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What happened to Tokyo/Japan as a seat of international arbitration?

The 2015 International Arbitration Survey carried out by Queen Mary University of London in partnership with White & Case (2015 Survey) has disappointed arbitration practitioners in Japan.[1] Five years ago when Queen Mary University of London and White & Case published the 2010 International Arbitration Survey (2010 Survey), Tokyo was ranked fourth among the preferred seats of arbitration.[2] However, in 2015 Tokyo/Japan disappeared from the list of most preferred seats of arbitration.

2010 International Arbitration Survey
Choice of seat of arbitration Chart 15

1	London	30%
2	Geneva	9%
3	Paris	7%
4	Tokyo	7%
5	Singapore	7%
6	New York	6%
7	Others	34%

2015 International Arbitration Survey
Choice of seat of arbitration Chart 8

1	London	47%
2	Paris	38%
3	Hong Kong	30%
4	Singapore	24%
5	Geneva	17%
6	New York	12%
7	Stockholm	11%

What happened to Tokyo/Japan over the past five years as a seat of international arbitration? The 2015 survey revealed that the following are the top three decisive factors for the respondents to the 2015 Survey in selecting their preferred seat:
(i) reputation and recognition of the seat;
(ii) law governing the substance of the dispute; and
(iii) particularities of contract in dispute.

Given these factors, the author considers that two phenomena might have primarily contributed to the change of the survey result over the past five years: first, the recent severe competition among the arbitration seats, particularly in Asia, resulted in two winners in the region – Hong Kong and Singapore, which has made the rest in the region less compelling (ie, item (i)). Second, the surge of outbound investment by Japanese companies due to the continued low growth rate of the economy in Japan might have made Tokyo/Japan less pertinent to disputes under contracts in terms of governing law (ie, item (ii)) as well as making Tokyo/Japan less important as a centre of business contemplated under the contracts (ie, (iii)).

What should Tokyo/Japan do to revive and further boost its position as a preferred seat of arbitration? The Japanese Arbitration Act is consistent with the 1985 UNCITRAL Model Law, and the Japan Commercial Arbitration Association (JCAA) introduced up-to-date arbitration rules in 2014 incorporating then state-of-the-art arbitration rules, including emergency arbitrators. Arbitration practice in Japan meets the global standard, and Japanese courts have been very much arbitration friendly, diligently enforcing arbitration awards and dismissing challenges to arbitration awards, taking a consistent position that errors in the finding facts and application of law do not constitute grounds to refuse enforcement of or set aside an arbitration award. The only exception to this clean record is the Tokyo High Court decision in 2013[3] in which the court set aside an arbitration award based on breach of procedural public policy because the tribunal treated the disputed issues as undisputed and failed to find the facts. The mishandled facts were likely to have been dispositive as such facts would have been found to be in favour of the respondent by the tribunal, and the claimant claims granted by the tribunal may have been in violation of the Antimonopoly Act of Japan. Accordingly, the 2013 Tokyo High Court decision may well be regarded as not having deviated from the principles of the UNCITRAL Model Law, and the Japanese courts remain arbitration friendly. Last, but not least, the Japanese legal market has been open in the sense that foreign practitioners are free to come to Japan to serve as arbitrators or arbitration counsel in arbitration proceedings in Japan regardless of the governing law of the disputed contracts.

The Japanese Federation of Bar Associations and the Japan Association of Arbitrators each launched a project group in 2015 with the purpose of promoting Japan as a preferred seat of arbitration and are now attempting to seek endorsement from the business community and the government. The project is still in its inception, and the author hopes to report the progress of such project in the next edition of the *GAR Asia-Pacific Arbitration Review*. In the meantime, any constructive suggestions from users or those who wish to use Japan as a seat of arbitration would be very much appreciated. After all, multiple attractive options for seats only benefit users as arbitration is such a global engagement.

Key Japanese court decisions issued in 2015

The author introduces below two key Japanese court decisions issued in relation to arbitration: first, the court dismissed a challenge to an arbitral award based on the presiding arbitrator's failure to disclose; and second, the court narrowly construed an arbitration agreement of a time charter to exclude disputes involving interpretation of the Corporate Reorganisation Act. These court decisions are important because for the first time among the scant published Japanese court decisions in arbitration they dealt with hot topics: a challenge based on an arbitrator's failure to disclose;

and an insolvency and arbitration agreement, both of which are widely debated in the global arbitration community.

