The Asia-Pacific Arbitration Review 2020

Published by Global Arbitration Review in association with

Clayton Utz
Debevoise & Plimpton LLP
Desierto & Desierto Law
Dzungsrt & Associates LLC
Economic Laws Practice
FTI Consulting
Hong Kong International Arbitration Centre
King & Wood Mallesons
KL Partners
Nagashima Ohno & Tsunematsu
Rajah & Tann Singapore LLP
Shanghai International Economic and Trade Arbitration Commission (Shanghai International Arbitration Center)
Singapore Chamber of Maritime Arbitration
Wilmer Cutler Pickering Hale and Dorr LLP
WongPartnership LLP

www.globalarbitrationreview.com

The Asia-Pacific Arbitration Review 2020

A Global Arbitration Review Special Report

Reproduced with permission from Law Business Research Ltd
This article was first published in June 2019
For further information please contact Natalie.Clarke@lbresearch.com

The Asia-Pacific Arbitration Review 2020

Account manager Sophia Durham

Head of production Adam Myers
Editorial coordinator Hannah Higgins
Deputy head of production Simon Busby
Production editor Harry Turner
Chief subeditor Jonathan Allen
Subeditor Hilary Scott

Publisher David Samuels

Cover image credit iStock.com/Mirexon

Subscription details
To subscribe please contact:
Global Arbitration Review
87 Lancaster Road
London, W11 1QQ
United Kingdom
Tel: +44 20 3780 4134
Fax: +44 20 7229 6910
subscriptions@globalarbitrationreview.com

ISBN: 978-1-83862-208-4

Printed and distributed by Encompass Print Solutions
Tel: 0844 2480 112

The Asia-Pacific Arbitration Review 2020

A Global Arbitration Review Special Report

Published in association with:

Clayton Utz

Debevoise & Plimpton LLP

Desierto & Desierto Law

Dzungsrt & Associates LLC

Economic Laws Practice

FTI Consulting

Hong Kong International Arbitration Centre

King & Wood Mallesons

KL Partners

Nagashima Ohno & Tsunematsu

Rajah & Tann Singapore LLP

Shanghai International Economic and Trade Arbitration Commission (Shanghai International Arbitration Center)

Singapore Chamber of Maritime Arbitration

Wilmer Cutler Pickering Hale and Dorr LLP

WongPartnership LLP

Welcome to *The Asia-Pacific Arbitration Review 2020*, a *Global Arbitration Review* special report. *Global Arbitration Review* is the online home for international arbitration specialists, telling them all they need to know about everything that matters.

Throughout the year, *GAR* delivers pitch-perfect daily news, surveys and features, organises the liveliest events (under our GAR Live banner) and provides our readers with innovative tools and know-how products.

In addition, assisted by external contributors, we curate a range of comprehensive regional reviews – online and in print – that go deeper into developments in each region than our journalistic output is able to. *The Asia-Pacific Arbitration Review*, which you are reading, is part of that series. It contains insight and thought-leadership inspired by recent events, written by pre-eminent practitioners from around Asia.

Across 16 chapters spanning 128 pages, this edition provides an invaluable retrospective, executed by 34 leading figures. All contributors are vetted for their standing and knowledge before being invited to take part.

Together, our contributors capture and interpret the most substantial recent international arbitration events of the year just gone, with footnotes and relevant statistics. Other articles provide valuable background so that you can get up to speed quickly on the essentials of a particular country as a seat.

This edition covers Australia, China, Hong Kong, India, Japan, Korea, Malaysia, the Philippines, Singapore and Vietnam, has overviews of developments in energy arbitration, investment treaty arbitration, and enforcement, and includes a discussion of the pros and cons of discounted cash-flow as a method of valuing a growth business.

Among the nuggets it contains:

- a description of how China has extended its reporting system – whereby lower courts must notify the Supreme People's Court before taking decisions that may affect awards or arbitrations – to include domestic cases;
- statistics showing a boom in arbitration in Vietnam, plus a review of the most recent cases on annulment and enforcement;
- a full review of all the significant court decisions from Indian in the past year;
- how Malaysia has made it easier for foreign counsel to appear in international arbitrations there; and
- remarkable statistics from Korea showing the growth of international cases at the Korean Commercial Arbitration Board and the extent of the government's development plans.

The review also looks to answer speculative questions facing arbitration in the Asia-Pacific. The retrospective on the Hong Kong International Arbitration Centre on the occasion of the HKIAC's 35th birthday answers 'will Hong Kong will be seen as neutral territory vis-à-vis the mainland in the future?', while 'DCF – gold standard or fool's gold?' questions how arbitrators might attempt to value Spotify Technology were it expropriated by Sweden.

