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Modernising and streamlining the Japanese arbitration landscape

Yoshimi Ohara, Yusuke Iwata and Annia Hsu
Nagashima Ohno & Tsunematsu

In summary

This article looks at recent significant developments in Japan's arbitration sector from both commercial and investor–state perspectives. Significant legislative changes appear imminent and there is a new directive that the Business Court in Nakameguro will handle all arbitration-related cases submitted to the Tokyo District Court, allowing for consolidation and accumulation of expertise in arbitration law. There have also been notable developments in Japanese case law relating to arbitration.

Discussion points

- Japan prevails in its first known investor–state dispute settlement case
- Bills to update the Arbitration Act and implement the Singapore Convention on Mediation tabled in the Diet in February 2023
- Business Court will hear all arbitration-related cases
- Tokyo District Court applies the Arbitration Act for the first time to uphold a consumer's right to terminate an arbitration agreement
- Sapporo District Court clarifies when an arbitration agreement binds a non-signatory

Referenced in this article

- Arbitration Act
- Law with respect to implementation of United Nations Convention on International Settlement Agreements Resulting from Mediation
- Singapore Convention on Mediation
- Consumer Contract Act
- *X v Ouchi no Kanri Corp*
- *Juki Corp et al v Tsuken Corp et al*

Japan prevails in its first known investor–state dispute settlement case

In 2011, Japan introduced a renewable energy subsidy regime that offered feed-in tariffs to renewable energy producers with the stated goal of enabling efficient operators to achieve reasonable profits. Shift Energy, a Hong Kong-based renewable energy company with operations in Japan, Taiwan and Vietnam, purportedly argued that it was entitled to receive the tariffs set in the year its photovoltaic project in Japan was certified, not the year it became operational. However, it appears that Japan argued that the regime was introduced at a time when solar equipment costs were falling and it never guaranteed a certain level of profit for renewable producers.[1]

It was first reported in March 2021 that an arbitration claim had been lodged against Japan under the bilateral investment treaty between Hong Kong and Japan for regulatory changes that affected the feed-in tariff rates for renewable energy producers.[2] This case is significant as it is the first known treaty claim that has been made against Japan. The investor claimant was Shift Energy.[3]

The case was conducted under the United Nations Commission on International Trade Law's Arbitration Rules. Although the arbitral award is not publicly available, it has been reported that a tribunal consisting of Andrés Rigo Sureda (president), Stanimir Alexandrov (claimant's appointee) and Zachary Douglas KC (Japan's appointee) rejected the claim filed by Shift Energy.[4]

Amendments to Arbitration Act and implementation of Singapore Convention on Mediation

On 28 February 2023, the Ministry of Justice (MOJ) tabled two bills to the Diet: one for a new act[5] to implement the Singapore Convention on Mediation (the Singapore Convention) and the other for amendments to modernise the Arbitration Act (AA). More than two years have passed since the initiative to update the AA started in October 2020. In principle, it is only a matter of time before the bills are passed and enter into force. The Singapore Convention was also recently submitted to the current session of the Diet, and Japan's signing and ratification of the same appears to be on the horizon. It seems that Japan is preparing to sign and ratify the Singapore Convention at or around the time the new proposed law implementing it is passed.

1 Tom Jones, 'Japan defeats first treaty claim', *Global Arbitration Review*, 14 February 2023.
2 Leo Lewis, 'Hong Kong energy fund sues Japan in groundbreaking case', *Financial Times*, 3 March 2021.
3 More information on Shift Energy can be found on its website.
4 Jones, 2023.
5 This act is also known as the law with respect to implementation of United Nations Convention on International Settlement Agreements Resulting from Mediation.

The previous edition of this article summarised the key highlights of the planned amendments to the AA,[6] which were aimed at ensuring the enforceability of interim measures issued by arbitral tribunals (and reflecting the United Nations Commission on International Trade Law's 2006 Model Law on International Commercial Arbitration), and extending the jurisdictions of the Tokyo District Court and Osaka District Court to hear all cases relating to arbitration. However, one of the key amendments noted in the previous edition of this article was not included in the final bill to amend the AA submitted to the Diet.

