Recent trends in international arbitration in Japan


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To date, Japan has not frequently been selected as a place for international arbitration. The Japan Commercial Arbitration Association (the JCAA), a representative institution for international commercial arbitration in Japan, hosted only ten new cases for the business year of 2005 (from April 2005 to March 2006), and together with other continuing cases from previous business years, hosted only 36 cases in the same business year. Of claimants, 95.2 per cent, and 78.7 per cent of respondents, came from Japan, Korea and China, which demonstrates a remarkably uneven geographical distribution of users of international arbitration at the JCAA. International arbitration in Japan has not been very popular as a method of dispute resolution. Considering the size of the national economy and transnational transactions, it is rather surprising that the number of international arbitration cases in Japan has been relatively small.

The choice of the place of arbitration has implications other than just the ease with which the parties will be able to access the arbitration hearings. The lex arbitri, ie, the law of the place or seat of the arbitration, is applicable to the whole process of arbitration. Arbitral awards might be set aside without a legitimate reason by a court in the place of arbitration if the host nation has a stake in the result and the judiciary is not independent from local politics. Regardless of the importance of the place of arbitration, it appears that business lawyers engaging in transactional matters often fail to pay sufficient attention to its implications when they agree to arbitration clauses.

This chapter provides an overview of the characteristics of Japanese arbitration law and practices, focusing on recent legal developments and trends, in order to discuss the advantages of Japan as a place for international arbitration, which may not have been fully appreciated by both Japanese and non-Japanese parties.

Modern arbitration law

It is fundamentally important that the place of arbitration has modern arbitration law. Until recently, the law regarding arbitration in Japan was not refined in many respects. It provided that, unless the parties agreed otherwise, there were to be only two arbitrators and in cases where the arbitrators failed to agree on the award the arbitration agreement would become void. It also provided that, in general, parties had to resort to full litigation if they wanted to obtain a court decision regarding judicial assistance or intervention concerning arbitration proceedings in Japan, such as appointment and challenge of arbitrators. Court decisions regarding these matters were rendered after full judgment (*hanketsu*) proceedings, which provided the unsatisfied party with means to resort to full appeal to a higher court and even to the Supreme Court, making the process very time-consuming. These anachronistic rules of procedure made it possible for parties to unreasonably delay arbitration proceedings.

In 2003, Japan adopted new arbitration legislation called the Arbitration Law, which followed the UNCITRAL Model Law on International Commercial Arbitration and which came into effect in 2004.[1] The Arbitration Law applies to both domestic and international arbitration, and provides the necessary legal infrastructure for Japan's arbitration system to be globally accepted by users of international arbitration. Under the Arbitration Law, unless both parties have otherwise agreed, each party shall appoint one arbitrator, and the two arbitrators shall appoint a third arbitrator. Court decisions regarding assistance and intervention in arbitration proceedings shall be made in ruling (*kettei*) proceedings, which are less formalised and faster than judgment (*hanketsu*) proceedings. For a ruling rendered by a court, the parties can resort to an appeal only once. This change has brought about speedier resolutions of disputes raised in the process of arbitration.

The Arbitration Law provides several deviations from the UNCITRAL Model Law in order to incorporate the most recent global trends in international arbitration. For example, the Arbitration Law explicitly provides that agreements made by way of exchange of "data messages", such as e-mails, are valid. In July 2006, UNCITRAL adopted revisions to the UNCITRAL Model Law to include a similar provision to address the reality of contemporary commercial trades. The Arbitration Law predates such revisions, but it had already incorporated them in anticipation of the revisions to the UNCITRAL Model Law.

Another example is with regard to the choice of law by the arbitral tribunal. While article 28(2) of the UNCITRAL Model Law provides that "failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable", article 36(2) of the Arbitration Law provides that "failing agreement as provided in the preceding paragraph, the arbitral tribunal shall apply the substantive law of the State with which the civil dispute subject to the arbitral proceedings is most closely connected". The Arbitration Law follows the most recent trends in international arbitration, directing arbitral tribunals to apply the appropriate law of a particular nation without applying conflict of laws rules of any particular nation.