If you have any suggestions for future editions, or want to take part in this annual project, my colleague and I would love to hear from you. Please write to insight@globalarbitrationreview.com.

David Samuels
Publisher
May 2019

Japan

Yoshimi Ohara
Nagashima Ohno & Tsunematsu

Overview

The year of 2018 was full of new developments in dispute resolution in Japan.

- In May, the Japan International Dispute Resolution Center (JIDRC-Osaka) was launched, offering an affordable and convenient venue for arbitration and mediation at a facility of the Ministry of Justice in the Kansai area of Japan.[1]
- In September, the International Arbitration Center in Tokyo (ITAC) was launched to offer the settlement of IP disputes in arbitration by distinguished former IP judges of the United States, South America, the United Kingdom, Europe, China, Korea, Japan and Australia.[2]
- In November, the Japan International Mediation Center (JIMC-Kyoto) was launched to offer international mediation services at Doshisha University, in the heart of Kyoto, close to the imperial palace and certain temples in Kyoto.[3]
- In December, the Japan Commercial Arbitration Association (JCAA), under the leadership of Professor Masato Dogauchi published three new rules:[4]
  - the Commercial Arbitration Rules;
  - the Interactive Arbitration Rules; and
  - the Administrative Rules for the UNCITRAL Arbitration, all of which came into force in 1 January 2019.
- Last not the least, the Japanese government budgeted approximately US$2.6 million in its 2019 fiscal year plan to promote international arbitration in Japan. As part of an effort to attract more international arbitration to Japan, the government has put together a bill to amend the act commonly known as the registered foreign lawyer act (Registered Foreign Lawyer Act)[5] to expand the scope of international arbitration that registered foreign lawyers[6] can handle as counsel.

This article focuses on actions taken by the government and the JCAA in 2018.

Government backing of international arbitration in Japan

The Japan article in the 2019 edition of *The Asia-Pacific Arbitration Review* reported that the Abe administration, for the first time in the history of modern Japan, identified the promotion of international arbitration in Japan as part of the Basic Policy on Economic and Fiscal Management and Reform in 2017.[7] Such policy was introduced based on the initiatives of Ms Yoko Kamikawa, the then incumbent Minister of Justice, and has been continued by Mr Takashi Yamashita, the current incumbent Minister of Justice. To implement this policy, the government budgeted approximately US$2.6 million for the 2019 fiscal year for launching a state of the art hearing facility in Tokyo to be ready for:

- sports arbitration for the 2020 Olympics;
- capacity building;
- organising international arbitration events in Japan;
- increasing awareness of international arbitration among the Japanese business community; and
- promoting Japan as seat of arbitration.

Although the budget may not be impressive compared with the amounts offered by governments in neighbouring jurisdictions, it is substantial given the record high fiscal deficit and competing political, economic and social agenda in Japan and such budgeting sends an unequivocal message to the arbitration community that the Japanese government is committed to support the promotion of international arbitration in Japan.

Another important step taken by the government in 2018 was to prepare a draft bill to amend the Registered Foreign Lawyer Act to expand the scope of international arbitration that registered foreign lawyers registered in Japan and outside Japan can handle as counsel. Currently, foreign lawyers may serve as counsel in Japan only in international arbitration seated in Japan in which one of the parties' address or principal place of business is outside Japan. As a consequence, technically foreign lawyers are currently not allowed to serve as counsel in arbitration in Japan where all parties are Japanese parties even when all parties are wholly owned subsidiaries of foreign parent companies. This was harshly criticised by a prominent foreign lawyer then stationed in Japan and registered as a foreign lawyer under the act.[8] Sharing an anecdote concerning himself, he claimed that the act unreasonably restricts the choice of Japanese parties to have truly international arbitration proceedings seated in Japan by retaining registered foreign lawyers.

As part of an effort to increase capacity to conduct international arbitration in Japan, the government aims to expand the definition of international arbitration in which foreign lawyers may serve as counsel in Japan to include arbitration among all Japanese parties so long as there are certain foreign elements, more specifically where:

- a party to the arbitration is a subsidiary of foreign entities;
- governing law of an underlying contract is foreign law; or
- seat of arbitration is outside Japan.[9]

This bill once passed at the Diet will offer more choices to users who conduct whole or part of the arbitration proceedings in Japan. While this bill has not been submitted to the Diet due to rather congested schedule of the Diet, the arbitration community welcomes this prospective amendment that will aid the capacity building of arbitration practitioners in Japan.

