision, a party may petition a court to rule on whether the arbitral tribunal has jurisdiction (Article 23, paragraph (5)). My colleagues and I have filed such petition. However, the decision therein has not been made public. Therefore, I would like to write about our petition for reference, although it is not recent. One of the reasons why there is no public decision on a petition filed under Article 23, paragraph (5) of the Arbitration Act of Japan may be that only a person that has an interest in the case may request inspection of the records thereof (Article 9). Therefore, in this article, I will omit many of the details of the parties and the disputes and make some changes to keep such details from becoming public.

Ⅱ. Outline of the Case

(1) Arbitration Agreement

A Japanese company (hereinafter referred to as the "Japanese Company") and a foreign

1) Act No. 138 of 2003.

company (hereinafter referred to as the "Foreign Company") had entered into an agreement which provided the following arbitration clause:

"All disputes, controversies, claims or differences which may arise between the parties, out of or in relation with or in connection with this Agreement, or for the breach thereof, shall be referred to and settled by arbitration (without being submitted to any court), except as otherwise expressly provided herein. If the Japanese Company initiates the arbitration, then the arbitration shall take place in a foreign country (hereinafter referred to as the "Foreign Country"), in accordance with the rules of procedures of a foreign arbitration institution (hereinafter referred to as the "Foreign Arbitration Institution"). If the Foreign Company initiates the arbitration, then the arbitration shall take place in Osaka, Japan, in accordance with the rules of procedures of the Japan Commercial Arbitration Association. In the event of arbitration, the panel shall consist of three (3) arbitrators, one (1) of whom is chosen by the Foreign Company, and one (1) of whom is chosen by the Japanese Company, and one (1) of whom shall be chosen by the two (2) arbitrators chosen by the Foreign Company and the Japanese Company."

(2) Request for Arbitration to the Foreign Arbitration Institution

Notwithstanding the arbitration agreement set forth in paragraph (1) (hereinafter referred to as the "Arbitration Agreement"), the Foreign Company submitted a petition for an arbitration case (hereinafter referred to as the "Arbitration Case") to the Foreign Arbitration Institution. The Japanese Company, which received the notice from the Foreign Arbitration Institution, argued with its case manager that it should refuse to accept the case because the Arbitration Agreement clearly stated that the Arbitration Case should be filed with the Japan Commercial Arbitration Association. However, the Foreign Arbitration Institution decided that this issue should be decided by the arbitrators, and the proceedings proceeded under the administration of the Foreign Arbitration Institution.

Accordingly, the Japanese Company submitted a written answer, and argued therein that the Foreign Company had initiated arbitration, that in accordance with the Arbitration Agreement, "the arbitration shall take place in Osaka, Japan, in accordance with the rules of procedures of the Japan Commercial Arbitration Association," and that the Foreign Arbitration Institution did not have the jurisdiction to arbitrate, and requested that the Foreign Company's petition for arbitration be rejected.

The Japanese Company selected a person (hereinafter referred to as the "Japanese Company Selected Arbitrator") as the arbitrator while maintaining the objection. The arbitrator appointed by the Foreign Company (hereinafter referred to as the "Foreign Company Selected Arbitrator") and the Japanese Company Appointment Arbitrator appointed the third arbitrator (hereinafter referred to as the "Third Arbitrator"), and then all of the arbitrators were appointed by the Foreign Arbitration Institution (hereinafter the arbitral tribunal composed of the Japanese Company Selected Arbitrator, the Foreign Company Selected Arbitrator and the Third Arbitrator shall be referred to as the "Arbitral Tribunal").

Incidentally, the Commercial Arbitration Rules of the Japan Commercial Arbitration

Association (hereinafter referred to as the "JCAA") provide as follows:

"Article 17 Constitution of Arbitral Tribunal and Jurisdictional Objection

The JCAA may proceed to constitute the arbitral tribunal even if the respondent raises an objection about the existence or validity of the arbitration agreement, or about a Single Arbitration for Multiple Claims. The arbitral tribunal, after being duly constituted, shall make a determination on any such objection under Article 47.1 or 48.1."

I believe that the JCAA does not have to "proceed to constitute the arbitral tribunal" if it is obvious that there is no arbitration agreement pursuant to the Commercial Arbitration Rules and the respondent raises an objection about the existence of such arbitration agreement since it the provision states that "The JCAA may proceed to constitute the arbitral tribunal." So, I do not think that the JCAA should "proceed to constitute the arbitral tribunal" if a request for arbitration is submitted to the JCAA invoking the arbitration agreement pursuant to the rules of another arbitration institution and the respondent raises an objection, as in a case opposite of the Arbitration Case.[2)]

At present, the Foreign Arbitration Institution has changed its rule to provide that whether a party has met the administrative requirements to initiate or file an arbitration contained in the rules shall be determined by a body separate from the arbitral tribunal. Accordingly, the Foreign Arbitration Institution would currently not accept such request for arbitration by the Foreign Company.

(3) Decision of the Arbitral Tribunal

The Arbitral Tribunal decided as follows:

"The Arbitral Tribunal shall apply the rules of the JCAA and will conduct the hearing, when there is one, in Osaka, Japan.

The Japanese Company's motion to terminate the arbitration is denied.

The Arbitration will continue to be administered by the Foreign Arbitration Institution unless and until such time as one of the parties transfers the administration of the Arbitration to the JCAA, which either party can elect to do, in which case the JCAA will administer the Arbitration."

The reasons why the Arbitral Tribunal decided in the manner above are as follows.

First, the arbitrators were selected in the manner agreed by the parties, that is, as provided in the Arbitration Agreement. The Commercial Arbitration Rules of the JCAA impose only two requirements for arbitrator eligibility and qualification: impartiality and independence. (See Article 24) No challenge was made to the impartiality or independence of the arbitrators chosen in this matter, nor was there any basis for making such challenge. Under the Commercial Arbitration Rules of the JCAA, confirmation of the appointed arbitrators will only be denied "if the JCAA finds that the appointment was clearly inappropriate." (See Article

2) Of course, the JCAA shall accept a request for arbitration invoking an arbitration agreement pursuant to the Interactive Arbitration Rules or UNCTIRAL Arbitration Rules, in accordance with each rules.

25.6) Thus, the prospect of such confirmation being denied is extremely remote as there would be no basis for doing so. Accordingly, the fact that the Arbitral Tribunal was not confirmed under Article 25.6 of the Commercial Arbitration Rules of the JCAA was a minor departure from the selection method agreed upon by the parties and will not bar the enforceability of any arbitral award that it may ultimately make.

(4) Petition

(a) Substantial Grounds

Although the decision of the Arbitral Tribunal mentioned in paragraph (3) was unjustified, it is probable that the Arbitral Tribunal also made its decision on the basis that the place of arbitration was not the Foreign Country but Japan. Therefore, I and my colleagues, as counsel of the Japanese Company, filed a petition with the Osaka District Court pursuant to Article 23, paragraph (5) of the Arbitration Act of Japan to rule that the Arbitral Tribunal did not have jurisdiction. For the Japanese Company, the following points were most problematic in the decision of the Arbitral Tribunal.

Firstly, procedurally, none of the arbitrators were confirmed by the JCAA.

Secondly, substantively, there were the following reasons. If the arbitrators appointed by the parties cannot agree on the appointment of a third arbitrator, and if the Commercial Arbitration Rules of the JCAA were to apply, then the JCAA will appoint a third arbitrator that has a nationality different from the nationality of any of the parties upon a request by one party (Article 27.4). The arbitrators appointed by the parties will thus appoint the third arbitrator, taking into account such circumstances. On the other hand, it was reasonably anticipated that the Foreign Arbitration Institution would have appointed a practitioner who had the nationality of the Foreign Country as the third arbitrator if its rules of arbitration applied. Consequently, the Japanese Company had no choice but to select its own arbitrator, expecting that a majority of the arbitral tribunal would be arbitrators with the nationality of the Foreign Country. Accordingly, the arbitrator to be selected if the Commercial Arbitration Rules of the JCAA applied would be different from the arbitrators selected if the arbitration rules of the Foreign Arbitration Institution applied, and naturally, the third arbitrator would also be different.

Furthermore, the JCAA has no procedure to accept any transfer of a case from any other arbitration institution, and so the Arbitration Case could not be transferred to the JCAA. (There was no provision in the rules of arbitration of the Foreign Arbitration Institution to accept any transfer from any other arbitration institution.) Consequently, we argued that continuing the proceeding under the administration of the Foreign Arbitration Institution was in violation of the Commercial Arbitration Rules of the JCAA (Article 8.1) and did not comply with the Arbitration Agreement.

It was also noted that the administrative fees and the arbitrators' fees under the Commercial Arbitration Rules of the JCAA were different from those under the rules of arbitration of the Foreign Arbitration Institution.

(b) Formalities

As mentioned above, there were no published cases, and there were no forms for this type of petition, so we had to consider several aspects of procedural formalities.

At first, we considered whether the other party to the petition should be the Arbitral Tribunal, which decided that it had jurisdiction, in light of the legislative intent to have an arbitral tribunal reconsider the matter as described below. However, since the other party to a petition for setting aside an arbitral award shall be the other party in the arbitration proceeding, such party having the most interest in the petition (see Article 44, paragraph (5) of the Arbitration Act of Japan), we designated the Foreign Company, which was the claimant in the Arbitration Case, as the other party in the petition.

Next, we named the petition as a petition pursuant to Article 23, paragraph (5) of the Arbitration Act of Japan, although it was not specified in the Arbitration Act of Japan and the Rules of Procedure for Arbitration-Related Cases of Japan.

On the other hand, the object of the petition must be stated under the Rules of Procedure for Arbitration-Related Cases (Article 2, paragraph (2), item (ii)). So, we stated it as "to request for a ruling affirming that the arbitral tribunal described in the exhibit titled Arbitral Tribunal Index does not have the jurisdiction to arbitrate the arbitration case described in the exhibit titled Arbitration Case Index," considering the relief in an action for declaratory judgment.

The Osaka District Court accepted such petition. The reason may be that it was necessary to make the petition within thirty days from the day on which the notice of the decision of the arbitral tribunal was received.

(5) Court Proceedings

With regard to a petition to set aside an arbitral award, the court may not make a decision without holding an oral hearing or a hearing which both parties can attend (Article 44, paragraph (4) of the Arbitration Act of Japan). However, in the case of a petition for ruling on the jurisdiction of the arbitral tribunal, the arbitral tribunal may continue the arbitration proceedings and make an arbitral award (*Id*., Article 23, paragraph (5)), and therefore, it was not necessary to hear the opinion of the other party to the Arbitration Case, nor was it necessary to serve a writ of summons in the Foreign Country for this purpose. Actually, it will take months to serve a writ of summons in the Foreign Country. It can also take more than a year. However, about one week after acceptance of the petition, the court requested us, as the petitioner's counsel, to notify the other party of the court's request that the other party respond to the petitioner's petition by a certain date (about six weeks later). In the Arbitration Case, the counsel of the Japanese Company had been notifying the counsel of the Foreign Company and the Arbitral Tribunal by e-mail. Therefore, the counsel of the Japanese Company immediately notified them by e-mail of the court's request, and sent the petition and the documentary evidence as well as the English translation thereof by e-mail.

In response to this, the counsel of the Foreign Company immediately sent an e-mail to the Arbitral Tribunal and the counsel of the Japanese Company stating that the Foreign Company was not a party to the petition of the Japanese Company in the Osaka District Court, that the

Foreign Company had not been served, and that it would decide later how to respond to the petition, and that the ruling rendered by the court was advisory at best, and requested the Arbitral Tribunal to continue the arbitration proceedings because the ruling to be rendered by the court would be advisory at best and that an unenforceable opinion and the Arbitration Act of Japan permitted the Arbitral Tribunal "to continue the arbitration proceedings and make an arbitral award" while the court renders its advisory ruling.

Thus, the petitioner submitted the above e-mail to the Osaka District Court. In the end, the other party did not submit any response to the court by the date specified.

(6) Ruling of the Court

The Osaka District Court rendered a decision about 10 days from such specified date. The main text of its decision is as follows:

"The arbitral tribunal described in the exhibit titled Arbitral Tribunal Index does not have the jurisdiction to arbitrate the arbitration case described in the exhibit titled Arbitration Case Index."

The petition sought for a ruling "affirming" the lack of jurisdiction as mentioned above. "But the court seemed to decide that it just had to rule whether the Arbitral Tribunal "has the jurisdiction to arbitrate" or "does not have the jurisdiction to arbitrate," because Article 23, paragraph (5) of the Arbitration Act of Japan provides that "a party may petition a court to rule on whether the arbitral tribunal has jurisdiction."

The decision stated the name and address of the petitioner and the name and address of its counsel, but did not state the other party.

The reasons for the ruling were described as follows:

"The Arbitration should be subject to the Commercial Arbitration Rules of the JCAA, and the appointment of arbitrators also requires such procedures, such as confirmation by the JCAA. However, this Court does not find that such procedures were observed.

Accordingly, the Arbitral Tribunal has no jurisdiction to arbitrate the Arbitration Case."

The decision also refuted the decision of the Arbitral Tribunal by stating that "the Commercial Arbitration Rules that applied under the Arbitration Agreement were incorporated in the Arbitration Agreement (Article 3.1 of the said rules), and the Commercial Arbitration Rules provided for the confirmation procedure by the JCAA (Article 25.4) in addition to the appointment of an arbitrator by each party and the appointment of the remaining arbitrator by the agreement of the two arbitrators appointed. No circumstances were found indicating that an agreement was effectively reached to deviate from the Commercial Arbitration Rules. The Commercial Arbitration Rules may be construed to set forth the procedure by which the remaining arbitrator shall be appointed should the two arbitrators appointed by the parties fail to appoint the remaining arbitrator. The right to appoint an arbitrator pursuant to the Commercial Arbitration Rules is critical. This Court does not find that the Arbitration Case was conducted pursuant to the procedures set forth under the Commercial Arbitration Rules, including the confirmation by the JCAA, and that the arbitrators were appointed in accordance with the agreement of the parties. Moreover, whereas before the appointment of the

arbitrators of the Arbitral Tribunal, the petitioner requested that the Foreign Company's request for arbitration be dismissed, pointing out the lack of jurisdiction of the Arbitral Tribunal constituted with the arbitrators appointed under the administration of the Foreign Arbitration Institution, the Foreign Arbitration Institution ruled that the competence of the Arbitral Tribunal should be determined by the Arbitral Tribunal itself. Under such circumstances, it cannot be said that the petitioner relinquished the right to appoint its arbitrator pursuant to the Commercial Arbitration Rules, and selected the Japanese Company Selected Arbitrator with the intention to consent to the arbitration proceedings. In light of this also, it cannot be said that the arbitrators of the Arbitral Tribunal were appointed in accordance with the appointment method set forth in the Arbitration Agreement. The Arbitration Act of Japan permits the party to argue for or against the jurisdiction of the arbitral tribunal even after an arbitrator is appointed by the party (Article 23, paragraph (3))."

(7) Service of the Written Decision

The Osaka District Court did not serve the decision on the Foreign Company. As mentioned above, it was impractical to effect service on it because it may take months and during that time the Arbitral Tribunal may make an arbitral award. The counsel of the Japanese Company in the Arbitration Case sent the decision of the Osaka District Court and its English translation by e-mail to the Arbitral Tribunal and the counsel of the Foreign Company.

(8) Subsequent Progress

The Arbitral Tribunal, however, continued the arbitration proceedings on the basis that the decision of the Osaka District Court was not binding on it. While it is true that the decision has the effect of providing the arbitral tribunal with materials to review its own decision about jurisdiction, in general, the arbitral tribunal is expected to make a decision to terminate the arbitration proceedings because it is no longer possible to continue the same.

Considering the proceedings of the Arbitration Case, it seems that it would have been better for the decision of the court to be binding, as contemplated in the Model Law. On the other hand, to make the decision of the court binding, the issue is whether "an oral argument or a hearing which both parties can attend" should be required, as in the case of a petition for setting aside an arbitral award (Article 44, paragraph (4) of the Arbitration Act of Japan). If a date for such hearing is set, the summons therefor is issued through the service of a writ of summons or by other means considered appropriate (Article 10 of the Arbitration Act of Japan and Article 94, paragraph (1) of the Code of Civil Procedure of Japan[3)]). Determining, however, what means is appropriate to effect summons on a party located in a foreign country will be an important issue to be resolved. Furthermore, if a party located in a foreign country does not appear on the hearing date in case of summons by means considered appropriate, rather than through the service of a writ of summons, no disadvantage may be attributed to the party (Article 94, paragraph (2) of the Code of Civil Procedure of Japan). Therefore, the

3) Act No. 109 of 1996.

summons shall be made again. In view of the foregoing, a writ of summons should be served. Consequently, it will take months as mentioned above to set a date for such hearing and the arbitral tribunal will more likely be able to make an arbitral award before the court decides on the matter. It is also an issue whether or not an immediate appeal may be filed against the court's decision (Article 44, paragraph (7) of the Arbitration Act of Japan). If an immediate appeal is permitted, then notice of the decision should be required (Article 7 of the Arbitration Act of Japan). The notice may be given by means considered appropriate (Article 10 of the Arbitration Act of Japan and Article 119 of the Code of Civil Procedure of Japan). If a Japanese attorney has been appointed as counsel, notice thereto would be sufficient. But if counsel has not been appointed, then it becomes a problem as well to effect summons for the hearing date as mentioned above.

However, in this case, the Foreign Company subsequently settled with the Japanese Company. This seemed to be partly due to the consideration of the risk that the arbitral award may be set aside in Japan (Article 44 of the Arbitration Act of Japan) even if the arbitral award is made.

Ⅲ. Conclusion

The above is a brief introduction to the petition we filed to obtain a decision on whether or not the arbitral tribunal has the jurisdiction pursuant to Article 23, paragraph (5) of the Arbitration Act of Japan. I would be grateful if this article is used as reference for those involved in filing similar petitions. In addition, because the petition has to be filed within thirty days and the court proceedings relating to the petition are quick, attention should be given to, among others, obtaining the qualification certificate of a foreign company, preparation of Japanese translations of foreign language documents, and preparation of foreign language translations of Japanese documents, as typically required in international arbitration cases.

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Unlocking the Potential of Third-Party Funding in Arbitration in Japan

—Legal Landscape, Practical Considerations, and Arbitral Rules—

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Ⅰ. Introduction[1)]

Interest in third-party funding—a financial arrangement where litigation or arbitration costs are funded by a third-party funder—has been gradually increasing in Japan, particularly in international commercial arbitration. With rising legal costs and limits on legal budgets[2)] that often hinder dispute resolution, third-party funding has been drawing more attention as a practical solution to alleviate parties' financial constraints and enhance their ability to pursue and recover their claims.

However, third-party funding is not yet common or well understood in Japan. At present, Japan lacks specific laws or guidelines on the use of third-party funding, thus, concerns about its legality have been the subject of discussion,[3)] particularly in relation to the Attorneys Act,[4)] the Basic Rules on the Duties of Practicing Attorneys,[5)] the Trust Act,[6)] and the Money Lending Business Act.[7)] Nevertheless, third-party funding schemes can be offered and implemented in Japan if they are carefully structured to comply with the above laws.[8)]

1) The authors thank Mr. Edouard Fremault, the Executive Director and Chief Strategy Officer of Deminor Litigation Funding (“**Deminor**”), and Ms. Ruth Stackpool-Moore, the Portfolio Manager for Global International Arbitration of Omni Bridgeway for sharing their insights and experience regarding third-party funding.

2) Stavros Brekoulakis, William W. Park, and Catherine A. Rogers, *The ICCA Reports No. 4 – Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration* (April 2018) (the “**ICCA-Queen Mary Task Force Report**”), at 18. Third-party funding can convert in-house legal departments *“from cost centres to profit centres.”* (*Id*., at 21.)

3) For a recent discussion of the legality of third-party funding under Japanese law, *see, e.g.*, Yoshie Midorikawa, *Third Party Funding (TPF) as Legal Infrastructure in International Business Disputes: Why We Need It in Japan*, JCA Journal, Vol. 69, No. 2 (Feb. 2022) at 19; Junya Naito and Motomu Wake, *Third Party Funding - Possible Application of the Attorney Act and the Basic Rules on the Duties of Practicing Attorneys*, JCA Journal, Vol. 68, No. 5 (May 2021) at 9; and Tom Glasgow, et al., *For Practical Utilization of Third Party Funding in Japan*, Business Law Journal (July 2019), at 59.

4) Act No. 205 of June 10, 1949, as amended.

5) JFBA's Rule No. 70 of Nov. 10, 2004, as amended.

6) Act No. 108 of Dec. 15, 2006, as amended.

7) Act No. 32 of May 13, 1983, as amended.

In addition to navigating the legal framework, funded parties in commercial arbitration cases administered by the Japan Commercial Arbitration Association ("**JCAA**") should safeguard the integrity and confidentiality of the arbitration process by ensuring compliance with arbitrator disclosures and confidentiality obligations.

This article explores the growing potential of third-party funding in commercial arbitration in Japan. Section II provides an overview of third-party funding of a commercial arbitration dispute in return for a share of the award, contingent upon its successful outcome,[9] including frequently asked questions about it, its procedural flow, and the typical terms of a third-party funding agreement. Section III then examines the current legal framework governing third-party funding in Japan, focusing on key Japanese laws and regulations that are relevant to determining its legality, including their underlying regulatory objectives and practical considerations for compliance. Thereafter, Section IV examines the potential treatment of arbitrator disclosures, confidentiality, and privilege under the rules of the JCAA in cases involving third-party funding and compares these approaches with those of other leading arbitral institutions. Section V ends with some key takeaways and concluding thoughts.

Ⅱ. An Overview of Third-Party Funding

A. What is Third-Party Funding?

Third-party funding is a rapidly growing multibillion industry.[10] It has been broadly defined as an *"arrangement, whereby a third party, which has no other link to a dispute, provides the funding [or resources]*[11] *for some or all of a party's litigation costs in return for a share of the proceeds in case of success."*[12]

More comprehensively, a third-party funder was recently defined in Rule 2.1 of the Arbitration Rules (2025) of the Singapore International Arbitration Centre ("**SIAC**") (the "**SIAC Rules**") as *"any*

8) A prominent use of third-party funding in Japan involved the case filed against Olympus Corporation by a group of more than 60 investors that was syndicated by Deminor. The investors sought damages for the substantial losses (i.e., loss of half of the share price) incurred after accounting irregularities at the said company were announced in 2011. In 2016, Deminor's clients reached an in-court settlement before the Tokyo District Court to recover 45% of their losses. *See Olympus*, Deminor at https://www.deminor.com/en/case/investment-recovery/olympus (accessed on June 25, 2025). There has also been at least one example of third-party funding of commercial litigation in the Japanese courts. According to Omni Bridgeway, it funded a party to a joint venture dispute in the District Court of Kyoto.

9) Other types of litigation funding not covered by this article include loans made directly to plaintiffs' law firms, and consumer legal funding, such as nonrecourse loans as seen in the United States (Ronen Avraham and Abraham L. Wickelgren, *Third-Party Litigation Funding with Informative Signals: Equilibrium Characterization and the Effects of Admissibility*, The Journal of Law and Economics 61 (2018), at 638).

10) In 2020, about USD 17 billion was invested in litigation funding globally, with about half of it directed to the United States. The third-party funding market is projected to reach USD 30 billion by 2028. (Jeff Dunsavage, *Reining in Third-Party Litigation Funding Gains Traction Nationwide*, The Triple-I Blog, Insurance Information Institute, April 11, 2025).

11) ICCA-Queen Mary Task Force Report, at 1. The report established the four ICCA-Queen Mary Task Force Principles on Third-Party Funding on disclosure and conflicts of interest, privilege and professional secrecy, allocation of costs in the final award, and security for costs.

person, either legal or natural, who is not a party to the arbitration proceedings but who has a Direct Economic Interest in the outcome of the arbitration proceedings," with "Direct Economic Interest" *referring to "an interest in the arbitration proceedings resulting from the provision by a third-party funder to (i) a party in the arbitration proceedings, (ii) an affiliate of that party or (iii) a law firm representing that party, of funding for, or indemnity against the award to be rendered in the arbitration proceedings, either individually or as part of a specific range of cases where such provision of support or financing is provided in exchange for either remuneration or reimbursement that is wholly or partially dependent on the outcome of the arbitration proceedings."*[13] This definition covers a broad range of direct and indirect third-party funding arrangements, however, this article focuses on the fundamental model—the direct funding of a party's own case.

Third-party funding is also increasingly being viewed in a positive light. From a social standpoint, it has been seen as a valuable tool to increase access to justice by enabling parties who lack sufficient financial means to pursue their legitimate claims.[14] From a business perspective, it offers a practical solution for corporate parties who are seeking ways to manage risk, cut down their legal budgets, move the cost of arbitration off their balance sheets, or allocate their resources to other business priorities instead of an arbitration case.[15]

B. Basic FAQs About Third-Party Funding

Below are answers to some frequently asked questions about the third-party funding of commercial claims:

Question	Answer
Who are the funders?	Individual or corporate investors[16]
Who is funded?	The funded party is usually the claimant[17]—directly or indirectly (e.g., through an affiliate or law firm)—and more rarely, the respondent[18] typically with a counterclaim or an adverse costs award.

12) Adrian Cordina, *Is It All That Fishy? A Critical Review of the Concerns Surrounding Third Party Litigation in Europe*, 14 Erasmus L. Rev. 270 (2021). Third-party funding has also been defined as *"support or financing [that] is provided through a donation, or grant, or in exchange for remuneration or reimbursement wholly or partially dependent on the outcome of the dispute."* (emphasis supplied) (ICCA-Queen Mary Task Force Principles on Third-Party Funding, art. A.3.) This article does not cover third-party funding on a gratis basis.

13) SIAC Rules, Rule 2.1.

14) Cheng-Yee Khong, *Monetizing Legal Assets: Social and Economic Benefits of Third-Party Dispute Finance in Asia*, Asian Journal of Law and Society, Cambridge, Vol. 10, Issue 2 (June 2023), at 204. The author noted these reasons for funding: (a) substantial up-front payments of arbitral institutions for institutional and arbitrator fees; (b) to *"level the playing field"* vis-à-vis an opponent with more resources; and (c) to *"manage internal legal budgets whilst pursuing claims and asserting market positions"* (*Id*., at 205).

15) ICCA-Queen Mary Task Force Report, at 20.

16) This article does not cover "not-for-profit funders" who are not motivated by profit but instead aim to obtain a certain outcome in the case or a change in the law (*Id*., at 109).

17) *Id*., at 18 and 20.

18) For a discussion of respondent-side funding, *see* ICCA-Queen Mary Task Force Report, at 23-24.

When can a case be funded?	According to funders such as Deminor and Omni Bridgeway, funding can occur at any stage of a case, such as at the start to cover filing fees and any security bond for urgent emergency measures; in the middle of the proceedings when a party is running out of funds to continue pursuing its claim(s); or after a favorable award is secured but further costs need to be covered to enforce the same.
What cases are funded?	Individual money claims, or a portfolio of money claims
Who deals with the funder?	Client or counsel[19] thereof
What costs can be funded?	Some or all of the party's attorney's fees, expert fees, arbitrator fees, arbitral institution fees (administrative costs), discovery-related fees, security for costs and adverse costs the funded party is ordered to pay; and other agreed expenses, including for appeals or enforcement actions.[20]
How much is the fund amount?	According to Deminor, the industry standard follows the 1:10 ratio between the entire legal budget and the estimated amount of damages. For example, if the claim is USD 30 million, then the funder could, in principle, be willing to fund the legal action for an amount of up to USD 3 million.[21]
What is the nature of the funder's right to repayment?	Conditional (i.e., contingent on a future event—a judgment (or award) or settlement *and* recovery[22] thereon);[23] and secured but on a non-recourse basis (i.e., the funder does not have any recourse against the funded party if the case it not successful).[24]
How much can the funder recover?	An agreed portion of the proceeds, which refers to any amount obtained from the successful resolution of the claim, including through an award or settlement.[25] According to Deminor, it can be a percentage of the damages recovered (e.g., 25%) and/or a multiple of the invested amount—generally, whichever is higher. Omni Bridgeway added that the applicable multiple or percentage will typically increase over time. The understanding is that the funder will only get paid once the proceeds are actually received by the funded party.

19) To avoid a conflict of interest, Omni Bridgeway suggested that separate counsel be engaged to give independent advice on the funding agreement.

20) Khong, at 206; and ICCA-Queen Mary Task Force Report, at 20.

21) Omni Bridgeway uses the same general principle to guide the upper limits of their investment amounts.

22) The practice of funders like Deminor and Omni Bridgeway is that their return is only due on recovery, rather than being conditional on an award or judgment. In the latter situation, a funded party may find that it has to pay out of pocket if it "wins" the proceedings but cannot recover its claims. Funded parties should thus pay careful attention to the terms being offered and should only agree to the latter situation after due consideration.

C. Procedural Flow of Third-Party Funding

When considering third-party funding, a party needs to understand the basic process involved. We have outlined below the general procedural flow of the third-party funding process from the initial application for funding until recovery of the funds invested by the funder:

(a) Execution of a Non-Disclosure Agreement ("NDA"). The funder typically signs a confidentiality agreement or an NDA with the potential funded party (usually the prospective claimant) before entering into negotiations for a formal funding agreement. The NDA can protect communications and minimize the risk of the potential funded party waiving any legal privilege applicable to the information to be disclosed[26] as discussed further below.

Parties can also restrict the use of any information disclosed to mitigate any concern that such information might be used by the funder for another funded matter for another client, potentially creating a conflict of interest with the original client.[27]

(b) Funding Application, Term Sheet, and Due Diligence by the Funder. The party applying for funding provides the funder with initial case information and materials, which generally include an outline of the dispute, the parties involved, the nature and amount of the claim, available evidence, potential legal issues, potential defenses, any legal opinion, and the amount of funding applied for (i.e., the amount needed to cover the likely costs of the arbitration).[28] Some of these materials are confidential or constitute privileged information. A term sheet would typically follow.[29] The funder would then conduct its own due diligence (using in-house staff or external counsel) to evaluate whether the case is suitable for funding (investment) as discussed further below. During this stage, the funder may obtain a second opinion from outside counsel.[30]

Confidential and privileged information will have to be disclosed to obtain third-party funding and then maintain it. However, sharing such information with a third-party funder could result in a waiver of confidentiality or any applicable privilege.[31] That said, privilege should not be considered lost solely on account of the disclosure of information for legitimate funding purposes.[32]

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23) William J. Harrington, *Champerty, Usury, and Third-Party Litigation Funding*, The Brief; Chicago, American Bar Association, Vol. 49, No. 2 (Winter 2020), at 57 and 61. The author explained that if the funder's right to repayment is absolute, then the agreement would be a loan, but if it is contingent on a future event, then it would be something else, such as an investment.

24) ICCA-Queen Mary Task Force Report, at 18. The funder may have a security interest in the proceeds but may not recover costs from other assets of the funded party (Harrington, at 56). The funder can recover its costs and gain a return on its investment only if recovery is successful (Khong, at 206).

25) Khong, at 206.

26) ICCA-Queen Mary Task Force Report, at 29.

27) *Id*., at 118.

28) Khong, at 206.

29) Omni Bridgeway would conduct a full due diligence on a case only after agreeing on the commercial terms of the funding to avoid unnecessary costs and delay in case a deal is not reached in the end.

30) Khong, at 206; and ICCA-Queen Mary Task Force Report, at 31.

31) ICCA-Queen Mary Task Force Report, at 117.

32) *See* ICCA-Queen Mary Task Force Principles on Third-Party Funding, art. B.3.

(c) Decision-Making and the Funder's Investment Criteria. Only a few cases actually receive approval for funding.[33] The evaluation process is notoriously rigorous and is a crucial component of the funding process. As has been observed, *"funders have substantial sunk costs of developing the relevant expertise and evaluating a case before making a funding offer."*[34] Notably, apart from the due diligence described earlier, according to Deminor, funders consider the motivations of the party seeking funding and its willingness, in principle, to agree to settle a case and for what amount. Funders like Deminor and Omni Bridgeway will also seek to verify the status and location of the counterparty's assets using their enforcement network and/or available search platforms. In the case of Omni Bridgeway, it also has an in-house asset tracing and intelligence team for this purpose.

The decision by the funder to fund an arbitration case is an investment decision, typically requiring the approval of its board or investment committee.[35] In general, the investment criteria can be summarized as follows: (a) cases with a good degree of certainty (prospect of success) based on its legal merits (considering the weight of any supporting evidence and the clarity of points of law); (b) the *"'economics' of the investment,"* i.e., whether *"the estimated costs and risks of pursuing the claim are not disproportionate to the estimated monetary value of the claim or likely recovery"*; and (c) cases with a high prospect of recoverability of damages (e.g., enforcement of the award).[36] Other relevant factors of evaluation include jurisdictional issues, the nature and expected length of the proceedings, settlement possibilities, creditworthiness of the parties in light of collection prospects, the counsel selected and its fee structure (including any assumption of risk by way of contingency fees or caps), and any additional obligations of the funded party in respect of the potential recovery (e.g., prior funding agreements or any other alliance).[37] Conservative funders will also adhere to their internal investment policy and ethical requirements, consider reputational risks, and set funding commitments based on known risks and review them throughout the lifetime of the case.[38]

In terms of the economics of their investment, funders usually want the combined costs of funding (i.e., return of the capital and success fee, any contingent insurance premium payable and any contingent legal fees of counsel) to be less than half of the amount of the total recovery. This would result in the funded party gaining a substantial share of the recovery money. Thus, typically, the minimum ratio is 1:10 between the funding request and a realistic claim value even if recovery is estimated to be about four times the amount invested, enough to cover the return of the funder's capital plus a "three-fold return" of the amount invested. To illustrate this, if a funder invests USD 1 and the funded party recovers USD 10, the funder will recover its USD 1 plus a three-fold return, and the funded party will get the remaining

33) For example, out of 1,500 requests for capital, Burford Capital only funded 60 in 2017 (Harrington, at 59). Rejection rates are estimated at 90% or higher (ICCA-Queen Mary Task Force Report, at 25).