An additional deviation from the UNCITRAL Model Law addresses criticisms of the former practice of arbitration in Japan. Formerly, it was not rare for Japanese arbitrators to recommend that parties enter into a settlement during the course of arbitration, such practice being a reflection of Japanese court practices. However, the practice was often criticised, especially from foreign parties with common law backgrounds who generally consider that once the arbitrators act as mediators, they should not resume their roles as arbitrators when the settlement fails. To eliminate such criticism, the Arbitration Law provides that the arbitral tribunal may attempt to settle the dispute only if the parties consent to do so. The Arbitration Law provides that such consent shall be in writing unless both parties agree otherwise.

Japanese courts' attitudes to arbitration

The Arbitration Law provides court assistance for, and intervention in, arbitration proceedings in Japan. From March 2004 to July 2006, one case each for the appointment of an arbitrator, service of an award and service of a document was filed in Japanese courts relating to arbitration proceedings. Because the number of large arbitration cases in Japan is relatively small, the number of requests

for court assistance or intervention is also small. However, as the following sections demonstrate, Japanese courts have so far shown reasonably pro-arbitration tendencies.

Enforcement of arbitral awards

Under Japanese law, the party who has obtained an arbitral award and wishes to enforce it in Japan must file a motion with a competent Japanese court to issue a decision to enforce the arbitral award. To obtain such a decision, the arbitral award and the arbitral process to obtain it must satisfy certain requirements.

The Arbitration Law adopts requirements for the enforcement of arbitral awards substantially the same as those in the UNCITRAL Model Law. As Japan is a signatory state to the New York Convention regarding the enforcement of arbitral awards, the liberal requirements of the New York Convention regarding the enforcement of arbitral awards have been applied to enforcement of arbitral awards rendered in signatory states, but the liberal requirements for enforcement under the new Arbitration Law now apply regardless of the nation in which the arbitral award is rendered. From March 2004 to July 2006, 14 enforcement rulings were made and so far we are aware of no ruling that has rejected the enforcement of a foreign arbitral award.

As explained above, since the enforcement of the new Arbitration Law, court decisions regarding arbitration proceedings have been rendered in ruling (*kettei*) proceedings, which has expedited such proceedings. Generally, courts are expected to make decisions regarding the enforcement of foreign awards in approximately one to three months.

Of course, not all arbitral awards are enforceable in Japan. For example, Japanese courts cannot enforce arbitral awards the recognition of which would be contrary to the public policy of Japan. Because punitive damages rendered by US courts have been interpreted as being contrary to the public policy of Japan by the Supreme Court of Japan, punitive damages awarded by an arbitral tribunal would probably be interpreted in the same way and would not be enforced in Japan.[2]

Assistance in taking evidence for arbitration proceedings

Under the Arbitration Law, an arbitral tribunal or a party to arbitration (with permission from the arbitral tribunal) may request that a court examine a third party witness, unless the parties have otherwise agreed. The examination of the witnesses in courts must be conducted in Japanese. Thus, if the witness does not speak Japanese, the court appoints an interpreter. From March 2004 to July 2006, only one request for a court's assistance in a witness examination was filed in a Japanese court.

Japanese courts can also issue a document production order to a party to the arbitration or a third party unless the documents fall within certain exceptions provided in the Code of Civil Procedure, such as privileged documents and documents prepared for internal use only. Since the arbitral tribunal may order a party to the arbitration to produce documents, the tribunal would not normally find it necessary to request the court to issue a document production order to a party to the arbitration.

It should be noted that Japanese courts provide assistance in taking evidence only for arbitration proceedings in Japan, and a party to arbitration or an arbitral tribunal cannot directly request the assistance of Japanese courts if the place of arbitration is outside of Japan. However, such party or arbitral tribunal may request that a court of the country in which the arbitration is conducted make arrangements for judicial assistance from a Japanese court and can in this way indirectly obtain assistance from a Japanese court.

