The Asia-Pacific Arbitration Review 2021

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A Global Arbitration Review Special Report

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Welcome to *The Asia-Pacific Arbitration Review 2021*, 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 the exigencies of journalism allow. *The Asia-Pacific Arbitration Review*, which you are reading, is part of that series. It contains insight and thought leadership inspired by recent events, from 37 pre-eminent regional practitioners.

Across 17 chapters and 112 pages, it offers an invaluable retrospective. 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, Singapore and Vietnam. It also has overviews of construction and infrastructure disputes in the region (and how to avoid them), investment treaty arbitration (particularly its relevance to the Belt and Road Initiative), the impact of covid-19 on the art of damages calculation, and third-party funding.

Among the nuggets it contains:

- the common mistakes that contractors make when allocating risk in contracts and how to avoid them;
- a groundbreaking year for international arbitrations in Korea;
- the vogue among Asian states for including appeal mechanisms in their ISDS;
- how China's government has managed to open up the mainland market to institutions such as the ICC, without having to amend the national arbitration law;
- the end of natural-justice based challenges to awards in Singapore; and
- a handy table showing the position of third-party funding in eight Asian states.

And much, much more.

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

David Samuels
Publisher
May 2020

Japan

Yoshimi Ohara
Nagashima Ohno & Tsunematsu

In summary

Japan continues to strive to boost its international arbitration capacity. A high-end hearing facility is now open in Tokyo. Foreign lawyers will be allowed to represent Japanese parties in domestic arbitration with foreign elements.

Discussion points

- Opening of JIDRC-Tokyo on 30 March 2020.
- Boosting the arbitration capacity in Japan – expanding the scope of representation by foreign lawyers in arbitration and mediation.
- Reaffirmation of the importance of proper conflict check systems in law firms of arbitrators – Osaka High Court exonerated an arbitrator and overturned its previous decision to vacate an arbitral award.
- JCAA update of its mediation rules.

Referenced in this article

- The Japan International Dispute Resolution Center (JIDRC).
- The Japan Commercial Arbitration Association (JCAA).

Opening of JIDRC-Tokyo on 30 March 2020

The long-awaited hearing facility in Tokyo was finally launched in Toranomon, the centre of Tokyo, on 30 March 2020 amid the outbreak of covid-19.[1] JIDRC-Tokyo offers two hearing rooms and six breakout rooms. The two hearing rooms, when combined, accommodate more than 150 persons, which enables JIDRC-Tokyo to host large-scale hearings for investment treaty arbitration. JIDRC-Tokyo offers state-of-the-art equipment and services, including PCs and tablets connected to the large screens and monitors installed in the hearing rooms and breakout rooms, AI transcriber services and equipment for simultaneous interpretation and microphones. JIDRC-Tokyo is ecologically friendly and serves plastic bottle-free water, tea and coffee. It is housed in Toranomon Hills Business Tower,[2] a large commercial complex containing offices, shops and restaurants. Five-star hotels are conveniently located, including Andaz, which is in an adjacent complex. JIDRC-Tokyo was ready to host the CAS arbitration for the 2020 Tokyo Olympics in the summer of 2020, which was, to the disappointment of many, postponed due to the covid-19 pandemic. With international arbitration going virtual amid the pandemic, JIDRC-Tokyo is facing tremendous challenges in promoting its physical high-end facility. The JIDRC-Tokyo and JIDRC-Osaka facilities are currently closed due to the state of emergency announced by the municipal governments of Tokyo and Osaka. Being a newly built facility, JIDRC-Tokyo continues to strive for BB (build it better) as opposed to BBB (build it back better) and has been boosting its virtual hearing capabilities with online video applications, including Teams, Meets, Webex and Zoom. It has received requests for quasi-virtual hearings (ie, a combination of virtual and physical hearings) to secure social distancing between the tribunal and the parties.

Boosting the arbitration capacity in Japan – expanding the scope of representation by foreign lawyers in arbitration and mediation

The launch of the hearing facilities in Tokyo and Osaka was backed by the government's policy to increase the capacity for resolving international disputes within Japan. As part of its basic policy, in May 2020, the Diet passed a bill to increase the ability of Japanese companies to access, within Japan, lawyers qualified to practise in foreign countries (foreign lawyers).[3] This bill has three prongs: first, Japanese parties may retain foreign lawyers[4] as counsel for arbitration and mediation with another Japanese party so long as there are foreign elements (eg, one of the Japanese parties is owned by a foreign parent, an applicable law is a foreign law or arbitration is seated outside Japan); second, the requirements for foreign lawyers to practise foreign law within Japan are to be eased (requirements for foreign registered lawyers) (ie, one year of practice in the attorney's home jurisdiction, when combined with two years of practice in Japan, suffices to meet the three-year practice requirement); and third, Japanese lawyers and foreign registered lawyers may form a joint corporation. This bill is intended to boost the international arbitration and mediation capacity within Japan and to meet the growing demand for legal services by foreign lawyers within the Japanese business community. As of April 2019, the number of foreign registered lawyers was only 421, which is equivalent to approximately 1 per cent of the total number of Japanese lawyers.[5] While the covid-19 pandemic and its associated travel ban will inevitably complicate the situation, this new bill will eventually increase the capacity of Japanese law firms in the field of international arbitration and mediation to meet the demands of Japanese business community.