34) Avraham and Wickelgren, at 645.

35) ICCA-Queen Mary Task Force Report, at 25.

36) Khong, at 207.

37) ICCA-Queen Mary Task Force Report, at 25 and 27.

38) Olivier Marquais and Alain Grec, *Do's and Dont's of Regulating Third-Party Litigation Funding: Singapore vs. France*, 16 Asian Int'l Arb. J. (2020), at 54.

60% (i.e., USD 6). In reality, however, the funder will likely receive less than a three-fold return. This explains why funders like cases with a very high and realistic claim value and a high ratio between the legal budget and the amount of the claim.[39)]

(d) Execution of the Funding Agreement. If the funder decides to provide funding, a formal funding agreement is executed with the funded party to set out the funding details, such as the budget for the arbitration costs, the amount of funding to be provided, the method of disbursement of funds, the distribution of any proceeds recovered, reporting obligations to the funder, conditions for early termination, and other pertinent terms as will be further discussed later herein. In light of Japanese regulations, it is also customary to expressly state that the funder will not interfere with strategy or settlement decisions. The funded party should always maintain control of the case.

(e) Funding and Pursuit of the Arbitration Case. Once the funding agreement is executed, the funder provides the necessary funds to cover the agreed arbitration expenses (e.g., the funded party's attorney's fees, evidence-gathering costs, arbitration fees, and any expert witness fees). The funded party then pursues the arbitration case. The funder typically receives periodic reports at critical junctures (such as settlement negotiations) but maintains a passive role and avoids any involvement in legal decision-making. This non-interference is essential under Japanese law.

(f) Recovery of Funds and Returns. If the funded party prevails and the other party pays the settlement amount or award, the funder will recover its agreed share of the proceeds in accordance with the payment order or priority in the funding agreement (also known as the "waterfall agreement"[40)]). In the case of an award, if the other party does not pay voluntarily, the funded party may need to enforce the award, and the funder will then receive its portion from any enforcement proceeds (according to Deminor, the funder may assist by leveraging its global network to help locate the other party's assets, or in the case of Omni Bridgeway, deploy its in-house enforcement team). It is also market practice that the funder's return is distributed only after the funded party has successfully recovered money from the other party. This too is essential under Japanese law.

D. Typical Terms of a Third-Party Funding Agreement

Funded parties and their counsel must understand the different aspects of a third-party funding agreement, including the scope and extent of the funding commitment (e.g., up to the end of the proceedings or until enforcement, and whether the funding will be up to a specific amount or for a part or milestone in the arbitration[41)]), structure of the investment return, the parties' rights and obligations, and termination rights.[42)]

A typical third-party funding agreement will describe the claim(s) being pursued by the funded party and the manner of funding legal and other professional expenses on a

39) *See* ICCA-Queen Mary Task Force Report, at 25-26.
40) *Id*., at 27.
41) *Id*., at 191.
42) *Id*., at 31.

"non-recourse basis." Other terms may include exclusivity, a funding cap, the funding request procedure and requirements, the budget plan for legal expenses to be paid, excluding any counterclaim filed against the funded party, the handling of additional expenses and whether other funders can be permitted, use of the funds, distribution and allocation of the proceeds of a case (from an award or settlement), payment priority of the funder, the parties' duties, representations, warranties and/or covenants, including reporting obligations, confidentiality, the term, termination provisions, grant of a security interest in the claim, the legal proceedings and the proceeds to secure the payment and performance of the funded party's obligations in favor of the funder, indemnity provisions, the governing law, and dispute resolution provisions (e.g., binding independent expert opinion, negotiation and/or arbitration). There can also be provisions about management of conflicts of interest[43] or an agreed minimum settlement amount. Ideally, the funding agreement should also have a clause encouraging the funded party to obtain independent legal advice.[44]

Funders need to control the costs of the proceedings. Thus, in one sample third-party funding agreement, broad consent rights are given to the funder, including on any decision that may reasonably have a material effect on the proceedings, the prospects of success of the claim(s), or the proceeds (including the funder's potential return), such as disposing of, or creating a security interest on, the claim(s), the legal proceedings, or the potential proceeds thereof; stopping the proceedings; pursuing any remedy or additional legal proceedings; settling the claim(s) or proceedings; filing crossclaims or counterclaims; enforcement; security for costs; retaining service providers, including counsel; and additional legal expenses beyond the agreed legal budget. The scope of such consent rights will vary depending on the funder. To ensure budget certainty, funders may also ask for fee caps or an overrun agreement from the legal team. The funding agreement should also identify which party will pay for the fees and costs of related or ancillary claims, including counterclaims, as well as any adverse award of costs.[45]

To monitor their investment, funders typically require progress reports, including significant developments, the right to monitor fees and approve expenses, and direct access to the legal team. On the part of the funded party, for more transparency, the funder can be asked to provide accurate information, particularly about its financial condition and funding commitment.[46]

Lastly, as to termination, it may occur upon mutual agreement of the parties, or unilaterally by either party in the event of material breach of the agreement or insolvency-related circumstances. Additional termination rights may be specified in favor of the funder. Parties may also consider whether termination of the agreement can be precluded at some point in the proceedings.[47] The consequences of termination may include a formula to calculate

43) Khong, at 207.
44) ICCA-Queen Mary Task Force Report, at 191.
45) *Id*., at 26 and 191.
46) *Id*., at 28 and 193.
47) *Id*., at 192.

liquidated damages for breach as well as entitle the funder to a share of the proceeds if a successful outcome occurs after termination. A party should also consider the cost of funding the arbitration (and enforcing the award) if funding ceases.[48)]

E. Know Your Funder: Selection Tips

When a case is suitable for funding, parties may want to shop around for appropriate funding. This will raise the chances of obtaining funding as well as competition in terms of funding offers.[49)]

To find the right funder, parties and their counsel must do their own due diligence. The following are some items to check when evaluating a potential funder: (a) its reputation and track record (number and size of claims funded and their outcomes); (b) the skills, experience and competence of its personnel; (c) its financial capacity to meet its funding obligations and the transparency of its business structure (as a public or private company); and (d) suitability of the funding terms based on the party's circumstances and needs. Other matters to verify include the funder's legal and financial status and capital structure as well as its internal or external code of conduct that governs its professional responsibilities.[50)]

Ⅲ. Regulatory Framework of Third-Party Funding in Japan

Japan is a civil law jurisdiction. Thus, common law doctrines prohibiting maintenance and champerty do not apply.[51)] However, third-party funding agreements involving arbitration disputes in Japan must comply with the following key laws and regulations:

A. Attorneys Act

(a) Prohibition of Unauthorized Legal Practice by Non-Lawyers (Article 72)

Article 72 of the Attorneys Act is the core provision that prohibits non-lawyers from engaging in legal services. It prohibits any person who is not a licensed attorney (or a legal professional corporation) from performing legal services related to litigation or other legal matters—such as giving legal advice on a case based on one's legal expertise,[52)] representing clients, acting as an arbitrator, or facilitating settlements—as a profession for the purpose of

48) *Id*., at 191.

49) *Id*., at 30.

50) Khong, at 208; and ICCA-Queen Mary Task Force Report, at 197. The said report has a due diligence checklist on a third-party funder's legal and financial status and capital structure (at 196).

51) Maintenance is the *"support of litigation by a stranger without just cause."* One form of maintenance is champerty, which is the *"support of litigation by a stranger in return for a share of the proceeds."* (ICCA-Queen Mary Task Force Report, at 186.) In the United States, champerty limitations are being abolished or not applied to third-party litigation funding arrangements in the absence of any *"good public policy argument"* and the borrower is not taken advantage of by the funder. (Avraham and Wickelgren, at 643-644.) *See also* Harrington. According to Deminor, in practice, litigation funding is commonly used in the United States, subject to compliance with certain rules.

52) Research Office of the JFBA, *Article-by-Article Commentary on the Attorneys Act [5th ed.]*, Kobundo (2019), at 653.

obtaining compensation.

As noted above, the funder conducts its own assessment as part of its due diligence process of the case's merits (i.e., the likelihood of its success) and determines the funding amount and recovery method before entering into a funding agreement with the party applying for funding. This means that some legal analysis of the case by the funder (and its local counsel) is inevitably involved in finalizing the agreement. However, the funder does not typically disclose the detailed results of its legal analysis or due diligence to the funded party, aside from informing the party of the amount approved to be funded and the method of distributing any recovery. Accordingly, the funder would not be deemed as giving any legal advice to the funded party.

The term "legal services" in Article 72 of the Attorneys Act is understood to mean activities that create, change, preserve or clarify legal rights or obligations.[53] In the context of third-party funding of an arbitration case, all the arbitration and related legal proceedings are carried out by the actual party thereto. The funder itself does not undertake any of those activities. Therefore, its involvement in a typical third-party funding arrangement is unlikely to constitute unauthorized practice of law.

(b) Prohibition of Monetizing Assigned Rights (Article 73)

Article 73 of the Attorneys Act prohibits any person from engaging in the business of enforcing through litigation or any other means (e.g., arbitration, settlement, or negotiation) rights that have been assigned thereto by another person. In essence, this provision forbids a person from accepting an assignment of someone else's legal claim (regardless of the legal form of the transfer, whether it is done with or without any payment, and whether it is done for profit or not) and then enforcing that claim for their own benefit as a business (e.g., debt collection).[54]

In the context of third-party funding, the claim in dispute is not assigned to the funder; the funded party remains the owner and holder of the claim and pursues the case on its own behalf. Therefore, it is highly unlikely that a standard third-party funding arrangement would violate the prohibition against the business of monetizing assigned claims under Article 73 of the Attorneys Act.

Relatedly, as noted earlier, a third-party funding agreement may provide for a security interest in the claim(s), the legal proceedings and the proceeds to secure the payment and performance of the funded party's obligations to the funder. The mere creation of such security interest would not, in itself, violate Article 73 of the Attorneys Act. However, under Japanese law, the most effective method of perfecting a security interest in a receivable (claim) or award is by way of an assignment for security purposes (*jouto tanpo*), either with notice to the debtor or by registering the assignment. In this regard, it is important that the arrangement is clearly documented as being for security purposes only and not structured in a manner that could be seen as an acquisition of the claim(s) in the ordinary course of business, which could raise concerns under Article 73. To mitigate any legal risk, the

53) *Id*., at 654.

54) *Id*., at 679.

documentation should expressly state that the funder has no interest in pursuing or controlling the legal action, and that the arrangement does not aim to promote unnecessary litigation, which is the type of conduct that Article 73 seeks to prevent.

B. Basic Rules on the Duties of Practicing Attorneys

The Basic Rules on the Duties of Practicing Attorneys were established by the Japan Federation of Bar Associations ("**JFBA**") to prescribe the ethical standards of the legal profession. Although not legally binding, they function as a self-regulatory code and are effectively binding in practice because violations can result in disciplinary actions on lawyers.

Lawyers will continue to play a major role in the growth of third-party funding in arbitration in Japan. Thus, they should bear in mind the above rules when introducing third-party funding to their clients or working with them on cases. In this regard, the most relevant provisions of the said rules are those concerning the sharing of fees and their duty of loyalty to their client's wishes as further discussed below.

(a) No Sharing of Fees with Non-Lawyers (Article 12)

Article 12 of the Basic Rules on the Duties of Practicing Attorneys prohibits an attorney from sharing any remuneration (attorney's fees) with non-lawyers. This rule is meant to prevent improper business arrangements or partnerships between lawyers and non-lawyers (often referred to as "non-lawyer partnerships").

In practice, third-party funding agreements usually include provisions on how any recovery from the case will be distributed among the funder, the lawyers, and other service providers, with the residual amount going to the funded party (the waterfall agreement). Typically, the funder's return is structured to be separate from the attorney's fees. Such an arrangement would not be viewed as a lawyer splitting the legal fees with the funder, and therefore, it would likely not constitute a breach of Article 12.

(b) Duty of Loyalty to the Client (Article 22(1))

Article 22(1) of the Basic Rules on Duties of Practicing Attorneys underscores the duty of loyalty of lawyers by requiring them to respect their client's wishes in the course of their legal representation. In the context of third-party funding, since the funder finances the legal expenses, there may be some concern that the lawyer might be influenced to prioritize the funder's interests over the client's wishes. However, standard third-party funding agreements address or mitigate this concern by clearly stipulating that the client retains control over key decisions, including strategy and settlement, and that the funder will not interfere or provide input on those matters. Most third-party funding agreements have been structured to ensure that the funder does not have control over the case or the funded party.[55] According to Deminor, funders also generally understand and accept that a client's counsel owes no

55) ICCA-Queen Mary Task Force Report, at 28. Although some third-party funding agreements allow or require the funder's active participation, others limit their role to updates and limited chances for intervention. The extent of control may depend on the funder's internal practices and protocols, the nature of the case, the funder's professional relationship with the funded party and the legal team, the financial terms of the funding, and the funding terms that expressly authorize or limit certain forms of control. (*Id*., at 48 and 75.)

fiduciary duty towards them. Thus, a typical third-party funding arrangement, as commonly structured, would not in itself constitute a breach of Article 22(1) of the Basic Rules on Duties of Practicing Attorneys.

That said, because the funder stands to gain from a successful outcome under the funding agreement, it could still attempt to exert influence or pressure the lawyer handling the case. Any excessive pressure or intervention by the funder could undermine the lawyer's independent judgment and ethical obligations. It is thus crucial for funders to refrain from overstepping their role and to respect the lawyer's independence in representing the client.

Legal counsel should be particularly careful around matters where the interests of the funded party and the funder may differ, such as settlement offers, budget overruns, changes in legal representation, or weakening in the merits of the case.[56] Thus, as a best practice, the third-party funding agreement should be kept between the funded party and the third-party funder to prevent any possible attorney conflict of interest that could arise from a disagreement on a material issue during the arbitration.[57] Third-party funding agreements are also recommended to clearly delineate the duties owed by counsel to the funded party, and if any, the funder.[58] In any event, counsel should always be loyal to the funded party's wishes.

C. Trust Act

A trust is a legal arrangement where certain property is entrusted to a trustee, who manages or disposes of it for a specified purpose (*see*, *e.g.*, Articles 2(1) and 3 of the Trust Act). Notably, Article 10 of the Trust Act prohibits the creation of a litigation trust whose primary purpose is the pursuit of litigation (or arbitration).

In a typical third-party funding arrangement (as discussed above in connection with the Attorney's Act), the funded party retains ownership of the legal claim and the right to sue thereon. Thus, no trust relationship is established, and the funder does not act as a trustee of the claim. Therefore, a typical third-party funding arrangement would not constitute a "litigation trust" under the Trust Act.

D. Money Lending Business Act

The Money Lending Business Act imposes registration requirements and interest rate caps on entities regularly engaged in money lending. However, most third-party funding arrangements are structured as non-recourse investments, meaning that if the funded party loses the case, the funder cannot demand repayment of the funds provided. The funder's return is limited to an agreed percentage of the recovery only if the case is successful, otherwise, the funded party has no obligation to repay any principal or pay interest. In the absence of an unconditional obligation to pay back the creditor, third-party funding is generally not considered as a "loan" for purposes of the Money Lending Business Act. Consequently,

56) *Id*., at 29-30.

57) *Id*., at 191.

58) *Id*., at 30.

statutory interest rate caps that aim to prohibit usurious lending practices do not apply to the payment to the funder of a certain percentage of the proceeds recovered, given that such payment is contingent upon a successful outcome of the arbitration.[59)]

Ⅳ. Arbitrator Disclosures and Confidentiality under the JCAA's Rules and Other Institutional Rules

Ideally, *"[t]he arbitration community must find a way to balance the increasing business need for innovative approaches to the financing of legal matters while protecting the integrity of the arbitral process and the ultimate enforceability of awards."*[60)] The JCAA can help achieve this objective by addressing third-party funding in the conduct of arbitration proceedings even under its current rules.

A. Disclosure of Third-Party Funding in Aid of Arbitrator Disclosures to Avoid Conflict of Interest

One central feature of arbitration is having a neutral decision-maker. Thus, arbitrators must always be impartial and independent of the parties.[61)] They have an affirmative duty to investigate potential conflicts of interest.[62)] An arbitrator must make reasonable enquiries to identify any conflict of interest as well as facts or circumstances that may reasonably give rise to doubts as to his or her impartiality or independence. Lack of knowledge would not excuse a failure to disclose a conflict if reasonable enquiries are not made.[63)] In *Prem Warehouse LLC v. Sanyo Electric Co Ltd.*,[64)] the Supreme Court of Japan affirmed the ongoing nature of an arbitrator's duty to actively investigate potential conflicts of interest, otherwise, an award may be set aside.

Concerns about potential arbitrator conflicts of interest have grown due to several factors such as the professional involvement of leading arbitrators as board members or advisors of funders, the increase in third-party funded cases, the niche nature of the industry of funders of international arbitration cases, the "symbiotic relationship" between funders and several law firms, and links between top law firms and some arbitrators.[65)] Arbitrator disclosures are meant to alleviate these concerns and *"avoid potential challenges to an arbitral award and to preserve the overall integrity of international arbitration."*[66)]

59) In the United States, the doctrine of usury (i.e., "*when a lender takes more compensation—usually in the form of interest—in exchange for a loan than is legal*") was used to challenge third-party financing arrangements. However, because of their contingent nature, such arrangements cannot be considered loans. (Avraham and Wickelgren, at 644.)

60) ICCA-Queen Mary Task Force Report, at 17.

61) IBA Guidelines on Conflicts of Interest in International Arbitration (2024) (the "**IBA Guidelines on Conflicts of Interest**"), General Standard 1.

62) ICCA-Queen Mary Task Force Report, at 87.

63) IBA Guidelines on Conflicts of Interest, General Standard 7(d).

64) Supreme Court of Japan, Dec. 12, 2017, 2106 Minshū (Saikou Saiban Sho Minji Hanreishu) Vol. 71, No. 10.

65) ICCA-Queen Mary Task Force Report, at 82 and 84.

66) *Id*., at 82.

To enable an arbitrator to assess and make the required disclosures of potential conflicts of interest, knowledge of the existence and identity of a third-party funder is necessary,[67] and should be sufficient. There is no need to disclose the details or terms of the funding arrangement.[68] According to well-regarded funders like Deminor and Omni Bridgeway, established funders have no problem when it comes to the disclosure of their involvement in a case and in fact welcome it as a means to avoid any unwarranted attack on any future award.

Other arbitral institutions have already imposed third-party funding disclosure obligations on funded parties at the earliest opportunity and throughout the proceedings to aid arbitrator disclosures. In Japan, however, the JCAA has yet to adopt similar rules concerning third-party funding in arbitration. Thus, at present, potential or sitting arbitrators bear the burden of ensuring that no conflict of interest exists in respect of any third-party funding arrangement, or that there are no justifiable doubts about their impartiality or independence.

Article 24 of both the Commercial Arbitration Rules and Interactive Arbitration Rules of the JCAA requires arbitrator candidates 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 for appointed arbitrators to submit a written undertaking to disclose any such circumstances or declare that no such circumstances exist. An arbitrator has an ongoing duty to make a reasonable investigation into any such circumstances that may affect his or her impartiality or independence, and must promptly disclose such circumstances, except as already disclosed. This disclosure duty cannot be discharged by an advance declaration by the arbitrator of circumstances that might arise in the future (an advance waiver). To ensure effective compliance with these disclosure obligations, an arbitrator candidate or an appointed arbitrator should proactively check with the parties about the existence and identity of any third-party funder. In administering the arbitral proceedings,[69] the JCAA can also invite the parties to disclose such third-party funding information. These actions can be made in other proceedings involving a single arbitration for multiple claims, third-party joinders, consolidations, and emergency arbitrator appointments.

In evaluating relationships with the parties, the IBA Guidelines on Conflicts of Interest provide that *"[a]ny legal entity or natural person having a controlling influence on a party, or a direct economic interest in, or a duty to indemnify a party for the award to be rendered in the arbitration, may be considered to bear the identity of such party."*[70] Third-party funders fall within this category.[71] Reference to the said guidelines—including the color-coded waivable and non-waivable lists—can be helpful, though not necessarily determinative.

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67) *Id*. There should be a balance between the disclosure of information to assess potential conflicts of interest and minimizing unnecessary delay, frivolous arbitrator challenges, or baseless disclosure requests for financial information and funding agreements, or security for costs (*Id*., at 83 and 86).

68) *Id*., at 189.

69) Commercial Arbitration Rules and Interactive Arbitration Rules, art. 8.1.

70) IBA Guidelines on Conflicts of Interest, General Standard 6(b), at 11.

71) ICCA-Queen Mary Task Force Report, at 11.

In contrast, other leading arbitral institutions have specific provisions that aid potential and sitting arbitrators in performing their disclosure obligations. For example, the SIAC has robust provisions on third-party funding in its amended SIAC Rules of 2025. Rules 6.3(h) and 7.1(g) require at the outset that the notice of arbitration and response thereto already disclose the existence of any third-party funding agreement as well as the identity and contact details of the third-party funder, or if concluded later, as soon as practicable upon concluding the third-party funding agreement.[72] Similar disclosures are required for consolidations, joinders, and emergency arbitrator appointments.[73] The funded party must also, as soon as practicable, notify the Tribunal, the parties and the SIAC Registrar of changes to the third-party funding agreement disclosed in respect of prior disclosures.[74] (This type of follow-up reporting can also be adopted and ordered by the Tribunal in a JCAA-administered case.)

The Hong Kong International Arbitration Centre ("**HKIAC**") Administered Arbitration Rules (2024) (the "**HKIAC Rules**") have similar third-party disclosure provisions. Under Article 44, if a funding agreement is concluded, the funded party must notify all the other parties, the Tribunal, any emergency arbitrator and the HKIAC of such fact and the identity of the funder. If the funding agreement is made on or before the commencement of the arbitration, the notice must be given at the time of the application for the appointment of an emergency arbitrator, the notice of arbitration, the answer, the request for joinder, or the answer thereto, as applicable, otherwise, it should be given as soon as practicable after the conclusion of the funding agreement. Changes to the information disclosed must also be reported by the funded party.

Similarly, Article 11(7) of the Arbitration Rules (2021) of the International Chamber of Commerce ("**ICC**") (the "**ICC Rules**") requires each party to promptly inform the ICC Secretariat, the Tribunal and the other parties of the existence and identity of any third-party funder that has entered into a funding arrangement with such party and has an economic interest in the outcome of the arbitration. According to the ICC, subject to any contrary determination by the Tribunal, Article 11(7) would normally exclude: (a) inter-company funding within a group of companies, (b) fee arrangements between a party and its counsel, or (c) an indirect interest, such as that of a bank that granted an ordinary business loan to a party not specifically meant to fund the arbitration.[75]

Based on the foregoing, the disclosure obligation of the funded party about any third-party funding arrangement is triggered at the outset of the proceedings or as soon as practicable if funding occurs in the course of the proceedings.[76] Such third-party disclosures can also be voluntarily made in JCAA-administered cases to prevent any potential conflict of interest.

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72) SIAC Rules, Rule 38.1.

73) *Id*., Rules 16.2(e) and 18.2(f), and Schedule 1 (Emergency Arbitrator Procedure), para. 3(i).

74) *Id*., Rule 38.2.

75) Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration dated Jan. 1, 2021, para. 21.

76) The early disclosure of funding costs may also support an award of such funding costs to the funded party (ICCA-Queen Mary Task Force Report, at 159).

Interestingly, to further prevent arbitrator conflicts of interest, under Rule 38.3 of the SIAC Rules, parties are prohibited from entering into any third-party funding agreement *after* the constitution of the Tribunal if it could give rise to a conflict of interest with any of the Tribunal members. In such cases, the Tribunal can even order the party to withdraw from the third-party funding agreement. This rule may have been meant to prevent the strategic use of third-party funding to disqualify an arbitrator.

Further disclosures may be needed. Under the SIAC Rules, the Tribunal can order additional disclosure regarding a third-party funding agreement, including details of the funder's interest in the outcome of the proceedings and its commitment to pay adverse costs, as well as take into account any such agreement in apportioning costs.[77] The Tribunal can also take appropriate measures, including issuing an order or award for sanctions, damages or costs for noncompliance with any obligation or order for disclosure.[78] All these powers fall within the broad procedural discretion of the Tribunal in conducting the arbitration proceedings.

Further disclosures, however, must be handled with care. Ordering the disclosure of the funding terms should be limited to exceptional circumstances[79] because they may include legally privileged information.[80] Appropriate measures should also be taken by the Tribunal (e.g., redaction and use for a limited purpose).[81]

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77) The disclosure and existence of a third-party funding agreement will not, on its own, be indicative of a party's financial status (SIAC Rules, Rule 38.5). A party should also not be denied recovery of costs on the basis of being funded by a third-party funder (ICCA-Queen Mary Task Force Principles on Third-Party Funding, art. C.1). While a detailed discussion is beyond the scope of this article, notably, recent arbitral awards—particularly in Singapore and the UK—have begun to recognize and award third-party funding costs to successful funded parties under certain circumstances (*see* Iulia Anghelescu, *LIDW 2024: Shifting Attitudes Towards Third Party Funding – Views From Across the Globe*, Kluwer Arbitration Blog, June 8, 2024, at https://arbitrationblog.kluwerarbitration.com/2024/06/08/lidw-2024-shifting-attitudes-towards-third-party-funding-views-from-across-the-globe/ (accessed on July 14, 2025)). However, this issue is not yet settled in Japan, where more practical experience is needed to assess the enforceability of such awards in Japan. In this regard, the following conditions may be considered: (a) that the Tribunal has the power to award funding costs under the applicable rules and laws; (b) that the amount of recoverable funding costs is reasonable under the circumstances; and (c) that the details of the funding costs that the funded party will have to incur if it is successful in the arbitration were disclosed at the outset or an early stage of the arbitration (ICCA-Queen Mary Task Force Report, at 158-159).

78) SIAC Rules, Rules 38.4, 38.6 and 38.7.

79) For example, an order for disclosure was deemed appropriate in one case based on these factors: (a) to avoid a conflict of interest for the arbitrator due to the third-party funder; (b) for transparency and to identify the *true* party to the case; (c) to enable the Tribunal to decide fairly how costs should be allocated at the end of any arbitration; (d) in case of an application for security for costs if requested; and (e) to ensure that confidential information is not disclosed to *"parties with ulterior motives."* (ICCA-Queen Mary Task Force Report, at 107 citing *Muhammet Cap & Sehil Insaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan* (ICSID Case No. ARB/12/6), Decision on Jurisdiction (Feb. 13, 2015) para. 50 (quoting Procedural Order No. 2).)

80) ICCA-Queen Mary Task Force Principles on Third-Party Funding, art. B.2.

81) *Id*., art. B.4.

B. Considerations of Confidentiality and Privilege when Third-Party Funders are Involved

Another key attraction of arbitration is confidentiality. Arbitral institutions have varying degrees of confidentiality rules, which can be supplemented by agreements of the parties or confidentiality protective orders of the Tribunal. As to privilege, which can vary between civil law and common law jurisdictions,[82] it becomes relevant during document production or disclosure or other document production orders.

First, let's look at confidentiality. Article 42 of both the Commercial Arbitration Rules and Interactive Arbitration Rules of the JCAA provides for automatic confidentiality of the arbitration proceedings and the records thereof, and prohibits arbitrators, the parties, their counsel and assistants, the JCAA's officers and other staff, and other persons involved in the arbitral proceedings from either disclosing facts related to or learned through the arbitral proceedings or expressing views as to such facts, except for permitted disclosures (i.e., where disclosure is required by law or in court proceedings, or for other justifiable grounds).[83] Given their passive role, it is difficult to consider third-party funders as being *"involved in the arbitral proceedings,"* and hence, within the scope of this provision. The better interpretation is that they are not covered by the said provision. Thus, for purposes of maintaining the confidentiality of the proceedings, if funding is secured before the commencement of an arbitration, then a confidentiality undertaking should be put in place by the Tribunal at the earliest opportunity to extend the provisions of Article 42 to a third-party funder. If, on the other hand, such funding is sought or obtained *after* an arbitration case has commenced and the Tribunal has been constituted, then permission to disclose details of the arbitration case to a potential funder should be first obtained from the Tribunal. Disclosure for the purpose of securing (and maintaining) third-party funding should be deemed justifiable and can be conditioned on a confidentiality undertaking by the third-party funder. As a non-party, the consent of the third-party funder to any confidentiality undertaking must be obtained.

In contrast, the SIAC has already included third-party funders in its confidentiality provisions. Rule 59 of the SIAC Rules also provides for automatic confidentiality obligations on the parties, any party representative, witness or expert, *third-party funder*, the arbitrators, any emergency arbitrator, and any person appointed by a Tribunal, including any Tribunal Secretary and Tribunal-appointed expert, the SIAC Court, the President, the Vice President, the Registrar, and the SIAC Secretariat with respect to all matters relating to the proceedings, unless otherwise agreed or consented to by the parties, or as otherwise provided in the SIAC Rules (e.g., permitted disclosures).[84]

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82) For a discussion of privilege in international arbitration, *see* ICCA-Queen Mary Task Force Report, chap. 5, at 117-143.

83) Commercial Arbitration Rules and Interactive Arbitration Rules, art. 42.2.

84) Permitted disclosures include those made: (a) to apply to any competent court of any jurisdiction to challenge or enforce an award; (b) pursuant to a court order or subpoena; (c) to pursue or enforce a legal right or claim; (d) in compliance with the laws of any jurisdiction that are binding on the disclosing party, or the request or requirement of any regulatory body or other authority; (e) pursuant to an order by the Tribunal on application by a party with proper notice to the parties; or (f) for the purpose of any application under the SIAC Rules (SIAC Rules, Rule 59.3).

As to the HKIAC, it has expressly permitted disclosures to third-party funders. While Article 45 of the HKIAC Rules prohibits the parties, the party representatives, the Tribunal, any emergency arbitrator, expert, witness, Tribunal Secretary and the HKIAC from publishing, disclosing or communicating any information relating to: (a) the arbitration under the arbitration agreement; or (b) an award or emergency decision made in the arbitration, unless otherwise agreed by the parties,[85] certain disclosures by parties and party representatives are permitted, including for third-party funding purposes.[86]

In contrast, the ICC has taken a more hands-off approach. Under its rules, parties are not subject to any automatic confidentiality obligation. But everyone doing the work of the International Court of Arbitration must respect the confidential nature of such work.[87] Nevertheless, Article 22(3) of the ICC Rules permits any party to request the Tribunal to issue confidentiality orders and take measures to protect trade secrets and confidential information. Such orders or measures can cover disclosures to third-party funders.

As to matters of privilege, they are largely left to the broad discretion of the Tribunal,[88] subject to any agreement of the parties.[89] Many arbitral rules give the Tribunal the "final say" concerning matters of admissibility of evidence, including whether to strictly apply evidence rules, such as privilege.[90]

The Commercial Arbitration Rules and Interactive Arbitration Rules of the JCAA do not specifically provide for matters of admissibility of evidence. Nevertheless, in the context of document production, Article 54.4 gives the Tribunal broad discretion to order the production of documents that it deems necessary unless it finds "reasonable grounds" for the party possessing such documents to refuse production. In exercising this discretion, the Tribunal must always treat the parties equally.[91]

In contrast, Rule 32.3 of the SIAC Rules clearly empowers the Tribunal to determine the admissibility of evidence, without being bound to apply the evidence rules of any applicable law. In exercising its procedural discretion, the Tribunal is similarly required to act fairly.[92] The HKIAC has a similar rule concerning admissibility of evidence[93] and ensuring the equal

85) HKIAC Rules, arts. 45.1-45.2.

86) Permitted disclosures include those made: (a) to protect or pursue a party's legal right or interest, or enforce or challenge an award or emergency decision in proceedings before a court or other authority; (b) to any government body, regulatory body, court or tribunal when legally required; (c) to a professional or any other adviser of any party, including any actual or potential witness or expert; or (d) to any party or additional party and confirmed or appointed arbitrator for purposes of Articles 27 (joinder of parties), 28 (consolidation of parties), 29 (single arbitration under multiple contracts) or 30 (concurrent proceedings); or (e) to a person to have or seek third-party funding (HKIAC Rules, art. 45.3).

87) ICC Rules, Appendix I – Statutes of the International Court of Arbitration, art. 8.

88) ICCA-Queen Mary Task Force Report, at 118.

