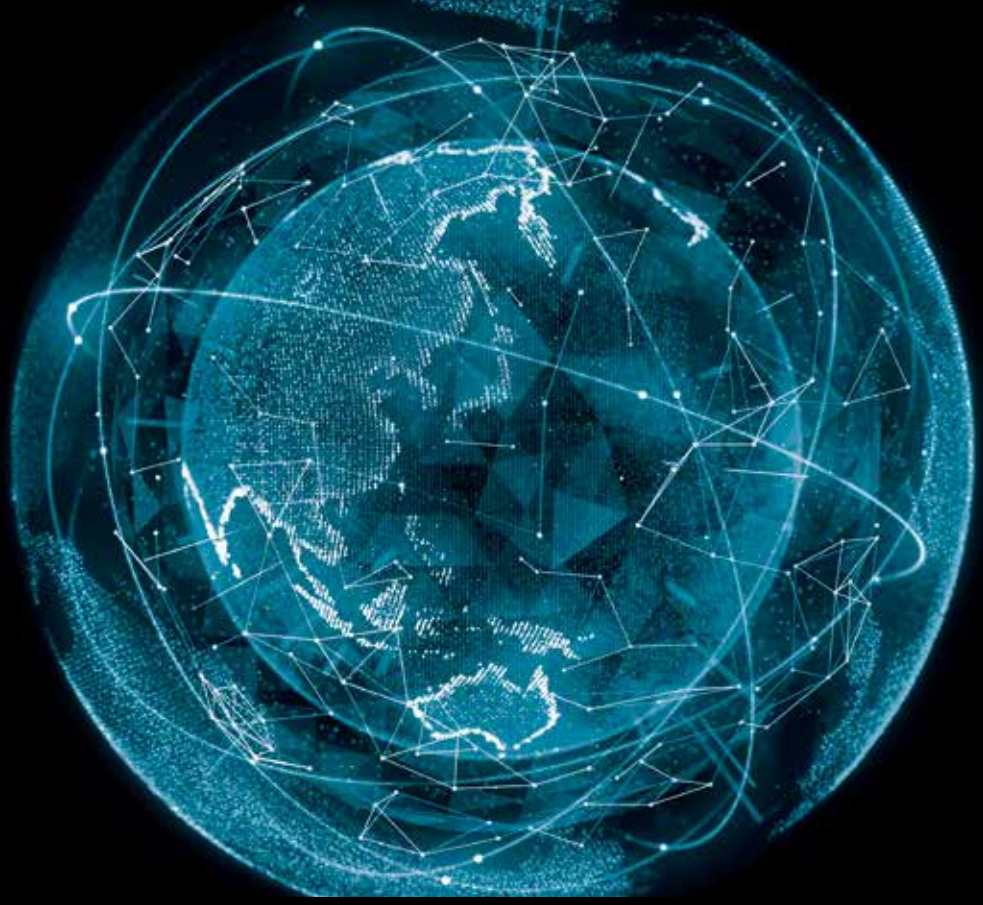

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For further information please contact Natalie.Clarke@lbresearch.com

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Head of insight Mahnaz Arta
Account manager J'nea-Louise Wright

Production editor William Holt
Chief subeditor Jonathan Allen
Subeditor Tessa Brummitt
Head of content production Simon Busby
Senior content coordinator Hannah Higgins

Publisher David Samuels

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Subscription details
To subscribe please contact:
Global Arbitration Review
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL
United Kingdom
Tel: +44 20 3780 4134
Fax: +44 20 7229 6910
subscriptions@globalarbitrationreview.com

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Welcome to *The Asia-Pacific Arbitration Review 2022*, *a Global Arbitration Review* special report. For the uninitiated, *Global Arbitration Review* is the online home for international arbitration specialists the world over, telling them all they need to know about everything that matters.

Throughout the year, we deliver our readers pitch-perfect daily news, surveys and features; lively events (under our GAR Live and GAR Connect banners (GAR Connect for virtual)); and 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 35 pre-eminent practitioners. Across 14 chapters and 92 pages, they provide us with an invaluable retrospective on the past year. All contributors are vetted for their standing and knowledge before being invited to take part.

The contributors' chapters capture and interpret the most substantial recent international arbitration events across the Asia-Pacific region, with footnotes and relevant statistics. Elsewhere they provide valuable background on arbitral infrastructure in different locales to help readers get up to speed quickly on the essentials of a particular country as a seat.