Challenge to an arbitral award based on arbitrator's failure to disclose – dismissed

Court decision – Osaka District Court, 17 March 2015[4]

Facts

In a JCAA arbitration seated in Osaka, the presiding arbitrator was a partner of a law firm in Singapore, and a lawyer who joined the same law firm in its San Francisco office as a partner after about 18 months from the commencement of arbitration had represented and continued to represent a sister company of the claimant in a CRT antitrust class action in California (Class Action). The presiding arbitrator failed to disclose such fact. Before he was appointed, the presiding arbitrator submitted a statement of independence (SOI) to the JCAA with a reservation that, according to his firm's policy, lawyers of his firm in the future would be able to give advice or represent a client in a matter unrelated to the arbitration but having a conflict of interests with a party or parties to the arbitration or their affiliates; lawyers of his firm in the future would be able to give advice or represent a party or parties to the arbitration or their affiliates in a matter unrelated to the arbitration; an arbitrator would not be able to be involved in any of these matters or receive any information on any of these matters; the arbitrator considers that such matters if any will not affect his independence and impartiality as an arbitrator. The two party arbitrators appointed the presiding arbitrator in spite of the reservation. The respondent challenged the arbitration award based on, among other things, the composition of the arbitral tribunal and the arbitration procedure being in violation of Japanese law and public policy[5] due to the presiding arbitrator's failure to disclose circumstances likely to give rise to justifiable doubts as to his impartiality and independence.

Ruling

The court dismissed the challenge to the award for two reasons: no ground for a challenge to the presiding arbitrator was met and any flaw caused by breach of duty to disclose was minor. First, in terms of the ground for a challenge to the presiding arbitrator, the court found that such circumstances do not give rise to justifiable doubts, and there was no suggestion that such circumstances affected the outcome of the arbitration[6] because:

- there was no indication that an exchange of information on the class action was made between the presiding arbitrator and the partner in the San Francisco office;
- the two cases are unrelated and the parties are different; and
- the presiding arbitrator was not involved in the class action or exposed to information concerning the class action.

Second, in terms of breach of duty to disclose, any flaw caused thereby was minor because of the reservation made in the SOI. The respondent could have anticipated that circumstances like the one in this case might happen, yet the respondent did not object to the reservation.

Analysis

While the court in a different jurisdiction could have reached the same conclusion under the same fact pattern, the court analysis significantly fell short compared to international arbitration practice. Essentially, the court in denying the circumstances that give rise to justifiable doubts, relied on the presiding arbitrator's lack of knowledge of his new colleague's representation in the class action and the unrelated nature of the two cases, namely, the arbitration and class action and the party to the class action was a sister company of the party and not the party itself. However, under the IBA Guidelines on Conflicts of Interest in International Arbitration (the IBA Guidelines), which is widely referred to by prospective and appointed arbitrators, arbitration institutions and the courts in various jurisdictions, if the arbitrator's firm is currently rendering services to an affiliate of one of the parties, will fall within the Orange List, which warrants disclosure of such circumstances even when such relationship with an affiliate of a party does not create a significant commercial relationship for the law firm and without involving the arbitrator.[7] If the arbitrator's law firm did regularly advise an affiliate of a party and the firm derives significant financial income from such affiliate, then the facts fall within the Non-Waivable Red List.[8] Representing a company in a US antitrust class action could incur substantial legal fees. However, the court in this case did not investigate whether the presiding arbitrator's law firm regularly advised a party's affiliate or whether the firm derived significant financial income from such affiliate to the party. The court appeared to have heavily relied on the fact that the presiding arbitrator was not aware of his colleague's services. However, the Japanese Arbitration Act, consistent with the UNCITRAL Model Law, imposes on an arbitrator a continuous duty to disclose any and all circumstances likely to give rise to justifiable doubts as to his or her impartiality and independence. Although neither the law nor rules clearly spell it out in Japan, it is considered to be the natural conclusion that an arbitrator, as well as a party, is required to conduct a reasonable investigation to identify whether there are any circumstances that are likely to give rise to justifiable doubts.[9]