89) *See*, e.g., JCAA's Commercial Arbitration Rules and Interactive Arbitration Rules, art. 5.

90) ICCA-Queen Mary Task Force Report, at 122.

91) JCAA's Commercial Arbitration Rules and Interactive Arbitration Rules, art. 40.2.

92) SIAC Rules, Rule 32.2.

93) *See* HKIAC Rules, arts. 22.2 and 22.3.

94) *Id*., art. 13.1

treatment of the parties in the arbitration procedures.[94] As to the ICC, its rules are silent about admissibility matters, but the Tribunal is given broad procedural discretion to adopt measures it deems appropriate,[95] which can cover such matters.

The IBA Rules on the Taking of Evidence in International Arbitration (2020) (the "**IBA Rules of Evidence**"), which are commonly adopted in international arbitration cases, also offer guidance in determining issues of privilege or confidentiality relating to admissibility of evidence. In particular, the Tribunal may exclude from evidence or production all or part of any document or other communication on account of commercial or technical confidentiality, or special political or institutional sensitivity (including classified government secrets or secrets of a public international institution) for compelling reasons or a legal impediment or privilege under the legal or ethical rules deemed applicable by the Tribunal.[96] Moreover, in considering issues of legal impediment or privilege, to the extent permitted by any applicable mandatory legal or ethical rules, the Tribunal may take into account: (a) any need to protect the confidentiality of a document or other communication made in connection with and for the purpose of providing or obtaining legal advice (advice privilege or attorney-client privilege); (b) any need to protect the confidentiality of a document or other communication made in connection with and for the purpose of settlement negotiations (settlement privilege); (c) the expectations of the parties and their advisors at the time the legal impediment or privilege is said to have arisen; (d) any possible waiver of any applicable legal impediment or privilege due to consent, prior disclosure, affirmative use of the document, communication or advice contained therein, or otherwise; and (e) the need to maintain fairness and equality between the parties, especially if different legal or ethical rules apply to them.[97] As to the matter of waiver of a privilege, as noted earlier, privilege should not be lost on account of a disclosure for funding purposes.[98]

Notably, in Japan, unlike the broad legal privilege recognized in common law jurisdictions, communications between lawyers and their clients are only protected by professional secrecy.[99] Lawyers generally have a duty to keep confidential facts they may have learned in the course of performing their duties.[100] Thus, in an arbitration case involving parties from different legal backgrounds, the Tribunal should consult them about the applicable rules of privilege.

95) ICC Rules, art. 22(3).

96) IBA Rules of Evidence, art. 9.2 (b), (e) and (f).

97) *Id*., art. 9.4.

98) *See* ICCA-Queen Mary Task Force Principles on Third-Party Funding, art. B.3.

99) A lawyer may refuse to testify about any fact learned in the course of his or her duty (Code of Civil Procedure, Act No. 109 of June 26, 1996, as amended, art. 197(1)(ii)).

100) Attorneys Act, art. 23.

V. Conclusion

Third-party funding has the potential of growing in Japan. As discussed, it can and is being offered and implemented under Japan's existing legal framework to parties with claims that are reasonably believed to be meritorious and likely to prevail. Fund-seeking parties and their lawyers should be mindful of the highly competitive funding evaluation process and the commercial terms of the funding. Together with the funder, they should ensure that the terms of any third-party funding agreement and their practices comply with the relevant legal requirements, safeguards and restrictions in Japan. In particular, from the perspective of legal ethics, maintaining a consistently client-focused approach is a prerequisite when pursuing a case funded by a third-party funder.

Recommended measures include clearly defining funders as pure financiers that do not provide legal advice and structuring funding arrangements as solely success-based investments without transferring or assigning the subject claims. Funders should maintain a passive role while their clients actively control the arbitration case. Consequently, there is minimal risk of typical third-party arrangements violating applicable Japanese laws.

Funded parties should also pay attention to potential arbitrator conflicts of interest, confidentiality and privilege matters. These matters can be addressed even under JCAA's current rules for cases administered thereby. However, clearer arbitral rules can better guide parties in cases involving third-party funding to help promote integrity and preserve confidentiality and privilege throughout the arbitration proceedings.

"Reasonable" Costs in Japan-Seated Arbitrations in the light of Macroeconomic Trends

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On 20 June 2023 an international arbitral tribunal[1)] rendered an award in *Elliott Associates, L.P. v The Republic of Korea*. The arbitration arose out of Elliott Associates' investment in Samsung C&T Corporation and its assertion that the Republic of Korea improperly intervened in a shareholder vote, causing damage to shareholders including Elliott Associates. Elliott Associates claimed losses of USD 306.95 million or, alternatively, USD 408.25 million. While the claimed losses are undoubtedly substantial, they are not unusual: between 2014 and 2023 the average claimed damages in similar (investor-state) proceedings was USD 1.1 billion.[2)] Among several more noteworthy elements of the proceedings were, however, the legal cost claims: Elliott Associates sought legal costs of more than USD 58 million (with one of 3 law firms involved having more than USD 1 million in disbursements alone), and the Republic of Korea sought more than USD 10 million[3)] in legal costs. Adding all legal costs, expert fees, disbursements, and arbitral costs together, the parties spent *at least* (and claimed) a total of approximately USD 84 million. In the event, these claimed costs far outstripped the amount of damages awarded by the Tribunal: USD 53,586,931.00.

Prior to rendering its award the tribunal received submissions from the parties on the principles governing the allocation and award of costs. The tribunal proceeded to analyze and recount these submissions in just over 11 pages of the 290 page award. The tribunal examined the applicable arbitral rules and the relevant law (in this case, the investment treaty in question and customary international law), and considered the parties' submissions on the allocation and reasonableness of costs (including allegations about conduct in the arbitration). Importantly, for present purposes, the tribunal held that it *"considers that what qualifies as "reasonable" depends on the circumstances of the case"* and spent a single paragraph (992) applying this conclusion on the law, to the facts. In the tribunal's view, out of USD 38.8

1) Elliott Associates, L.P. (U.S.A) v Republic of Korea, PCA Case No. 2018-51l; the tribunal was composed of (1) a dual American-Argentine Republic national, (2) a Finnish national, and (3) a Canadian national ("Elliott Award").

2) UNCTAD, IIA Issues Note September 2024: Compensation and Damages in Investor-State Dispute Settlement Proceedings at page 4.

3) Composed of USD 5,635,430 and KRW 8,357,531,600 converted to USD as at 1 April 2025.

million incurred by one of the international law firms acting for Elliott Associates, only USD 8.8 million was reasonably incurred. In the end, pursuant to the Tribunal's decisions on reasonableness and the allocation of costs, Elliott Associates was awarded legal costs of USD 28,903,188.90 (being, in the result, more than half of the damages it was also awarded) and the Republic of Korea was awarded USD 3,457,479.87.

While the figures in *Elliott Associates* are eye catching, it is increasingly common to see such disproportion between (i) claimed fees and awarded fees, and between (ii) claimed/awarded fees and the damages awarded. For example, in the tribunal's award of 8 March 2024, in *Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd. v Romania*[4], the Claimants sought their full costs, totaling USD 63,961,210 (with USD 155,291 sought for the costs submissions themselves). The respondent sought approximately (on present exchange rates) USD 18.8 million in costs, giving a total claimed combined cost of USD 82,793,800 (including about USD 2.75 million in institute/tribunal fees). Again, it is entirely possible that in *Gabriel Resources* the parties even claimed lower costs than they actually incurred, in an attempt to increase the perceived reasonableness of the sums claimed. The parties in *Gabriel Resources* agreed (as did the tribunal) that "costs follow the event", meaning that the costs awarded should be determined by the tribunal in light of its conclusions on jurisdiction and on the merits. All of the claimant's claims were dismissed, and in the exercise of its discretion, the tribunal ordered the claimant to pay Romania half of its legal costs and all of its costs of the arbitration (i.e. to the administering institution and tribunal): the arbitration therefore cost the unsuccessful claimant a combined minimum of approximately USD 75.5 million in incurred and ordered costs.

Ⅰ. General Approach to Costs in International Arbitration

In many international commercial (and investor-state) arbitrations, arbitrators apply the "costs follow the event" concept. This allows the successful litigant to seek recovery from the losing party of their costs, including the fees paid for arbitrators to any relevant administering institution, for expert witnesses and other disbursements like hearing venues, and importantly – as they are generally the largest portion of any party's costs – attorney's fees.[5] Some arbitrations also see parties seek the recovery of the time spent by in-house counsel and management in connection with the dispute, and often in connection with the production of documents pursuant to any disclosure orders.

This differs from the normal rule in Japanese litigation (and in many civil law jurisdictions) whereby parties each bear their own attorney's fees in litigation. In contractual claims, for example, the successful litigant is generally entitled to only recover limited expenses from the losing party including court filing fees, expert remuneration, and certain other disbursements.

4) ICSID Case No. ARB/15/31.

5) Survey data available from *inter alia* the Queen Mary International Arbitration survey 2015 describes “cost” as the “worst characteristic of international arbitration” and the same survey in 2018 described it as “arbitration’s worst feature”. It is fair to say that such views are driven in part by attorney’s fees.

The largest part of most litigant's fees, those of a party's attorneys, are generally not recovered. Similarly, pursuant to Japan's Arbitration Act (Act No. 138 of August 1, 2003, revised in 2023), if the parties to an arbitration have not reached agreement on the bearing of expenses, then (pursuant to Article 52(2)) each party is to bear their own expenses paid in relation to the arbitration. If the parties *have* reached an agreement, then pursuant to the agreement (and Article 52(3)), the tribunal is statutorily empowered to specify the apportionment of expenses by way of an award or other decision having the effect of an award.

Japan seated international commercial arbitrations consequently lack (1) a statutory presumption of costs follow the event, (2) statutory guidance on the apportionment and awarding of costs, and (3) substantial litigation practice and precedents upon which to draw. In such circumstances, arbitrators in Japan-seated arbitrations governed by major institutional rules frequently draw upon (1) the applicable institutional rules to provide the agreement as to their powers, (2) such institutions' publications[6] (and publicly available prior decisions[7]), and (3) international standards, developed in the specific context of arbitration, to guide the exercise of their discretion.[8] In so doing, in the authors' experiences, it is not unusual for awards made in Japan seated arbitrations to adopt the "loser pays" principle, including those awards made under the JCAA rules. The question then becomes how to assess what should be paid by the unsuccessful party, and it is here that macroeconomic trends may play a role.

Arbitral institutions commonly used in Japan-seated arbitrations do not speak with one voice in providing guidance on a tribunal's assessment of what should be paid to successful parties by the losing party. In the Singapore International Arbitration Rules 2025, Rule 58.1 allows the tribunal a broad remit to take into account the circumstances the tribunal thinks relevant, including the parties' respective conduct. Other commonly used rules[9] will often import a requirement of reasonableness, either as to the basis for deciding the amount in a reasonable way (LCIA Rules 2020 at Article 28.3) or, more commonly, as a limiting factor on the range of costs that can be awarded: under the ICC rules (Article 38(1)) the costs of the arbitration include the "reasonable legal and other costs" incurred by the parties. This is the approach under the JCAA Commercial Arbitration Rules, in which the "costs of the arbitration" includes *inter alia* attorney's fees and expert fees incurred by the parties "to the extent the arbitral tribunal determines that they are reasonable" (Article 80).

What, then, makes costs "reasonable"?

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6) See e.g. "Controlling Time and Costs in Arbitration" published by the International Chamber of Commerce in March 2018.

7) For example, the ICC publishes awards (on terms) through a third party service called Jus Mundi: https://jusmundi.com/en/partnership/icc .

8) See further in this respect Gary Born, *International Commercial Arbitration* 3rd Edition 2021, Kluwer Law International (updated November 2023), Chapter 23.08 at *[D] Choice of Law Governing Costs of Legal Representation* ("Born 2021").

9) See also in this respect the UNCITRAL Rules at Article 40. https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration.

Ⅱ. Determining Reasonableness of Costs in Arbitration

In general terms, reasonableness of costs is determined by the tribunal assessing what was reasonably required of a party in order to make its case or present its defence.[10] Although most tribunals (according to the 2015 ICC Commission report on "Decisions on Costs in International Arbitration") consider reasonableness in making their costs awards, and are willing to reduce legal fees where unreasonable, "the factors taken into consideration to determine reasonableness vary"[11] between tribunals and the report's authors could also find "no definition of reasonableness in institutional arbitration rules or national arbitration statutes".[12]

In considering reasonableness it is often the case that tribunals point to *inter alia* unreasonable behavior to justify reductions in costs awarded, including but not limited to excessive document requests and arguments, dilatory tactics, failure to comply with procedural orders, unjustified applications, and exaggerated claims. But it is also the case that legal fees are sometimes argued to be unreasonable without any behavior itself having been unreasonable, including by reference to (i) proportionality considering the amount in dispute, (ii) proportionality considering the necessary costs of the claims/defence[13], (iii) the reasonableness of the level of specialist knowledge and responsibility retained for the dispute, (iv) the reasonableness of the rates charged and number of fee-earners, and (v) any disparity between the costs incurred by the parties as a general indicator of reasonableness.[14] It is these last two factors that may be impacted by macroeconomic trends in Japan-seated arbitrations.

On November 14, 2023, a sole arbitrator issued an award in an international arbitration between Seagen Inc. and Daiichi Sankyo Co., Ltd (DSC).[15] As the successful respondent, DSC sought approximately USD 58.1 million in costs of which USD 46 million was for attorney's fees.[16] Among many other factors considered, the arbitrator specifically noted the potential relevance of the respective hourly rates charged by Seagen's and DSC's respective attorneys[17] and was asked to consider Seagen's argument that, because the seat of the arbitration was Seattle, that "reasonable attorney's fees" must be "informed by the rates charged by

10) Michael W. Bühler, "Costs of Arbitration: Some Further Consideration" published in *Global Reflections on International Law, Commerce and Dispute Resolution*, ICC Publishing, 693 of November 2005 at page 185.

11) ICC Commission Report, "Decisions on Costs in International Arbitration", originally published in the ICC Dispute Resolution Bulletin 2015 Issue 2 at paragraph 15 ("ICC Report").

12) ICC Report at paragraph 63.

13) In this respect see paragraph 44 of the ICC Report which separately identifies, as considerations, (iii) "the reasonableness and reality of the costs incurred" and (iv) "other circumstances, where relevant, including the extent to which each party conducted the arbitration in an expeditious and cost-effective manner." See also footnote 27 to the same report.

14) ICC Report at paragraph 65.

15) International Centre for Dispute Resolution Case *Seattle Genetics, Inc. (Seagen) v. Daiichi Sankyo Co., Ltd.*, ICDR Case No. 01-19-0004-0115, Final Award dated November 14, 2023 ("ICDR Award 0115").

16) ICDR Award 0015 at paragraph 91.

17) ICDR Award 0015 at paragraphs 88, 93, and 97.

Washington attorneys with intellectual property experience"; on that basis, Seagen sought a 40% discount on DSC's requested attorneys' fees.[18)]

In declining to exercise his discretion in this manner, the Arbitrator did so decline because (i) the seat was only "nominally" Seattle and the arbitration was largely conducted remotely due to the COVID-19 pandemic, (ii) the parties chose law firms based respectively in California and New York, and (iii) no Washington law or AAA authority had been offered in support.[19)] The arbitrator did agree, however, to reduce DSC's claimed attorneys' fees by 5% to match the rates of Seagen's counsel on the basis that (i) both were located outside of Seattle, (ii) both were eminent and specialized attorneys, and (iii) both demonstrated exceptionally high quality.[20)] Put differently, the arbitrator accepted as potentially relevant *inter alia* both the seat of arbitration, and the location of the attorneys engaged.

Ⅲ. Macroeconomic Trends Potential Impacts

As set out above, for Japan seated arbitrations (i) there is a lack of statutory presumption that costs follow the event, (ii) a lack of statutory guidance on the apportionment and awarding of costs, (iii) a lack of substantial litigation practice and precedents on which to draw, but (iv) a not insignificant number of arbitral awards made in Japan seated arbitrations indeed adopt the "loser pays" principle, and (v) under various arbitral institutions, including the JCAA, only "reasonable" costs are likely to be recovered. As set out above, the determination of what is reasonable is context dependent but frequently is argued to include the reasonableness of rates charged and is also sometimes argued to include comparative expenditures by the parties.

The disparities today between US wealth/incomes and Japanese incomes are increasingly striking.[21)] According to World Bank Data[22)], having once surpassed the US in GDP per capita in the 1980s, today GDP per capita shows a stark difference: America's GDP per capita[23)] in 2023 was USD 82,769.4 while Japan lagged far behind at USD 33,766.5.[24)] Incomes show similar differences, with 2023 OECD data showing US average annual wages at USD 80,115 and Japan at just USD 46,792.[25)] At the same time, the Yen has weakened substantially,

18) ICDR Award 0015 at paragraph 97.

19) Which the arbitrator had previously decided were relevant, rather than international arbitral practice – see ICDR Award 0015 at paragraphs 85, 108, and 110.

20) ICDR Award 0015 at paragraph 97.

21) For the avoidance of doubt, this trend is also visible in comparison to other major arbitration jurisdictions, such as the United Kingdom or Switzerland.

22) World Bank Group, Adjusted net national income per capita (constant 2015 US$) available at https://data.worldbank.org/indicator/NY.ADJ.NNTY.PC.KD (last accessed 16 June 2025).

23) World Bank Group, GDP per capita (current US$) https://data.worldbank.org/indicator/NY.GDP.PCAP.CD (last accessed 16 June 2025).

24) While the differences with other jurisdictions, such as the United Kingdom, at present smaller, they remain substantial.

25) OECD, Average Annual Wages https://www.oecd.org/en/data/indicators/average-annual-wages.html?oecdcontrol-89cf33ff83-var1=JPN%7CGBR%7CUSA (last accessed 16 June 2025).

exacerbating these differences.

While granular data on arbitrators and lawyers is less readily available, the available data suggests similar trends are also there visible. In the *Elliott* arbitration, for example, the arbitrators received USD 750 per hour[26] - on today's exchange rates, the JCAA's commercial arbitration rules hourly rate is less than half that amount, at just USD 347. Large law firm partners[27] in the US now reportedly charge more than USD 1000 per hour with some of the highest charging firms and partners now exceeding USD 3000 per hour[28], being approximately JPY 431,000 per hour.

It is therefore not difficult to imagine a party attempting to raise various arguments in a Japan seated arbitration resulting from the foregoing[29]. For example, the hourly rates for lawyers engaged in New York could be anything from 2 to 10 times that charged by a counsel engaged in Tokyo. One can also imagine a tribunal seated in Japan and assessing the costs submitted receiving submissions on, and carefully considering, the reasonableness of hourly rates for counsel 5-10 times that of the rates the tribunal itself commands. Similarly, these macroeconomic effects may have implications for parties' choice of counsel, and experts, and even service providers.

While party autonomy to choose counsel and experts remains paramount, a party may potentially argue it disproportionate (and a tribunal may, depending on the circumstances, consider it disproportionate and therefore unreasonable as a matter of costs) to engage an overseas counsel and/or expert whose fees outstrip the amounts claimed and/or awarded, potentially by a large margin. In such circumstances, a comparison of expenditures by the parties as a check on reasonableness of claimed costs may similarly see parties making submissions on the matter. While a tribunal may or may not be minded to limit one party's claimed costs by reference to the other party's costs, the potential psychological effects remain: it may be more comfortable for a tribunal to award all incurred costs, without discount, to a successful party that starts from a position that its costs are a small fraction of the other party's attorneys' costs. Given that a large portion of Japan-seated arbitrations involve non-Japanese parties (including 86% of JCAA arbitrations from 2018 to 2022[30]), these matters – as macroeconomic trends continue to unfold – appear to have the potential to generate more spilled ink.

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26) Elliott Award at paragraph 988.

27) The Biglaw Firms with the Highest Hourly Rates (14 November 2024) available at https://abovethelaw.com/2024/11/the-biglaw-firms-with-the-highest-hourly-rates-2024/ (last accessed 16 June 2025).

28) Reuters, "More lawyers join the $3,000-an-hour club, as other firms close in" (28 February 2025) available at https://www.reuters.com/legal/legalindustry/3000-an-hour-lawyer-isnt-unicorn-anymore-2025-02-27/ (last accessed 16 June 2025).

29) Nor is this issue new: see the ICC report at paragraph 25.

30) Born 2021 at Chapter 1 at [1] *Supportive National Arbitration Legislation*, sub-section [r] *Japanese Commercial Arbitration Association* and footnote 1756 thereto.

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Generative AI and International Arbitration

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Ⅰ. Introducing AI to dispute resolution procedures

With the increasing use of artificial intelligence ("**AI**") in the legal field, including legal tech,[1] which supports legal-related work by lawyers and other legal professionals, AI is also being introduced into dispute resolution procedures such as court cases. In several countries, AI is already being employed in legal proceedings to review complaints, organize facts, and provide advice on judgments. In Japan, although AI is still not being used in court procedures, there are reports of AI being used by the parties. In a criminal case, for example, one criminal defense attorney reportedly submitted an apology letter to the victim written by generative AI.[2]

In the field of international arbitration, it was recently reported that Zhong Xiaomen, an AI arbitration assistant produced by the Guangzhou Arbitration Commission, was used to resolve disputes in China.[3] Further, several arbitration institutions are currently establishing guidelines on the use of AI in arbitration. For example, publicly available guidelines include the "Guidelines on the Use of Artificial Intelligence (AI) in International Arbitration"[4] published by the Silicon Valley Arbitration and Mediation Center ("**SVAMC**"), and the "Guideline on the Use of AI in Arbitration (2025)"[5] published by the Chartered Institute of Arbitrators ("**CIArb**"). Incidentally, regarding mediation procedures, the Mediation Committee of the International Bar Association has published "Guidelines on the use of generative artificial intelligence in

1) Regarding Japanese LegalTech products, refer to the products of the member companies of the AI Legal Tech Association (https://ai-legaltech.org), of which the co-author, Takayuki Matsuo, is the chairman (last accessed on June 1, 2025).

2) https://www.yomiuri.co.jp/national/20240405-OYT1T50081/ (last accessed on June 1, 2025).

3) https://www.gz.gov.cn/guangzhouinternational/home/citynews/content/post_9190081.html (last accessed on June 1, 2025).

4) https://svamc.org/svamc-publishes-guidelines-on-the-use-of-artificial-intelligence-in-arbitration/ (last accessed on June 1, 2025).

5) https://www.ciarb.org/media/m5dl3pha/ciarb-guideline-on-the-use-of-ai-in-arbitration-2025-_final_march-2025.pdf (last accessed on June 1, 2025).

mediation."[6)]

Obviously, AI is gradually being integrated into dispute resolution procedures, including both court proceedings and arbitration, as well as by the parties in such procedures. Discussions on this topic have already commenced internationally.[7)] This paper explores the potential applications of generative AI in international arbitration, specifically in dispute resolution procedures. It is organized according to three key stages: prior to the commencement of arbitration proceedings (Section II.), after arbitration proceedings have begun (Section III.), and in cases concerning setting aside, recognition and execution order of arbitral awards (Section IV.).

The analysis in this paper is based on the Japanese Arbitration Act. (We will omit "Japanese" when citing the Arbitration Act below.) It should be noted that the use of generative AI in arbitration proceedings raises concerns regarding the risk of information leakage, as AI systems may process sensitive data related to the parties and the case itself. Therefore, from a perspective of maintaining the confidentiality of data, ensuring the security of generative AI products is critical. However, this paper operates under the assumption that necessary and adequate security measures are and will be in place for the use of generative AI in arbitration.

Although Takayuki Matsuo's books and articles are often cited, as they are only focused on AI usage in the dispute resolution process, this article specifically considers what new challenges are brought in the case of arbitration, considering the specific wordings and interpretations of the Arbitration Act.

Ⅱ. Prior to the commencement of arbitration proceedings

In this section, we consider issues that may arise before the commencement of arbitration proceedings, including the possibility of an agreement to appoint a generative AI as an arbitrator (Section 1.), the possibility of an agreement to use a generative AI in the arbitration proceedings (Section 2.), and the possibility of using a generative AI in the process of drafting an arbitration clause (including transaction contracts) (Section 3.).

1. Agreement to appoint a generative AI as an arbitrator

(a)The validity of an agreement to appoint a generative AI as an arbitrator

In international arbitration, to tackle barriers created by differences in languages, legal systems and cultural backgrounds, it is possible that parties might agree to use a generative AI as an arbitrator to ensure fairness. The validity of such an agreement itself is questionable.

6) https://www.ibanet.org/document?id=Guidelines-on-the-use-of-generative-AI-in-mediation (last accessed on September 3, 2025). In addition, regarding the notice and guidelines issued by the Australian state of New South Wales on the use of generative AI in litigation proceedings, refer to Katsuya Uga, *Notice and guidelines of the New South Wales, Australia regarding the use of generative AI in litigation proceedings*, New Business Law, No.1291 (2025), 4.

7) For example, at the 2nd ICC Tokyo Arbitration Day on April 23, 2024, Takayuki Matsuo, the co-author, moderated a discussion with panelists titled “At the Threshold of an Era: Navigating AI in the Dispute Settlement Landscape” http://www.iccjapan.org/seminar/data/2nd_icc_tokyo_arbitration_day_draft_v40_as_of_20240417.pdf?d=1305 (last accessed on June 1, 2025).

First, the question of whether arbitrators should be limited to natural persons is already discussed in relation to whether legal persons can be arbitrators. Although the Arbitration Act does not explicitly state that arbitrators should be limited to natural persons, it is interpreted to be the case and that legal persons lack the qualifications to act as arbitrators.[8] The reason for this is that under the current Act, the grounds for termination of an arbitrator's duties are stipulated as "death" (Article 21, Paragraph 1, Item 1 of the Arbitration Act), and only a natural person can proceed with the arbitration procedures and make the arbitral award since a legal person is merely a legal concept.[9]

Therefore, based on the current Act, it is interpreted that an agreement to appoint a generative AI as an arbitrator is invalid. Only a natural person can be appointed as an arbitrator.

(b)The validity of the arbitration agreement as a whole

Imagine that both parties agree to a generative AI arbitrating product as arbitrator. As discussed in the above (a), such agreement to appoint a generative AI as an arbitrator is invalid. It then becomes questionable whether such an agreement also renders the entire arbitration agreement invalid.

A valid arbitration agreement requires nothing more than the parties' express commitment to be bound solely by the final, binding arbitral award (Article 13, Paragraph 1 of the Arbitration Act). Therefore, even if the agreement lacks the designation or appointment method of arbitrators, etc., the arbitration agreement is still considered to be valid.[10] The logical conclusion is that if there is an agreement to appoint a generative AI as an arbitrator, and there is also an agreement to resolve disputes through arbitration, it is possible to regard the arbitration agreement as valid, and invalidate only the agreement regarding the arbitrator (and practically, under Article 17 of the Act, appoint a natural person as arbitrator). This is supported by the interpretation of the Act in the case of an agreement to appoint a legal person as an arbitrator, where it is interpreted that the arbitration agreement should not be immediately regarded as invalid, and the agreement should be interpreted to determine whether the parties' intention is to appoint a representative of the legal person as an arbitrator or to adhere to such legal person's institutional arbitration rules and be overseen by such legal person (arbitral institution).[11] However, it is assumed that when the parties appoint a generative AI as an arbitrator, they usually intend for the generative AI itself to act as the arbitrator. This is different from an agreement in which a legal person is appointed as an arbitrator, where the assumption of the parties is that a natural person will act as the arbitrator. In the case of generative AI, it is difficult to apply the flexible approach as in the case of a legal person. If the firm intention of the parties is that NO natural person be the arbitrator, which is not allowed under the current Act, the question becomes critical whether

8) Takeshi Kojima & Takashi Inomata, *Arbitration Act* 172-173 (2014) ("Kojima & Inomata"). Tatsuya Nakamura, *An Overview of Arbitration Act* 115 (2022) ("Nakamura").

9) Kojima & Inomata, at 172-173.

10) Kojima & Inomata, at 106-107. Nakamura, at 54.

11) Kojima & Inomata, at 173.

they really agreed on arbitrating the dispute, as the arbitration that the parties intended cannot be achieved.

Therefore, under the current Act, when the intent of the parties is to have generative AI arbitrate, not a natural person, then it is likely that such intention is not considered as the agreement of arbitration and is, therefore, invalid as an arbitration agreement.

2. Agreement to use AI in arbitration proceedings

In contrast to the above 1., it is also possible for the parties to agree to use a generative AI in the arbitration proceedings, assuming that the generative AI does not replace the arbitrator, and that the arbitrator is a natural person. As mentioned in III. below, except in cases where the use of a generative AI is not permitted by the Arbitration Act (for example, where a generative AI itself replaces a natural person arbitrator), it is considered that an agreement to use a generative AI in the arbitration proceedings can be a valid agreement on the arbitration proceedings.

If the agreement of the parties is relatively abstract, such as "generative AI should be used," the reasonable interpretation of the parties' intentions is that the parties agreed on the use of generative AI to the extent that its use is permitted by the Act.

Further, even if there is an agreement between the parties regarding the specific use of generative AI, such as "the evidence should be selected by generative AI" or "the hearing records should be created in real time using generative AI," such is only complied with in practice when such usage is (1) lawful from the viewpoint of the Act, (2) acceptable for the arbitral institution and (3) acceptable by the arbitrators.

In the future, both the parties and the arbitral institutions will increasingly request the arbitrators to use generative AI for efficient and high-level arbitration. Consequently, arbitrators will need to be proficient in generative AI.

3. Drafting arbitration clauses by generative AI

(a) Relationship to written requirement for an arbitration agreement

It is also possible that a generative AI would draft a preliminary version of an arbitration clause (in many cases, a transaction contract that includes an arbitration clause).[12] In cases where a generative AI drafts a contract, the output is generally recorded in a document or an electronic record, and the parties usually agree to the results after review. In this case, the document can obviously be considered to satisfy the written requirement (Article 13, Paragraphs 2 and 4 of the Arbitration Act). Therefore, in ordinary cases, it is difficult to think of a situation where drafting by a generative AI would affect the validity of an arbitration agreement.

On the other hand, for example, in the case of template contracts such as NDAs, there are

12) Although this may also be a problem in relation to Article 72 of the Attorneys Act, the "Provision of Contract-Related Services Using AI, etc. and the Relationship with Article 72 of the Attorneys Act" published by the Ministry of Justice on August 1, 2023, clarifies that the automatic creation of contracts and review functions using AI, etc., do not violate Article 72 of the Attorneys Act, provided that certain requirements are met.

services that make it unnecessary to conclude individual NDAs by joining an association that agrees to NDAs drafted by a certain company. In the same way, if the parties agree to use a transaction agreement drafted by an AI contract drafting product created by a certain company, could it be considered that they have agreed to the arbitration clause in such agreement created by the AI product?

Even in this case, if both parties have a common understanding that, for example, such AI product uses the model arbitration clause recommended by the Japan Commercial Arbitration Association ("**JCAA**"),[13] it can be considered that the parties have agreed on a specific arbitration clause, even if they have only agreed on the specific AI product (since it will be recorded in a document or an electronic record, the written requirement will not be a problem).

In contrast to the above, if the parties do not have a common understanding on even how the dispute resolution clause should be drafted (court or arbitration), the validity comes into question. As mentioned in the above 1. (b), since the agreement regarding the arbitration procedure is not a necessary requirement for an arbitration agreement, as long as it is both parties' agreement to arbitrate, it would be interpreted as a valid arbitration agreement. But if not, such is not likely to be interpreted as a valid arbitration agreement.

(b) Interpretation of arbitration clause

With regard to arbitration clauses, the interpretation of the wording may also be problematic. If parties review and negotiate the arbitration clause, even if the draft is originally provided by the generative AI, such would be interpreted in the same way as a normal contract: by considering the circumstances and background at the time of contract conclusion, industry practices, the social status and occupation of the parties, the parties' sophistication, and other various circumstances, and seeking the parties' subjective intentions.[14]

However, if the review and negotiation is essentially not conducted, maybe other ways such as examining the prompt (directive) inputted to generative AI would be used as evidence for the wording interpretation. Further, because the generative AI automatically searches for information related to the prompt using Retrieval Augmented Generation ("**RAG**") and then outputs a certain result, it is also worth considering verifying the process of the RAG system in addition to the prompt.

Ⅲ. The possibility of using generative AI after arbitration proceedings have begun

In this section, we consider the availability of generative AI at each stage of the proceedings after the arbitration proceedings have commenced.

13) https://www.jcaa.or.jp/arbitration/clause.html (last accessed on June 1, 2025).

14) Nakamura, at 55.

1. Preparation stage of request for arbitration

(a) Drafting

In the case of institutional arbitration, the parties usually agree to appoint a specific arbitral institution together with its arbitration rules. Therefore, a request for arbitration (before the arbitral tribunal is established) is subject to the arbitration rules of the respective arbitral institution.[15] Further, since the rules of arbitration proceedings can all be determined by agreement between the parties (Article 26, Paragraph 1 of the Arbitration Act), in the case of ad hoc arbitration where an arbitral institution is not involved, a certain form of arbitration claim form is submitted to the other party based on the agreement of the parties or the procedural rules selected by the parties (for example, the UNCITRAL Arbitration Rules, etc.).