Interpretation of the principle of separability by Japanese courts

Modern arbitration law recognises the principle of separability, ie, an arbitration agreement is not necessarily invalid or cancelled even if the contract providing for the arbitration agreement is invalid or cancelled. Even before the enactment of the new Arbitration Law, the Supreme Court of Japan recognised this principle.[3] The new Arbitration Law explicitly incorporates this principle.

Recently, a Japanese court applied the principle incorporated in the new Arbitration Law to an actual case. The Tokyo High Court ruled that an arbitration agreement shall be valid even if the main contract was terminated by the plaintiff's notice to the defendant.[4]

Validity of agreements which reject the finality of arbitral awards

An interesting issue regarding Japanese courts' attitudes to arbitration was raised in a recent decision by the Tokyo District Court regarding the validity of agreements which reject the finality of arbitral awards.[5] The issue raised in the decision is similar to that discussed in a US court decision that held that the decision of an arbitral tribunal could be reviewed by a court under a standard of substantial evidence and error of law but not a more deferential standard such as "completely irrational" or "manifest disregard of law".[6]

The Tokyo District Court stated, obiter, that an agreement permitting lawsuits to be filed with regard to disputes that have already been decided in arbitration would be invalid. The court reasoned that it would be unacceptable to admit the validity of such an agreement because it would create a situation where inconsistent decisions made by an arbitral tribunal and a court could concurrently exist. Because both the arbitral award and the court judgment would have a res judicata effect, allowing inconsistent decisions to exist concurrently would undermine the principle of res judicata and threaten the stability of the legal order.

Method of conducting arbitration in Japan consistent with international standard

Japan has adopted the UNCITRAL Model Law and has sought to achieve a global standard in conducting arbitration. It has become less frequent for international arbitration proceedings in Japan to be conducted in a way like court proceedings in Japan.

Participation of foreign counsel and arbitrators

Previously, foreign attorneys were prohibited from representing parties in international arbitration proceedings by the Japanese Lawyers Act. However, since 1996, foreign attorneys have been permitted to represent parties in international arbitration proceedings if they are requested to undertake or have undertaken the case in a foreign country where they are qualified to practice laws. Furthermore, foreign attorneys registered in Japan (*gaikoku-hô-jimu-bengoshi*) are permitted to represent parties regardless of where they are requested to undertake or have undertaken the case. It is not rare for many of the players, including counsel and arbitrators, of international arbitration proceedings in Japan to be non-Japanese, with the language of the proceedings having been agreed to be, or ordered by an arbitral tribunal to be, English.

There are no explicit provisions in Japanese statutes regulating the practice of law in Japan by non-lawyers that allow foreign arbitrators to sit in an arbitral tribunal and to conduct arbitration proceedings in Japan for fees. Thus, some have argued that it is unclear whether foreign arbitrators could conduct arbitration proceedings in Japan. Most Japanese jurists have believed that participation by foreign arbitrators in international arbitration proceedings in Japan

was not legally prohibited, and in fact, there have been a number of cases where arbitrators not qualified to practise law (such as law professors, architects, and foreign lawyers) acted as arbitrators, but some foreign arbitrators have shown hesitation in assuming such responsibility due to the apparent lack of explicit provisions in the Japanese regulations on the activities of non-lawyers as arbitrators. However, in the process of drafting the new Arbitration Law, a governmental committee stated in discussions at the Diet that no qualifications were necessary for arbitrators, and such statements can be interpreted to mean that foreign lawyers and non-lawyers can sit as arbitrators in international arbitration proceedings conducted in Japan. It would be unreasonable to require foreigners to be admitted to practise law in Japan in order to sit as arbitrators in Japan, when Japanese non-lawyers such as law professors are allowed to sit as arbitrators. The Japan Federation of Bar Associations confirmed such interpretation when one of the authors of this chapter made an inquiry in December 2006. Given such a view, foreign arbitrators clearly can participate in proceedings without concern. Furthermore, a de facto barrier for foreign arbitrators provided in the JCAA's rules has been eliminated. The JCAA formerly provided in its rules that a party who appointed a foreign resident as an arbitrator was responsible for additional fees incurred from such appointment that would not be incurred if a Japanese resident was appointed, but such rule has now been abolished.