What is worse in this case is that the law firm seems to have been aware of the fact that a new partner represented a sister company of a party to the arbitration, over which another partner is presiding as an arbitrator, and elected not to share such information with the presiding arbitrator by using the so-called advance waiver to avoid a conflict. It was that law firm's policy according to the court decision. The law firm might have thought this advance waiver was a more sanitised version of a conventional advance wavier because an arbitrator would not know during the arbitration the circumstances that are likely to give rise to justifiable doubts so as not to jeopardise his impartiality and independence. The court in this case endorsed the law firm's policy by reasoning that the presiding arbitrator was not aware of his colleague's services, and the respondent, who challenged the award, did not object to the advance waiver. The court rushed to its conclusion without even examining, among other things, whether it was a waivable conflict, whether a duty to disclose/duty to investigate was waivable, the scope of waiver (if waivable), and the timing of the respondent becoming aware of these circumstances. The challenging party does not appear to have made these arguments, and therefore the court may not have been aware of numerous insightful discussions in the wider arbitration community and varying practices in other jurisdictions over an arbitrator's impartiality, independence and duty of disclosure and advance wavier. It would be a pity if, in fact, the court was unable to benefit from those resources, especially the IBA Guidelines. The 2014 IBA Guidelines exhibit a clear direction on this issue (ie, advance waiver does not discharge an arbitrator's ongoing duty of disclosure).[10] Depending on the facts to be explored further in this case, the court could have come to a different conclusion,

or at least could have examined and analysed the issues differently, if it had received such input.[11] Accordingly, it is too early to conclude that the Japanese court will find the advance waiver enforceable even under the same fact pattern.

Insolvency and arbitration – disputes over the interpretation of Japanese insolvency law are outside the scope of an arbitration agreement

Court decision – Tokyo District Court, 28 January 2015[12]

Facts

In a case where a charterer went through corporate reorganisation proceedings in Japan, an owner sued the trustee of the charterer in the Tokyo District Court seeking, among other things, declaratory judgment that the charterer's freight should be qualified as a common benefit claim as opposed to a reorganisation claim. The trustee, on the other hand, sought dismissal of the lawsuit due to an arbitration agreement in a time charter. The time charter in the dispute was based on the one authorised by the New York Produce Exchange, 1946 version.[13] Paragraph 17 provides that 'should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision, or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men'. The charterer and the owner modified this paragraph 17 to have London as the seat of arbitration. The High Court of Justice in the UK issued an order recognising the Japanese reorganisation proceedings as foreign main proceedings and staying any individual proceedings concerning the charterer's assets, including arbitration.

Ruling

The court dismissed the trustee's claim ruling that the arbitration agreement in paragraph 17 is reasonably construed not to cover disputes such as whether or not the charterer's freight should be qualified as a common benefit claim as opposed to a reorganisation claim under the Japanese reorganisation act. To come to that conclusion, the court first found UK law to be the governing law of the arbitration agreement in paragraph 17, given that the time charter was governed by UK law and the seat of arbitration was London. The court, while recognising that UK law interprets a contract as it is written, construed the parties' intention in entering into the arbitration agreement to exclude differences primarily relating to the interpretation of Japanese reorganisation law reasoning that:

- the parties agreed to arbitrate in London under UK law because maritime court precedents and maritime experts are abundantly available in the UK;
- an arbitrator in London who is a 'commercial man' and neither a scholar nor a former judge, may not properly construe complicated legal issues under the Japanese reorganisation act, which is at the centre of the disputes in this suit; and
- UK law itself allows arbitration against a bankrupt debtor only under special circumstances, such as upon the permission of the court.