In addition, Article 14 of the JCAA Commercial Arbitration Rules (2021)[16] ("**Commercial Arbitration Rules**") stipulates the matters to be stated in a written request for arbitration. Some of these items are non-discretionary,[17] for example (1) a request that the dispute be referred to arbitration under the Rules, (2) a reference to the arbitration agreement that is invoked (including any agreement on the number of arbitrators, the procedure for appointing arbitrators, the place of arbitration, and the language(s) of the arbitral proceedings), (3) the parties' full names (if a party is a legal entity or other association, the corporate name and the name of the party's representative), street addresses and other known contact details (i.e., the designated street address including, if a party is a natural person, such party's place of employment, telephone number, fax number and email address), and (4) the full name, street address and other contact details (i.e., the designated street address, telephone number, fax number and email address) of claimant's counsel, if the claimant is represented by counsel. Therefore, it is possible for the generative AI to read the information entered by the parties and related materials, and to fill it into the request form.[18]

On the other hand, there is some room for discretion in relation to the items (5) the relief and remedy sought, (6) a summary of the dispute, and (7) a statement of the factual and legal grounds for the claim(s), and the manner and method of proof. Leaving aside the question of how much detail should be argued at the request stage, it is possible for the generative AI to fill in information read by the AI into the request form for each of the essential facts.

(b) Legal research

In legal research, it is possible to use a method called vector search to generate judgments that are similar to the natural language input in order of similarity, and to show them with AI-generated summaries of the judgments. For example, it is already technically possible to input

15) Yoshihisa Hayakawa, *The Current State of Arbitration: The Forefront of Law and Practice, Part 9: Modern International Commercial Arbitration Practice: Arbitration Request and Responses*, Japan Commercial Arbitration Journal, Vol. 71, No. 9 (2024), 37 ("Hayakawa").

16) https://www.jcaa.or.jp/arbitration/rules.html (last accessed on June 1, 2025)

17) Hayakawa, at 37.

18) In the stage of initiating a lawsuit, it is expected that AI can provide substantial support in handling routine aspects such as transforming standard cases into the format of a complaint and calculating stamp duties. This potential is discussed by Takayuki Matsuo in *AI in Justice and Law,* Law & Practice, No. 18 (2024), 165-166 ("Matsuo").

documents submitted by the opposing party's attorney and extract the judgment with the highest similarity in the database.[19)]

Of course, if you simply ask ChatGPT a question and then paste the result into your legal brief without verifying it, you run the risk of ending up like the New York lawyer who was penalized for including a fictional case created by ChatGPT in his brief.[20)] However, if one uses AI that provides highly accurate legal research based on reliable data such as laws, court decisions, commentaries, and legal journals, it is expected that AI will provide advanced support for legal research.[21)]

2. Support for arbitral institutions

In the case of institutional arbitration, a request for arbitration is submitted to an arbitral institution, and as part of the administrative work, the institution confirms whether the request is based on an arbitration agreement. In addition, if the parties cannot agree on an arbitrator, the institution appoints one. Finally, the institution also reviews the formal aspects of the arbitral award. In the following, assuming that the arbitral institution is the JCAA, we consider the possibility for generative AI to support its work.

(a) Examination of a request for arbitration

As stated in the above 1.(a), necessary documents for a request for arbitration, including the items to be included in the written request, are stipulated in Article 14 of the Commercial Arbitration Rules, and according to Article 16, Paragraph 1 of the Rules, the JCAA will confirm whether the request for arbitration complies with Article 14 (excluding Paragraph 2 and 6) and then notify the respondent. This is similar to the examination of complaints in litigation, which confirms the formality of the items stated and the availability of the necessary documents. For example, as Intellidact AI in the United States is automating the examination of complaints using AI,[22)] it is also possible to consider automating the examination of documents submitted, such as a written request for arbitration, using generative AI.

(b) Appointment of an arbitrator

In cases where the JCAA appoints arbitrators, for example, it will be able to extract candidates from a database of arbitrator candidates held by the arbitral institution, including the arbitration experience of each candidate, by inputting into AI information such as the industry of the parties to the case, the legal field in question, and nationality. After that, the arbitral institution (or its staff) should also confirm more detailed suitability issues, including whether there are any individual conflicts of interest and actual experience. In terms of providing all possible candidates without overlooking any, AI is a powerful tool.

(c) Review of an arbitral award

In addition, the JCAA reviews arbitral awards from a formal perspective to check whether

19) Matsuo, at 167.

20) https://cases.justia.com/federal/district-courts/new-york/nysdce/1:2022cv01461/575368/54/0.pdf?ts=1687525481 (last accessed on June 1, 2025).

21) Matsuo, at 167.

22) Komoda Junpei, *Artificial Intelligence (AI) Used in Courts*, Hanrei Times, No. 1513 (2023), 19.

they meet the requirements for description in the Rules, whether there are any errors in figures, etc., and whether there are any omissions in the matters determined by the arbitral tribunal. Although the JCAA does not request the arbitral tribunal to revise the conclusions themselves, it may comment on parts of the reasoning that are inaccurate or unclear.[23] In this regard, for example, if you ask ChatGPT to "extract what appears to be a mistake on a sentence-by-sentence basis, highlight the parts that need to be corrected, and indicate why they need to be corrected and how they should be corrected," it will output fairly good results.[24] Currently, arbitrators and arbitral institutions spend a lot of time and effort reviewing arbitral awards before sending them to the parties, and it seems that the introduction of generative AI will make it possible to correct errors and extract obvious mistakes from arbitral awards relatively quickly. It is therefore expected that such use of AI will be used to check for errors in arbitral awards before the final award is sent to the parties.

3. Appointment of arbitrator

Can a generative AI appoint an arbitrator based on an agreement to leave the selection of the arbitrator to AI?

In this regard, the appointment of an arbitrator is based on the principle of party autonomy and is decided by agreement between the parties (Article 17, Paragraph 1 of the Arbitration Act). It is also possible to leave the appointment of an arbitrator to a third party by agreement between the parties, and "Arbitration Act" (Kojima & Inomata) states that this third party can be either a natural person or a legal person.[25] This is thought to be a description that does not assume the use of generative AI as a third party to appoint arbitrators. However, in considering the purpose of Article 17, Paragraph 1 of the Arbitration Act, which respects the autonomy of the parties in appointing arbitrators, it seems possible to agree to entrust the appointment of arbitrators to generative AI.

On the other hand, there is the question of whether it is appropriate for a generative AI to actually replace the appointment of arbitrators. First of all, when appointing an arbitrator, the most important thing is whether or not the candidate has no doubt about their fairness or independence in relation to the case or the parties.[26] As a guideline for this issue of conflict of interest, the "IBA Guidelines on Conflicts of Interest in International Arbitration"[27] are widely used in international arbitration practice. The guidelines list grounds for recusal on the Red List, grounds for disclosure on the Orange List, and cases that do not apply to the disclosure standards on the Green List. According to the grounds and cases in these lists, the relationships and experiences of the individual parties and the candidate arbitrators are

23) https://www.jcaa.or.jp/arbitration/qa.php (last accessed on June 1, 2025).

24) Matsuo, at 175.

25) Kojima & Inomata, at 180.

26) Yoshihisa Hayakawa, *The Current State of Arbitration: The Forefront of Law and Practice, Part 10: Modern International Commercial Arbitration Practice: Selection of Arbitrators*, Japan Commercial Arbitration Journal, Vol. 71, No. 10 (2024), 21 ("Hayakawa").

27) https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918 (last accessed on June 1, 2025).

considered, and it is difficult for a generative AI product to comprehensively collect this basic data.

In addition, when appointing arbitrators, it is not only a matter of avoiding conflicts of interest (fairness and independence), but also necessary to consider various aspects, such as whether the candidate is suitable for the case in relation to the characteristics of the case, whether they have sufficient experience, and whether they can devote an appropriate amount of time and effort to the case, etc.[28] It is also difficult in practice to collect such information on the candidate as basic data.

Based on the above, at least at this point in time, it is difficult for a generative AI to ultimately appoint an arbitrator who is appropriate for each specific arbitration case. Even if a generative AI is used in the arbitrator appointment process, it will only be able to extract candidates for arbitrators based on relatively limited information. In the final arbitrator appointment, it will be necessary to collect and confirm information for each individual arbitration case, such as through interviews with the parties and the candidates. However, in the future, it is possible that a generative AI will be able to replace or assist in this process of information collection and confirmation, including interviews.

4. Evidence disclosure

In international arbitration, there are cases where broad discovery under English and American law is adopted, and cases where document production based on the "IBA Rules on the Taking of Evidence in International Arbitration"[29] ("**IBA Evidence Rules**") is adopted. In these cases, there are also cases where electronic information is targeted. In particular, when a party requests disclosure of electronic information, the other party can use a generative AI to accurately and quickly pick up information that may be relevant to the case in question, covering all electronic information in the company. The following refers to the submission of documents based on the IBA Evidence Rules. Generative AI will be useful mainly in determining whether to disclose each item of information in relation to the case ((a) below) and whether or not it is subject to the privilege of confidentiality ((b) below).

(a) Determining whether to disclose in relation to the case

The IBA Evidence Rules also apply to requests for the submission of electronic information.[30] The Rules stipulate that a party may request the other party to submit documents within a time limit set by the arbitral tribunal (Article 3, Paragraph 2). The request must include (1) the identification or the attributes of the document, (2) the relevance of the document to the case and material to its outcome, (3) a statement of why the document is not under the requesting party's control and is difficult to obtain, and the reason why it is thought to be under the control of the other party (Article 3, Paragraph 3). In particular, (1) and (2) could be factors that a generative AI uses to determine whether or not to disclose

28) Hayakawa, at 20-23.

29) https://www.ibanet.org/MediaHandler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b (last accessed on June 1, 2025).

30) The Rules state that "Document means a writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means."

information. Therefore, it is possible that a generative AI could pick up electronic information related to the case, and then use (1) and (2) to determine whether or not to disclose it, or to support that determination.

(b) Determining whether to apply the privilege of confidentiality

Further, it is also possible for generative AI to assist in determining whether information is covered by the privilege of confidentiality as stipulated in Article 9, Paragraphs 2(b) and 4 of the IBA Evidence Rules. In other words, a generative AI is capable to select formally, for example, whether a document or piece of electronic information is marked with a phrase indicating that it is privileged, such as "Privileged Attorney-Client Communication" or "Confidential Attorney Work Product." Further, in the future, it seems that a generative AI will be able to support substantive judgments on whether a document or piece of electronic information is privileged from the content of the document or electronic information, based on the grounds set forth in each item of Article 9, Paragraph 4 of the IBA Evidence Rules.

(c) Summary

Although there is the possibility of support through the use of generative AI as described above, the necessity of disclosure of evidence and whether or not it is a matter of privilege will ultimately be determined by the agreement of the parties and the judgment by the arbitrator or arbitral tribunal, including the applicability of the IBA Evidence Rules.

In addition, if one party receives a request or an order to submit documents from the other party or the arbitral tribunal, and uses a generative AI to select and submit certain documents, the requesting party may object, suspecting whether the documents are truly the result of comprehensive research into documents that meet the request or the order. The requesting party or the arbitrator may also request disclosure of the algorithm, etc., in order to scrutinize the selection and judgment process using generative AI.

5. Oral Hearing

In an oral hearing, the following generally takes place: opening statements, examination of fact witnesses and expert witnesses, and final arguments.

(a) Opening statements

First, as support for the party's attorney, a generative AI could create an opening statement that summarizes the main points of the arguments for each point at issue by reading through the typical reams of documents submitted until the oral hearing, such as written submissions and evidence.

In international arbitration, arbitrators sometimes ask questions in the opening statement. Arbitrators could receive support from AI when considering what questions to ask the parties. For example, AI could be made to read the documents submitted by the parties and organize the issues and evidence. AI could then point out any insufficient arguments or evidence, or any contradictions therein. Using the results as a reference, the arbitrators could ask the parties more appropriate questions in a more efficient manner. Further, AI could also assist the attorneys in answering questions from the arbitrator. Specifically, AI could read the relevant documents, then pick up information related to the arbitrator's questions and create

answers that do not contradict the written submissions and evidence. The attorneys would answer referring to the output of the AI's analysis.

(b) Examination of witnesses

It seems possible that a generative AI can assist the examiner. For example, by loading a huge amount of evidentiary materials, AI can display materials that contradict the testimony in real time, and suggest ideas for cross-examination in order to confirm points like misstatements, misunderstandings and errors in perception and memory.[31] On the other hand, it should not be allowed for the witness receiving examination to receive support from a generative AI in real time to think about their answers and give testimony.[32] Further, it is also possible to assist or replace the simultaneous interpretation of testimony by witnesses through generative AI.

(c) Recording of the entire oral hearing

In international arbitration, a stenographer needs to be assigned for each case to prepare a transcript of the oral hearing. In practice, a specialist contractor types the oral statements of the parties at the hearing in real time, and the typed content is displayed on a monitor in front of the arbitrators and attorneys.

In this respect, since a generative AI has a function for transcribing and drafting minutes, it is possible to support or replace this transcription work. Further, in the future, it will also be possible to use accurate transcriptions by a generative AI in examining witnesses and refreshing a witness's memory as to earlier testimony.

(d) Final arguments

It is possible that a generative AI will present the arbitral tribunal and the parties with a summary of the points in dispute based on the record of the entire proceedings and the documents previously submitted. If the parties make their final arguments after the examination of witnesses, it is also possible that AI will prepare and advise on the content of the arguments, focusing on the relevant disagreements, which will greatly reduce the time and burden of the parties' preparation for their final arguments and make them more effective.

6. Settlement negotiations

In international arbitration, there are also cases where the parties negotiate a settlement outside of the arbitration proceedings or after submitting to mediation.

Here, it is also possible that the parties will negotiate a settlement while referring to a settlement proposal made by a generative AI. In this respect, while settlement requires flexible solutions that are not bound by legal requirements or court precedents, conventional AI was only able to deal with the essential facts, and it was difficult to respond flexibly. However, recent generative AI is learning-based, and its strength is that it can flexibly consider "[x] is probably the point where the two sides can reach a compromise."[33] Therefore,

31) Matsuo, at 185.

32) Matsuo, at 189.

33) Matsuo, at 173.

it is possible for AI to support settlement discussions between the parties.

7. Arbitral awards

The possibilities for using a generative AI to make arbitral awards include the following: a natural person arbitrator makes a substantive decision, and then AI is used to put that decision into the format of an arbitral award ((a) below); and AI itself makes a substantive arbitral award ((b) below).

(a) Incorporation into arbitral award format

Arbitral awards have a particular format, and under the Arbitration Act, they must be (1) in writing, (2) signed by the arbitrators, and (3) include the reasons for the award, the date of the preparation, and the place of arbitration (Article 39, Paragraph 1, 2 and 3). The reasons for the award (3) mean the basis for the conclusion, which is the main text of the arbitral award, and the explanation of the logical process leading to that conclusion,[34] and are therefore equivalent to the substantive judgment in the arbitral award. Other examples of matters that are generally included in arbitral awards are the names and addresses of the arbitrators, the content of the arbitration agreement, the identification of the governing law and the applicable arbitration rules, and the chronology of the arbitration proceedings, and the summary of the parties' arguments.

Therefore, after loading all written submission and evidence submitted by the parties and the judgment made by the natural person arbitrator into the generative AI, it should be able to pick up the appropriate information for each of the above items and draft an appropriate document.

Further, if the arbitrator makes a substantive judgment regarding the reasons for the arbitral award in the above (3), and then gives a prompt (directive) such as, "With regard to Issue 3, generate an explanation that makes a judgment in favor of the respondent based on the irrefutable fact that [x], and thereby dismiss the claim," then a "plausible" sentence will be drafted.[35] However, it is simply creating the most likely explanation in such cases based on big data (for example, in the case of AI using machine learning), and in that sense it is nothing more than a "draft" or "rough draft."[36] Given this premise, it seems that the reasoning for the arbitral award, which is the core of arbitral award, as described in the above (3), could be used to a certain extent as a reference when drafting the arbitral award by a natural person arbitrator.

(b) Substantive decision

As described in the above II.1.(a), under the current Act, a generative AI cannot act as an arbitrator, thus it is understood that an AI cannot replace an arbitral award (the part of the arbitral award that is the reasoning in the above (3)). In addition, in the context of assistant arbitrators, the JCAA Commercial Arbitration Rules stipulate that "No arbitrator shall delegate to a third person tasks that substantially influence the arbitral tribunal's decision including the

34) Kojima & Inomata, at 411.

35) Matsuo, at 174-175.

36) Id.

arbitral award" (Article 33, Paragraph 1), and the guidelines of the SVAMC, referred to in the above I., also explicitly prohibit AI tools from replacing arbitrators' decision-making. The guideline of the CIArb also states that "arbitrators should not relinquish their decision-making powers to AI."

On the other hand, it is technically possible for a generative AI to make a certain decision (leaving aside the issue of accuracy) based on the party's submitted written submission and evidence, and referring to judgments in similar cases in laws and precedents.[37] Therefore, such AI-generated output could be used as a reference by natural person arbitrators when making an arbitral award, and could assist arbitrators in their considerations. In addition, it seems that arbitrators would be allowed to use the decisions made by generative AI if the arbitrators themselves, as a result of their own deliberations, agree with the AI's decision.

Further, if a generative AI that supports substantive judgments is developed, the parties can use the generative AI to predict the arbitral award before filing an arbitration claim, and since the prediction is shared between the parties, settlement negotiations may be accelerated.[38]

Ⅳ. Setting aside, recognition and execution order of arbitral awards

First of all, it is possible that a generative AI could support courts in determining whether there are grounds for setting aside and refusal of execution. The grounds for setting aside an arbitral award (Article 44, Paragraph 1) and for refusing to execute an arbitral award (Article 45, Paragraph 2) are stipulated in accordance with the grounds for recognition and refusal of execution under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) ("**New York Convention**"). Therefore, if it is possible to use a database of case studies for each ground in each country that has signed the New York Convention, it seems that it would be possible to conduct research and provide advice based on similar cases using a generative AI.

In addition, in relation to the execution order procedure, the petitioner must submit a Japanese translation of the written arbitral award in English (Article 46, Paragraph 2 of the Arbitration Act). Further, in cases where a petition for the setting aside of an arbitral award is filed, documents related to the arbitration proceedings that were written in English must be submitted with a Japanese translation (Article 138, Paragraph 1 of the Rules of Civil Procedure). In such translation work, generative AI is very useful and is expected to greatly reduce the burden on the parties in preparing their petitions.

Ⅴ. Conclusion

As described above, we have considered the potential uses of generative AI at each stage of international arbitration. Except in cases where it is prohibited by the Arbitration Act or where

37) Since arbitral awards are confidential, the judgments referred to here in similar cases are those made by publicly accessible court rulings or decisions.

38) Matsuo, at 162.

not practically feasible, it is anticipated that generative AI will provide support to all parties involved in arbitration proceedings, including the party attorneys, arbitrators, and arbitral institution. This support is expected to enable natural persons to allocate more time and effort to more critical considerations. On the other hand, since there are potential negative impacts and risks associated with the use of generative AI, it is hoped that procedural rules, including the rules of each arbitral institution, will be developed to ensure the appropriate and effective use.

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Recent Discussions on the Scope of the Parties to Arbitration Agreements

Approaches toward the "Group of Companies" Doctrine in Various Jurisdictions

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Ⅰ. INTRODUCTION — Whether and when should non-signatories be bound by an arbitration agreement?

In principle, an arbitration agreement binds the signatories because of its fundamentally consensual nature. However, considering the nature of modern international business transactions, which often involve large corporations that may comprise of a group of related entities, there may be situations where an arbitration agreement might be binding on non-signatories. This article explores how the issue of non-signatories are dealt with under various legal systems, including Japanese law.

The question of whether a non-signatory is bound by an arbitration agreement can arise not only during the arbitral proceedings, and also in the course of the procedure to set aside, and enforce arbitral awards.

Article 2 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("New York Convention") as well as national laws in many jurisdiction including the Arbitration Act of Japan (Article 13 (2)) require that an arbitration agreement shall be "in writing". However, the requirement of "in writing" does not necessarily exclude the possibility that an arbitration agreement may also bind non-signatories to the agreement.

In relation to this, international arbitration conventions and national arbitration legislation generally provide no express guidance in identifying who the "parties" to an international arbitration agreement shall be. For example, while the New York Convention refers to the basic principle that international arbitration agreements bind their "parties", this does not address the question of how such "parties" shall be determined. The same applies to the UNCITRAL Model Law as well as most of the national legislation.[1)]

National courts have taken various approaches across different jurisdictions. These approaches can broadly be categorized into two groups.

1) Gary B. Born, *International Commercial Arbitration* (Third Edition), § 10.1[C] (Kluwer Law International, Updated August 2022).

In the first category, non-signatories are allowed or compelled to arbitrate on the basis of equitable considerations. This includes the theories of apparent or ostensible authority, alter ego or lifting the corporate veil, and equitable estoppel. Based on these theories, which are essentially founded on corporate or contract law (rather than arbitration law) theories, the non-signatory party is compelled to arbitrate not because it has actually consented to arbitrate, but because it would be unfair or unjust not to arbitrate.

In the second category, non-signatories are allowed or compelled to arbitrate on the basis of a functional concept of consent. This includes the theories of assignment, agency and succession, the third-party beneficiary, and theories of implied consent including the "Group of Companies" Doctrine.[2)]

Among various jurisprudence, the "Group of Companies" Doctrine is one of the most discussed principles in the various jurisdictions. In this article, we will look into international arguments about this legal principle, and analyze how this principle can be treated or referred to under Japanese arbitration law.

Ⅱ. What is the "Group of Companies" Doctrine?

The leading authority of the "Group of Companies" Doctrine is *Dow Chemical v. ISOVER Saint Gobain*,[3)] which was subsequently and favorably considered by the Court of Appeal of Paris on 21 October 1983[4)]. This case centered around four distribution agreements, which was governed by French law and contained arbitration clauses providing for arbitration seated in Paris. Dow Chemical Europe and Dow Chemical A.G., who were signatories to two of the distribution agreements, compelled arbitration under the arbitration clauses in these agreements, and their parent company (i.e., Dow Chemical) and sister company (i.e., Dow Chemical France), which were non-signatories, sought to join the arbitration in their own right under the same agreements. The arbitral tribunal held that these parent and sister companies were entitled to invoke the arbitration agreements because both had been central to the negotiations, the parent company's approval was needed for consummating the deal and the performances, the sister company was consistently in charge of performing the agreements and was largely responsible for the termination of the agreements, and the parent company was the proper owner of all the relevant trademarks.[5)]

In the "Group of Companies" Doctrine, in general, an arbitration agreement can be extended to non-signatory parties if all the parties involved (i.e., both of the signatories and non-signatories) had a common intention to be bound by the arbitration agreement. Such common

2) Stavros Brekoulakis, 'Chapter 8: Parties in International Arbitration: Consent v. Commercial Reality', in Stavros Brekoulakis, Julian D.M. Lew, et al. (eds), *The Evolution and Future of International Arbitration* (International Arbitration Law Library, Volume 37 (Kluwer Law International 2016)), paragraphs 8.102, 8.103 and 8.110.

3) *Dow Chemical v. ISOVER Saint Gobain*, Interim Award, ICC Case No. 4131, 23 September 1982.

4) *Société Isover-Saint-Gobain v Société Dow Chemical* [1984] 1 Rev Arb 98 (21 October 1983) ; '2. Agreement to Arbitrate', in Nigel Blackaby, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration* (Seventh Edition), (Oxford University Press 2023), paragraph 2.49.

intention (or consent) will often be presumed on the basis of various factors, including (a) whether the non-signatory was actively involved in the conclusion, execution, and/or performance of the contract containing the arbitration agreement; (b) whether the non-signatory has a clear interest in the outcome of the dispute; and (c) whether the non-signatory is a party to another contract that is different from but intrinsically inter-twined with the contract under which the dispute has arisen.[6] As such, the "Group of Companies" Doctrine is ordinarily a means of identifying the parties' intentions as to who should be bound by the contract. In the "Group of Companies" Doctrine, the corporate affiliations among distinct legal entities provide the foundation for concluding that they were intended to be parties to an agreement, notwithstanding their formal status as non-signatories. Thus, the "Group of Companies" Doctrine would not disturb or affect the legal personality of the entities in question, which is a different approach from equity driven jurisprudence such as the doctrine of alter ego or lifting the corporate veil, requiring to disregard an entity's separate legal identity in the exceptional circumstances.

Ⅲ. Approach to the "Group of Companies" Doctrine taken in various jurisdictions

1. Approach to the "Group of Companies" Doctrine taken in other jurisdictions

English courts have rejected the "Group of Companies" Doctrine. For example, in *Peterson Farms Inc. v C & M Farming Ltd.*, the commercial court clearly stated that it "*forms no part of English law*".[7] Further, even for cases which were seated in non-English country and governed by non-English law, English courts are generally reluctant to consider precontractual negotiations to presume or identify the parties' common intention. In *Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs, Government of Pakistan*,[8] where an arbitral tribunal seated in Paris applied French principles of international arbitration law to conclude that the Government of Pakistan was bound by a contract, the UK Supreme Court applied the same principles of French law,[9] but denied enforcement of an arbitral award against Pakistan on jurisdictional grounds.[10]

Singapore courts have a similar view to English courts, i.e., not accepting the Group of

5) Manasi Kumar, 'The 'Composite Transaction' and Extension of Arbitration Agreements in India', in Maxi Scherer (ed), *Journal of International Arbitration* (Kluwer Law International 2020, Volume 37, Issue 3), pages 367-368; *Dow Chemical v. ISOVER Saint Gobain*, Interim Award, ICC Case No. 4131, 23 September 1982.

6) '2. Agreement to Arbitrate', in Nigel Blackaby, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration* (Seventh Edition), (Oxford University Press 2023), paragraph 2.53.

7) *Peterson Farms Inc. v C & M Farming Ltd.* [2004] EWHC 121, paragraph 62; Manasi Kumar, 'The 'Composite Transaction' and Extension of Arbitration Agreements in India', in Maxi Scherer (ed), *Journal of International Arbitration*, (Kluwer Law International 2020, Volume 37, Issue 3), pages 369-370.

8) *Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, [2011] 1 A11 ER 485.

9) The UK Supreme Court referenced to multiple French precedents including *Société Isover-Saint-Gobain v Société Dow Chemical* [1984] 1 Rev Arb 98 (21 October 1983) and the Cour de Cassation (1re Ch. Civ) (20 December 1993) in *Municipalité de Khoms El Mergeb v Dalico* [1994] 1 Rev Arb 116).

Companies Doctrine. For example, the Singapore High Court in *Manuchar Steel Hong Kong Limited v Star Pacific Line Pte Ltd* held, "*[f]or now, the import of Peterson Farms was that as a matter of arbitration principle, a tribunal has no jurisdiction to bind strangers to the arbitration agreement on the basis that these strangers are part of a larger group under the 'group of companies' doctrine.*"[11] At a glance it would thus appear for now that in jurisdictions that adopt the more traditional common law view, the approach to bind non-signatories would rely on contractual/equitable concepts such as implied agreement, agency, or estoppel.

On the other hand, India is one of the common law jurisdictions which has expressly adopted the doctrine. The doctrine was first recognized in India by *Chloro Controls India (P) Ltd v. Severn Trent Water Purification Inc* (2013) 1 SCC 641. Recently, the Supreme Court of India rendered the judgment under the "Group of Companies" Doctrine, that a non-signatory can also be made a party in proceedings arising out of an arbitration agreement (*Cox & Kings Ltd v. SAP India Private Ltd*, [2023] INSC 1051 ("Cox and Kings")).

As for the test of the "Group of Companies" Doctrine, Cox and Kings held, *"Since the group of companies doctrine is a consent-based theory, its application depends upon the consideration of a variety of factual elements to establish the mutual intention of all the parties involved. In other words, the group of companies doctrine is a means to infer the mutual intentions of both the signatory and non-signatory parties to be bound by the arbitration agreement. The relationship between and among the legal entities within the corporate group structure and the involvement of the parties in the performance of the underlying contractual obligations are indicators to determine the mutual intentions of the parties. The other factors such as the commonality of the subject matter, composite nature of the transactions, and the performance of the contract ought to be cumulatively considered and analysed by courts and tribunals to identify the intention of the parties to bind the non-signatory party to the arbitration agreement. The party seeking joinder of a non-signatory bears the burden of proof of satisfying the above factors to the satisfaction of the court or tribunal, as the case may be."*[12] *Cox and Kings* further stated, *"[i]t is important to note that the group of companies doctrine concerns only the parties to the arbitration agreement and not the underlying commercial contract. Consequently, a non-signatory could be held to be a party to the arbitration agreement without becoming a formal party to the underlying contract. The existence of a group companies is one of the essential factors to determine whether the conduct amounts to consent but membership of a group is not sufficient in itself."*[13]

In Switzerland, the Federal Supreme Court recently adopted a similar approach to the French "Groups of Companies" doctrine in DSC of 4 Sep. 2023, 4A_146/2023; DSC of 4 Sep.

10) By contrast, the Paris Court of Appeal confirmed the tribunal's award, held that Pakistan, as a non-signatory to the contract, was bound by the arbitration clause, and rejected Pakistan's jurisdictional objection under French law (Arrêt de la Cour d'appel de Paris (Pôle 1 - Chambre 1) 09/28533 - 17 févr. 2011).

11) *Manuchar Steel Hong Kong Limited v Star Pacific Line Pte Ltd* [2014] SGHC 181, paragraph 75.

12) *Cox and Kings Ltd. v SAP India Pvt. Ltd*. [2024] INSC 670, paragraph 111.

13) Ibid, paragraph 106.

2023, 4A_144/2023; and DSC of 4 Sep. 2023, 4A_148/2023. This series of cases concerned a dispute between a father, his four sons and a group of companies owned by the father and managed by him and his sons. Within the group, the companies concluded several loan agreements and a debt assumption agreement. The agreements were not drafted, negotiated, or signed by the father or his sons. However, the father and his sons were involved in the implementation of the loans as they participated in the decisions on the investments to be made with the funds in question, personally benefited from part of these funds and actively participated in the discussions on the repayment of the loans in the context of the French tax procedure. The loan agreements and the debt assumption agreement contained an identical arbitration clause, which provided for the jurisdiction of an arbitral tribunal seated in Geneva. The Swiss Federal Supreme Court ("SFSC") stated that it was bound by the arbitral tribunal's finding of the actual intention of the parties to be bound by the arbitration clauses at issue, as the parties' actual intention was a question of fact. The SFSC further held that the respective behaviour of the parties (as established by the arbitral tribunal) could also be objectively interpreted as an expression of the will of the non-signatories to be bound by the arbitration clauses contained in the underlying loan agreement.[14)]

2. What kinds of non-signatories have Japanese law recognized as being subject to an arbitration agreement?

In the authors' view, with some exceptions and depending on the actual circumstances of the case, Japanese courts generally tend to deem the subjective scope of an agreement to arbitrate to be a matter of the implied consent, instead of invoking particular theories.[15)]

There is no precedent in which a Japanese court expressly referred to or endorse the "Group of Companies" Doctrine under Japanese law, but in light of aforementioned Japanese courts' approach, the fact that the third party belongs to the same group of companies can be considered as one of factual elements to establish the mutual implied intention of all the parties involved.[16)]

For instance, in the case of Tokyo District Court Judgment dated 17 October 2014, Hanrei Times Vol. 1413 Page 271, which was governed by U.S. law and Arizona State law, the Japanese court found the implied consent by considering the facts, among others, that (a) the

14) Petra Rihar, '2023 Year in Review: Switzerland (Part I: Scope of Arbitration Clause, Capacity of Discernment, Res Iudicata)' (Kluwer Arbitration Blog, February 17, 2024); Juliette Asso-Richard, Felix Dasser, Dilber Devitre, Manya Gopalakrishnan, Nikolina Marusic, Korinna von Trotha, Andrea Meier, and Nino Sievi, 'Swiss Arbitration Summit – Shaping the Future of Arbitration Together: Extension of Arbitration Clauses to Non-signatories and AI in Practice' (Kluwer Arbitration Blog, January 17, 2025).

15) For instance, in the case of Tokyo District Court Judgment dated 27 October 2014, Hanreihisho L05934299, where the relevant governing law was Japanese law, the court ruled that *"According to Japanese law and case law, there is no legal principle that the effect of a contract between legal entities will automatically extend to the representatives of those legal entities. ... However ... it is reasonable to interpret that the arbitration agreement in this case also extends to the individual Defendant Y2, who is the representative of the defendant company, which is consistent with the reasonable intentions of both parties to the agreement."*

16) *See* Tatsuya Nakamura, *Issues in Arbitration Law* (Seibundo, First edn, 2017), page 162.

non-signatory belonged to the same corporate group with the signatory and (b) the non-signatory is acknowledged to have acted as a liaison in place of the signatory for the transactions under the agreement in question. Based on the relevant facts, the Japanese court reasoned that if the court allowed the relationship between the plaintiff (a signatory) and the non-signatory to be separately adjudicated in another lawsuit (instead of arbitration), it would be contrary to the intent of the contracting parties, who agreed to resolve the dispute through arbitration under the arbitration agreement, and would substantially undermine the significance of that arbitration agreement.