Reaffirmation of the importance of proper conflict check systems in law firms of arbitrators – Osaka High Court exonerated an arbitrator and overturned its previous decision to vacate an arbitral award[6]

In the 2017 to 2019 editions of *The Asia-Pacific Arbitration Review*, the author reported on a Supreme Court decision and lower court decisions dealing with the issue of advance waiver and the consequences of an arbitrator's failure to disclose potential conflicts of interest. The lengthy post-arbitration court battle started when Prem Warehouse, a US-based company, challenged a JCAA award on the ground that the presiding arbitrator, who was a partner at the Singapore office of King & Spalding, failed to disclose the fact that his colleague in the San Francisco office of King & Spalding

(Mr A) represented Panasonic Corp of North America, which later became a sister company of Sanyo (a claimant in the arbitration), in a class action in the US District Court for the Northern District of California.

The Osaka District Court dismissed the challenge on the ground that a potential conflict did not give rise to a justifiable doubt as to the arbitrator's independence and impartiality and that such potential conflict did not appear to have affected the outcome of the case.[7] The Osaka High Court, however, upheld the challenge, finding that an arbitrator's disclosure obligation was of paramount importance for the integrity of the arbitration and that the arbitrator breached his disclosure obligation when he failed to disclose the potential conflict that could have been identified by running a relatively simple conflict check within his firm.[8] In this case, the arbitrator declared at the time of his appointment that his colleague might engage in matters that may have a potential conflict pending arbitration in the future. The Osaka High Court found that such declaration fell short of disclosure. The Supreme Court, while concurring with the High Court decision on the point that a general disclaimer does not satisfy a disclosure obligation, remanded the case back to the Osaka High Court on the issue of whether the arbitrator had actual knowledge of the potential conflict or whether he could have identified such potential conflict with a reasonable investigation.[9]

The parties relevant to the potential conflict submitted their declarations in the remanded proceedings, which revealed that, if the alleged potential conflict existed, it was of an insignificant nature and ostensively created by glitches and an omitted notice to the US court regarding withdrawal or change of counsel when Mr A changed law firms. The Osaka High Court found that King & Spalding did install and implement a proper conflict check system for arbitrators; however, neither the arbitrator nor the firm was aware of the potential conflict. In fact, Mr A ceased to represent Panasonic Corp of North America when he left Weil, Gotshal & Manges and, therefore, he did not notify King & Spalding that Panasonic Corp of North America was his client when he joined the firm. For that reason, the King & Spalding conflict check system never detected a potential conflict with Panasonic Corp of North America. However, neither Mr A nor Weil, Gotshal & Manges had notified the US Court that Mr A ceased to represent Panasonic Corp of North America when he left Weil, Gotshal & Manges. As such, the US Court's record continued to indicate that Mr A was counsel for Panasonic Corp of North America, which prompted Prem to challenge the award.

After years of litigation, the Osaka High Court finally exonerated the arbitrator and vindicated the King & Spalding conflict check system. Most importantly, the arbitral award survived the challenge.[10] The alleged potential conflict was attributable to a combination of multiple factors, all of which arose after arbitration commenced (ie, Panasonic's acquisition of Sanyo, former counsel for Panasonic joining an arbitrator's law firm and an omitted notice to the US court in respect of Mr A's withdrawal). On the one hand, the number of challenges against arbitrators is surging and the failure to disclose potential conflicts may have consequences. On the other hand, it is not uncommon for parties and clients to engage in M&A and for lawyers to move from one firm to another during arbitration. It is a daunting task for both arbitrators and counsel to trace the evolution of all facts that might amount to potential conflicts. In this case, the conflict check system of King & Spalding defended the validity of the arbitral award and reaffirmed the importance of implementing proper conflict check systems in law firms.

The Supreme Court clarified that it has not decided on the issue of whether parties may waive in advance an arbitrator's duty to disclose, whether an arbitrator's breach of the duty to disclose should be a ground for setting aside an award or when the court should exercise its discretion and not set aside an award in spite of an arbitrator's breach of the duty to disclose.[11] Given the difficulties in comprehensively identifying potential conflicts and the growing number of challenges against arbitrators as well as awards, the consequences of a breach of the duty to disclose should be prudently assessed by taking into account the level of such breach and the circumstances surrounding such breach.