This edition covers Australia, Hong Kong, India, Malaysia, Singapore, Sri Lanka and Vietnam and has overviews on construction and infrastructure disputes in the region (including the effect of covid-19), the state of ISDS and what to expect there, and trends in commercial arbitration, as well as contributions by four of the more dynamic local arbitral providers.

Among the nuggets this reader learned is that:

- force majeure is not necessarily the only option for project participants affected by covid-19, especially if the FIDIC suite is in the picture;
- Korea's diaspora is known as its *Hansang* and more 'international' arbitrators are now accepting KCAB appointments (the number of KCAB 'first-timers' is up by 23 per cent);
- it has become far easier for foreign counsel and arbitrators to conduct cases in Thailand;
- there have been some strongly pro-arbitration decisions from the Philippines and Vietnam of late;
- Sri Lanka's courts also seem to have turned a corner on avoiding excessive interference; and
- improvements in the arbitral environment in Vietnam are part of a concerted effort that began in 2015.

I also found answers to some other questions that had been on my mind, such as whether an increase in case numbers in the SIAC in 2020 was matched by an increase in the total value at stake there (spoiler alert: no), and a number of components I plan to consult when the need arises – including a summary of key decisions in Singapore; a long explainer on the background to the Amazon-Future dispute in India; and a fabulous chart deconstructing the arbitral furniture in Uzbekistan.

I hope you enjoy the volume and get as much from it as I did. 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 2021

Japan: gearing up to become a popular seat for arbitration in Asia

Yoshimi Ohara, Kei Kajiwara and Annia Hsu
Nagashima Ohno & Tsunematsu

In summary

Japan has upgraded its arbitration infrastructure by launching the Tokyo facility of the Japan International Dispute Resolution Center (JIDRC) and expanding the definition of international arbitration to include arbitration between Japanese parties with foreign elements (which was categorised as domestic under the previous definition) so that foreign-qualified lawyers may serve as counsel. Further reforms are underway for Japanese courts to ensure enforceability of interim measures issued by arbitral tribunals, develop expertise in international arbitration in the Tokyo and Osaka district courts, and ease administrative burdens in the enforcement of awards in the Japanese courts.

Discussion points

- JIDRC Tokyo, a new state-of-the-art facility
- Changes to the Foreign Lawyers Act to relax requirements for foreign-qualified lawyers to practise in Japan and allow foreign lawyers to serve as counsel in arbitration between Japanese parties seated in Japan with a foreign element
- Plans to amend the Arbitration Act to ensure enforceability of interim measures issued by arbitral tribunals, strengthen arbitration expertise in the Tokyo and Osaka district courts, and reduce administrative burdens for the enforcement of interim measures and awards in Japan
- A Tokyo District Court judgment in 2020 that dismissed a party's attempt to circumvent an LCIA arbitration agreement by bringing tort claims against a wholly owned Japanese subsidiary of a counterparty to an arbitration agreement
- The Japan chapter of the International Council for Commercial Arbitration's (ICCA) project on whether there is a right to a physical hearing in international arbitrations seated in Japan
- Plans to ensure enforceability of settlement agreements arising out of mediation in the Japanese courts

Referenced in this article

- JIDRC
- Arbitration Act
- Foreign Lawyers Act
- *Shintoyo Enterprise v Aston Martin Japan*, Tokyo District Court, judgment of 19 June 2020
- ICCA project, 'Does a Right to a Physical Hearing Exist in International Arbitration?'

Launch of JIDRC Tokyo

On 12 October 2020, JIDRC Tokyo[1] hosted its long-awaited opening ceremony, which had been postponed after a state of emergency was introduced during the covid-19 pandemic.[2] In her opening remarks, the Minister of Justice, Yoko Kamikawa, affirmed Japan's commitment to promoting the use of international arbitration in the region to settle cross-border disputes efficiently and effectively. In their keynote speeches, Itsuro Terada, the former Chief Justice of the Supreme Court of Japan, shared an overview of the major developments of the law in Japan over the past 30 years, including the enactment of the Arbitration Act, and Kevin Kim, a founding partner of law firm Peter & Kim, emphasised the importance of Japan as an alternative seat of arbitration in Asia. This was followed by panel discussions featuring Michael Moser, James Castello, Hiroyuki Tezuka, Yoshihiro Takatori (all arbitration practitioners), Tsuyoshi Harada (head of the legal division of Nippon Steel Corporation) and Yoshimi Ohara (moderator), who discussed the present and future of Japan as a seat of arbitration.