Notably, some Japanese courts, in ascertaining an implied consent, also look at equity-related factors, such as fairness between the parties involved, and the necessity to prevent contradictory decisions.[17)]

3. Factors to be considered

Considering the above arguments, in author's view, the following non-exhaustive factors will likely be taken into account by a Japanese court if it needs to decide the inclusion of non-signatories to an arbitration agreement. The exact weight and relevance of each factor will depend on circumstances of each case:

(i) A non-signatory's involvement in the negotiation and conclusion of a contract containing an arbitration agreement;
(ii) A non-signatory's involvement in the execution and performance of some or all of the obligations of a contract containing an arbitration agreement;
(iii) A non-signatory's involvement in the termination of a contract containing an arbitration agreement;
(iv) A relationship between and among legal entities (i.e., the non-signatory and signatory) within their corporate group structure;
(v) A non-signatory's interest in the outcome of the dispute;
(vi) Commonality of contractual relationship's subject matter and non-signatory's conduct;
(vii) In case of a transaction involving multiple agreements, the relationship between the contract containing the arbitration agreement and the other ancillary contract(s) which includes the non-signatory to the arbitration agreement as a party;
(viii) Necessity to respect for the separate corporate legal personality of a company;
(ix) Language of an underlying contract such such as the usage of the expression "party";
(x) A relationship between a claim against a non-signatory and a contract containing an arbitration agreement;

17) In Tokyo District Court Judgment dated 27 October 2014, Hanreihisho L05934299, the court held that *"it is fair between the parties to admit that Defendant Y2 is equivalent to a party to the arbitration agreement. Moreover, if the court held that the lawsuit between the plaintiff and Defendant Y2 can be heard and judged by this court, ... there would be a risk that the judgment of this court and the arbitral award of the tribunal would contradict … As such, it is reasonable to interpret the arbitration agreement in this case also extends to the individual Defendant Y2, who is the representative of the defendant company, which is consistent with the reasonable intentions of both parties to the agreement."*

(xi) Necessity to prevent contradictory decisions between the dispute involving signatories and a dispute involving a non-signatory; and
(xii) Fairness between the parties involved.

4. Conclusion — Takeaways from the foreign jurisdictions' approach for the Japanese approach

Courts worldwide take a variety of approaches regarding the issue of non-signatories. These different approaches are particularly relevant in modern international business transactions, where companies strategically leverage their corporate structures and deliberately determine who the signatories to a contract should be. Consequently, parties should consider not just the position of parties in relation to the commercial terms of the contract, but also this issue of non-signatories as it relates to the arbitration agreement and its governing law.

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When Arbitration and Insolvency Intersect: Developments from Common Law Jurisdictions and Key Takeaways for Japan

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Ⅰ. Introduction

When a creditor seeks insolvency proceedings against a debtor in relation to a debt subject to arbitration proceedings, or when the debtor seeks to resolve a dispute concerning the debt pursuant to an arbitration agreement after a creditor seeks insolvency proceedings against the debtor, which will take precedence in the court – the insolvency proceedings or the arbitration proceedings?

When a debtor is unable to pay its debts as they fall due, insolvency proceedings provide the means to distribute the debtor's assets in an orderly manner among all its creditors in proportion to the amount owed to each creditor. Each country has its own laws to govern such proceedings as a matter mandatory law and public policy. Nonetheless, there is also a public policy interest in respecting the autonomy of parties to contract for the resolution of disputes through arbitration rather than through the courts.

When these two areas of public policy collide, the courts must decide which of them shall take precedence. The legal framework and case precedents in each jurisdiction lead to different approaches by jurisdiction. This paper will first examine the issue in the Japan context. Next, this paper will examine recent trends in judicial precedents from the common law jurisdictions of Hong Kong and the British Virgin Islands ("BVI") as well as the influence of English case law on these jurisdictions. Following this review, this paper will then consider some key takeaways from a Japanese perspective.

Ⅱ. Leading Case in Japan

A leading case concerning an agreement to arbitrate and the insolvency of one of the parties was decided by the Tokyo District Court on January 28, 2015.[1)]

A shipowner and a charterer, a Japanese company, entered into a time charter agreement

1) Hanrei Jiho, No. 2258. Page 100.

in which the parties agreed to resolve disputes through a London arbitration institution. The charterer subsequently filed for insolvency proceedings in the Tokyo District Court, under the Corporate Reorganization Act. After the commencement order was issued, dispute arose as to the nature of the shipowner's claim for unpaid charter fees. The shipowner/creditor asserted that the matter should be resolved by the Tokyo District Court pursuant to the Corporate Reorganization Act, while the charterer/debtor asserted that the issue should be resolved in accordance with the agreement to arbitrate under the time charter agreement. The shipowner/creditor sought to: (1) defend against the trustee's rejection of its claim; and (2) deduct a debt it owed to the charterer/debtor from the shipowner/creditor's claim for unpaid charter fees. The crux of the issue was whether the unpaid charter fees constituted a "common benefit claim" under the Corporate Reorganization Act. If so, the shipowner/creditor's claim would fall outside the scope of the corporate reorganization proceedings and thus be beyond the reach of the trustee's powers and the prohibitions on set-off under the Corporate Reorganization Act. Conversely, if not a common benefit claim, creditor/shipowner's claim would fall within the corporate reorganization proceedings and thus be subject to the powers of the trustee and the prohibitions on set-off under the Corporate Reorganization Act.

In the judgement of the Tokyo District Court, it was determined that the matter should be resolved in the Tokyo District Court rather than through arbitration in London. The court's reasons for giving precedence to the corporate reorganization proceedings in the Tokyo District Court were that: (1) the determination of whether the creditor's claim was in the nature of a common benefit claim and whether set-off could be permitted, were issues unique to Japan's Corporate Reorganization Act; and (2) arbitrators of an arbitration proceeding in London would not be well placed to determine such matters of Japanese law appropriately; and (3) even as a matter of English law, absent exceptional circumstances, arbitration proceedings could not be commenced against a debtor in insolvency proceedings. On this basis, the court determined that the arbitration clause in the time charter agreement did not include disputes concerning the merits of the specific issues at hand.

Overseeing a proceeding which aims to rehabilitate the debtor and implement the equitable and fair repayment to creditors from a limited pool of assets, it is evident that the Tokyo District Court understood that the substantive issue, that is, whether the creditor's claim constituted a common benefit under the Corporate Reorganization Act, directly impacted the all-important restructuring plan, which in turn was directly tied to the priority of multiple creditors. Given that all these issues were fundamentally governed under the Corporate Reorganization Act, this was strong basis for the Tokyo District Court to decide that these matters should be determined by the court rather than through arbitration in London. It is notable that the rationale of the judgement is framed in terms of interpreting the intention of the parties, given the court's reasoning that the parties could not have intended that the agreement to arbitrate would extend to matters of this kind. Critics of this aspect of the judgment argue that the court should have approached the issue (*i.e.*, whether the claims constituted common benefit claims under the Corporate Reorganization Act) head on as a question of arbitrability.[2)]

Ⅲ. Development of Cases in England and the British Virgin Islands

In the courts of England, *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* ("Salford")[3] decided in 2014, became a leading case that reinforced the trend towards giving precedence to the arbitration agreement over the insolvency proceedings against the debtor party. As shall be discussed in Section IV below, this also became the approach followed by certain common law jurisdictions in Asia. However, a reversal in the thinking of the English courts was signaled by a recent decision by the Judicial Committee of the Privy Council ("Privy Council") in *Sian Participation Corp (In Liquidation) v Halimeda International Ltd* ("Sian") which was a BVI case on appeal.[4] In *Sian*, the Privy Council criticized of the approach in Salford and expressed its support for the approach giving precedence to insolvency proceedings even in the courts of England.

1. The Salford Case

Salford was decided by the English Court of Appeal in 2014. In this case, the appellant and respondent were parties to a lease agreement under which the lessor leased space commercial space in a Salford shopping mall to the lessee. The lessor petitioned for the winding up of the lessee on the basis of unpaid amounts under the lease. The lease agreement included an arbitration clause for the resolution of disputes. The lower court ordered that the winding up proceedings be stayed pursuant to the automatic stay provision under Section 9(1) of the Arbitration Act 1996. The lessor/petitioner appealed.

The Court of Appeal dismissed the lessor/petitioner's appeal on the reasoning that in order to trigger the automatic stay provision under Section 9(1), it was sufficient for the lessee/debtor to assert that it disputed the debt, irrespective of the merits of the dispute, and whether or not formal proceedings to recover the debt had been commenced. The Court of Appeal found that it was right for the court below to either stay or dismiss the winding up petition to hold the parties to their agreement to resolve disputes by arbitration and that it was not necessary for the court to investigate whether or not the debt was disputed in good faith on substantial grounds in order to do so. In essence, the judgment determined that as a general rule, if the dispute is subject to an arbitration clause in the relevant agreement, court proceedings, including insolvency proceedings will be automatically stayed. As such, this was a judgement giving precedence to arbitration.

2. The *Sian* Case

A decade later, the Privy Council rendered its judgement in *Sian*, a case on appeal from the

2) Takasugi, Naoshi "*Tousan Tetsuzuki no Kyoeki Saiken ni Kannsuru Funsou to Kokusaichusai no Goi Kouryoku*" Jurist No. 1493, p. 114 ff. Nagata, Mari "*Rondon wo Chusaichi to Suru Chusaigoi to Kaishakousei*" Jurist No. 1492, p. 298 ff.

3) [2014] EWCA Civ 1575 https://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2014/1575.html&query=Peter+and+Knox&method=boolean%22

4) [2024] UKPC 16 https://www.jcpc.uk/cases/judgments/jcpc-2023-0055

BVI courts.[5] The appellant/debtor, a BVI company and respondent/creditor were parties to a loan agreement which contained an arbitration clause. After the debtor failed to repay the loan, the creditor made an application to the relevant BVI court for the commencement of liquidation proceedings against the debtor. The debtor asserted that the debt was disputed and argued that an order for liquidation against the debtor could not be made until the issue regarding the debt was resolved pursuant to arbitration. Reference was made to Article 18(4) of the BVI's Arbitration Act 2013 which provides for a stay of legal proceedings where the parties where the matter is subject to an arbitration agreement. The Privy Council dismissed the debtor's appeal on the basis that as a matter of BVI law, "the correct test for the court to apply to the exercise of its discretion to make an order for the liquidation of a company where the debt on which the application is based is subject to an arbitration agreement or an exclusive jurisdiction clause and is said to be disputed is whether the debt is disputed on genuine and substantial grounds."[6] The findings of fact in the lower court were that there were not sufficiently substantial grounds to dispute the debt. Thus the Privy Council confirmed the position under BVI law that a decision to stay liquidation proceedings against a debtor that disputes a debt subject to an arbitration agreement, will depend on whether the debt is disputed on genuine and substantial grounds.

The Privy Council's judgement not only affirmed the long line of BVI judicial precedent giving preference to the insolvency proceedings[7] but also held that *Salford* was decided incorrectly. The Privy Council's judgment even went so far as to direct that *Salford* should no longer be followed in the courts of England and Wales. Essentially, *Sian* is a judgement that strongly gives insolvency proceedings precedence over an agreement to an agreement to arbitrate.

Ⅳ. Development of Cases in Hong Kong

In the past, the courts of Hong Kong had taken the view that for a debtor to seek a stay of winding up proceedings on the basis that the debt is disputed, the debtor must first establish that there is a bona fide dispute on substantial grounds (for example, *Hollmet AG v Meridian Success Metal Supplies Ltd.*[8]). However, after *Salford*, the prevailing view turned towards a position giving preference to the arbitration proceedings. The following cases illustrate how the position in the Hong Kong courts developed over the course of ten years following *Salford*

5) Though the Justices of the Privy Council are primarily made up of judges from the Supreme Court of the United Kingdom, the Privy Council's distinct jurisdiction should be noted. The Privy Council is the final court of appeal for several Commonwealth countries, as well as the United Kingdom's overseas territories (such as BVI), crown dependencies, and military sovereign base areas. *See*: https://www.jcpc.uk/about-judicial-committee. In contrast, it is the Supreme Court that serves as the final court of appeal for the United Kingdom for civil cases and for criminal cases from England, Wales and Northern Ireland. *See*: https://supremecourt.uk/.

6) *Ibid*. para. 99

7) For example, see: *Jinpeng Group Ltd v Peak Hotels and Resorts Ltd BVIHCMAP2014/0025* (8 December 2015) https://www.eccourts.org/judgment/jinpeng-group-ltd-v-peak-hotels-and-resorts-ltd

8) *Hollmet AG v Meridian Success Metal Supplies Ltd*. [1997] 4 HKC 343

until it was solidified by the Hong Kong Court of Appeal in 2024.

1. *Lasmos Limited v Southwest Pacific Bauxite (HK) Limited* ("Lasmos")[9)]

Lasmos was decided in 2018 by the Hong Kong Court of First Instance. The case involved a Hong Kong joint venture company as debtor and one of its shareholders as creditor. The company and shareholder were parties to a management services agreement under which it was agreed that the shareholder would provide management services to the company in exchanges for fees to be paid by the company. The agreement included an arbitration clause. After the company declined to pay fees that the shareholder asserted were owed under the management services agreement, the shareholder issued a petition to wind up the company. The company then sought to strike out the petition on the basis that the debt was disputed and that this dispute should be resolved by arbitration. Justice Harris observed that prior Hong Kong precedents took the view that when a creditor seeks a winding up order, this should not be subject the normal consequences of the parties having agreed to resolve disputes by arbitration because a winding up order was a class remedy, that is, that a winding up order is not a means of enforcing a debt. Critiquing the past cases, Justice Harris noted that notwithstanding the nature of winding up proceedings and the interests of the general class of unsecured creditors, the petitioning creditor's purpose was ultimately to recover the debt.[10)] Justice Harris continued this analysis reasoning that the fact of a petitioner being a member of the class was not relevant to the issue of determining whether a debt is owed.[11)]

Ultimately, Justice Harris found that the court generally should dismiss the winding-up petition if the following criteria are satisfied: (1) the debt is disputed by the company; (2) the debt arises under a contract which contains an arbitration clause that covers any disputes relating to the debt; and (3) the company takes the steps required under the arbitration clause to commence the mandated dispute resolution process. Although precedence was given to arbitration, Justice Harris also left room for a winding up order to proceed where exceptional circumstances were present, such as a risk of misappropriation of assets or where there are substantiated concerns there had been fraudulent preferences.

2. *Guy Kwok-Hung Lam v Tor Asia Credit Master Fund LP* ("Guy Lam")[12)]

Guy Lam was decided in 2023 by the Hong Kong Court of Final Appeal. In *Guy Lam*, the petitioner/creditor advanced a loan to a company (the borrower) under a Credit and Guaranty Agreement between the petitioner/creditor, the borrower and Mr. Guy Kwok-Hung Lam, a resident of Hong Kong, as guarantor for the debt. The agreement contained an exclusive jurisdiction clause under which the parties agreed to the exclusive jurisdiction of the New York

9) *Lasmos Limited v Southwest Pacific Bauxite (HK) Limited* [2018] HKCFI 426 https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=113905&QS=%2B&TP=JU

10) *Ibid*., para. 25.

11) *Ibid*., para. 27.

12) *Guy Kwok-Hung Lam v Tor Asia Credit Master Fund LP* [2023] HKCFA9 https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=152321&currpage=T

courts for the purposes of all legal proceedings arising out of or relating to the agreement. Subsequently, on the allegation that the borrower was in default, the petitioner/creditor sought payment from Mr. Lam as the guarantor. After the petitioner's demand for payment was went unsatisfied, the petitioner/creditor commenced bankruptcy proceedings against Mr. Lam in the courts of Hong Kong. In defending against the petition, Mr. Lam disputed the allegation of default and argued that the existence of the liability should be determined in the courts of New York in accordance with the exclusive jurisdiction clause. The Hong Kong Court of First Instance found that there was no bona fide dispute on substantial grounds in respect of the debt and issued a bankruptcy order against Mr. Lam. After Mr. Lam was successful in the Court of Appeal, the petitioner/creditor sought further appeal to the Hong Kong Court of Final Appeal.

The Hong Kong Court of Final Appeal affirmed the judgment of the Court of Appeal in favor of Mr. Lam dismissing the bankruptcy petition on the reasoning that where the parties have agreed to refer disputes to a foreign court, a bankruptcy petition against the debtor cannot proceed as a general rule where the debt triggering the petition is disputed, until the debt is determined by that agreed foreign court. Although this judgement gave precedence to exclusive jurisdiction clause over the domestic bankruptcy proceeding, the Court of Final Appeal left a narrow scope of exceptional circumstances where the Court of First Instance should use its discretion to allow the bankruptcy petition to proceed, referring to "countervailing factors", such as where there is a the risk of insolvency affecting third parties and where the dispute borders on the frivolous or abuse of process.[13)]

In subsequent judgements of the Court of First Instance where the position on arbitration clauses was still in flux, question arose as to whether *Guy Lam* could apply to cases involving an arbitration clause for dispute resolution instead of an exclusive jurisdiction clause. The Court of Appeal settled this issue in the cases discussed below.

3. *Re Simplicity & Vogue Retailing (HK) Co., Limited* ("Re Simplicity")[14)]

Re Simplicity was decided by the Hong Kong Court of Appeal in 2024. In this case, a Cayman company, Simplicity & Vogue Retailing Corporation ("Cayman Issuer") issued convertible bonds to China Everbright Securities Value Fund SPC ("Creditor"). A corporate guarantee agreement was entered into between the Cayman Issuer, the Creditor and a Hong Kong company, Simplicity & Vogue Retailing (HK) Co., Limited ("Guarantor"), as guarantor for the debt under the bond instrument. Both the bond instrument and the guarantee agreement contained an arbitration clause. After the Issuer failed to pay the maturity redemption amount when it became due under the terms of the bond instrument, the Creditor filed a winding up petition against the Guarantor in the Court of First Instance. The Guarantor sought to oppose the petition arguing among other things that the debt was disputed and subject to arbitration in accordance with the bond documents and guarantee agreement. The Guarantor filed its

13) *Ibid*., para. 105.

14) Re Simplicity & Vogue Retailing (HK) Co., Limited [2024] HKCA 299 https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=159561&currpage=T

opposition documents late and thus had to request an extension. The court granted the request on condition that the Guarantor pay into court the amount of the debt in dispute by a specific deadline. The Guarantor failed to do so and sought an extension to pay the amount. The Court of First Instance rejected the Guarantor's request, meaning that the Creditor's petition could proceed. The Guarantor appealed. The main argument of the Guarantor on appeal was that Court of First Instance failed to apply the approach in *Guy Lam* and refer the disputed debt to arbitration pursuant to the arbitration clause in the relevant agreements.

In analyzing the arguments of the parties, the Court of Appeal confirmed the following legal principles.[15)]

Court of Appeal confirmed that the *Guy Lam* approach should also apply to disputes subject to an arbitration clause, instead of limiting it to cases involving exclusive jurisdiction clauses. Accordingly, it was confirmed that the court has discretion to determine whether there is a *bona fide* dispute of the debt on substantial grounds, even where the parties have agreed to submit any dispute to arbitration. It was also made clear in which direction the court should exercise its direction as a general rule. As in *Guy Lam*, it was decided that the agreement of the parties should be respected, *i.e.*, the Court of First Instance should decline jurisdiction on the petition debt (including the jurisdiction to determine the existence of a *bona fide* dispute of the debt on substantial grounds), unless there are "countervailing factors" such as the risk of insolvency affecting third parties and a dispute that borders on the frivolous or abuse of process.

Although the judgement reinforced the approach of giving precedence to arbitration proceedings as a general rule, through the discussion of the above exceptional circumstances, the Court of Appeal also established that the court should take a "multi-factorial" analysis where, if such circumstances were identified, the court may give precedence to the insolvency proceedings.

Applying the above principles, the Court of Appeal dismissed the Guarantor's appeal, agreeing with the Court of First Instance that: (1) there was no dispute in respect of the petition debt; and (2) even if there was, the Guarantor's arguments bordered on the frivolous or abuse of process. Thus in Simplicity, the Court of Appeal confirmed the legal principles of the approach favoring arbitration proceedings, but in the result allowed the insolvency proceedings based on the exceptional circumstances in the facts of the case.

4. *Arjowiggins HKK 2 Limited v Shandong Chenming Paper Holdings Limited* ("Shandong")[16)]

The Court of Appeal rendered its judgment in *Shandong*[17)] on the same day as *Simplicity*

15) For a helpful analysis of the case see: https://www.hsfkramer.com/notes/asiadisputes/2024-05/navigating-the-crossroads-between-arbitration-and-insolvency-proceedings-the-hong-kong-court-of-appeal-applies-guy-lam-principles-in-a-winding-up-case-involving-an-arbitration-clause/

16) *Arjowiggins HKK 2 Limited v Shandong Chenming Paper Holdings Limited* [2024] HKCA 352 https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=159564&QS=%2B&TP=JU

17) For a helpful analysis of the case see: https://www.hsfkramer.com/notes/asiadisputes/2024-05/the-hong-kong-court-of-appeal-extends-re-guy-lam-approach-to-cross-claims-subject-to-arbitration-agreement

confirming the same legal principles, except in the context of a cross-claim by the debtor against the petitioning creditor.

In *Shangdong*, the debtor, a mainland Chinese company registered in Hong Kong and creditor/petitioner, a Hong Kong company were parties to an agreement regarding their respective shareholdings and operation of a mainland Chinese joint venture company. This joint venture agreement contained an arbitration clause. Over the course of the joint venture, a series of disputes arose between the parties, which they attempted to resolve through arbitration. After the debtor failed to pay the demanded amount, the creditor/petitioner commenced winding up proceedings against the debtor and the debtor resisted by applying to the court for a dismissal or stay of the proceedings asserting that it had a cross-claim against the creditor/petitioner in arbitration which exceeded the petition debt. The Court of First Instance held that the *Guy Lam* approach applied and stayed the winding up proceedings pending determination of the cross-claim in the arbitration. The creditor/petitioner appealed.

The Court of Appeal agreed that the *Guy Lam* approach applied to arbitration cases and even where debtor did not dispute the debt claimed by the creditor and instead asserted a cross-claim. Thus, as in *Simplicity*, the Court of Appeal held that the court should exercise its discretion to give precedence to arbitration in order to respect the agreement between the parties, unless the dispute borders on the frivolous or an abuse of process. In the case of *Shandong*, the Court of Appeal did not find on the facts of the case that there were any such exceptional factors, and thus dismissed the creditor/petitioner's appeal.

V. Some Key Takeaways for Japan

Among the common law jurisdictions, it appears that a divide has emerged regarding the priority to be given between insolvency proceedings and arbitration proceedings. As illustrated by the major judicial precedents discussed above, the courts of England and BVI have taken the approach of giving priority to insolvency proceedings; whereas the courts of Hong Kong have taken the approach of giving priority to arbitration proceedings. However, it is noteworthy that even in the courts of Hong Kong, the approach favoring arbitration proceedings is subject to reservations allowing insolvency proceedings to take precedence where there are exceptional circumstances. An underlying theme in the approach taken by the courts in Hong Kong can be seen in the words of Justice Harris, in *Lasmos* cautioning against allowing creditors to use insolvency proceedings as a means to collect on their own claims and emphasizing that in order to respect the autonomy of the parties, disputes regarding the debt should be resolved in the manner agreed upon by the parties (i.e. arbitration proceedings, where there is an arbitration agreement). From *Lasmos* to *Guy Lam* and onwards, the approach developed to consider exceptional circumstances such as impact on third parties, risk of misappropriation of assets or where there are substantiated concerns of fraudulent preferences. In the author's experience with Japanese cases, there is a fair chance of discovering that a debtor has misappropriated assets, and when a debtor's financial condition deteriorates, it is not uncommon for rumors to circulate about the debtor paying

certain creditors in advance of others. Assuming that the realities are similar in Hong Kong as well, it may be that in practice, such exceptional circumstances could be easily asserted.

In the Japanese case discussed in Section II above, the Japanese court gave precedence to the insolvency proceedings on the basis of a factual determination that the agreement to arbitrate did not extend to disputes concerning the legal nature of the dispute or the permissibility of set-off. To date there has been no judgement in the courts of Japan directly addressing the issue of whether the claim under the bankruptcy petition would be arbitrable. In the event that such a dispute came before a Japanese court, it can be anticipated that the question of whether to give priority to the arbitration proceedings or the bankruptcy petition would present a difficult dilemma for the Japanese court. Ultimately, given the high regard given to trustees in bankruptcy appointed by the courts in Japan, it would be important to give priority to the bankruptcy petition to allow the trustee to manage the fair treatment of creditors and other stakeholders in the distribution of the debtor company's assets.

Nevertheless, there is also validity to the thinking that arbitration should be given precedence, with emphasis on the autonomy of the parties. In such cases, it would be important to clarify exceptions to the rule as seen in the Hong Kong cases, in order to maintain predictability. The Japanese courts will be required to strike a delicate balance in making such determinations and it can be anticipated that the recent developments in the courts of England, BVI and Hong Kong will impact the thinking in the Japanese courts going forward.

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Filling the Void – Issues That Arise When an Arbitrator Dies

Peter Harris[1)] **Owain Cooke**[1)]

Ⅰ. Introduction

Receiving an email which says that an arbitrator has a terminal illness or that a tribunal member has suddenly passed away is an extremely sad moment. At the same time, for counsel representatives, there is a duty to pass this news on to their clients as well as to explain to them what this means for their case. In addition to having an understandably emotional reaction, clients will naturally have many questions. For example, how long will it take to replace the arbitrator and what is the process for appointing a replacement.

To a large extent the answers to these questions will depend on what stage the arbitration has reached, the number of arbitrators, the applicable procedural rules, the seat of the arbitration (i.e. the *lex arbitri*) and the nature of the dispute.

This article focuses on three key questions that arise when a member of the tribunal dies:

1. How is the arbitrator replaced?
2. To what extent must the proceedings be repeated?
3. What are the potential impacts on any existing or future award in the case?

This article will also discuss practical considerations and steps a party may be able to take in order to mitigate the risks of a tribunal member passing away.

Ⅱ. Replacement of an Arbitrator

If an arbitrator dies, and must be replaced, what process should be followed to replace them? To some extent this will vary depending on the seat of the arbitration and the national laws governing the arbitral procedure.

Under the UNCITRAL Model Law[2)] the most relevant provisions are Article 14 and 15 which,

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without expressly contemplating the death of an arbitrator, allow for the substitution of a dead or terminally ill arbitrator '*according to the rules that were applicable to the appointment of the arbitrator being replaced*'. Jurisdictions that essentially adopt the Model Law are similar but often slightly more detailed. For example, the Japanese Arbitration Law expressly refers to death as a circumstance resulting in the termination of an arbitrator's mandate.[3] However, in terms of replacement, the Japanese Arbitration Law follows the Model Law precisely.[4] On the other hand, the English Arbitration Act provides that '*authority of an arbitrator is personal and ceases on* [⋯] *death*'.[5] It also stipulates that the parties are free to agree '*whether and if so how the vacancy is to be filled*'.[6] It is worth remembering that by application of the fundamental principle of party autonomy, the parties should in any event be able to agree (if they can) on what should happen. However, in the absence of an agreement by the parties on the process, the applicable arbitral rules should step in.

Arbitral institutions tend not to have express or detailed provisions covering the death of an arbitrator specifically but rather deal with the question of replacement in a consistent manner whatever the reason for it being required (e.g. as a result of a successful bias challenge, resignation or death). There are slight differences between the different institutional rules. For example, under the ICC Rules, where the ICC Court is appointing the replacement arbitrator, the ICC Court has discretion as to whether to follow the original nominating process or not.[7] Under the JCAA Rules, a party, the parties or the remaining arbitrators will appoint a substitute arbitrator in the same manner as the deceased arbitrator was appointed. The party, parties or remaining arbitrators must notify the JCAA of the appointment within a specified timeframe failing which the JCAA will proceed to appoint the substitute arbitrator itself; for example, in a scenario where a three-member tribunal has been appointed under the standard JCAA Rules procedure, if the claimant's arbitrator were to die during proceedings, the claimant would appoint the replacement and notify the JCAA (or if it did not, the JCAA would make the appointment).[8]

In terms of timing, the quickest way to replace an arbitrator is usually if the parties can agree, particularly if the deceased arbitrator is the presiding arbitrator.[9] However, in the context of a major dispute, often this is not possible. For this reason, most rules have a time limit by which the institution can and will step in to make a replacement appointment if the

2) The United Nations Commission on International Trade Law Model Law on International Commercial Arbitration ('UNCITRAL Model Law') (1985, with amendments as adopted 2006)

3) The Arbitration Act (Act No. 138 of 2003) (Japan) art 21(1)(i)

4) The Arbitration Act (Act No. 138 of 2003) (Japan) art 22 provides: 'Unless otherwise agreed by the parties, where the mandate of an arbitrator terminates under any of the grounds described in each item of paragraph (1) of the preceding article, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.'; see also UNCITRAL Model Law art 15.

5) The Arbitration Act (England and Wales) 1996 s 26

6) ibid s 27(1)(a)

7) International Chamber of Commerce Arbitration Rules ('ICC Rules') (2021) art 15(4)

8) The Japan Commercial Arbitration Association Commercial Arbitration Rules ('JCAA Rules') (2021) art 36; see also The United Nations Commission on International Trade Law Arbitration Rules ('UNCITRAL Rules') (2021) art 14(2); The Arbitration Rules of the Singapore International Arbitration Centre ('SIAC Rules') (2025) art 14(2)

nomination process goes beyond a certain date. The authors also note that the current LCIA Rules allow for the expedited appointment of a replacement arbitrator whereby a party can apply to the LCIA court to expedite the process for replacing an arbitrator.[10)]

The stage of the proceedings is also relevant to the question of replacing a deceased arbitrator, in particular, where the arbitrator dies after proceedings, or at least after all hearings have been closed (which may be prior to the issuance of the award depending on the applicable framework). Some rules make it possible for the parties or institution to decide that the arbitral award can be issued without making a substitution, for example, the JCAA Rules.[11)] However, some rules do not expressly provide for this eventuality.

At this stage it is worth noting that challenges to enforcement (valid or invalid) may arise if the procedure for substitution of the arbitrators is not correctly followed or if non-appointment of an arbitrator following closure of proceedings results in an award that is not signed by all the arbitrators.[12)] Therefore, regardless of the underlying merits of such potential challenges, care needs to be taken to consider the applicable rules, the *lex arbitri* and the laws applicable in any jurisdiction where the award is likely to be enforced.

Ⅲ. The Need for Repeating the Case

When an arbitrator dies, and particularly if a replacement is nominated, the question arises as to how much of the proceedings, if any, need to be reheard. The parties may be able to find agreement on this point but, in any event, the applicable *lex arbitri* and procedural rules also need to be consulted. Generally, national arbitration legislation does not contain detailed provisions dealing with this point and it is not covered in the UNCITRAL Model Law. However, the English Arbitration Act contains a provision that allows the parties to agree on the '*extent the previous proceedings should stand*' as does the Singapore Arbitration Act.[13)]

Where the parties have agreed to apply the rules of an arbitration institution, these also provide additional directions or guidance and there is a degree of variation in approaches. For example, the JCAA Rules provide that the replacement arbitrator, '*after giving the Parties an opportunity to comment, shall decide whether or to what extent arbitral proceedings already conducted should be repeated*'.[14)] However, the current SIAC Rules say that, '[u]*nless the*

9) Where a party-appointed arbitrator dies most rules allow for the same appointment process used previously to apply. Therefore, more often than not, this allows for the party that appointed the arbitrator who dies to appoint a new arbitrator, the appointment of whom would then be subject to the same process as usual.

10) London Court of International Arbitration Rules ('LCIA Rules') (2020) art 9C

11) JCAA Rules art 37

12) UNCITRAL Model Law art 31(1) provides that awards may be made by the signatures of the majority of the arbitral tribunal in proceedings with more than one arbitrator, 'provided that the reason for any omitted signature is stated'. In Germany, which mirrors the UNCITRAL Model Law, an award was recently challenged on the basis that insufficient reason was given for the omission of one arbitrator's signature. This claim eventually failed before the German Federal Court of Justice (Case No. I ZB 34/23, 11 July 2024).

13) The Arbitration Act (England and Wales) 1996 s 27(1)(b); The Arbitration Act (Singapore) 2001 s 18(1)(b)

14) JCAA Rules art 38

Tribunal decides otherwise after considering the views of the parties, any hearings held previously relating solely to a decision, ruling, order, or award shall not be repeated and the decision, ruling, order, or award shall remain in effect'.[15] In another variation, the current HKIAC Rules provide that '[i]*f an arbitrator is replaced, the arbitration shall resume at the stage where the arbitrator was replaced or ceased to perform his or her functions, unless the arbitral tribunal decides otherwise*'.[16]

In practice, the stage of the proceedings at the point of the arbitrator's death and the number of arbitrators are central considerations and it is possible that the parties will have very different views on this issue. While obviously there will be time and cost implications if the proceedings are extended as a result of having to re-do all or part of the proceedings, there are also considerations of fairness and views of the remaining tribunal members, and the incoming arbitrator, to be taken into account. Interestingly, the current ICSID Rules seems to give some priority to the views of the incoming arbitrator in providing that '[a]*ny portion of a hearing shall be recommenced if the newly appointed arbitrator considers it necessary to decide a pending matter*'.[17]

Ⅳ. Award

It is also important to consider how the death of a member of the panel will affect the status of any award that is to be or has been issued. The New York Convention, to which 172 countries are parties, states that '*[e]ach Contracting State shall recognize arbitral awards as binding*'.[18] Similarly, the ICSID Convention states that signatories '*shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State*'.[19] Therefore, awards, once made, signed and issued, should not be affected by the subsequent death of a member of the panel.