It was previously reported that the detailed plan to modernise the AA by the Legislative Council of the MOJ included giving courts the discretion to waive the requirement to provide Japanese translations of all or some of the evidence, including arbitral awards. This discretionary power for the courts in arbitration-related proceedings other than enforcement proceedings was not included in the final bill to amend the AA submitted to the Diet. Instead, the relevant revisions to grant the courts such a discretionary power in court proceedings other than enforcement proceedings will likely be made in the Rules of the Supreme Court or the Rules of Civil Procedure, although no official announcements to amend the rules have been made as at April 2023. It is hoped that this amendment will take place sooner rather than later as it is expected to reduce the administrative and cost burdens of challenging arbitral awards in Japan.

Regarding the implementation of the Singapore Convention, the previous edition of this article also summarised the key provisions in the proposed new Japanese law, such as the need for express intent for an agreement to be subject to the Singapore Convention and requirements relating to parties' nationality, place of business or place of performance for a settlement agreement to have international character. These provisions were included in the bill submitted to the Diet in 2023.

Business Court opens in Nakameguro

In October 2022, the Business Court opened in Nakameguro, an area known for its beautiful cherry blossoms in spring. The Business Court consists of the Intellectual Property High Court and three specialist divisions of the Tokyo District Court that moved from Kasumigaseki – the Commercial Division, Insolvency Division and Intellectual Property Division.[7] The Business Court is the first Japanese central court and one-stop solution for business-related cases, including shareholder, intellectual property, antitrust and consumer litigation, and insolvency proceedings. Moreover, all arbitration-related cases will now be handled by the Business Court,[8] where it is expected to consolidate

6 The previous edition of this article is available on GAR's website.
7 Statement of the president of the Tokyo District Court, October 2022.
8 A list of the types of matters handled by the Business Court, published in April 2023, can be found on the Business Court's website.

and accumulate experience and expertise in arbitration law. This move to accumulate expertise in arbitration was made within the Tokyo District Court in anticipation of the amendments to modernise the AA, to expand the jurisdiction of the Tokyo District Court for arbitration-related cases.

In line with the nation's push for the digitalisation of judicial procedures to facilitate the expeditious resolution of business-related disputes, the Business Court is equipped with the state-of-the-art facilities for web conferences to reduce the need to physically appear before the court. In addition, it is expected that e-management and e-filing functions will be implemented in the Business Court by 2025, involving court records being fully digitalised and parties being allowed to file documents, including complaints, online.

The Business Court is well poised to deliver efficient, predictable and high-quality judicial service to users who are operating in an increasingly globalised business environment. This is a welcome development, especially for arbitration users, as it can be expected that judges hearing arbitration-related cases will have knowledge and expertise in arbitration law, and will also be business-minded.

X v Ouchi no Kanri Corp

In a judgment dated 31 January 2022, the Tokyo District Court applied the Supplementary Provisions to the AA for the first time to uphold a consumer's right to terminate[9] an arbitration agreement in a contract with a trader.[10]

In *X v Ouchi no Kanri Corp*,[11] the plaintiff was an individual who purchased real property from C, a non-party to the litigation proceedings. On 1 May 2019, while still in ownership of the real property in question, C entered into lease agreements with the defendant, a stock company in the business of subleasing real estate. On 28 June 2019, the plaintiff acquired the real property from C and succeeded C as the lessor of the lease agreements on the same date.

Each of these lease agreements contained the following arbitration clauses:

> *All disputes, etc, that may arise between the parties arising out of or in connection with the lease agreements shall be finally settled by private arbitration in Tokyo in accordance with the Commercial Arbitration Rules of the Japan Commercial Arbitration Association . . . The parties mutually covenant not to sue each other in court as a natural legal effect of the arbitration agreement and mutually confirm without objection that, even if a lawsuit is filed by one party, the arbitration agreement will*

9 Article 3(2) of the Supplementary Provisions to the AA (Act No. 138 of 1 August 2003).
10 'Trader' is defined as an entity or individual who becomes a party to a contract as a business or for business purposes in article 2(2) of the Consumer Contract Act (Act No. 61 of 12 May 2000).
11 Tokyo District Court judgment of 31 January 2022, 2021 (wa) No. 3721, Hanrei Taikei database.

serve as a defence to the lawsuit and the lawsuit should be dismissed as a matter of course.

When the plaintiff terminated the lease agreements for the defendant's non-payment of rent on 7 October 2020 and brought a claim in the Tokyo District Court for the surrender of the real property, payment of the rent or damages equivalent to the rent for the real property and damages for delay in payment, the defendant requested that the claim be dismissed on the basis of the arbitration agreement in the lease agreements as a preliminary issue. However, the Tokyo District Court dismissed the defendant's request and upheld the plaintiff's right to sue in court because:

- the plaintiff's termination of the arbitration agreement based on article 3(2) of the Supplementary Provisions to the AA was valid; and
- in any event, the defendant's request to dismiss the action on basis of the arbitration agreement was an abuse of rights.