The JCAA's reforms and new rules

The JCAA has changed

Not surprisingly, amid the government's efforts to promote arbitration in Japan, the JCAA's consistently low caseload of around 20 new filings per year has been under the constant spotlight when the government sector and the private sector have been devising a plan to promote international arbitration in Japan. Presumably in

response to such pressure, in 2018 the JCAA appointed Professor Masato Dogauchi, a prominent international private law academic to serve as the director and officer of the JCAA in charge of arbitration and mediation in 2018. He focused on improving the transparency of the organisation and administration of JCAA arbitration, and introduced new rules in order to make arbitration, in his view, more useful and affordable.

Publication of arbitrators

In terms of transparency, first and foremost the JCAA published a list of arbitrators who have sat as an arbitrator in the last 20 years and quantified each arbitrator's experience as an arbitrator in the JCAA's arbitration proceedings by the number of appointments and their role within the tribunal (co-arbitrator received one point, sole arbitrator received two points and a presiding arbitrator received three points).[10] The JCAA also published not only the name but also the age, nationality and procedural languages of each arbitrator. The JCAA used to share its panel of arbitrators with parties and their counsel upon their request. However such panel of arbitrators was never made publicly available and the quality of the panel of arbitrators had been questioned due to lack of published objective standard for the selection of the panel members and lack of periodic review of the panel members. Therefore, publication of objective information of arbitrators who once sat in JCAA arbitrations has been generally welcomed by users who always need to rely on the expertise of outside counsel with respect to arbitrator candidates.

As part of an effort to increase transparency, the JCAA codified and published its policy of restricting the involvement of the JCAA officers and staff members in the administration of arbitration and mediation cases having conflict of interest.[11] The JCAA officers and staff members will be excluded from administering those cases or otherwise an information firewall will be installed. The JCAA may not appoint its director or auditor as an arbitrator or mediator. As a user, I found the latest JCAA website more informative and accessible as a result of the initiatives taken by the JCAA in 2018.

In terms of the JCAA's new rules, unlike its effort to promote transparency, not all aspects of the new rules were hailed by the arbitration community in Japan.

The Interactive Arbitration Rules[12]

The JCAA was quite ambitious to introduce unique rules for arbitration called the Interactive Arbitration Rules, which require arbitral tribunals to disclose their interim views on factual and legal issues in the arbitration twice in writing: first, at the early stage of the proceedings by drafting a summary of each party's positions on factual and legal grounds of the claim and the defence;[13] and second, prior to an evidentiary hearing by drafting a summary of factual and legal issues that the tribunal considers important and preliminary view on those issues. After giving a party an opportunity to comment on the tribunal's preliminary views as well as on whether to conduct an evidentiary hearing, the tribunal is to decide whether to hold an evidentiary hearing.[14] In spite of the additional daunting task entrusted to them, remuneration for the tribunal members is set disproportionately low compared to the additional daunting task entrusted to them. Arbitrator fees are flat fees and vary depending on the amount in dispute. For instance, if the amount in dispute is ¥100 million or more, but less than ¥5 billion, the remuneration is fixed at ¥3 million in the case of a sole arbitrator regardless of the nature and complexity of the case or the number of hours spent by the sole arbitrator.[15] The idea behind the new ambitious rules is first to make the outcome of the arbitration more predictable for the parties and second to make the arbitration more affordable. The JCAA considers that early disclosure of the tribunal's interim views may facilitate settlement discussions between the parties.

In terms of predictability, arbitrators, being open-minded, intentionally form only a very preliminary view on disputed issues at the early stage of the proceedings, which later evolves in one direction or another based on the parties' subsequent written and oral submissions. In fact, appreciating the preliminary nature of such views the JCAA rules provide that the preliminary views expressed by the tribunal will not be binding on the tribunal's subsequent decisions.[16] I wonder whether it would be useful to force arbitrators to form preliminary impression to be ready to share in writing with the parties twice even before an evidentiary hearing both from the perspectives of predictability of arbitration and impartiality of arbitrators. It is not uncommon for judges in the civil law jurisdictions, particularly in Asia, to disclose their preliminary impression to the parties in order to guide the parties and to facilitate settlement. However, such practice is entirely foreign to most common law jurisdictions. Disclosure of arbitrators' preliminary impressions might invite challenge against arbitrators based on lack of impartiality in common law jurisdictions. While the rules prohibit the parties from challenging arbitrators based on the fact that he or she has expressed preliminary views under article 56.1,[17] how the court of enforcement will perceive the interactive aspect of the JCAA rules is yet to be seen.