The key takeaway from the panel session was that the popularity of Asian seats has been growing dramatically over the past 10 years. Japan is well placed to capitalise on this trend given its sophisticated pro-arbitration legislation and judiciary, and the support it receives from the arbitration community. The Japanese government is on track to raise Japan's profile as a popular seat of arbitration in Asia. The panellists all agreed that the launch of JIDRC Tokyo would boost Japan as a seat of arbitration in Asia by not only facilitating the organisation of the hearing but also serving as a focal point for collaboration within the international arbitration community.

The JIDRC has been ramping up its IT capabilities to increase the efficiency of both remote and physical hearings. For instance, it is developing automated live transcriber services, which are expected to substantially reduce the administrative costs of hearings and facilitate hearing preparations. It has also increased its venue capacity and is now ready to host arbitrations for the Court of Arbitration for Sport in time for the Tokyo Olympics in July and August 2021.

Amendments to Foreign Lawyers Act

On 29 August 2020, new amendments to the Foreign Lawyers Act[3] came into force, which expanded the definition of international arbitration to include a wider range of cases. Previously, international arbitration was narrowly defined to include only cases that were seated or conducted in Japan, and in which one or more of the parties had an address, principal office or head office in a foreign jurisdiction. This meant that a dispute between Japanese subsidiaries of foreign parent entities seated or conducted in Japan was considered domestic and foreign lawyers were not allowed to represent these parties under the law, even though the ultimate decision makers in these 'domestic' arbitration proceedings resided outside Japan. The amended Foreign Lawyers

Act prioritises substance over form when determining whether a case is considered an international arbitration,[4] which expands the number of cases in which parties have the freedom to choose their counsel in international arbitrations seated in Japan, as only local Japanese counsel can represent parties in domestic arbitrations.

The Foreign Lawyers Act also relaxed the requirements for foreign-qualified lawyers to become registered foreign lawyers to live and practise in Japan. Foreign lawyers must have at least three years of post-qualification experience in the jurisdiction of their primary qualification before they become eligible to be registered foreign lawyers in Japan. While this has not changed, before the amendments, only one year of work experience in Japan could count towards the requirement (ie, there was a minimum requirement of two years' work experience in the foreign lawyers' respective home jurisdictions). With the amendments, foreign lawyers can satisfy the three-year post-qualification requirement with only one year of work experience in their home jurisdictions and two years of practising in Japan.[5] This reduces the amount of time that foreign lawyers have to spend outside Japan before qualifying as registered foreign lawyers.

In addition to the registered foreign lawyers regime, the Foreign Lawyers Act also allows foreign-qualified lawyers to act as counsel in international arbitration and international mediation proceedings in Japan, provided that they were retained in their home jurisdiction to do so.[6] This is known as the 'fly-in, fly-out' regime, which was designed for foreign arbitration practitioners and has been in place for a number of years. The latest amendments to the Foreign Lawyers Act not only expand the scope of arbitration cases seated in Japan in which foreign lawyers under the fly-in, fly-out regime may serve as counsel but also clarify that foreign lawyers under the registered foreign lawyers regime or the fly-in, fly-out regime are allowed to represent parties in international mediation proceedings.

Planned revision of Arbitration Act

The Ministry of Justice[7] published proposed amendments to the Arbitration Act and related laws on 5 March 2021. The Arbitration Act currently in force in Japan was enacted in 2003 and is primarily based on the 1985 UNCITRAL Model Law on International Commercial Arbitration, without the subsequent amendments.[8] The proposed amendments incorporate key aspects of the 2006 UNCITRAL Model Law, such as expressly providing for enforceability of interim measures issued by arbitral tribunals.

The Arbitration Act will likely be amended to adopt articles 17 and 17A of the 2006 UNCITRAL Model Law on the definitions of interim measures and conditions for granting the same. Under the draft amendments, Japanese courts would also be required to recognise and enforce[9] an interim measure issued by an arbitral tribunal unless there is a ground for refusal under article 17I of the 2006 UNCITRAL Model Law.