Method of conducting proceedings

It has become fairly common for English to be used for the arbitration proceedings in Japan in accordance with the parties' agreement or the tribunal's order. The method of conducting international arbitration proceedings has now become compatible to the international standard in modern arbitration rather than the method of proceedings adopted in Japanese courts. For example, in the past Japanese arbitrators sometimes relied on the approach adopted in the Code of Civil Procedure in issuing document production orders. Now, it has become more common for even Japanese arbitrators to defer to the Rules of Evidence of the International Bar Association (the IBA).

Logistical aspects

It is also important that the place of arbitration be equipped with adequate infrastructure to accommodate the proceedings. Tokyo was known to be a very expensive place to stay, but due to a long recession, the prices of lodging, conference rooms, etc, in Tokyo are competitive as compared with major arbitration centres, such as Paris and Hong Kong. Capable English-Japanese interpreters are easy to find. Even court reporters who can prepare real time transcripts in English, which had been impossible to find in Japan until recently, have become available. Tokyo has direct flights to and from many major cities in the world.

Neutrality and independence of the judiciary

Arbitration is preferred in cases where a particular nation has a stake in the outcome of the case and the parties would like to avoid the potentially biased disposition of national courts. Furthermore, because a tribunal, unlike a court, does not have its authority supported by a sovereign power, it is imperative that tribunals, parties to arbitration and awards are effectively supported by impartial national courts.

Japanese judges are known to be independent from political influence and free from corruption. The Japanese judiciary adopts the 'career system', where judges are generally recruited from new graduates of the Legal Training and Research Institute of the Supreme Court of Japan based on their level of achievement, and are trained as judges and promoted within the court system according to the competency of each judge. Judges recruited and trained in such a manner are generally considered to be highly competent and independent of political influence.

It is also an important consideration that Japan's political climate and society are stable. In conducting arbitration in Japan, a country with an independent judiciary and a stable political and social environment, there are unlikely to be surprising, unreasonable interventions in arbitral proceedings or arbitral awards by Japanese courts.

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As an officer of the IBA's Arbitration Committee, one of the authors of this chapter last year organised an international symposium on international arbitration in Tokyo discussing whether Japan could become an arbitration centre in Asia. Foreign panellists knowledgeable and experienced in international arbitration proceedings from Switzerland, Korea and Canada expressed their views that Japan has many advantages favourable to it becoming such a popular place for arbitration in Asia, but as stated in the beginning of this chapter, this has yet to occur.

As demonstrated in this chapter, modern arbitration in Japan under the new Arbitration Law has many strong points and is worthy of consideration when parties negotiate dispute resolution clauses.

Notes

1 An English translation of Japan's Arbitration Law is available at www.jcaa.or.jp/e/arbitration-e/kisoku-e/kaiketsu-e/civil.html.

2 *Northcon I v Mansei Kogyo KK*, 51 Minshu 2573 (Supreme Court, 11 July 1997).

3 *Kokusan Kinzoku Kogyo KK v Guardlife Corp*, 29 Minshu 1061 (15 July 1975).

4 *Taiyo Inki Seizo KK v Tamura Kaken KK*, LEX/DB 28110611 (28 February 2006).

5 *KK Descente v Adidas-Salomon AG*, 1847 Hanrei Jiho 123 (Tokyo District Court, 26 January 2004).

6 *Lapine Technology Corp v Kyocera Corp*, 130 F3d 884 (9th Circuit 1997).