The JCAA explains that the new interactive arbitration rules are also aimed at tackling issues of time and cost of arbitration. While the JCAA calls for the 'noble integrity of arbitrators', it would be quite a task for counsel to find well qualified arbitrators able to properly manage creative, interactive arbitration proceedings without appearing to be biased towards either party and at the same time who would accept heavily discounted remuneration. Given the relatively limited contribution of arbitrators' fees and expenses to the total cost of arbitration (which was reported to be on average 16 per cent of the entire cost of arbitration in ICC arbitration in 2003 and 2004 according to the first edition of Techniques for Controlling Time and Costs in Arbitration (2007))[18] once again I wonder if these new ambitious rules will do more harm than good to the users of arbitration.

The Commercial Arbitration Rules

Concurrently, the JCAA has amended its conventional Commercial Arbitration Rules as well as its administrative rules for UNCITRAL arbitration. The new Commercial Arbitration Rules are the default rules when the parties agree to the JCAA arbitrations without specifying which rules out of three will apply. The Commercial Arbitration Rules clarify, in line with the global standard practice, among other things:

- an arbitrator's continuing obligation to investigate and disclose to the parties any circumstances that may, in the eyes of the parties, give rise to justifiable doubts as to his or her impartiality and independence pending arbitration; and
- the disclosure obligation of tribunal secretaries and their terms and conditions of appointment.

On the other hand, the JCAA has introduced rather unique provisions, such as the prohibition of disclosure of a dissenting opinion or individual opinion in any manner[19] and the prohibition of a party appointed arbitrator's ex parte communication with the party who appointed the arbitrator, with respect to the appointment of the third arbitrator without a written consent of

all parties.[20] In the JCAA's view, dissenting opinions only serve a losing party in assisting its challenge against an arbitral award. On the contrary, in my view the prohibition of communicating a dissenting opinion to the parties may reduce the quality of deliberation, as the tribunal members may not take the time to reach a unanimous opinion, particularly given that arbitrators' fees under commercial arbitration rules are capped and their hourly rate will be reduced by 10 per cent for every 50 hours in excess of the initial 150 hours on a case.[21]

The JCAA considers it inappropriate for a party appointed arbitrator to engage in ex parte communication with a party who appointed him or her in relation to the selection of the third arbitrator unless all parties agree to do so in writing. This new rule could be confusing to the parties because ex parte communication of a party with a party appointed arbitrator in relation to the selection of the third arbitrator is general practice in international arbitration, as recognised in the IBA Guidelines on Party Representation in International Arbitration, and parties and arbitrators who are unfamiliar with the JCAA rules may easily run afoul of those provisions, which will potentially create grounds for challenging an arbitrator and even an award.

Calling for arbitrators' noble integrity

Perhaps the most controversial aspect of the JCAA's new rules, consistent through the three sets of new rules, is the JCAA's attempt to reduce arbitrators' remuneration. The JCAA may, and does, depending on the rules, set the remuneration of arbitrators at substantially below the international arbitration standard, which makes it rather difficult for the parties to appoint an arbitrator of their choice. Under the Interactive Arbitration Rules arbitrators' remuneration is set to be fixed fees at an amount that is substantially below the international standard. Under the Commercial Arbitration Rules, which calculate arbitrators' remuneration on an hourly basis, the hour rate of an arbitrator is set to be ¥50,000 regardless of the complexity of disputes subject to downward adjustments. First, when an arbitrator spends more 150 hours, his or her hourly rate will be reduced by 10 per cent for every 50 hours in excess of the initial 150 hours, up to 50 per cent of the original hourly rate.[22] Second, arbitrators' remuneration is capped at an amount that varies depending on the amount in disputes.[23] The parties may not opt out from the rules which regulate arbitrators' remuneration without the agreement of all parties prior to the constitution of the tribunal; however, there is no guarantee that all parties will agree to opt out, particularly when the relationship between the parties has been aggravated. Under the administrative rules for UNCITRAL arbitration, again it is the JCAA, not the parties, that determines an hourly rate of arbitrators within the range of US$500 to US$1,500 for each arbitrator.[24]

The JCAA has taken rigorous steps in an attempt to improve its stature in the international arbitration arena by introducing innovative rules and vigorous disclosure. These are remarkable changes that should be welcomed because the JCAA's policy and practice has not been very visible to users both in and out of Japan in the past. Whether the actual steps taken by the JCAA truly serve its objectives and its goals is a separate issue. Public comments were sought for the new draft rules for only two weeks, which was too short for the arbitration community, even within Japan, to react timely. Some of the initiatives appear to be more controversial than beneficial to the parties and to the JCAA itself. Now that the JCAA is under its new leadership, we can only hope that the JCAA will reach out to the arbitration community in and outside Japan to listen to their needs and concerns in order to become more friendly and proactive for the benefit of users.