JCAA update of its mediation rules

In line with the government's basic policy to increase the capacity for resolving international disputes within Japan, the JCAA has been ambitiously upgrading its administration of arbitration and mediation. In January 2019, the JCAA released its updated commercial arbitration rules[12] to make them more in line with the global standard practices and manage costs and time of the arbitration by, inter alia, offering the option of an experimental approach obligating an arbitrator to communicate its preliminary impression in writing to the parties at an early stage of arbitration.[13] In March 2020, the JCAA released its new commercial mediation rules, which are applicable to both domestic and international mediation[14] and replaced two separate sets of mediation rules, one for domestic mediation and the other for international mediation. The new rules improved party autonomy by giving parties the option to choose, inter alia, the number of mediators, the amount of mediator remuneration and the mediation approach (eg, either adjudicative or facilitative). The new rules provide for settlement privilege, which is not automatically recognised under the Japanese Code of Civil Procedure. By codifying settlement privilege, the JCAA aims to facilitate open discussions during mediation while protecting communications from disclosure in litigation or arbitration. Last, but not least, the new rules introduced certain new requirements, such as a mediator's signature on a settlement agreement resulting from mediation so that a party may enforce the same in accordance with the Singapore Convention on Mediation (the Convention)[15] in the courts of member states thereof. Japan has not signed the Convention and is currently assessing its strategy in signing and ratifying the Convention, including any conditions that Japan may seek to apply thereto.

Despite the covid-19 pandemic crisis that has undermined some of the ambitious initiatives launched by the government, the joint efforts of the public and private sectors to increase the capacity of international dispute resolution in Japan will continue.

Notes

1 https://idrc.jp/en/news/jidrc-tokyo-is-now-open/.

2 https://toranomonhills.com/en/.

3 'A Bill to Amend Part of the Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers' (http://www.japaneselawtranslation.go.jp/common/data/outline/200116134238_9053108.pdf).

4 Foreign lawyers, in this context, includes lawyers who 'fly in and fly out' but whose offices are outside Japan.

5 The total number of Japanese registered lawyers (*bengoshi*) is 41,118 as of 31 March 2019. (https://www.nichibenren.or.jp/library/pdf/document/statistics/2019/1-1-1_2019.pdf (Japanese only)).

6 *Prem Warehouse LLC, et. al v Sanyo Electric Co., Ltd., et. al.*, Osaka High Court Decision, 11 March 2019, 2017 (Ra) No. 1552.

7 *Prem Warehouse LLC, et. al v Sanyo Electric Co., Ltd., et. al.*, Osaka District Court Decision, 17 March 2015, 2014 (arb) No. 3.
8 *Prem Warehouse LLC, et. al v Sanyo Electric Co., Ltd., et. al.*, Osaka High Court Decision, 28 June 2016, 2015 (arb) No. 547.
9 *Prem Warehouse LLC, et. al v Sanyo Electric Co., Ltd., et. al.*, Supreme Court Decision, third petty bench, 12 December 2017, 2016 (leave) No. 43.
10 A losing party appears to have filed an appeal to the Supreme Court and therefore, technically, the Osaka High Court decision is not yet final. However, the likelihood of the Supreme Court entertaining the appeal in this case is very low.
11 Commentary on Supreme Court Decisions (2019), 71 Hoso Jiho No. 7, pp. 159–180.
12 Yoshimi Ohara, *GAR Asia-Pacific Arbitration Review*, Japan chapter, 2020 edition.
13 Interactive Arbitration Rules (https://www.jcaa.or.jp/en/arbitration/rules.html).
14 https://www.jcaa.or.jp/en/news/index.php?mode=show&seq=31.
15 https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements.

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Yoshimi Ohara is a partner at Nagashima Ohno & Tsunematsu, Tokyo office.

She represented both domestic and foreign clients in international arbitration in various seats under the rules of the ICC, ICSID, AAA/ICDR, SIAC and JCAA. Before launching her international arbitration practice, she was active in the area of corporate transactions and IP dispute resolution. With a strong corporate and IP background, she has extensive experience in dealing with disputes covering a wide range of subjects, including M&A, joint ventures, investment, infrastructure, energy, construction, insurance, joint development, technology transfer, licensing, procurement, sales and distribution. Yoshimi served as sole arbitrator and presiding arbitrator in international arbitration under the auspices of the ICC, SIAC, JCAA, KCAB and UNCITRAL rules in various seats. She helped shape soft law in the field of international arbitration as a member of the task force of professional conduct of counsel and conflicts of interest subcommittee of the IBA Arbitration Committee. Ms Ohara is currently serving as Vice-President of the ICC Court, a governing board member of the ICCA and a board member of the Japan Association of Arbitrators and Swiss Arbitration Association. She also served as Vice-President of the LCIA (2013-2015). She teaches international arbitration at Keio University Law School (2014-).

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