Another amendment that is likely to be passed expands the jurisdiction of the Tokyo and Osaka district courts to hear more cases related to arbitration. Although there was a call to create a specialised court to hear arbitration-related cases, the proposed route is to increase access to the Tokyo and Osaka district courts to accumulate experience and develop expertise in international arbitration. In fact, this amendment reflects the current state of affairs as statistics suggest that the majority of cases relating to arbitration are heard by the Tokyo District Court, with the Osaka District Court hearing the second-highest number of cases. Although the proposed amendments will not prevent parties from agreeing that a court other than the Tokyo District Court or the Osaka District Court has jurisdiction over an arbitration-related case,[10] the cumulative effect of the amendments is expected to increase the traffic of such cases to these district courts.

The draft amendments to the Arbitration Act also contemplate giving Japanese courts the discretion to dispense with the requirement for parties to submit translations of non-Japanese documents in enforcement proceedings,[11] which would reduce the administrative burden on and costs for parties seeking to enforce interim measures issued by an arbitral tribunal or an arbitral award in Japan,[12] and potentially expedite Japanese court proceedings. The aspiration is to staff the Tokyo and Osaka district courts with judges proficient in English to increase the likelihood of such discretion being exercised in arbitration-related cases. This is based on the understanding that national courts' support for and familiarity with arbitration is crucial for facilitating smooth arbitration proceedings.

While there are proposals to recognise and enforce settlement agreements resulting from mediation, it is still being debated whether legislative provisions on this issue should be limited to international commercial mediation. Japan is presently not a signatory to the United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention on Mediation). However, the broad consensus among practitioners, the business community and the government appears to be that Japan should become a signatory to promote international mediation as an efficient means to facilitate cross-border commercial dispute settlements.

Judgment of Tokyo District Court

In *Shintoyo Enterprises Ltd v Aston Martin Japan GK*,[13] the Tokyo District Court dismissed a party's attempt to circumvent an arbitration agreement by bringing tort claims before a Japanese court. This is in line with the positions taken by most national courts in pro-arbitration jurisdictions, demonstrating that the Japanese courts are aligned with and attuned to arbitration users' expectations.

In this case, the plaintiff, Shintoyo Enterprises Ltd (Shintoyo), had entered into a dealership contract with Aston Martin Lagonda Ltd (AMLL), with the law of England and Wales as its governing law and requiring disputes, differences or claims resulting from or relating to the contract to be referred to arbitration administered by the London Court of International Arbitration and seated in London. When negotiations for a new dealership contract between Shintoyo and AMLL fell through, Shintoyo commenced an action in the Tokyo District Court against AMLL's wholly owned Japanese subsidiary, Aston Martin Japan GK (AMJ), and two other individuals who were representatives of AMJ and AMLL, on the basis of tort for wrongful abandonment of the negotiations.

The defendants argued that the case should be dismissed in favour of the arbitration clause, even though none of the defendants were parties to the arbitration agreement in the dealership contract. The defendants further contended that the applicable law governing the arbitration agreement was the law of England and Wales, under which a third party that is an agent or subject to the full control of a signatory to an arbitration agreement (such as AMJ) can invoke the agreement to refer the claims made against the third party to arbitration.

The Tokyo District Court followed the Japanese Supreme Court's decision in *Ringling Circus*,[14] finding that, where there is no express agreement on the governing law of the arbitration agreement, an agreement could nevertheless be implied based on the circumstances, which include the seat of arbitration and the

governing law of the underlying contract already agreed by the parties. Given that the parties agreed to London as the seat of arbitration and the law of England and Wales as the governing law of the dealership contract, the Tokyo District Court found that there was an implied agreement that the law of England and Wales was the governing law of the arbitration agreement. It thus held that the defendants were entitled to invoke the arbitration agreement between AMLL and Shintoyo to seek dismissal of Shintoyo's tort claims.

This is an exemplary case demonstrating that pro-arbitration Japanese courts will dutifully apply the relevant governing law and enforce arbitration agreements, and will not allow any unwarranted attempt to circumvent an arbitration clause by framing a dispute as a tortious one when it should rightfully be submitted to arbitration.