Nevertheless, there is a possibility that a party may (validly or invalidly) challenge an award based on issues connected to the death of an arbitrator or other complications that may arise. For example, the ICSID Convention, and most sets of arbitration rules, allow for parties to seek a clarification or revision of an award after it has been rendered.[20] It is not always clear or consistent as to how such clarifications will be made in the admittedly rare circumstances where an arbitrator has passed away between the issuance of the award and the making of the request for clarification – so care needs to be taken as to how such requests are treated and whether or not it is possible for the remaining arbitrators to respond and make any

15) SIAC Rules r 30.3

16) Hong Kong International Arbitration Centre Administered Arbitration Rules ('HKIAC Rules') (2024) art 12.3

17) The International Centre for Settlement of Investment Disputes Arbitration Rules ('ICSID Rules') (2022) r 26(4)

18) Convention on the Recognition and Enforcement of Foreign Arbitral Awards (opened for signature 10 June 1958, entered into force 7 June 1959) ('New York Convention') art III

19) Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) ('ICSID Convention') art 54

20) ICSID Convention art 50, 51

clarifications.

It is also important to consider the status of interim decisions or appointments which were made by an arbitrator who has since died. Many legal frameworks, including the UNCITRAL Model Law and UNCITRAL Arbitration Rules 2021 do not specifically address this question. However, both the English Arbitration Act[21] and the Singapore Arbitration Act[22] state explicitly that the validity of appointments of arbitrators made by a replaced arbitrator will not be affected by that replacement. The SIAC Rules also make explicit that any previous '*decision, ruling, order, or award shall remain in effect*' even after the replacement of an arbitrator.[23]

Many rules provide that when a member of the panel dies, the tribunal can be reconstituted and potentially rehear parts of the case in order to make an award.[24] The New York Convention requires that awards are '*duly authenticated*' in order to be recognised and enforced.[25] It also states that an award can be challenged if the '*composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties*… [or] *the law of the country where the arbitration took place*'.[26] It is therefore important for the enforceability of awards that if an award is issued after the death of a member of the panel, it is done so validly according to the terms of the arbitration agreement, the applicable rules and the *lex arbitri*. These provisions (and enforcement more generally) also need to be carefully considered if the parties continue with a panel where the deceased arbitrator is not replaced.

National arbitration legislation, generally provides for the replacement of arbitrators by the process of their original nomination.[27] However, the arbitral rules sometimes provide for awards to be rendered without replacement of the deceased arbitrator in certain circumstances or subject to conditions. For example, the UNCITRAL Rules provide that the appointing authority may, *in*' *exceptional circumstances*' be justified in bypassing a party's right to nominate a substitute arbitrator and '*after the closure of hearings, authorize the other arbitrators to proceed with the arbitration and make any decision or award*.'[28] The JCAA Rules similarly provide that '*where an arbitrator ceases to perform his or her duties after the closing of the arbitral proceedings but before an arbitral award is rendered, the arbitral tribunal may render an arbitral award without a substitute arbitrator being appointed, if the JCAA… considers it appropriate*'.[29] Where the rules are silent on this point it is not always clear whether the arbitral institution or tribunal can continue to make decisions and issue an award without a replacement arbitrator (although national or international law may step in depending on the governing law, seat and type of arbitration in question).

21) The Arbitration Act (England and Wales) 1996 s 27(5)
22) The Arbitration Act (Singapore) 2001 s 17(6)
23) SIAC Rules r 30.3
24) See for example JCAA Rules art 36, 38; ICSID Rules r 26
25) New York Convention art IV 1(a)
26) ibid art V 1(d)
27) See for example UNCITRAL Model Law art 15, on which many countries' arbitration laws are based.
28) United Nations Commission on International Trade Law Arbitration Rules ('UNCITRAL Rules') (2021) art 14 s 2
29) JCAA Rules art 37

V. Practical Considerations and Mitigating Risks

As detailed above, arbitration rules and laws do contain directions in relation to the issues above that may arise on the death of an arbitrator, however, there are gaps and potential inconsistencies. Therefore, to mitigate the risks of additional time, cost and enforcement struggles, there are important practical steps that parties can take, some of which are mentioned below.[30)]

i. Due Diligence

While it is not often the highest priority on the list, parties should consider mortality risk during their arbitrator selection process. To be clear, this does not only relate to the age of the arbitrator but other factors including their health and well-being considering that the arbitration may go on for a number of years. While this will often be difficult information to obtain, law firms that are well connected to the arbitration community should be able to gather relevant intelligence on all arbitrator candidates being considered, including with respect to potential mortality risk.

Of course, the challenge here is that experience is also a key criterion in selecting an arbitrator and this is likely to result in more senior practitioners being shortlisted. In this regard, the ICC notes that the average age of arbitrators appointed in ICC cases is 55 years.[31)]

ii. Budgeting

The possibility of death of an arbitrator may be something that parties should factor into budgets. At the very least, it is a scenario with associated additional time and costs that parties should be aware might arise. Consequently, some budget contingency for this and/or other unforeseen eventualities is a sensible precaution. In the authors' experience, the parties will not receive any refund with respect to the fees incurred by an arbitrator prior to their death and, subject to any other agreement or arrangement, are likely to have to shoulder any additional time and costs required by the replacement arbitrator (e.g. for reading in or repeating all or part of a hearing).

There does not appear to currently be a specific insurance product for this eventuality, but it is something that parties might also consider.[32)] In addition, where an insurer or litigation funder is involved in funding the action, it may be possible to expressly allocate (or share) the risk of additional time and costs caused by death of an arbitrator in the arbitration funding agreement.

30) Simon Greenberg and others, The Secretariat's Guide to ICC Arbitration (2012) 3-597 reports that the ICC faces a number of deaths of arbitrators during proceedings each year.

31) ICC Dispute Resolution 2023 Statistics (International Chamber of Commerce 2024) 10

32) Lexis+ UK, 'Tribunal – resignation, revocation or death of an arbitrator' <https://www.lexisnexis.co.uk/legal/guidance/tribunal-resignation-revocation-or-death-of-an-arbitrator> accessed 13 March 2025

iii. The Arbitration Agreement

Some rule sets are more mandatory than others. In choosing the seat and rules of arbitration, it is worth considering how the chosen rules and *lex arbitri* would deal with the situation if an arbitrator were to pass away. While this is unlikely to be a topic which occupies a party's mind while negotiating a commercial contract, for major transactions with a significant value, it may at least be worth checking that a party's legal advisors are comfortable that the given rules and seat are capable of dealing with this issue smoothly.

iv. The Need for Negotiation

Many of the legal regimes and rule sets' starting point for addressing issues arising upon the death of an arbitrator is agreement between the parties. For example, the English Arbitration Act expressly provides that parties are '*free to agree*' the process for filling the vacancy where an arbitrator ceases to act and the extent to which previous proceedings should stand or be repeated.[33)]

In the context of a dispute, in the authors' experience, it can sometimes be difficult to agree on the shape of the hearing room let alone major procedural decisions. Nevertheless, if additional costs and protracted procedural battles are to be limited, negotiation is one way of limiting the impact. In this regard, any *inter partes* negotiations aimed at dealing with the procedural consequences of an arbitrator's death may benefit from deadlines that, if not met, result in the arbitral institution stepping in. This can limit the time (and costs) lost on an unsuccessful negotiation. For example, the parties may agree to identify a replacement presiding arbitrator within 30 days but, if that cannot be achieved, the institution will be mandated to make the appointment within 15 days. While this may ultimately result in a 45-day delay, it at least provides a finite date for the reconstitution of the tribunal. However, if there is a real concern that the other side will just use the 30-day period without seriously attempting to agree on a replacement, then it may be better to avoid seeking agreement all together, depending on the default timelines under the applicable rules.

Other points where agreement between the parties can also potentially save time and costs includes the extent to which hearings need to be repeated or what steps could be taken to bring the replacement arbitrator up to date. For example, the parties may agree to an *ad hoc* mini-hearing at which both parties present short summaries of their case, or they may simply agree to carry on without making any special accommodation. Failure to negotiate and agree will generally result in the applicable rules, institution and laws stepping in to govern these issues – so again, practitioners may benefit from considering upfront the position under the rules, institution and laws being agreed in the contract.

Ⅵ. Conclusion

There are fairly comprehensive rules, in Japan and elsewhere, to deal with the

33) The Arbitration Act (England and Wales) 1996 s 27

consequences of the death of an arbitrator even though few rules and laws expressly refer to death as a distinct scenario from other events that cause an arbitrator to be unable to act.

There are broad similarities between seats and institutions, but not uniformity. Parties should consider these differences and what they can do themselves to mitigate the risk of death and, where possible, to deal with this sad and unexpected eventuality in a collaborative and cost-effective manner if it happens. There are small gaps in certain legal and rules regimes which could be improved to avert the possibility of the type of costly litigation seen in the case of *Tupinave*[34] and there is space for a more cognisant market to devise solutions for this risk. The death of an arbitrator during proceedings is a very sad event for all those who know them, but with a collaborative approach between all involved, proceedings can still run smoothly and additional time and costs can be limited.

34) Rocco Guiseppe & Figli SpA v Tupinave (The Graziela Ferraz) [1992] 1 WLR 1094 Queen's Bench Division (Commercial Court) Parties to a charter party had included an arbitration clause stating that disputes would be submitted to a standard three arbitrator arbitration. Their dispute was heard and judgment, save for costs, awarded without issue. However, by the time the parties returned to arbitrate the costs issue, the plaintiff's arbitrator had passed away. The plaintiff applied to the court for a declaration under the Arbitration Act 1950 that they could nominate a replacement arbitrator or in the alternative, that the court would nominate the plaintiff's choice. Hirst J made the nomination but commented in his judgment on the 'lacuna in our present arbitration procedure' and the 'lengthy and expensive service processes' the case had required.

The Transformation of Dispute Resolution in Japan: Group Claims by Japanese Investors in Investment Treaty Arbitration

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Ⅰ. Introduction

In recent years, Japan has witnessed a growing interest in the strategic use of formal dispute resolution mechanisms, particularly in international disputes. Historically, many Japanese parties have had a strong preference for resolving business disputes through an informal process without the involvement of the courts. This traditional attitude is now changing. This article begins by reviewing the conventional wisdom on the negative attitude towards formal dispute resolution among the Japanese public and then presents an explanation for the recent changes to this negative attitude. The central elements of these changes are the increase in international disputes faced by Japanese companies, the development of a unique method of handling corporate scandals, and the rising expectations of stakeholders for corporate boards. Another novel trend introduced in this article is the increasing awareness of third-party litigation funding in Japan.

As a representative example of this transition, this article focuses on the recent initiatives by Japanese investors in using investment treaty arbitration to collectively seek compensation for their losses from the write-down of Credit Suisse's Additional Tier 1 bonds ("AT1 Bonds") in 2023. This marks the first instance of group investment treaty arbitration by groups of Japanese parties. This initiative has been further strengthened by the involvement of third-party litigation funding. This article examines this groundbreaking shift and its potential implications for the future of dispute resolution practice involving Japanese parties.

Ⅱ. From a Negative Attitude Towards Litigation to a Pragmatic Approach for Solving Disputes

1. The negative attitude towards litigation in Japan

In *The Legal Consciousness of the Japanese*[1)], a classic work of Japanese legal sociology in

1) Takeyoshi Kawashima, *The Legal Consciousness of the Japanese*, 1967, Iwanami Shoten.

the 1960s, Takeyoshi Kawashima, a professor at the University of Tokyo, argued that Japanese people generally preferred to leave the contract terms as vague as possible so that parties would be able to flexibly negotiate any issues raised from the contract, and agree on a new arrangement that would fit the specific context based on their longstanding relationship. Even corporations preferred not to conclude a written agreement and refrained from providing detailed contract terms in an agreement even when they did. The purpose of this arrangement was to reserve opportunities for flexible negotiations when a dispute arose. According to Kawashima's observation, the common perception among the Japanese public was that exercising a legal right was in fact selfish and reprehensible behavior.

Therefore, initiating litigation has been strongly associated with the negative connotation of *saiban-zata* (court troubles), reflecting a deeply ingrained reluctance to engage in legal proceedings in Japan. Even being involved in litigation was often stigmatized, and the existence of an ongoing lawsuit was perceived as a reputational risk to the company. This perception was particularly pronounced in long-term business relationships, where the emphasis on continuity often led companies to refrain from filing lawsuits even in the face of contractual breaches, avoiding reputational risk by being associated with *saiban-zata*.

In fact, Shigeru Nakajima, a lawyer with extensive experience in corporate disputes in Japan, has recently echoed similar observations regarding this long-standing attitude in Japan[2]. As a result, a common response to a breach of contract by the counter party has not been to enforce contractual rights in court, but rather to negotiate informally between the parties in an attempt to reach a settlement out of court. Consequently, even when disputes over the interpretation of contracts arise, they often do not proceed to the stage of formal litigation, which in turn, inhibits the development of the interpretation of laws through court judgements. In addition to this, in Japanese litigation, a significant number of cases are resolved through settlements rather than court judgements[3]. Since settlements facilitated by the court do not produce written rulings, this further limits the development of law through interpretations by courts. However, as will be discussed in the following sections, this attitude has changed considerably over recent decades.

2. Increase in international business disputes

In international business disputes, arbitration is the most widely preferred method of dispute resolution.[4] While Japanese companies have traditionally been more likely to be respondents in international arbitration proceedings, there has been a noticeable increase in cases where they act as claimants[5]. The traditional Japanese practice of engaging in

2) Shigeru Nakajima, "Building a Justice System that Respects People (1)", *Nikkei*, March 10, 2025.

3) The Supreme Court of Japan, *Annual Report of Judicial Statistics for 2023*, Volume 1 Civil Cases, 2023, Table19.

4) Queen Mary University of London and White & Case, *2018 International Arbitration Survey: The Evolution of International Arbitration*, 2018.

5) For example, the Singapore International Arbitration Centre("SIAC")'s Annual Report 2024 - Where The World Arbitrates shows that Japanese parties (excluding their foreign subsidiaries) act as claimants in 18 cases, which is a larger number than the cases where Japanese parties act as respondents in 16 cases at SIAC arbitration in 2024.

prolonged voluntary negotiations and reaching a resolution through mutual compromises—often deviating from the original contractual terms—is no longer applicable in international contractual disputes. More Japanese companies increasingly find themselves confronted with sudden lawsuits or notices of arbitration from counterparties in response to alleged contractual breaches. This shift suggests that Japanese companies have become more inclined to enforce the contractual terms through formal dispute resolution processes.

Regarding investment treaty arbitration, the Japanese government has concluded numerous investment treaties with various countries, providing Japanese investors with a well-established framework for benefitting from investment treaty arbitration. However, Japanese companies have historically been reluctant to take advantage of this mechanism. Like their approach in domestic contracts, they have demonstrated an aversion to pursuing formal dispute resolution procedures in cases of contractual breaches, perceiving such actions as undesirable *saiban-zata*. It is therefore unsurprising that this attitude has also been observed in disputes against host governments of overseas investments.

Although it is not common for Japanese companies to thoroughly analyze the protections available under investment treaties when structuring overseas investments, their reluctance toward investment treaty arbitration has begun to change as their losses by overseas investments have accumulated. Since the 2010s, several Japanese companies have initiated investment treaty arbitration cases.[6] However, investment treaty arbitration has still received little media attention in Japan. For instance, even when the Japanese government faced its first-ever investment treaty arbitration claim in 2020 by a Hong Kong investor, there appeared to be no reports of the case in the Japanese-language media.[7]

3. Higher expectations for corporate management

Over the past decade, Japan has witnessed a series of reforms in corporate governance through amendments to the Companies Act as well as the Corporate Governance Code by the Tokyo Stock Exchange. The achievements through a series of reforms were reflected in a survey by the Asian Corporate Governance Association ("ACGA"). ACGA has conducted research on corporate governance issues in the Asia-Pacific region. According to its 2023 report, Japan has risen to the second place "because of the greater effort being made this year not only by government and regulators, but also listed companies, investors and various non-profit and professional associations".[8] As expectations for boards of directors have risen, listed companies have enhanced their disclosure practices, and shareholder oversight of management has intensified[9]. Consequently, companies can no longer refrain from enforcing

6) The investment treaty arbitration cases which Japanese parties initiated include *JGC Holdings Corporation (formerly JGC Corporation) v. Kingdom of Spain* (ICSID Case No. ARB/15/27), *Eurus Energy Holdings Corporation v. Kingdom of Spain* (ICSID Case No. ARB/16/4), *Nissan Motor Co., Ltd. v. Republic of India* (PCA Case No. 2017-37), *Itochu Corporation v. Kingdom of Spain* (ICSID Case No. ARB/18/25), *Mitsui & Co., Ltd. v. Kingdom of Spain* (ICSID Case No. ARB/20/47), *Macro Trading Co., Ltd. v. People's Republic of China* (ICSID Case No. ARB/20/22).

7) *Shift Energy Japan KK v. Japan.* Yoshie Midorikawa, "Japan faces the first investment treaty arbitration", Miura & Partners Legal Alert, 2021.

8) ACGA, *CG WATCH 2023: A new order, Biggest ranking reshuffle in 20 years*, 2023.

their contractual rights out of fear of bearing the stigma of *saiban-zata*, as doing so has become increasingly difficult to justify to the stakeholders that include a large number of foreign investors.

During this period, Japan has also developed a distinct practice for responding to corporate scandals.[10] According to this new practice, companies found to have engaged in corporate misconduct accept investigations conducted by external committees that are voluntarily established by the company. These committees issue public investigation reports that usually contain factual findings, analyses of the causes of scandals, and recommendations for future preventive measures. The publication of these reports has, in turn, led to legal actions from stakeholders, such as securities litigation by investors, as well as shareholder derivative actions seeking to hold executives accountable for damages caused by corporate misconduct. A notable example is the case of Toshiba Corporation, where investors initiated securities litigation, and shareholders' derivative actions against former executives of Toshiba Corporation to recover damages caused by long term accounting fraud.[11] More recently, foreign investors have begun requesting that Japanese companies initiate investigations on scandals, replace executives, or pursue claims against executives. Numerous examples illustrate this trend, including requests by a Hong Kong investor for executive accountability in response to quality control incidents that resulted in fatalities at Kobayashi Pharmaceutical Co., Ltd. in 2024,[12] and requests for an investigation into sexual harassment at Fuji Television in 2025.[13] A shareholder of the Fuji Television's parent company recently initiated a shareholder derivative action against its directors to seek damages caused by the mishandling of the corporate scandals at Fuji Television in 2025.[14] Amid these governance reforms, the market has closely overseen the conduct of corporate boards, and executives are now expected to take a more proactive approach to handling corporate scandals and enforcing corporate rights. There has been a notable shift in perspective: whereas legal disputes were previously viewed as undesirable troubles to be avoided at all costs, they are now increasingly

9) Yoshie Midorikawa, "Rising Expectations for Outside Directors in Combatting Corporate Scandals in Japan", Miura & Partners Legal Alerts, 2022.

10) Yoshie Midorikawa, "Navigating the Fraud Landscape of Japan", Lawyer Monthly, 2022.

11) Toshiba Corporation, "Notice on Receipt of Investigation Report from Executive Liability Investigation Committee, Filing of an Action for Compensatory Damages Against Former Company Executives, an Action Filed in the U.S., and Other Matters", 2015 at https://www.global.toshiba/content/dam/toshiba/migration/corp/irAssets/about/ir/en/news/20151107_1.pdf (accessed 31 March 2025), and "Notice on an Action for Compensatory Damages Filed Against Toshiba", 2017 at https://www.global.toshiba/content/dam/toshiba/migration/corp/irAssets/about/ir/en/news/20171226_1.pdf(accessed 31 March 2025).

12) *"Oasis petitions Kobayashi Pharma to sue executives for $67m: Activist investor wants payment of damages tied to red yeast supplement scandal", Nikkei Asia*, December 4, 2024 at https://asia.nikkei.com/Business/Pharmaceuticals/Oasis-petitions-Kobayashi-Pharma-to-sue-executives-for-67m(accessed 31 March 2025).

13) "Activist fund Dalton urges Japan's Fuji Media to probe TV host scandal, Investigation with external lawyers is underway, broadcaster says", *Nikkei Asia*, January 16, 2025 at https://asia.nikkei.com/Business/Media-Entertainment/Activist-fund-Dalton-urges-Japan-s-Fuji-Media-to-probe-TV-host-scandal(accessed 31 March 2025).

14) "A Fuji HD shareholder files suit against directors, demanding 23.3 billion yen in compensation for reduced incomes from advertisements", *Nikkei*, March 27, 2025 at https://www.nikkei.com/article/DGXZQOUE26ATC0W5A320C2000000/ (accessed 31 March 2025).

seen as an inherent business risk. Companies are adopting a more pragmatic approach, selecting and utilizing the most suitable dispute resolution forum based on the strength of their legal position and economic rationale.

4. Third-party litigation funding as a new instrument for cost management

The rising costs of international arbitration have become a global concern,[15] and as Japanese companies become more proactive in international dispute resolution, the financial burden of these proceedings has also emerged as a significant challenge for Japanese parties.

A key factor in this issue is that litigation costs in Japan have historically been much lower than those in common law jurisdictions. In domestic litigation, legal fees have traditionally followed a contingency-based model under the regulations that used to be set by the bar association until 2004, and the absence of a discovery process has kept litigation costs relatively limited compared to common law countries. As a result, the issue of high procedural costs has not been a major concern in Japan. On the other hand, international arbitration and litigation in other jurisdictions require Japanese parties to bear significantly higher costs than those associated with domestic litigation.

One emerging solution to this cost issue is the use of third-party litigation funding. Third-party litigation funding involves a third-party with no prior interest in the dispute advancing the costs of legal proceedings, in exchange for a portion of any proceeds obtained through dispute resolution process. The earliest known use of third-party litigation funding in Japan dates back to a 2012 Olympus securities litigation, where foreign investors relied on third-party litigation funding to pursue claims in Japanese courts. While this development was publicly disclosed,[16] awareness of third-party litigation funding remained limited even among Japanese legal professionals. More recently, however, leading third-party litigation funders have begun expanding into the Japanese market, and there is increased awareness of third-party litigation funding, particularly among lawyers involved in international arbitration. Additionally, Japan's first domestic litigation fund was established in 2024, signaling growing momentum for this financing model.[17]

Ⅲ. Collective Investment Treaty Arbitration Claims by Japanese Parties

1. A unique initiative

In 2023, following measures by the Swiss government that wrote down the AT1 Bonds, bondholders of AT1 Bonds ("AT1 Bondholders") in various jurisdictions have been collectively preparing for investment treaty arbitration to recover their losses from the Swiss government

15) See Note. 4.

16) Deminor Litigation Funding, “Olympus (Japan): Deminor’s clients achieve the highest recovery”, at https://www.deminor.com/en/news-insights/olympus-japan-deminors-clients-achieve-the-highest-recovery(accessed 31 March 2025).

17) “Japan's first “litigation fund” raises funds from GREE and other sources”, *Nikkei*, February 11, 2024, at https://www.nikkei.com/article/DGXZQOUC02DGS0S4A200C2000000/(accessed 31 March 2025).

("AT1 Bondholders' Claims"). Japanese investors are no exception, since Japanese investors obtained as much as USD 1 billion (JPY 140 billion) of AT1 Bonds prior to the write-down.[18)]

The AT1 Bondholders' Claims by Japanese investors signals a notable shift in the landscape of dispute resolution in Japan. The following sections explore unique features of the AT1 Bondholders' Claims in the context of the changing landscape of dispute resolution in Japan.

2. Strategic selection of the forum for dispute resolution

Historically, litigation has been the most popular forum for dispute resolution in Japan, while initiating formal dispute resolution itself has been traditionally treated as an undesirable behavior.

In relation to the losses incurred by the AT1 Bonds, a number of AT1 Bondholders joined the collective actions before Japanese courts. In these actions, AT1 Bondholders initiated litigation against the financial institutions which sold the bonds to these investors in Japan.[19)] Another forum is mediation provided by an ADR institution such as the Financial Instruments Mediation Assistance Center ("FINMAC"). As the procedure at FINMAC is confidential, the number of cases facilitated by FINMAC on the AT1 Bonds is not known. At these two kinds of proceedings, the bondholders have initiated claims against the financial institutions as contractual or tort claims due to lack of appropriate explanation on the risk of the financial products. In these proceedings, the central issue is the underlying facts on the process of explaining the features or risks associated with investing in the AT1 Bonds, and on whether each investor received appropriate information from the financial institution considering the investor's experience and knowledge about investments in financial products. Therefore, the outcome of each action might be different based on the difference in the underlying facts for each investor.

On the other hand, in investment treaty arbitration, the central issues would be whether the host state has violated the obligations set out in the relevant investment treaty and the amount of damages. This means that the relevant facts might be identical for all investors, and all investors may have the same outcome from the arbitration for a given amount of investment, unless an investor has a specific issue, such as standing.

At this moment, there are at least a few group claims involving Japanese investors. Each group has taken a different approach. One group consists of only Japanese investors to deal with one investment treaty, which enables parties to expedite the entire process to avoid jurisdictional issues which they need to face if there are several relevant investment treaties. Another group includes investors from various jurisdictions, which enables them to increase the value of claims and therefore would make it easier to acquire funds from a third-party litigation funder. It is an interesting move, since Japanese parties have proactively chosen the

18) *"Credit Suisse AT1 bond writeoff hands $1 billion loss to Japan investors", The Japan Times*, April 21, 2023 at https://www.japantimes.co.jp/news/2023/04/21/business/credit-suisse-japanese-investors/(accessed 31 March 2025).
19) *"Plaintiffs exceed 100 in suits against MUFG over Credit Suisse bonds", Nikkei Asia*, June 28, 2024 at https://asia.nikkei.com/Business/Finance/Plaintiffs-exceed-100-in-suits-against-MUFG-over-Credit-Suisse-bonds(accessed 31 March 2025).

best forum for them among several options including litigation, ADR, and investment treaty arbitration.

3. The first collective treaty claims by Japanese investors

As mentioned above, the Japanese government has concluded numerous investment treaties aimed at mutually protecting investments between contracting states. One such agreement, the Agreement on Free Trade and Economic Partnership between Japan and the Swiss Confederation ("Japan-Switzerland EPA"), was signed in 2009.

Investment agreements impose obligations on contracting states to protect investments made by investors from the other state. When a host state violates these treaty obligations, investors may seek remedies such as damages through investment treaty arbitration. While the obligations vary across treaties, the Japan-Switzerland EPA includes provisions on General Treatment and Protection[20], National Treatment[21], Most-Favored-Nation Treatment[22], Transfers[23], and Expropriation and Compensation[24]. The Swiss government's measures that wrote down the AT1 Bonds could reportedly constitute violation of the prohibition on illegal expropriation under the Expropriation and Compensation provision, or the obligation to provide fair and equitable treatment under the General Treatment and Protection provision. Investors who have suffered losses by the host state's violation of the treaty may initiate arbitration against the host state to seek remedies[25]. To initiate arbitration under the Japan-Switzerland EPA, a claimant must qualify as a Japanese investor holding investments in the host state. The treaty broadly defines protected investments as "any kind of asset," explicitly including "bonds, debentures, loans, and other forms of debt, including rights derived therefrom"[26].

The AT1 Bondholders' Claims are notable for their collective approach, with individual investors as well as corporations seeking to utilize investment treaty arbitration to address common losses from investments in the same types of assets.

4. The first collective use of third-party litigation funding for investment treaty arbitration

Investment treaty arbitration is highly complex, conducted primarily in English, involves substantial amounts at stake and intricate factual disputes, and typically entails significant procedural costs. By collectively filing for investment treaty arbitration, Japanese parties can significantly reduce legal costs compared to individual claims. Moreover, media reports indicate an increasing use of third-party litigation funding. It is likely that more parties in

20) Article 86 of Japan-Switzerland EPA.
21) Article 87 of Japan-Switzerland EPA.
22) Article 88 of Japan-Switzerland EPA.
23) Article 89 of Japan-Switzerland EPA.
24) Article 91 of Japan-Switzerland EPA.
25) Article 94 of Japan-Switzerland EPA.
26) Article 85(c)(iii) of Japan-Switzerland EPA.

Japan are taking cost management in dispute resolution seriously and are considering the use of third-party litigation funding for the effective enforcement of claims.

In practice, lawyers representing Japanese parties have been among the facilitators of this new trend, linking potential users of third-party litigation funding with third-party funders. Through this process, potential users can obtain necessary information through their lawyers, and lawyers can work to obtain favorable terms for their clients by negotiating with the funders.

Ⅳ. Changing Attitudes towards Dispute Resolution

This pragmatic approach in the AT1 Bondholders' Claims case, using arbitration for group claims as well as funded claims, shows a shift in the attitude of Japanese parties toward formal dispute resolution mechanisms, from a negative perception of formal dispute resolution as *saiban-zata* (court troubles) to a strategic and pragmatic approach to treat dispute resolution mechanism as instruments for dispute resolution. Previously in Japan, limited numbers of global businesses showed interest in international arbitration or third-party litigation funding. However, the recent initiative by Japanese bondholders has attracted media attention and has played a role in informing Japanese businesses of these previously unknown methods. More Japanese businesses, facing higher expectations from the markets, may take further proactive approaches to solving legal disputes using these methods. Ultimately, more Japanese parties will share the notion that facing legal disputes is merely a normal part of doing businesses rather than a pathological or shameful phenomenon which should be avoided no matter what. It will become more common for Japanese parties to handle complex legal disputes by proactively using available mechanisms and tools including selection of appropriate dispute resolution forums and third-party litigation funding.

The Japan International Dispute Resolution Center

- Its Achievements and Challenges -

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This article introduces the activities of the Japan International Dispute Resolution Center (JIDRC), which has been actively promoting international arbitration in Japan under a research project commissioned by the Japanese Ministry of Justice. This article is based on the author's report “The Activities and Achievements/Challenges of the Japan Dispute Resolution Center” NBL No. 1265, pages 27 – 33.

Ⅰ. Establishment of JIDRC and Commissioning of the Research Project

1. Overview of the JIDRC Research Project

In April 2018, a government task force, assembled to assess the state of international arbitration in Japan, compiled a report titled *Measures to Promote the Activation of International Arbitration*, which outlined key recommendations, including updates to arbitration-related laws, public awareness initiatives, human resource development, and the establishment of arbitration hearing facilities.

Following these recommendations, the Ministry of Justice commissioned a research project to JIDRC for the period 2019–2024 (the *Research Project*). The project encompassed three main initiatives:

1. Establishing and operating facilities for international arbitration hearings.
2. Capacity-building efforts related to arbitration.
3. Publicity and awareness campaigns, both domestically and internationally.

These initiatives closely aligned with the task force's recommendations, with the exception of legislative actions, which were supposed to be undertaken by the government itself (and were actually implemented as the legislation of amendment to the Arbitration Act in 2023).

The Research Project aimed to enhance Japan's arbitration infrastructure while simultaneously fostering professional expertise and increasing global awareness. The ultimate goal was to significantly expand international arbitration in Japan and position the country as a competitive hub alongside other leading Asian arbitration centers such as Singapore, Hong Kong, and South Korea.

2. Development of Arbitration Facilities

A key component of the Research Project was the establishment of dedicated arbitration facilities. In March 2020, JIDRC opened its own arbitration hearing facility in Tokyo, leasing office space in a central business district and investing significantly in state-of-the-art equipment to meet international arbitration standards. Reception and technical support services were outsourced to ensure efficient operations.

Throughout the project period, JIDRC received government funding in the form of commission fees for the Research Project, with the long-term objective of achieving financial self-sufficiency by the project's conclusion.

3. JIDRC's Organization

JIDRC was established in 2018 with the Japan Association of Arbitrators (JAA) and the Japan Federation of Bar Associations (JFBA) as its founding bodies. Professor Emeritus Yoshimitsu Aoyama was appointed as its first president, later succeeded by Mr. Soichiro Sakuma in April 2022.

To support the Research Project, JIDRC expanded its organizational structure by enhancing its board, strengthening its secretariat, and increasing staff capacity through outsourcing. By 2020, the board had grown to 15 members, comprising professionals from business, legal practice, and academia. The secretariat was composed of a secretary general and deputy secretary generals, primarily young and mid-career lawyers.

To ensure broad input on JIDRC's activities, an advisory board was also established, consisting of over 20 experts, including prominent international arbitration practitioners. Former Chief Justice of the Supreme Court, Itsuro Terada, was appointed as the chairman of the advisory board.