Conclusion

It is an exciting moment to be part of the evolution of dispute resolutions in Japan. We anticipate a state of the art hearing facility to be open in Tokyo, the Registered Foreign Lawyer Act to be amended, amendments to the Arbitration Act to be proposed to the Diet and more to come. Please stay tuned.

Notes

1 http://www.idrc.jp/index_en.html.
2 https://www.iactokyo.com/.
3 https://www.jimc-kyoto.jp/page1.
4 http://www.jcaa.or.jp/e/arbitration/rules.html.
5 Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers (The amended act comes into effect as of 1 March 2016 (Act No. 69 of 2014 comes into effect as of 1 April 2016)) http://www.japaneselawtranslation.go.jp/law/detail/?id=2787&vm=04&re=01.
6 Those foreign lawyers are registered with the Japan Federation of Bar Association and different from foreign lawyers registered to practice outside Japan.
7 http://www5.cao.go.jp/keizai-shimon/kaigi/cabinet/2017/2017_basicpolicies_en.pdf (a provisional English translation).
8 https://globalarbitrationreview.com/article/1067624/japan-%E2%80%93-eight-years-on-and-no-progress.
9 This element was introduced to clarify foreign lawyers' ability to serve counsel in Japan when seat of arbitration is outside Japan but part of the proceedings such as hearing is conducted in Japan.
10 http://www.jcaa.or.jp/e/arbitration/rules.html See 'JCAA-experienced Arbitrators and Mediators'.
11 http://www.jcaa.or.jp/e/arbitration/docs/eb8304d06e9003fbd19e8e51cc9d887c77717cc3.pdf.
12 http://www.jcaa.or.jp/e/arbitration/docs/Interactive_Arbitration_Rules.pdf.
13 Article 48.1 of Interactive Arbitration Rules.
14 Article 56.1 of Interactive Arbitration Rules.
15 In the event of the three member tribunal the presiding arbitrator will receive ¥4 million and party appointed arbitrators will each receive ¥2.5 million. Article 94 and 95 of Interactive Arbitration Rules.
16 Article 56.5 of Interactive Arbitration Rules.
17 Article 56.6 of Interactive Arbitration Rules.
18 https://iccwbo.org/publication/icc-arbitration-commission-report-on-techniques-for-controlling-time-and-costs-in-arbitration/.
19 Article 63 of the JCAA Commercial Arbitration Rules.
20 Article 28.5 of the JCAA Commercial Arbitration Rules.
21 Article 94, 95 of the JCAA Commercial Arbitration Rules.
22 Article 95.1 of the Commercial Arbitration Rules.
23 Article 94 of the Commercial Arbitration Rules.
24 Rule 20.2 of the Administrative Rules for UNCITRAL arbitration.

Yoshimi Ohara
Nagashima Ohno & Tsunematsu

Yoshimi Ohara is a partner at Nagashima Ohno & Tsunematsu, Tokyo office. Her practice focuses on international arbitration, litigation and mediation. She represents both domestic and foreign clients in international arbitration in various seats under the rules of the International Chamber of Commerce (ICC), ICSID, the Singapore International Arbitration Centre (SIAC), the Japan Commercial Arbitration Association (JCAA) and the American Arbitration Association and International Centre for Dispute Resolution. Before launching her international arbitration practice, she was active in the area of corporate transactions and IP disputes. With a strong corporate and IP background, she has extensive experience in dealing with disputes covering a wide range of subjects, including joint ventures, M&A, corporate alliance, infrastructure, energy, investment, insurance, technology transfer, intellectual property, sales and distribution. Ms Ohara worked for the Ministry of Economy Trade and Industry (METI) in Japan in putting together the Investment Treaty FAQ and the Commentary on Investment Treaty Arbitration Award available on the METI website. Ms Ohara also serves as chair arbitrator, co-arbitrator or sole arbitrator under the rules of the ICC, SIAC, JCAA, the Korean Commercial Arbitration Board and UNCITRAL.

Ms Ohara is currently serving as a vice president of the ICC Court, a governing board member of the International Council for Commercial Arbitration and a board member of Swiss Arbitration Association and Japan Association of Arbitrators. She previously served as a court member (2010–2015) and vice president of the London Court of International Arbitration (2013–2015). She is a frequent speaker and author on the subject of international arbitration. She has taught international arbitration at Keio University Law School, LLM programme since 2014.

Ms Ohara received her LLB from the University of Tokyo and her LLM from Harvard Law School. She is admitted to practice law in Japan and New York.

Law
Business
Research

THE ASIA-PACIFIC ARBITRATION REVIEW 2020 ISBN 978-1-83862-208-4