ICCA project on the right to a physical hearing

On 26 May 2021, the third and final batch of national reports on the ICCA's Right to a Physical Hearing project was released, which included the Japan report. Like most Model Law jurisdictions, the right to request an oral hearing does not translate into the right to request a physical hearing in Japan.[15] However, the fact that there is no right to a physical hearing per se is not the end of the matter, as this issue involves considerations of due process. While an arbitral tribunal has wide discretion to decide the manner in which an arbitration is conducted,[16] tribunals should be mindful when ordering a remote hearing against a party's objection.[17] An arbitral tribunal's failure to observe the rules of an arbitration procedure agreed between the parties could be a ground to set aside or refuse recognition of an award, although the circumstances specific to the case will be taken into account, including, among other things, whether real prejudice had been caused to the parties.[18] In short, an arbitral tribunal seated in Japan must carefully assess the circumstances before making a decision on the mode of the hearing to ensure integrity of the proceedings and enforceability of the arbitral award.

Notes

1 https://idrc.jp/en/.

2 JIDRC Tokyo Opening Ceremony: https://www.youtube.com/watch?v=duH2lnvsOSE.

3 The Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers (Act No. 66 of 1986) (the Foreign Lawyers Act). The Foreign Lawyers Act can be accessed at: http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=02&dn=1&yo=handling+of+legal+services&x=63&y=20&ia=03&ja=04&ph=&ky=&page=2.

4 Article 2(xi) of the Foreign Lawyers Act now defines an international arbitration case as a civil arbitration case in which (i) some or all of the parties to the arbitration have an address, principal office or head office in a foreign jurisdiction (including cases in which more than 50 per cent of the voting shares or equity interest in any of the parties to the arbitration are held by persons with an address, principal office or head office in a foreign jurisdiction or persons specified by Ministry of Justice Orders as equivalent to those persons), (ii) the governing law of the dispute agreed by the parties is not Japanese law or (iii) the place of arbitration is in a country other than Japan. A summary of the key amendments to the Foreign Lawyers Act can be accessed at: http://www.japaneselawtranslation.go.jp/common/data/outline/200901155904_9053108.pdf.

5 Article 10(1)(i) and 10(2) of the Foreign Lawyers Act.

6 Article 58-2 of the Foreign Lawyers Act. The fly-in, fly-out regime is separate and different from the registered foreign lawyers regime. Foreign-qualified lawyers who regularly practise in Japan are required to be registered as registered foreign lawyers, while those who were instructed in their home jurisdiction and are acting as counsel in international arbitration or mediation cases in Japan do not need to be registered.

7 The Subcommittee on the Reform of the Arbitration Act within the Legislative Council of the Ministry of Justice.

8 The Arbitration Act (Act No. 138 of 2003). The Arbitration Act can be accessed at: http://www.japaneselawtranslation.go.jp/law/detail/?id=2784&vm=2&re=02.

9 In line with article 17H of the 2006 UNCITRAL Model Law.

10 Article 5(1)(i) of the Arbitration Act.

11 Article 46(2) of the Arbitration Act presently in force states that '[i]n filing the petition [for an execution order (meaning an order allowing a civil execution based on an arbitral award)], the party shall submit a copy of the written arbitral award, a document proving that the contents of said copy are the same as those of the written arbitral award, and a Japanese translation of the written arbitral award (excluding those prepared in Japanese).'

12 Under the proposed amendments, courts would have the discretion to dispense with the requirement for parties to submit translations regardless of article 74 of the Court Act (Act No. 59 of 1947) (providing that '[i]n the court, the Japanese language shall be used') or article 138(1) of the Rules of Civil Procedure (Rules of the Supreme Court No. 5 of 1996) (stating that '[w]hen requesting the examination of documentary evidence by submitting a document prepared in a foreign language, a translation of the part of the document for which examination is sought shall be attached thereto').

13 Tokyo District Court, judgment of 19 June 2020, 2018 (Wa) No. 10883, 2020WLJPCA06198007.

14 *Nippon Kyoiku Co Ltd v Kenneth Feld*, 51-8 Minshu 3657, Supreme Court, 4 September 1997, commonly referred to as the *Ringling Circus* case. An English translation of the Supreme Court's judgment in this case can be accessed at: https://www.courts.go.jp/app/hanrei_en/detail?id=318.

15 ICCA project: 'Does a Right to a Physical Hearing Exist in International Arbitration?', Japan report, subparagraph a.2. The Japan report can be accessed at: https://cdn.arbitration-icca.org/s3fs-public/document/media_document/Japan-Right-to-a-Physical-Hearing-Report.pdf.