4. Medium-to-Long-Term Business Plan

In December 2020, JIDRC formulated its *Medium-to-Long-Term Business Plan* as a strategic blueprint for its initiatives. The plan set a core objective: to dramatically revitalize international arbitration in Japan.

As part of the Research Project's key performance indicators (KPIs), JIDRC aimed to increase the number of international arbitration cases held in Japan to 60–80 annually by the end of the project period.

To achieve this goal, the following initiatives were outlined:

1. Facility Operation – Developing arbitration facilities that meet international standards in terms of physical infrastructure, service quality, and pricing competitiveness.
2. Publicity and Awareness-Raising Activities – Promoting arbitration among domestic businesses and economic organizations while also engaging with the international arbitration community to increase demand for arbitration hearings in Japan.
3. Capacity Building – Training and developing arbitrators and arbitration counsel, including the creation and dissemination of e-learning materials to support their professional growth.

Ⅱ. The JIDRC Activities – Its Achievements and Challenges

As outlined in the *Medium-to-Long-Term Business Plan*, the activities carried out by JIDRC under the Research Project were diverse. Below, I outline a comprehensive overview of these initiatives, highlighting both the achievements and the challenges encountered.

5. Facility Operations

(1) Facility Development and Operations

In March 2020, JIDRC opened its Tokyo facility in Toranomon, Minato Ward. Designed to meet international arbitration standards, the facility was developed with a strong emphasis on both physical infrastructure and operational efficiency.

From a hardware perspective, the facility features two large arbitration hearing rooms capable of hosting simultaneous proceedings, along with six smaller conference rooms serving as waiting areas for counsel and arbitrators. The space is soundproofed and equipped with state-of-the-art technology, including:

- Wireless LAN
- Large screens and projection equipment
- High-quality cameras and acoustic systems
- Tablet terminals at each seat
- Video and telephone conferencing systems
- Simultaneous interpretation booths with interpretation devices

On the operational side, JIDRC assembled a team proficient in English to assist international users, along with specialized technical support staff for sound, video, and network systems-critical for facilitating web-based hearings. Additionally, an online booking system was introduced to streamline reservations.

(2) Adapting to the COVID-19 Pandemic

The facility's launch coincided with the COVID-19 pandemic and the declaration of a state of emergency. In response, JIDRC prioritized adapting arbitration procedures to pandemic-related challenges. The facility was equipped with IT infrastructure to support web-based hearings and remote arbitration, ensuring that proceedings could continue uninterrupted. A comprehensive system was also established to accommodate various hearing formats, including fully virtual and hybrid arbitration sessions, as well as international online conferences and other remote meetings.

(3) User Satisfaction and Achievements

JIDRC's facility has received generally high satisfaction ratings from its users. In terms of operational quality and cost-effectiveness, the center has largely achieved its initial objectives. The combination of advanced infrastructure, competitive pricing, and adaptability to web-based and remote arbitration has positioned JIDRC as a reliable venue for international dispute resolution.

(4) Utilization and Financial Results

The utilization of the Tokyo facility during the Research Project period is summarized below, with numerical targets from the *Medium-to-Long-Term Business Plan* indicated in brackets [ ]. Note that the fiscal years refer to the 12-month period from April 1 to March 31 of the following year.

Table 1. Fiscal Year Performance vs. Targets

Fiscal Year	Utilization Days [Target]	Arbitration Hearings	Other Events	Arbitration Cases [Target]	Facility Revenue [Target] (¥)
2020	105 **[60]** [1]	64	41	25 **[12]**	16,000,000 **[21,600,000]**
2021	131 **[115]** [2]	77	54	32 **[23]**	16,000,000 **[41,400,000]**
2022	143 **[160]**	40	103	17 **[32]**	33,000,000 [3] **[57,600,000]**
2023 [4]	11 **[260]**	2	9	2 **[52]**	4,000,000 **[93,600,000]**

Notes:

1. Due to the government-imposed pandemic-driven state of emergency, JIDRC was unable to operate in April and May 2020.
2. During the Tokyo Olympic Games, JIDRC leased the facility to the Olympic Organizing Committee for *Court of Arbitration for Sport (CAS)* hearings. The 77 utilization days include 32 days allocated to this lease, and the 32 arbitration cases include 17 CAS arbitration cases.
3. The revenue figures reflect the fee increase implemented in July 2022.
4. In fiscal year 2023, JIDRC operated for only two months (April and May).

(5) Financial Challenges and Decision to Cease Operations

As shown in Table 1, revenue from facility fees fell significantly below the projected targets. In fiscal year 2020, this shortfall was largely due to the pandemic and the two-month closure during the pandemic-driven state of emergency. In fiscal year 2021, revenue reached only 40% of the target, and in fiscal year 2022, it achieved just 60% of the projected amount-demonstrating a considerable gap between expected and actual financial performance.

Given these results, JIDRC management concluded that achieving financial self-sufficiency after the end of government funding in April 2024 would be unfeasible. As a result, JIDRC made the difficult decision to cease operations at the Tokyo facility by the end of May 2023. Continuing operations at a loss, without a clear path to breaking even, was not a viable option, especially in light of the discontinuation of government financial support.

6. Development of Arbitration Promotion Initiatives

(1) Capacity Building Activities

JIDRC implemented various capacity-building initiatives, focusing on human resource development and training in collaboration with relevant organizations. A key achievement was establishing a framework to continuously offer *Chartered Institute of Arbitrators (CIArb)* certification courses in Japan.

In March 2022, JIDRC hosted the *Associate Course* (beginner level), followed by the *Member Course* (intermediate level) in July of the same year. The same sequence of courses was repeated in 2023, with the *Associate Course* in March and the *Member Course* in July. These programs consistently attracted a stable number of participants, demonstrating strong interest among young practitioners and judicial apprentices. *(In Japan, judicial apprentices undergo approximately one year of training at the Supreme Court's Legal Training and Research Institute before being admitted to the bar, or becoming assistant judges or public prosecutors.)*

Additionally, JIDRC developed e-learning training videos on commercial arbitration and sports arbitration, catering to beginner and intermediate levels. These videos were made available on the JIDRC website and distributed via YouTube to ensure broad accessibility. (Most of those videos are to be succeeded by JAA and will be on the JAA website.)

JIDRC also contributed to legal education by providing arbitration and mediation lectures to law faculties and law schools-reaching 10 institutions in 2021, 11 in 2022, and 8 in 2023. Furthermore, starting in 2022, JIDRC collaborated with the *Legal Training and Research Institute* and the *Ministry of Justice* to offer an international arbitration program specifically designed for judicial apprentices.

JIDRC's capacity-building initiatives have made a significant impact by fostering specialized professionals and expanding the pool of future arbitrators and arbitration counsel. However, capacity-building is a long-term effort, and the key challenge moving forward will be ensuring the sustainability of these initiatives beyond the Research Project period.

(2) Other Arbitration Promotion Activities

JIDRC undertook various public relations and awareness-raising initiatives in collaboration with organizations such as JAA, JFBA, arbitration institutions, industry groups, and government agencies.

Since arbitration relies on arbitration agreements typically embedded in business contracts, JIDRC prioritized outreach to corporate legal departments and external legal counsel-professionals who play a critical role in drafting and negotiating dispute resolution clauses. Rather than focusing solely on dispute resolution specialists, JIDRC aimed to raise awareness among those directly involved in contract negotiations and transactions.

To achieve this, JIDRC organized seminars and study sessions of various sizes. Notably:

- Domestic Outreach: In collaboration with JFBA and local bar associations, JIDRC held seminars for legal practitioners in 10 locations across Japan.
- Industry-Specific Engagement: In partnership with the *Ministry of Economy, Trade and Industry* and various industry organizations, JIDRC conducted 15 industry-specific seminars

targeting legal and business departments of Japanese corporations.

JIDRC also made efforts to enhance Japan's presence in the global arbitration community with international outreach. Key initiatives included:

- Publishing a comprehensive booklet outlining Japan's arbitration laws, legal framework, and notable arbitration-related court cases. These materials, prepared in English, were made available on JIDRC's website, which will be maintained on the JAA website.
- Strengthening international relationships by signing Memorandums of Understanding (MOUs) with foreign arbitration institutions and hosting events to commemorate these agreements. Many of these MOUs are in the process of being succeeded by JAA.
- Organizing international seminars and webinars in collaboration with arbitration institutions and overseas universities.

Major events included:

- October 2020: A ceremonial event commemorating the opening of JIDRC's Tokyo facility (postponed from March 2020 due to the COVID-19 pandemic).
- March 2023: A three-region webinar series promoting Japan's arbitration system to audiences in the Americas, Asia, and Europe.
- March 2024: A seminar on investment treaty arbitration and investment treaty mediation, featuring representatives from the *International Centre for Settlement of Investment Disputes (ICSID)* and the *United Nations Commission on International Trade Law (UNCITRAL).*

(3) Judicial Engagement and Legal Reforms

Following amendments to the Arbitration Act and related laws in 2023, JIDRC, in cooperation with the *Ministry of Justice* and the *Supreme Court*, has organized a series of arbitration-focused briefings and discussions for judges since 2021. These sessions have been held at district courts in Tokyo, Osaka, and other major cities, emphasizing the importance of judicial understanding in fostering an arbitration-friendly legal environment in Japan.

(4) Challenges and Future Considerations

JIDRC engaged in multifaceted and proactive efforts to promote arbitration through public relations, awareness campaigns, and information dissemination. However, achieving widespread knowledge and acceptance of arbitration within Japan's corporate sector remains a long-term challenge. Given the scale of this objective, sustained efforts at multiple levels will be necessary.

Additionally, JIDRC's international outreach activities were hindered by the COVID-19 pandemic, limiting its ability to fully engage with the global arbitration community. Addressing this gap will be a key focus in the future.

Ⅲ. Assessment and Future Initiatives

7. Summary Assessment of JIDRC Project

The core achievement of JIDRC's activities under the Research Project was the establishment and operation of Japan's first public international arbitration facility in Tokyo-an

unprecedented initiative that garnered significant attention. The facility was successful in terms of quality and user satisfaction. However, its inability to achieve financial self-sufficiency, ultimately leading to its closure, was a disappointing outcome for all involved.

To understand the reasons behind this outcome, it is essential to examine the underlying factors. While the COVID-19 pandemic undoubtedly played a role, the primary issue appears to have been an overly ambitious business plan. Specifically:

- The goal of significantly increasing arbitration cases in Japan through initiatives such as capacity building, public relations, and awareness-raising was a long-term endeavor. However, the Research Project's duration of approximately four years was insufficient to generate a substantial rise in arbitration cases within that period.
- Achieving financial independence without continued government support proved unrealistic. Covering the costs of leasing and operating a large-scale facility in a prime city-center location required a longer runway than initially anticipated.
- Many other countries provide government support for arbitration facilities-whether through rent-free spaces or operational subsidies-highlighting that self-sufficient operation of such facilities is a challenging venture.

Given these factors, both the Japanese government and the arbitration community must reconsider the appropriate operational framework and level of government support for arbitration facilities moving forward.

Although the JIDRC Tokyo facility has ceased operations, Japan still has venues suitable for international arbitration hearings. Through its experience managing the facility, JIDRC was able to identify the necessary hardware and software specifications for arbitration venues. It continues to list alternative facilities in Tokyo and Osaka on its website. (Currently, three facilities in Tokyo and three in Osaka are listed, and the list will be maintained and to be updated on the JAA website.)

One notable development is the Tokyo Facilities for Arbitration Hearings (TFAH), a privately owned and operated venue launched in 2023, which is primarily dedicated to arbitration hearings. *(Website: https://tokyofacilities.com/)*

8. A Broader Perspective on JIDRC's Achievements

When evaluating JIDRC's impact, it is crucial to consider the entire scope of its activities. As outlined in Section II, Japan had never before seen such a multifaceted and coordinated effort-spanning both the public and private sectors-to promote international arbitration.

Moreover, despite the project's short duration, measurable progress was made. Perhaps more importantly, clear paths were established, and the groundwork was laid for future arbitration development in Japan. While challenges remain, the initiatives set in motion by JIDRC will likely contribute to the country's long-term efforts to become a more competitive international arbitration hub.

9. Future Efforts to Promote International Arbitration

Promoting international arbitration in Japan remains an important issue that requires

continued efforts from both the public and private sectors. Below are key considerations for advancing these efforts.

(1) Who Benefits from Arbitration Promotion?

The promotion of international arbitration is about strengthening a key legal infrastructure for the business community that may utilize it. Therefore, it is essential to emphasize that arbitration promotion requires not only support from the legal community but also active engagement from the business sector and, most importantly, government backing.

(2) A Long-Term Commitment

If the goal is to increase the number of arbitrations seated in Japan, efforts such as capacity building, public relations, and awareness-raising will, over time, lead to more arbitration agreements selecting Japan as the seat of arbitration. However, disputes do not arise immediately, and even when they do, they may be resolved amicably before arbitration is initiated. As a result, there is no direct or immediate path to increasing arbitration cases-it is a long-term process that requires patience and sustained effort.

With this long-term perspective in mind, effective targeting is crucial. As already initiated by JIDRC, outreach should be strengthened toward legal departments and external counsel of companies engaged in cross-border transactions, particularly those involved in contract negotiations.

Beyond simply raising awareness about the importance of dispute resolution clauses, these efforts should also focus on educating businesses about key factors in selecting an arbitration seat or institution-including the legal environment, procedural rules, enforcement mechanisms, and cost considerations-as well as addressing practical issues that arise during negotiations.

(3) Strengthening and Reforming Arbitration Institutions

To revitalize international arbitration in Japan, it is essential that Japanese arbitration institutions-particularly the Japan Commercial Arbitration Association (JCAA)-gain greater global recognition. International companies, especially those entering into contracts with Japanese firms, should be aware of and comfortable selecting JCAA in their dispute resolution clauses.

Achieving this requires:

- Stronger international promotion of JCAA to enhance its visibility and reputation.
- Ongoing reforms and improvements in JCAA's organizational structure, rules, and practices to align with international expectations.

A more widely recognized and well-regarded JCAA will contribute significantly to positioning Japan as a preferred arbitration hub.

Ⅳ. In Concluding This Article

At the end of March 2024, JIDRC completed its Research Project and submitted a final report to the Ministry of Justice. In May 2024, the government released the updated *Measures to Promote the Activation of International Arbitration (2024 Guidelines)*, incorporating lessons

from the project and substantially revising the 2018 version of the report.

While JIDRC has significantly scaled down its operations (and it was formally dissolved as of March 2025), its efforts have laid the foundation for a sustained and collaborative approach to arbitration promotion. Moving forward, JAA, JFBA, and JCAA, in consultation with the Ministry of Justice and other relevant ministries, must continue working together to strengthen Japan's arbitration landscape.

The journey toward a robust and internationally competitive arbitration ecosystem in Japan is only beginning. Continued commitment and coordinated efforts from both the public and private sectors will be essential for its long-term success.

Know-how regarding the logistics of international arbitration hearings

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Ⅰ. Introduction[1)]

The Japan International Dispute Resolution Center ("JIDRC") was established in February 2018 with the Japan Federation of Bar Associations and the Japan Association of Arbitrators ("JAA") as its founding entities, in order to further revitalize international arbitration and mediation in Japan. The JIDRC conducted its activities based on two pillars: arbitration promotion, and facility operation[2)]. As an overview, the JIDRC operated arbitration hearing facilities in Osaka from April 2018 to March 2024 (initially at the Nakanoshima Joint Government Building, then at Grand Cube Osaka), and in Toranomon, Tokyo from March 2020 to May 2023. After the operation of the facilities ceased, based on the knowledge gained from the operation of the dedicated arbitration facilities, some facilities suitable for arbitration hearings were listed on the JIDRC website[3)]. In addition, as part of the arbitration promotion project, the JIDRC conducted various seminars and training programs, created e-learning materials, and prepared and published explanations of Japanese court cases and other materials related to arbitration. The aim of such activities has been to deepen understanding of international arbitration and international mediation, and to further develop the human resources who will be responsible for these activities. The majority of these activities have been taken over by the JAA and other organizations.

In this article, we shall introduce know-how on the logistics of arbitration hearings (preparation and implementation arrangements) gained mainly through experience in the facility operation at the JIDRC, and provide it as a reference for those who operate arbitration hearing facilities, as well as parties and their representatives who are preparing for arbitration

1) The authors are grateful to Mr. Andrew Halliwell at Anderson Mori & Tomotsune for his assistance in the preparation of this article.

2) The details are given in a separate article at Naoki Idei, “Efforts, Achievements and Issues of the Japan Center for International Dispute Settlement - Promoting International Arbitration, Toward a New Phase”, NBL No. 1265 (2024), p. 27.

3) Currently, information on such facilities is available on the JAA website (https://en.arbitrators.jp/).

hearings.

We would like to express our sincere gratitude to the following individuals for their valuable suggestions in the preparation of this article: Mr. Kizashi Miyasaka, former JIDRC Tokyo Facility Manager, who was in charge of equipment and on-site technical support for hearings and is still in charge of the operation of private arbitration hearing facilities; Professor Yoshihisa Hayakawa, Professor at Rikkyo University and attorney-at-law, formerly JIDRC's Executive Director and Secretary General in charge of Facility Operation until immediately after the JIDRC Tokyo Facility ceased operations; and Mr. Shinji Ogawa, Manager of the Arbitration and Mediation Department of the Japan Commercial Arbitration Association (JCAA), which used the JIDRC's arbitration and hearing facilities on numerous occasions.

Ⅱ. Overall structure of international arbitration proceedings

As a foundation for addressing the logistical know-how of arbitration hearings, we will first address the overall structure of the entire international arbitration process.

In international arbitration, since the parties involved are located across national borders, it may be difficult to coordinate schedules and expensive if the parties involved travel long distances to gather in one place for each step and preparatory meeting. Accordingly, the majority of work is done in writing and written submissions and evidence are exchanged by e-mail or other electronic methods.[4] Of course, there are some situations[5] where e-mail exchange is not sufficient and where it is necessary and appropriate to address certain matters orally. In such cases, videoconferencing and teleconferencing were used in the past, but with the COVID-19 pandemic, web conferencing has spread rapidly, and in recent years, web conferencing seems to be the most common way to conduct procedural meetings.

Generally, the process will culminate in an oral evidentiary hearing with the participation of the arbitral tribunal, the parties, and their representatives. At the hearing, typically, counsel for each party will provide a summary of their case and evidence (by way of an oral opening)[6] and the evidence will be heard (by way of examination of the witnesses)[7]. In addition, following the hearing of the evidence, the parties' counsel may be invited to present an oral closing (by way of a summary of their case and evidence). In addition, the parties' counsel may respond to questions from the arbitral tribunal and discuss post-hearing arrangements. After the oral hearing, the parties may be invited to submit post hearing briefs and cost

4) Although the parties may be located in different countries, the arbitral tribunal and the representatives may all be located in the same country, in which case there may be more opportunities for face-to-face communication. In addition, some arbitral institutions require that written submissions and evidence be printed on paper and sent by mail, courier, or other means.

5) It is also called a case management conference or a preparatory meeting for proceedings.

6) It is also called an opening statement.

7) In cases where there are no particular facts to be proven by witnesses, the examination of witnesses may not be conducted, and only a question-and-answer session may be held between the arbitrators and parties' counsel after each party's counsel has summarized the party's case. See JCAA Commercial Arbitration Rules and Interactive Arbitration Rules, Article 50(1).

submissions (addressing the allocation of costs incurred in the arbitration), before the tribunal closes the proceedings and renders its award.

Ⅲ. Characteristics of recent arbitration hearings

Next, we will discuss the characteristics of arbitration hearings in recent years. In arbitration practice, there have been changes such as: (1) the growth of online hearings, (2) the digitization of arbitration records, and (3) the streamlining of transcription (stenographic records), in flexible response to the restrictions caused by the COVID-19 pandemic and the advancement of information technology. These will be described in turn below. Among the topics related to the growth of online hearings, the online participation of simultaneous interpreters will be discussed in a separate section.

1. Method of participation of arbitration participants - growth of online hearings

As noted above, in most cases, the arbitration hearing will include a presentation from each party's counsel (possibly including a question and answer session between the arbitral tribunal and the parties' counsel), and the examination of witnesses. In such cases, the arbitration hearing will involve, at a minimum, the participation of the arbitral tribunal, the parties' counsel and the witnesses. In addition to this, the parties themselves may participate for the purpose of following the case and instructing their counsel. Interpreters and stenographers (transcribers) may also participate as needed. In addition, technical staff may be present to assist with IT matters (such as online connectivity and setting up and troubleshooting various equipment), and staff may be present to screen evidence and other written documents when they are mentioned by the parties' counsel.[8)]

How do these participants participate in the hearing? In the past, the default principle was that all participants would physically gather in-person at one location for the hearing. This was generally subject to a limited exception for witnesses who had difficulty travelling to the hearing location (for example due to visa issues or scheduling conflicts), who may then be permitted to give their evidence remotely via videoconference or other means.

However, during the COVID-19 pandemic, a fully online hearing, in which each participant participated in the hearing online, became the only way to hold a hearing. Whilst there were some positive experiences and comments regarding such fully online hearing, such as "I was able to communicate more fully than I expected" and "I saved a lot of time and money on travel", on the other hand, there were also some negative aspects, such as (1) In cases where the internet environment is unstable, frequent communication interruptions may occur, (2) It is not easy to completely prevent the risk of the following issues: witnesses speaking based on notes rather than memory during testimony, or receiving instructions from a third party while testifying (coaching), (3) In cases where the examiner or arbitrator wishes to closely

8) Among arbitration institutions, such as the JCAA, the secretariat staff may be present at hearings, providing technical support, and taking on tasks such as recording. In addition, junior lawyers from the parties' counsel's law firm may be responsible for operating IT-related equipment and projecting documents on monitors and screens.

observe the witness's behaviour and demeanour (for example, their breathing, facial expressions, or subtle gestures—phenomena that are difficult to capture on camera) in order to assess the witness's credibility, online hearings cannot fully address such requirements.

Accordingly, whilst efforts were made to overcome the above negative aspects mainly from the perspective of facilities[9], as COVID restrictions gradually eased, a hybrid type of hearing, where participants gather in one or two locations per country and connect these venues online, began to be conducted. At this stage, the JIDRC hearing facilities were frequently used as the Japanese venue for hybrid-type hearings.[10]

Now that COVID restrictions have been lifted, face-to-face hearings are returning. Nevertheless, some hearings are adopting a limited hybrid format, such as conducting online examination of witnesses who are not considered particularly important, allowing some parties' counsel to participate online if they are unable to travel at short notice, having transcribers or interpreters participate online only, and allowing parties' representatives to observe the proceedings online.[11]

2. Online participation of simultaneous interpreters

We would like to add a few explanations regarding the online participation of simultaneous interpreters in the limited hybrid online hearings described above.

A mistranslation of a key piece of testimony could prove decisive in the outcome of a case. Given that the Japanese language differs greatly from English and many other languages in terms of word order and the tendency to abbreviate subjects, there is a high risk of mistranslations occurring (including those that are overlooked because the interpreter does not fully understand the meaning). It is also difficult for the parties' counsel to point out and correct such mistranslations whilst listening to the two languages simultaneously. Therefore, when interpretation is necessary between Japanese and a foreign language (such as English or Chinese), it is generally recommended that – at least for testimony – consecutive interpretation rather than simultaneous interpretation be used. On the other hand, when interpretation is necessary only for the understanding of a party, simultaneous interpretation is often used to save time.

With consecutive interpretation, no special equipment is required, and interpreters generally sit in the same room as the speakers. By contrast, with simultaneous interpretation, it is very difficult to hear both the speaker's voice and the interpreter's voice at the same time. In the past, interpreters would sit in a separate booth and interpret, and those who needed interpretation would listen to the interpreter's voice through headphones. In such cases, there was no problem if there was an interpreter booth at the venue, but if there was not, the

9) See IV. 2. below.

10) The JIDRC compiled a "Report and Recommendations" on the status of implementation of online hearings up to this time, issues to be considered, and the status of the JIDRC Tokyo facility's response, which is now available on the JAA website (https://en.arbitrators.jp/).

11) It should be noted, however, that even at this time, the rules of some arbitral institutions state that online hearings cannot be conducted without the agreement of all parties.

interpreter booth had to be set up in a corner of the venue in a temporary enclosure, and then dismantled after the hearing. The cost of bringing in, assembling, dismantling, and removing the interpretation booths alone could be several hundred thousand Japanese yen. In this regard, in recent times, simultaneous interpreters tend to be located in a separate room or building (which may be the interpreter's home) away from the hearing venue, and they receive audio as well as images of the speaker's mouth from the hearing venue, via a web conferencing system. The interpreter then delivers the interpretation through the web conferencing system, enabling those who require interpretation to hear the interpreted content.

3. Digitization of arbitration records

In arbitration proceedings, written submissions and documentary evidence were traditionally bound in hard copies and referenced as such. During arbitration hearings, parties would create a set of documents called a "bundle" limited to the documents they intended to refer to during the hearing. Each party would bring their own copy, and for the arbitration tribunal, sets would be prepared according to each arbitrator's preferences or instructions regarding paper size and binding method *etcetera*. Additionally, an extra set would be kept near the witness stand for presentation to witnesses. However, in smaller cases, it was sometimes handled by simply bringing the documents that had already been submitted, rather than creating a separate bundle for the hearing.

In recent years, whilst traditional paper-based hearings as described above continue to be conducted, some hearings have been partially or substantially digitized. In many cases, written submissions and written evidence are submitted exclusively as electronic files (e.g., attached to an e-mail or stored in a storage folder with access information). Accordingly, bundles may be only in electronic format as e-bundles. During the hearing, participants can freely access electronic files using their own electronic devices, and documents that all participants need to refer to collectively are often displayed on monitors or screens set up at the hearing venue.

4. How to prepare a record of the hearing

There have been a variety of methods of recording hearings in the past, and they have been used flexibly depending on the needs of the case. The most rigorous method is to have a transcriber (court reporter) transcribe all communications at the hearing verbatim. A single record is made, and the parties may prepare their post hearing briefs referencing the transcript (referring to the page numbers and lines from the relevant day number of the transcript). If a transcriber (court reporter) is not used at the hearing, an alternative may be for an audio recording of the hearing to be made. Then the parties may be provided with that audio recording and they may potentially arrange for a written record to be prepared by having the recording transcribed by a vendor at a later date.

Even before the COVID-19 pandemic, a method known as "livescript" had been gaining popularity. This allows for the transcript to be displayed in real time on a monitor or other

terminal. It is also possible to scroll through the live transcript whilst the hearing is in progress to easily refer to a record of what was said earlier. In addition, after the COVID-19 pandemic, there seems to be an increasing number of cases in which transcribers (court reporters) participate online, as described above, and in which the automatic transcription function of the web conferencing platform is used as the basis for the text transcript during the recording.[12)]

Ⅳ. Know-how regarding the logistics of arbitration hearings

1. Who leads the preparation

The general rule is that the logistical arrangements for an arbitration hearing should be organized by the parties, under the direction or with the consent of the arbitral tribunal. However, depending on the arbitral institution, the secretariat may assist or substitute the work of the parties to a considerable extent. For example, at the JCAA, the rules state that "*[t]he JCAA, at the request of the arbitral tribunal or either Party, shall make arrangements for interpreting, making a stenographic transcript of hearings, or providing a hearing room*"[13)]. The Secretariat can take the lead in preparing for arbitral hearings, provide necessary support and advice, and take other flexible measures depending on the case, if consulted by the parties or arbitral tribunal. In addition, if an institution operates its own hearing facilities – such as the Hong Kong International Arbitration Centre ("**HKIAC**") for example – its staff may take on a significant portion of the work, such as arranging the hearing room and equipment. If the facility (or its staff) is experienced in conducting arbitration hearings, it may be possible to consult with them regarding various arrangements, and there are also companies that can handle a wide range of logistical preparations.

2. Selection of arbitration hearing venue

If the arbitration hearing is to be conducted in a fully in-person or hybrid format, the hearing venue will be reserved at an appropriate time once the date of the hearing has been set. In addition to the main hearing room, it is generally necessary to reserve breakout rooms for each of the parties and the arbitrators. In selecting the venue, the following points should be considered.

First, it should be ensured that the number of rooms needed for the hearing are available and that each is of an appropriate size. In particular, the main hearing room should be set up to allow for a hearing-style seating layout[14)]. In addition, for each room, there should be

12) Various entities, including the JIDRC, attempted to use AI for automatic text input, but Japanese speech recognition is not yet at a practical level in terms of arbitration procedures, and even in English, at present, the accuracy of speech recognition varies considerably depending on the pronunciation and intonation of the speaker, differences in microphone performance, etc. However, the rapid development of AI has been remarkable, and it is hoped that in the not-too-distant future, AI-based speech recognition will make it easier to produce near-perfect verbatim transcripts.

13) JCAA Commercial Arbitration Rules and Interactive Arbitration Rules, Article 8(2).

sufficient sound insulation to prevent audible leakage through the doors and walls.[15] Furthermore, since arbitration hearings are generally confidential, it is desirable to be able to lock each room from a security perspective. If it is anticipated that a projector or projection screen will be used during the hearing, these facilities should also be confirmed.

In addition, if the hearing room is large, a microphone system may be required to enable smooth interaction. In hybrid-type hearings, it is fundamental to communicate via microphones for connection to outside venues, so there must be an appropriate sound system with measures to prevent interference.

Regarding the internet environment, since arbitral tribunals and parties often prefer to be connected via Wi-Fi, the venue should often have access to stable Wi-Fi. In addition, there should be multiple circuits so that if some failure occurs in one circuit, another circuit will still function. In particular, in the case of hybrid hearings, it is necessary to ensure the stability of the connection between the main venue and external venues. In this regard, a wired LAN connection using fiber optic cables is generally more stable than a wireless LAN connection.

In the case of a hybrid hearing, a sufficient number of webcams will also be required. In this regard, as mentioned in III. 1. above, it is often necessary to use a 360-degree camera so that the entire room can be viewed, and to set cameras at multiple angles so that images can be captured from multiple angles, for the purpose of preventing coaching and capturing images of witnesses as clearly as possible. When multiple cameras are used, the capacity and stability of the communication line should be checked.

The location of the hearing itself is also important so that the participants can comfortably concentrate on the hearing. Specifically, it is important to check whether the hearing venue is safe and easily accessible from airports and major train stations, and whether there are hotels and restaurants of various grades in the vicinity.[16] In many cases, catering is used for lunch, etc. during the hearing, in which case the hearing site should be able to accept catering.

In some cases, the hearing venue may be reserved and secured well in advance of the hearing, and then as the hearing approaches, the number of days required for the hearing may change depending on the number of witnesses who are required to testify, etc. In light of this, it is advisable to check the terms and conditions for changing or canceling the reservation of the hearing venue.

Finally, the fees for the hearing venue should be competitive. The venue for arbitration hearings does not need to be elegant and luxurious, but rather should be selected with an emphasis on the functionality of the facility, taking into consideration the above-mentioned considerations and any specific needs of the parties and tribunal.

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14) Regarding the layout of the main hearing room, it is often better to have desks that are not fixed in the room but movable, so that they can be arranged according to the preferences of the arbitral tribunal and the parties.

15) In many cases, general conference rooms are not soundproof. Since parties often hold discussions or meetings in the breakout room during breaks, the soundproofing of the room should be checked beforehand.

16) Some hearing facilities, such as Maxwell Chambers in Singapore, have established partnerships with nearby hotels and may offer discounted rates for hotel stays.

3. Arranging for transcription

As mentioned in Section III. 4. above, when a transcriber (court reporter) is to prepare a hearing transcript, the parties usually contact a service provider to arrange for a transcriber (court reporter) team for the relevant days of the hearing. Generally, the parties provide the service provider with information such as the hearing schedule and venue, obtain a cost estimate, and then pay the cost, often splitting it between the parties upfront.

4. Arranging interpreters

When an interpreter is required, it is usual for the party requiring the interpreter to arrange this. For example, in an arbitration between a Japanese party and a Korean party, if a Japanese witness for the Japanese party requires interpretation between Japanese and English, the Japanese party generally arranges for that interpreter. Interpreters are required to have sufficient skills and experience in interpreting during the examination of witnesses. In some cases, the timetable of the hearing is not finalized until just before the hearing, so it is advisable to contact the interpreter (or the interpreter provider) well in advance in order to ensure their availability.

5. Other preparations

When conducting arbitration hearings in a fully in-person or hybrid format, the specific layout of the hearing venue and the equipment to be used will be set up primarily through communication between the parties and the venue, based on the preferences of the arbitral tribunal and the parties. If the venue has a track record of hosting arbitration hearings, the process is expected to proceed smoothly, but if not, the parties will need to provide a detailed explanation to the venue, including the purpose of the arbitration hearing and specific requirements.

It is also necessary to confirm from whom and how technical service will be provided so that if a problem arises on the day of the hearing with various equipment, internet connection, etc., the technician can respond immediately.

Ⅴ. Preparation specific to online hearings

1. Arranging for service providers for online hearings

In the case of online hearings, some service providers offer comprehensive services that include setting up appropriate connections between participants, supporting the creation of e-bundles, providing a system for displaying and sharing documents, providing transcription services in a format suitable for online hearings, and responding to technical issues that arise during the hearing. Generally, the arbitral tribunal and the parties can discuss the need for such service providers, and if they decide to use one, the parties contact the provider directly to make the necessary arrangements.