Analysis

The issue of whether or not a trustee is bound by an arbitration agreement of a debtor has been the subject of heated debate among scholars in Japan. The prevailing view is that an arbitration agreement, being severable from the underlying contract, is not automatically terminated even when a trustee has terminated the underlying agreement based on its right to terminate executory contracts. At the same time, given the dual roles and character of a trustee, namely acting as a successor to a debtor and coordinating the interests of all the interested parties in insolvency proceedings, whether a trustee is bound by an arbitration agreement depends on the nature of each dispute. For instance, when a trustee exercises its rights on behalf of creditors, such as the right of avoidance, a trustee is considered not to be subject to an arbitration agreement. No court decision on this issue was published until the above court decision.[14] As a matter of practice, the courts in many jurisdictions are generally supportive of a trustee, and it is creditors who tend to insist on honouring an arbitration agreement. On this point, this case was unique in that it was the trustee who disputed the jurisdiction of the court based on an arbitration agreement. It is quite possible that this trustee might have attempted to compel the creditor to give up its claims due to legal costs and the burden associated with London arbitration, which might have affected the outcome of the court decision. It is worth noting that the Japanese court rejected the trustee's argument that, based on the severability of an arbitration agreement, a trustee may not terminate an arbitration agreement by terminating the underlying agreement under the corporate reorganisation act. On the other hand, the court narrowly construed the scope of disputes covered by the arbitration agreement to exclude the particular disputes primarily over the interpretation of the Japanese reorganisation act based on a reasonable interpretation of the parties' intentions. A critic commented that the parties to the arbitration agreement would not have contemplated a situation of insolvency at the time of executing the time charter and to conclude that they would have is hindsight interpretation of the arbitration agreement, with which the author concurs.[15] That said, it was helpful that the Japanese court confirmed that it does not take the position that a trustee is not bound by an arbitration agreement or that a trustee may terminate an arbitration agreement if the underlying contract is executory. A lesson to be learned from this case is that when the two Japanese parties choose a foreign seat of arbitration and foreign governing law (eg, London arbitration or UK governing law in maritime contracts or commodity contracts), due to the abundance of case law and expertise available at the seat and under the governing law, it would be prudent to tailor the language of an arbitration agreement so that the two Japanese parties do not need to argue complicated Japanese legal issues through translation when those are the only primary issues, so as to avoid a situation where important points are lost in the translation.

Conclusion – Going forward

The 2015 Survey is indeed insightful and even instructive as to what Japan should do to improve its position as a seat of international arbitration within the highly competitive arbitration community. The top-two important elements in choosing a preferred seat were neutrality and impartiality of the local legal system and national arbitration law.[16] When legal issues arise in connection with arbitration proceedings, it is the local law that resolves the issues and streamlines the proceedings. The Japanese court has a good track record of supporting arbitration. However, there is much room to improve so as to convince the global arbitration community that the Japanese court does support arbitration by offering clear guidance and direction to heavily debated issues in

the global arbitration community rather than focusing on resolving particular issues in each case. The author hopes to report the progress of court decisions in the area of arbitration in subsequent editions of the *GAR Asia-Pacific Arbitration Review*.

Notes

1 www.arbitration.qmul.ac.uk/docs/164761.pdf. Respondents were asked to indicate three preferred seats.
2 www.arbitration.qmul.ac.uk/research/2010/index.html. Respondents were asked to indicate a preferred seat.
3 Tokyo High Court, 13 March 2012, 2011 (Ra) No. 1332, D1-Law 28211461.
4 Osaka District Court, 17 March 2015, 2014 (arb.) No. 3, 2270 Hanrei Jiho 74.
5 Article 44 paragraph 1, items 6 and 8 of Arbitration Act. An unofficial translation of Arbitration Act is available at the Ministry of Justice website, www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=01&dn=1&yo=%E4%BB%B2%E8%A3%81%E6%B3%95&ia=03&x=49&y=23&ky=&page=1.
6 Article 18 (4) of Arbitration Act, section 28 of JCAA rules (2008) which is available at www.jcaa.or.jp/e/arbitration/docs/e_shouji.pdf.
7 Paragraph 3.2.1, Part II of the IBA Guidelines.
8 Paragraph 1.4, Part II of the IBA Guidelines.
9 Koichi Miki, et. al. 'Theory and Practice of New Arbitration Act' (Yuhikaku, 2006) Discussions among Koichi Miki, Naoki Idei, Masaaki Kondo, Takeshi Kojima and Tatsuya Nakamura.
10 (3)(b), Part I of the IBA Guidelines.
11 It was disappointing, but not too surprising, that the court was not aware of the international standard as it rarely handles conflict of interests with respect to arbitrators, and conflict of interests with respect to judges and arbitrators are handled differently in Japan.
12 Tokyo District Court, 28 January 2015, 2012 (wa) No. 35587, 2258 Hanrei Jiho 100.
13 www.fleetle.com/a/d/pdf/nype_46_portrait.pdf.
14 Etsuko Sugiyama, 'Arbitration Agreement in Insolvency Proceedings' Arbitration and ADR No. 10, p. 1, 2015.
15 Tokyo District Court, 28 January 2015, 2012 (wa) No. 35587, 2258 Hanrei Jiho 100.
16 Chart 10 of the 2015 Survey.

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