16 Article 26(2) of the Arbitration Act.

17 Article 26(1) of the Arbitration Act requires an arbitral tribunal to observe the agreement of the parties.

18 Supra note 15, subparagraph c.6.

Yoshimi Ohara
Nagashima Ohno & Tsunematsu

Yoshimi Ohara is a partner at Nagashima Ohno & Tsunematsu in the Tokyo office. She has represented both domestic and foreign clients in international arbitration in various seats under the rules of the ICC, the ICSID, the AAA/ICDR, the SIAC and the 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, and sales and distribution. She has served as sole arbitrator, co-arbitrator and presiding arbitrator in international arbitrations under ICC, SIAC, JCAA, KCAB and UNCITRAL rules in various seats. She helped to shape soft law in the field of international arbitration as a member of the Task Force on Counsel Conduct and the Conflicts of Interest Subcommittee of the IBA Arbitration Committee. She is currently serving as a governing board member of the International Council for Commercial Arbitration and a board member of the Japan Association of Arbitrators and the Swiss Arbitration Association. She also served as a vice president of the ICC International Court of Arbitration (2015–2021) and the London Court of International Arbitration (2013–2015). Since 2014, she has taught international arbitration on the LLM programme at Keio University Law School.

Kei Kajiwara
Nagashima Ohno & Tsunematsu

Kei Kajiwara is an associate at Nagashima Ohno & Tsunematsu Singapore LLP. He focuses his practice on international litigation and arbitration, including both commercial and investor-state arbitration. He assists multinational Japanese and foreign clients with business interests across Asia, as well as other regions. Well versed in Japanese court practice and international arbitration, he leverages his previous experience representing clients from an array of industries, such as construction, energy, mining, transportation, manufacturing and finance, to deliver robust cost-effective advice and representation for complex cross-border commercial disputes.

He earned his LLM in international business regulation, litigation and arbitration in 2019 from New York University School of Law, where he was a Hauser Global Scholar and a Starr Foundation Global Law School Scholar. He graduated *cum laude* from the University of Tokyo School of Law's JD programme in 2012 and obtained his LLB in 2010 from the University of Tokyo Faculty of Law. He is admitted to practise law in Japan and New York.

Annia Hsu
Nagashima Ohno & Tsunematsu

Annia Hsu is a Singapore-qualified attorney in the Singapore office of NO&T. Annia has assisted in representing and advising clients in all forms of dispute resolution, including litigation in the Singapore courts, arbitration, adjudication and mediation, and her areas of practice and experience include general commercial litigation and arbitration, shareholder disputes, construction disputes, resulting and constructive trusts, restructuring and insolvency, and probate and administration matters. She has experience in both commercial and investor-state arbitration conducted under ICSID, ICC, LCIA and SIAC rules. Annia works closely with the international arbitration team in NO&T Japan, and most recently co-authored the Japan chapter of the report produced by the International Council for Commercial Arbitration for its project 'Does a Right to a Physical Hearing Exist in International Arbitration?'.

NAGASHIMA OHNO & TSUNEMATSU

JP Tower, 2-7-2 Marunouchi
Chiyoda-ku
Tokyo 100-7036
Japan
Tel: +81 3 6889 7000
Fax: +81 3 6889 8000

Yoshimi Ohara
yoshimi_ohara@noandt.com

Kei Kajiwara
kei_kajiwara@noandt.com

Annia Hsu
annia_hsu@noandt.com

www.noandt.com

Nagashima Ohno & Tsunematsu is the first integrated full-service law firm in Japan and one of the foremost providers of international and commercial legal services based in Tokyo. The firm's overseas network includes offices in New York, Singapore, Bangkok, Ho Chi Minh City, Hanoi and Shanghai, and it has collaborative relationships with prominent local law firms throughout Asia and other regions. In representing our leading domestic and international clients, we have successfully structured and negotiated many of the largest and most significant corporate, finance and real estate transactions related to Japan. The firm has extensive corporate and litigation capabilities spanning key commercial areas such as antitrust, intellectual property, labour and taxation, and is known for path-breaking domestic and cross-border risk management and corporate governance cases and large-scale corporate reorganisations. The firm has over 500 lawyers, including about 40 experienced attorneys from various jurisdictions outside Japan, who work together in specialised teams to provide clients with the expertise and experience required for each client matter.

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