2. Agreement on protocols, etc. for online hearings

In the case of online or hybrid hearings, it is desirable for the tribunal and the parties to agree in advance on such matters as what platform will be used for connection to remote locations, how the hearing procedure (examination of witnesses) will be conducted from the perspective of due process (how the mechanism and rules will be formulated to prevent misconduct), and what measures will be taken if a failure occurs regarding connection. Such a written agreement is sometimes referred to as a protocol. This type of arrangement may also take the form of a procedural order by the tribunal.

In this regard, some arbitral institutions provide a checklist of items to be checked when conducting online hearings,[17] and JIDRC has published a "Draft Agreement on Virtual Hearings", which is now available on the JAA's website (https://en.arbitrators.jp/).

3. Pre-connection test for online hearings

When conducting arbitration hearings in an online or hybrid format, it is best practice to pre-test the online connection. The specific method of conducting the pre-hearing connection test is often determined through discussions between the tribunal and the parties at a preparatory meeting prior to the hearing.

Ⅵ. Conclusion

Whether it is a fully in-person, hybrid, or online hearing, adequate advance preparation is essential for the proper and smooth conduct of arbitration hearings. We hope that this article will be of some help to those involved in arbitration in their preparation for arbitration hearings in the future.

17) For example, the International Chamber of Commerce (ICC) International Court of Arbitration has prepared a document entitled “Checklist for a Protocol on Virtual Hearings and Suggested Clauses for Cyber-Protocols and Procedural Orders Dealing with the Organisation of Virtual Hearings,” which is available at https://iccwbo.org/.

ODR Demonstration Project conducted by Japan Federation of Bar Associations ("JFBA")

Attorney at Law[1)]

Satoshi Kawai

On March 15, 2024, the JFBA Legal Research Foundation (the "Foundation") submitted a report on "Research and Study Work on the Promotion of Social Implementation of ODR" to the Ministry of Justice of Japan. The term "ODR" is an abbreviation of "Online Dispute Resolution". With the submission of this report, the ODR Demonstration Project that JFBA had been working on finally completed. In this paper, I would like to report on the background to, the details of, and the findings and issues that were gained from, this ODR Demonstrartion Project.

Ⅰ. Introduction - Background to the Project

In recent years, the Japanese government has been making efforts to promote ODR as part of its growth strategy. JFBA has also been cooperating with the government's efforts, believing that ODR will facilitate access to the justice system for citizens who have had difficulty using conventional litigation and/or ADR, and that efforts should be made to expand its use.

To follow the timeline, first, in the "Growth Strategy Follow-Up" approved by the Cabinet on June 21, 2019, the Government stated, "As part of efforts to improve Japan's business environment in response to the diversification of disputes, we will study the use of IT and AI-based alternative dispute resolution, including ODR, and other civil dispute resolution procedures, and expand and enhance their functions. The Cabinet Secretariat studied the expansion and functional enhancement of civil dispute resolution, including out-of-court

1) Chairman of ADR Center of Japan Federation of Bar Associations. Admitted in Japan and New York.
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As a former member of the Arbitration Legislation Subcommittee of the Legislative Council of the Ministry of Justice, he was involved in the work to revise the Arbitration Act, enact the Singapore Convention Implementation Act, and revise the Act on the Promotion of Use of Alternative Dispute Resolution Procedures.

dispute resolution procedures utilizing IT and AI, such as ODR, and reach a conclusion on the basic policy within FY 2019. In response, the "Study Group for ODR Activation" (Chairperson: Professor Aya Yamada, Kyoto University) was established with the Japan Economic Revitalization Headquarters, Cabinet Secretariat as its secretariat, and members were selected from scholars and the private practitioners, including the representative of JFBA. As a result of discussions, the "Summary for ODR Activation" was published on March 16, 2020.

Furthermore, in the "Growth Strategy Follow-Up" released on July 17, 2020, it was decided that, as part of the national growth strategy, a study to promote ODR will be conducted by the end of FY2020 as one of the items to promote the computerization of court procedures, etc. In order to specifically promote this study, the Ministry of Justice established the "Study Group on Promotion of ODR" (Chairperson: Professor Shusuke Kakiuchi of the University of Tokyo), which gathered expert knowledge from various fields, including members of JFBA, to study measures necessary and beneficial for the promotion of ODR. As a result, in March 2022, the "Basic Policy on the Promotion of ODR: An Action Plan to Make ODR More Accessible to the Public" (the "Action Plan") was published. The Action Plan is a policy for the promotion of ODR. The Action Plan sets short-term and medium-term goals for the promotion of ODR, including "support for demonstration experiments of ODR that incorporate state-of-the-art technology" as a specific measure to achieve the medium-term goals.

Subsequently, in August 2022, the Ministry of Justice established the "ODR Promotion Council" (chaired by Professor Shusuke Kakiuchi of the University of Tokyo) to continuously implement efforts to promote ODR, and is continuing discussions on the promotion of ODR including members of JFBA. Under such circumstances, on February 1, 2023, the Ministry of Justice published a public notice for "Contract for Research and Study on Promoting Social Implementation of ODR". The purpose of the contract was to conduct a demonstration experiment of ODR, which provides a one-stop service from consultation to ODR through the use of a digital platform, in order to promote the social implementation of ODR in Japan and, in turn, the use of ODR, and to analyze the effects and issues of the experiment, as well as to conduct research and study on how the social implementation should be and what problems it should address. The project was to conduct a demonstration test of ODR, a one-stop service for a series of processes from consultation to ODR, using a digital platform.

In response, the Foundation decided to respond to the bidding for this research and study work on the assumption that the implementation of ODR itself would be outsourced to JFBA, and submitted a proposal for conducting an ODR demonstration experiment to the Ministry of Justice on February 27 of the same year. The Ministry of Justice opened the bidding on March 13 of the same year, and the Foundation won the bid. Then, JFBA was re-entrusted by the Foundation with the business of implementing ODR, and for the system side, AtoJ, Inc., an ADR organization certified under the Act on Promotion of Use of Alternative Dispute Resolution was re-entrusted by JFBA.

In addition, in proceeding with the preparation, the term "ODR Demonstration Experiment" was changed to the term "ODR Demonstration Project" from the viewpoint that the terminology should be easy to understand for the general public and refrain from using terms

that may cause unnecessary misunderstanding.

Ⅱ. Overview of ODR Demonstration Project

1. ODR Demonstration Project Process

The ODR Demonstration Project ("Project") began on September 1, 2023, and legal consultation services were completed on January 11, 2024, and mediation services were completed on or around February 28, 2024. Approximately 40 lawyers from the ADR Center of JFBA participated in the legal consultation and mediation services.

The following is an overview of the legal consultation and mediation process implemented in this Project.

- A person ("Petitioner")who is considering filing a claim for child support or other monetary claims first receives legal advice via chat via a smartphone or other means.
- The attorney in charge of legal consultation ("Counsellor") will answer questions on legal matters via chat based on the basic information on monetary claims raised by Petitioner.
- Based on the results of the legal consultation, the Petitioner shall decide how to deal with his/her dispute. If the Counsellor determines that it is appropriate for the Petitioner to move forward to the mediation ("Mediation") process, the Counsellor will push the Mediation Transition Button. In such a case, the Petitioner can easily file a request for mediation by entering the e-mail address of the opponent of his/her dispute ("Opponent") and other necessary information.
- After the request for the Mediation is filed, one attorney (other than the Counsellor) ("Mediator") shall be appointed as a mediator of the Mediation by system. The Mediator shall attempt to resolve the dispute between the Petitioner and the Opponent.
- The parties shall participate in the mediation through consultations via chat and meetings using an online conferencing system. The parties and Mediator can participate in the mediation process without the hassle of travel by using chat rooms and/or online meetings.
- If an agreement is reached through Mediation, the Mediator will create a PDF file of the settlement agreement and send it to both parties. If one party agrees to the contents of the agreement and presses the "Agree" button, a message is sent to the other party and the Mediator in the system. Once both parties' consent messages have been sent, the Mediator sends a message to both parties confirming their agrement.

2. Public relations and advertising activities

In this Project, various measures were implemented as public relations and advertising

activities.

First, the JFBA held a press conference on August 2, 2023, and also invited journalists to cover the implementation of the legal consultation service on the start date of the Project, September 1, 2023. In addition, publicity activities were conducted on the websites of the Ministry of Justice and the JFBA, and three types of leaflets on the Project ((a) overall version (please see Attachment1), (b) child support version, and (c) other money trouble version) were prepared and distributed to bar associations nationwide, regional offices of the Japan Legal Support Center, and consumer affairs centers in various regions.

Next, as for advertising activities, advertisements were placed in various digital advertising media. Initially, as of August 2023, advertisements were placed almost evenly to some extent on various SNSs and later we have had minor tuning so that we placed more advertisements to such SNS which has brought more applications. In response to a slight stagnation in the number of legal consultation applications in the latter half of October, the advertising budget was increased in November, and as a result, the number of new legal consultation applications increased from the latter half of November to the first week of December, highlighting the correlation between the increased advertising volume and the number of applications.

Ⅲ. Details of the Project

1. General

This Project officially started on September 1, 2023. The total number of applications for legal consultation was 171, and the number of applications for mediation was 55, of which 7 cases were mediated and 48 cases were not (please see Attachment 2).

There were 38 cases of non-acceptance and 9 cases where the parties accepted but did not reach an agreement (of these, 1 case where the parties voluntarily fulfilled their obligations after accepting and the mediation process was terminated).

Overview of ODR Demonstration Project

	Number of Cases
Legal consultation applied	171
Petition for mediation filed	55
Mediation procedure accepted by the opponent	17
Settlement agreed among the cases where the mediation procedure is accepted	7
Settlement not agreed among the cases where the mediation procedure is accepted	10
Mediation procedure terminated due to unacceptance by the opponent	38

(a) Average duration of procedures, time of use, etc.

The average duration of legal consultation proceedings is 21.7 days (median: 14.0 days), and the average duration of accepted mediation proceedings is 64.1 days (median: 70.5 days).

Two online interviews were conducted in the mediation process, and one was conducted once.

One of the two cases conducted online interviews, and the other conducted a total of six online interviews, Settlements have been reached in all cases. In addition, there are five other cases that were settled through chat only, without the use of online interviews.

The users, as well as the lawyers in charge of consultation and mediation, had access to the chat 24 hours a day, 7 days a week, and it can be said that most users used the service during the daytime at 3:00 p.m. on weekdays. From the results of the survey of legal counselors, there were opinions that they appreciated the fact that they were able to consult with lawyers without having to travel to the city/ward office or lawyer's hall, and that they were able to consult with lawyers via the Internet because there were no legal consultation opportunities in their neighborhood.

In addition, although the lawyers in charge of consultation and mediation were not required to respond on evenings, weekends, and holidays, many lawyers actually responded in the evenings after their regular legal work (trials, meetings with clients, etc.). The chat format also made it possible for the lawyers to use their time more flexibly. The flexibility of the chat format also has something in common with the high use of chatting during the mediation stage, which will be discussed later.

(b) Transition from legal consultation to mediation

For this pilot project, the legal consultation was made a necessary procedure prior to the mediation. In the case of those who had a dispute but had not yet found a solution, several consultants were observed who wished to continue using legal consultation but did not want to immediately move to mediation.

2. Legal Consultation Phase

(a) Merits and demerits of legal consultation via chat

For the consultants, the ability to receive legal consultation at home without having to travel to a lawyer's office or other location and without time constraints was considered an advantage, and there were no disadvantages compared to face-to-face consultations.

For the attorneys in charge of consultation, the advantage was that they could respond during their normal work hours or at night, without having to travel to a lawyer's office or other such location. As a disadvantage compared to face-to-face consultations, it is undeniable that it took more time to prepare a written response than to respond orally because of the sequential preparation of written responses compared to oral legal consultation responses at the attorney's office.

(b) Analysis of reasons for cases that did not result in a request for mediation

Although the reasons for cases that were terminated in the legal consultation process without a petition for mediation vary widely from case to case, the following types of reasons

were observed in some cases.

- The results of the legal consultation are satisfactory and resolved.
- Those that originally requested only legal advice.
- The case in which the client started the proceedings under the mistaken impression that his/her lawyer in charge of consultation would negotiate on his/her behalf, but when the lawyer in charge of consultation explained that he/she would not represent the client in the mediation process, all further contact with the client was cut off.
- The case ended with a referral to other more appropriate legal consultation services, such as traffic accidents, etc.
- Cases that were not suitable for mediation of this demonstration project due to the complexity of the case.
- The case in which the consultant did not provide any answer or information after confirming the circumstances necessary for legal consultation with the client.
- The case is more than 10 years old and the consultant does not have any evidence, so it is impossible or difficult to form a mental opinion about the basic facts.
- Cases that have already been unsuccessfully mediated by the court, or cases that cannot reasonably be expected to be resolved through negotiation with the other party, such as the other party's firm intention to file a lawsuit.
- The applicant did not know all of the other party's contact information (address, telephone number, e-mail address, etc.).
- The counterparty is a foreign corporation that is not expected to accept this demonstration project.

3. Mediation Phase

(a) Usefulness of the handover document

The results of the survey of lawyers in charge of mediation, in which the lawyers in charge of consultation were to prepare a handover letter describing the outline of the case when the case was transferred to mediation, indicated that it was generally useful.

(b) Differences between mediation conducted via chat and mediation conducted via online meeting, advantages and disadvantages, etc.

In mediation, when conducting online interviews, it is necessary to coordinate the schedules of the Petitioner, the Opponent and the Mediator, but in the case of busy parties, it is rather difficult to schedule such meetings in a short timeframe. Some Mediators expressed their impression that they were able to resolve the issue quickly by confirming both parties' claims and requests via chat.

Generally, in the case of settlement mediation such as bar association ADR, it is important not to miss the timing when the parties are in the mood for settlement, but, depending on the case, a chat session may be more effective because it does not take time to adjust the schedule and both parties can coordinate their requests in a timely manner. In addition, depending on the case, some parties are willing to go through the mediation process itself, but do not want to meet the other party face to face, so a chat session may be preferable.

On the other hand, another lawyer in charge of mediation commented that, after a certain degree of communication via chat, he conducted an online interview similar to the ones he had conducted in previous bar association ADRs, which resulted in a settlement after gaining the trust of the parties by meeting them face to face.

Of course, depending on the case, some cases were settled immediately after the online interview, but some cases were settled six times after the online interview, so my conclusion is that it is advisable to use both chat and online interviews depending on the case.

Ⅳ. Issues Considered in the Project

1. Identity verification procedures

In this Project, no special procedure for verifying the identity of the parties involved is implemented.

Possible identification verification procedures include uploading driver's license and/or my number card for individuals and certificate of registered matters for corporations, but if it becomes necessary to provide personal information as part of the identification verification process, the rate of use will decline because some people will not want to use the system due to concerns about information leakage.

2. Confidentiality/security systems

In this Project, the access authority management of information and password management for related parties are strictly implemented, and the vulnerability of the system itself is inspected, etc. Therefore, we believe that we have adopted the highest level of confidentiality management system in practice at present.

3. Fact-finding, persuasion of the person and the use of chat and/or online interviews

In addition to the online interviews, the chat sessions are comparable to the face-to-face sessions held in the bar association ADRs at the bar association buildings in terms of fact-finding and issue analysis, and there are no particular problems with regard to the formation of evidence and persuasion of the parties.

From this Project, it is considered that it was appropriate and reasonable to leave the choice between chat and online interview to the judgment of the lawyers in charge of mediation, taking into consideration the characteristics of the case, such as the busyness of the parties, the type of dispute, and whether the parties wished to avoid face-to-face meetings.

4. Acceptance by the other party

In this Project, as is the case with ordinary private-sector ADR, the other party's acceptance is not obligated, and whether or not to accept is solely voluntary.

In general private ADR, it is considered necessary for a neutral mediator to persuade the other party to accept the mediation only within a reasonable range so as not to impair the other party's right to choose the means of dispute resolution.

In this Project, if the Mediator does not receive a response within a week or so, the secretariat in charge of this Project would send an e-mail in the Mediator's name to inquire whether he/she accepts or does not accept the process, and if it is highly necessary, the secretariat will send a letter in the Mediator's name to recommend acceptance. The reason why it is not assumed that all cases will be automatically reminded by e-mail or in writing if there is no communication regarding acceptance or non-acceptance is because, again, depending on the nature of the case, there may be cases in which a reminder is undesirable.

5. Acceptance rate for the Project

The overall acceptance rate for bar association ADR varies by region, dispute type, and fiscal year, but in FY2023, the overall rate was 63.2%.

However, in this project, 17 cases out of 55 cases of petitions for mediation were accepted, and the acceptance rate was 30.9%, which was only half of that of ordinary bar association ADR. There are several possible reasons for this, but in this Project, both legal consultation and mediation were conducted free of charge, and some cases were less contentious than those in regular bar association ADR, and some cases were difficult to obtain consent due to interpersonal disputes between the parties involved. Although it was originally assumed that the lawyers in charge of counseling would screen cases with low case or contentious nature before transferring them to mediation, in reality, even though the lawyers in charge of counseling thought that "the other party would not agree to the request" and advised the client to that effect, there were cases in which the client strongly requested that the case be transferred to mediation process. In fact, there were many cases in which the case was transferred to mediation because the counselor was strongly requested that the case be transferred to mediation.

6. Method of reaching a Settlement Agreement and securing a Settlement Agreement

The settlement agreement is sent to both parties as a PDF file for confirmation and agreement by the system, and since it is not signed and sealed by both parties, the presumption of authenticity of the document under civil procedure law does not apply. However, by recording and storing a series of chats by means of screenshots or other methods, it is considered possible to prove the conclusion of an agreement in the event of a dispute.

Ⅴ. Conclusion - Future Challenges for Bar Association ADR

Many lawyers who have actually used the online dispute resolution system in this Project have voiced their opinions that the online system should be widely used for the bar association ADR. Although it is inevitable that a certain amount of financial resources will be required when developing the system on one's own, or even when cooperating with existing ODR providers, in my view, bar associations should aim to "deliver legal services to those who need them without time or location constraints" utilizing the online system.

Japan's Potential in International Mediation and Japan's Role in Global Dissemination and Promotion thereof

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Ⅰ. Potential of International Mediation, Including Collaborative Use with International Arbitration

International arbitration is the mainstream method of resolving international commercial disputes, but international mediation has unique advantages that international arbitration does not have, and is very well suited to the needs of international business as an appropriate dispute resolution method especially between parties who wish to continue their business relationship in the future. Thus, combined dispute resolution procedures that pursue the advantages of both international mediation and international arbitration are attracting worldwide attention. These include med-arb, in which mediation procedures are conducted first and then moved to arbitration proceeding if the case cannot be resolved through mediation proceeding, and arb-med (-arb), in which arbitration is temporarily suspended after the file for arbitration, mediation proceeding is conducted first, and if the mediation is unsuccessful, the case moves back to the arbitration proceeding. Mediation is sometimes cited as having a problem in that there is no guarantee of a final resolution, but by using it in combination with arbitration, it is possible to use international mediation while also ensuring a final resolution.

The results of a survey conducted by Queen Mary University London & White Case LLP in 2021 on international arbitration show in numerical terms that this collaborative use is attractive worldwide. The survey targeted lawyers, in-house lawyers, arbitrators, arbitration practitioners, in-house counsel, etc., from across the world, including Europe, the United States, South America, the Middle East, Africa, Asia, and Oceania, and received responses from over 1,200 people. 59% of respondents chose "international arbitration together with ADR" as the "preferred method of resolving cross-border disputes," far exceeding the 31% who chose "only international arbitration." In the same survey conducted three years ago, 49% chose "international arbitration together with ADR," while 48% chose "only international arbitration." This was the first time that those who appreciated " international arbitration together with ADR" slightly exceeded those who appreciated "only international arbitration."

Three years later, the evaluation of " international arbitration together with ADR" was far ahead of the evaluation of "only international arbitration." These survey results clearly show that the combined use of arbitration and mediation is gaining a higher reputation in the world. Thus, international mediation has great potential as a method of resolving international commercial disputes, and the combined use of arbitration and mediation has great potential as a method that uses the merits of each dispute resolution but compromises the demerits of each dispute resolution. It is no exaggeration to say that knowledge and experience of international arbitration alone is no longer sufficient for those involved in international commercial dispute resolution, and knowledge and experience of international mediation are also essential in addition to international arbitration.

Ⅱ. Japan's Potential in International Mediation

As described above, international mediation has great potential as a method of resolving international commercial disputes, and as described below, Japan is a country with great potential for international mediation in the world.

1. Japan's Mediation Culture and Achievements

Japan has had a culture that values harmony since ancient times. As Article 1 of the "17-Article Constitution" of A.D.604, which is said to be the first constitution of Japan, provides that "harmony shall be respected," Japan has a culture that highly values harmony and has a high affinity for mediation. The spirit of mediation has been passed through the generations in Japanese culture. From the perspective of legal systems and achievements, even if we limit it to the modern judicial system, civil mediation in Japan originated from the Land and House Lease Mediation Act of 1922 and has a long history of more than 100 years and a rich track record, mainly in court-annexed mediation (FN[1)]).

Thus, considering its historical background, culture, and achievements, Japan is undoubtedly an advanced country in domestic mediation. As a result, Japan also has a very high potential in international mediation, which does not yet have a very long history or track record internationally (FN[2)]).

Domestic mediation in Japan evolved mainly through court-annexed mediation and has some different characteristics in terms of procedures and methods from international mediation, but due to space constraints, this article will not touch on this topic (FN[3)]).

2. Development of Infrastructure for International Mediation in Japan

Despite Japan's high potential for mediation, international mediation has hardly been used

1) Yasuhei Taniguchi, "Japan's Culture of Conflict: From the Edo Period to the Present" (Keynote speech at the Lawasia Tokyo Conference, September 19, 2017), Rule of Law No. 188, p. 29 et seq. (2018)

2) The use of mediation varies around the world (Europe, the United States, Asia, etc.), but the history of the mediation system, which has a certain substance as a modern judicial system, can generally be said to be short. If we focus on mediation as a modern judicial system, it seems to be around 50 to 60 years.

in Japan to date. The reasons for this can be attributed to a lack of infrastructure, such as the lack of a specialized international mediation institution and delays in the development of legislation. In recent years, steady efforts have been made to resolve these infrastructural deficiencies.

(a) Establishment of the Japan International Mediation Center in Kyoto and Subsequent Developments

In November 2018, the Japan Association of Arbitrators (FN[4])("JAA"), with the cooperation of Doshisha University, established the Japan International Mediation Center in Kyoto ("JIMC"), Japan's first international mediation institution, in Kyoto. Kyoto is a world-renowned international tourist city that attracts foreigners, and is also a symbolic city of Japan's traditional culture. It is easily accessible from overseas, attracting foreign mediators, attorneys, and users, and Kyoto's calm and peaceful atmosphere is expected to have a positive psychological effect on the success of mediation.

JIMC's extensive facilities include access to the excellent facilities of Doshisha University, and, noting the affinity between traditional Japanese culture and mediation, it is also possible to hold mediation at a temple in Kyoto (Kodaiji Temple). Temples have a long history of providing a forum for reconciliation to resolve disputes, making them suitable as a venue for mediation.

JIMC also has a large number of experienced international mediators from a variety of jurisdictions, including the UK, the US, Europe, Australia, Singapore, India, Hong Kong, New Zealand, South Korea, Vietnam, Cambodia, and China, and this diversity has been highly praised overseas (FN[5]).

In this way, the establishment of JIMC has made it possible to develop both the hard and soft infrastructure for international mediation in Japan. For more information on JIMC, please refer to the website and literature (FN[6]).

As an institution specialized in international mediation and independent from arbitration

3) Traditional mediation practice in Japan has been heavily influenced by court-annexed mediation, and the practice is strongly influenced by civil law practice, with evaluative type mediation as the mainstream method. On the other hand, international mediation recently introduced to Japan may also use common law mediation practices, which use the facilitative type mediation. The difference between the two is particularly evident in the emphasis placed on confidentiality. For details, please refer to my article "Current Status of International Commercial Mediation" in Jurist, August 2019 issue (No. 1535), p. 41 et seq.

4) The organization whose main members are legal practitioners and researchers, aims to develop and train human resources related to arbitration and mediation, as well as to conduct research and disseminate information and raise awareness. Although this article focuses on international mediation, JAA aims to promote ADR, including arbitration as well as mediation, and has been actively involved in the development of laws for arbitration. For information on JAA's activities, including arbitration, please see the JAA website (https://arbitrators.jp/). The author has served as chairman since July 2021.

5) Overseas literature also lists JIMC alongside the ICC and SIMC as mediation institutions with diverse mediator panels ("...International organizations such as the Singapore International Mediation Centre (SIMC), the Japan International Mediation Centre (JIMC) and the International Chamber of Commerce (ICC) select mediators from diverse countries for their panels, thereby recognizing a variety of national and organizational standards for mediator competency, certification and practice" (Nadja Alexander and Shouyu Chong (eds), The Singapore Convention on Mediation: A Commentary (Kluwer Law International, 2019)5.53)).

institutions, JIMC can be used in cooperation with various international arbitration institutions both in Japan and abroad (FN[7]). For example, collaboration with the Japan Commercial Arbitration Association ("JCAA") arbitration, collaboration with the International Chamber of Commerce ("ICC") arbitration (place of arbitration is Japan or Paris), collaboration with the Singapore International Arbitration Centre ("SIAC") arbitration (place of arbitration is Japan or Singapore) are possible, but are not limited to these.

Furthermore, in September 2020, JIMC concluded the "JIMC-SIMC Joint Covid19 Protocol" with the Singapore International Mediation Centre ("SIMC") to build a collaborative relationship between JIMC and SIMC in implementing online international mediation amid the global spread of the COVID-19 pandemic. This joint protocol aims to resolve international commercial disputes affected by the COVID-19 pandemic quickly and inexpensively using online mediation, and is of great significance as it is timely and leads the global movement. This protocol, which allows international mediation institutions to work together, has been reported both domestically and internationally as a groundbreaking initiative that is the first of its kind in the world. The protocol was launched in response to the COVID-19 pandemic, but online mediation has become increasingly widespread and evolved recently, and continues to be actively used even after the COVID-19 pandemic, making the protocol even apart from the impact of the COVID-19 pandemic. Thus, when the protocol was updated in September 2023, it was renamed as the "JIMC-SIMC Joint Protocol", further strengthening the infrastructure for available international mediation. The first case of this joint protocol used the protocol as the mediation portion of Singapore Arb-Med-Arb procedure (FN[8]), which combines international arbitration by SIAC and international mediation by SIMC, and is a good and successful example of the collaborative use of international mediation and international arbitration (FN[9]).

(b) Development of Domestic Laws Regarding International Mediation and Subsequent Developments

(i) Amendment of the Foreign Lawyers Act (Explicit Solution to the Mediation Agency Issue)

While there were no explicit provisions regarding the representation of international mediation cases by foreign lawyers and registered foreign lawyers, the provisions on representation in international mediation came into effect in August 2020. This amendment to the law established a new provision for "international mediation cases" in which foreign lawyers and registered foreign lawyers can represent foreign clients, and established a system of representation for international commercial mediation cases, making it much easier to bring, to Japan, international commercial mediation cases in which foreign companies or

6) For a detailed introduction to JIMC, please refer to my article "Arbitration/ADR Forum Vol. 6," p. 81 et seq., and "Current Status of International Commercial Mediation," Jurist, August 2019 issue (No. 1535), p. 41 et seq.).

7) For a model Med-Arb clause using JIMC, see the JIMC website (https://www.jimc-kyoto-jpn.jp/20190517100601).

8) The Singapore Arb-Med-Arb Clause, at https://siac.org.sg/arb-med-arb-ama-protocol

9) This first case was a successful resolution of a major dispute over a joint venture agreement between a Japanese company and an Indian company in a short period of time. For details, please refer to Yoshihiro Takatori, "Arb./Med. Arb. as Multi-layered Dispute Resolution in Practice —Including Practice in Asian Countries and Concrete Mediation Techniques," Japanese Yearbook of Private International Law, No. 26 (2024).

Japanese companies with foreign companies as their parent companies are parties to the mediation proceeding.

(ii) Enactment of the Singapore Convention Implementation Act in Japan

Meanwhile, in terms of global developments during the same period, a signing ceremony for the United Nations Convention on International Settlement Agreements Resulting from Mediation ("Singapore Convention") was held in Singapore on August 7, 2019, and 46 countries, including the United States, China, India, Singapore, and South Korea, signed the Singapore Convention.

In response to these global movements, Japan also rapidly moved forward with domestic legislation to sign and ratify the Singapore Convention. I will not go into the details, but the legal framework, which was based on the premise of the ratification of the Singapore Convention with an opt-in reservation, made it possible to achieve the long-standing challenge of coordinating with domestic mediation practices and the scheme of the Singapore Convention (FN[10]).

(iii) Accession to the Singapore Convention by Japan

On October 1, 2023, Japan deposited the instrument of accession to the Singapore Convention, becoming the 12th ratifying party at that time, and the Convention entered into force for Japan on April 1, 2024. Although many other signatory countries have signed the Convention, ratification has stalled and not progressed much, which is presumably due to difficulties in coordinating with existing domestic mediation in each country. Japan is the first G7 country to ratify (approve) the Singapore Convention. Japan has become an advanced mediation country in that it is now subject to the Singapore Convention. In this way, by enacting the Convention Implementation Act and ratifying the Singapore Convention, Japan's status in international mediation has improved significantly. It is no exaggeration to say that Japan is now in a position to lead the world in international mediation.

10) Regarding the granting of enforceability to settlement agreements resulting from mediation, strong opposing opinions were expressed from the viewpoint of emphasizing private autonomy and the flexibility of mediation, as well as concerns about the emergence of abusive ADR institutions such as debt title manufacturers, and this had not been realized for a long time in Japan. However, by adopting the opt-in approach of the Singapore Convention, that is, by making it a prerequisite that the parties to mediation agree to the granting of enforceability to settlement agreements, it is possible to ensure the substantive and procedural legitimacy of the system for granting enforceability to settlement agreements, and make it possible to align with Japan's domestic legal system and practice. The default rule of the Singapore Convention is the "opt-out approach," under which the Convention applies and becomes enforceable unless the parties to the mediation explicitly exclude the application of the Convention. However, the Singapore Convention also allows for the adoption of the "opt-in approach," under which the Convention applies and becomes enforceable only if both parties to the settlement agreement explicitly agree to the application of the Convention (Convention 8-1(b)). (For details, see my article "The Impact of the Singapore Convention on International Commercial Mediation on International Commercial Mediation in Japan: Reasons Why Japan Should Sign the Convention Early and Specific Measures," JCA Journal, Vol. 67, No. 4 (April 2020), pp. 16, 18, and 19.) I believe that the method of adopting the opt-in approach to align with domestic legal systems may also be effective for countries that are hesitant to join the Singapore Convention due to difficulties in aligning with their domestic legal systems, or for countries that have signed the Convention but are delayed in ratification for similar reasons.

Ⅲ. Conclusion

As mentioned above, international mediation is in the spotlight in the world, and it is clear that collaboration between arbitration and mediation will become the mainstream method of resolving international commercial disputes in the future. Japan has a culture, history, and track record in mediation, and is a country with high potential for mediation. With the establishment of JIMC and the establishment of both hard and soft infrastructure, as well as the establishment of judicial infrastructure through legal reform, the hurdles to implementing international mediation in Japan were removed, and with the ratification of the Singapore Convention as the culmination of this, Japan has acquired the position to lead the global promotion and dissemination of international mediation. In addition, the collaborative use of international mediation and international arbitration is possible between JIMC, a specialized international mediation institution, and various international arbitration institutions in the world. One concrete and good example of this is the first joint protocol case mentioned above. We hope that Japan will play a proactive role in contributing to the global spread and promotion of international mediation in the future.

A Message from JCAA

President

Shinsuke Kitagawa

We are pleased to announce the publication of the sixth volume of the Japan Commercial Arbitration Journal this October, and we extend our sincere thanks to all contributors. This journal reflects the collective efforts of the arbitration community and continues to serve as a platform for dialogue and exchange.

To further strengthen our role in global arbitration, the JCAA established its Advisory Board on 25 October 2024. Comprising leading arbitrators and practitioners from diverse jurisdictions, the Board provides invaluable expertise to refine procedures, promote best practices, and address emerging trends.

This commitment was also reflected at the JCAA Arbitration Days, held from 20 to 22 November 2024 at the Tsunamachi Mitsui Club in Tokyo during the inaugural Japan International Arbitration Week. The event brought together nearly 700 participants from around the world in person and online, offering a dynamic forum for ideas and collaboration.

Looking ahead, the JCAA Global Arbitration Forum 2025 will take place on 27–28 November 2025 at the Tsunamachi Mitsui Club. This flagship event will highlight Japan' s evolving role in international arbitration and provide another opportunity to exchange perspectives. Details will be available on the JCAA website.

The JCAA remains committed to delivering ADR services of the highest quality. We are deeply grateful for your trust and support as we continue working together to advance arbitration in Japan and beyond.

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The Japan Commercial Arbitration Association (JCAA)

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