In this case, the Tokyo District Court accepted the plaintiff's stated intention to terminate the arbitration agreement in its submissions to the court as a valid form of termination.

Although the plaintiff was an individual who became a lessor of the real property for the purpose of earning rental income, the Tokyo District Court found the plaintiff to be a consumer[12] as the purchase of the real property was the plaintiff's first real estate transaction, which were two apartments in the same building with a low monthly rent of ¥83,500 each. The court reasoned that it could not be said that the plaintiff became a party to the lease agreements as a business or for the purpose of business.

In view of the plaintiff's identity as a consumer, the Tokyo District Court held that the plaintiff was entitled to terminate the arbitration agreements in the lease agreements and pursue its claims in court. Moreover, the court held that, even if the plaintiff had not been a consumer, it would not have been permissible for the defendant to seek dismissal of the action on the basis of the arbitration agreement as this would amount to an abuse of rights. The plaintiff's action was for the surrender of two apartments with a monthly rent of ¥83,500 each, whereas administrative fees under the Japan Commercial Arbitration Association's Commercial Arbitration Rules was ¥500,000 for a claimed sum of ¥1.1 million[13] and arbitrators charged an hourly rate of ¥50,000, which the Tokyo District Court considered to be excessive in light of the amount claimed in this case. The Court also noted that the defendant did not appear to have specifically explained the

12 'Consumer' is defined in article 2(1) of the Consumer Contract Act as an individual excluding one who becomes a party to a contract as a business or for business purposes.

13 According to an amendment by the Japan Commercial Arbitration Association to the Arbitration Rules and Enactment of Appointing Authority Rules, before 1 July 2021, the administrative fee chargeable was ¥500,000 when the amount or economic value of claim was less than ¥20 million.

content of the arbitration clauses to the plaintiff or that the plaintiff understood these explanations when succeeding the lease agreements as lessor.

This case is especially relevant for businesses with consumer-facing operations in Japan, as article 3(2) of the Supplementary Provisions to the AA gives consumers the right to terminate arbitration agreements found in consumer contracts and business operators may find themselves having to litigate in Japanese courts despite the presence of arbitration clauses.

Juki Corp et al v Tsuken Corp et al

In *Juki Corp et al v Tsuken Corp et al*,[14] the Sapporo District Court provided clear guidance on when an arbitration agreement would bind a non-signatory, another reaffirmation of Japan's pro-arbitration stance. This appears to be the first case in Japan where a non-signatory was found to be bound by an arbitration agreement under the AA.

Juki Corp and Active Corp (contractor) entered into two construction contracts for the installation of power generators, which included a mediation and arbitration clause to be conducted at the Construction Work Disputes Committee in the event of a dispute. Disputes subsequently arose between Juki and Active over accidents and defects, prompting Active to initiate mediation at the committee. Juki refused to accept the mediation settlement proposal and sued Active, its parent company Tsuken Corp and Employee A (an employee of Active who worked at the construction site) in the Sapporo District Court.

In response, Active commenced arbitration against Juki at the Construction Work Disputes Committee and sought confirmation that the disputes had to be arbitrated. The committee suspended the arbitration proceedings pending the Sapporo District Court's ruling on the appropriate forum for the disputes.

The Sapporo District Court dismissed Juki's claims against all the defendants on grounds that 'it is reasonable to conclude that the arbitration agreement in this case shall be effective against defendants Tsuken and Employee A', even though neither of the latter two were parties to the construction contracts containing the arbitration agreement. The Court found that it was not reasonable from a uniform resolution of disputes perspective to have disputes between plaintiffs and defendants pending in different dispute resolution procedures, and that it was reasonable for parties to seek resolution through the same procedure, especially if the two cases 'share the same material facts underlying their claims'.

On the facts, the Sapporo District Court found that Employee A was an employee of Tsuken at the time when it first approached Juki on the installation project, and discussions regarding the construction contract were initially held between

14 Sapporo District Court judgment of 8 February 2022, 2021 (wa) No. 106, Hanrei Taikei database.

Juki and Tsuken. It was only later decided that Active (a subsidiary of Tsuken) would be the contracting party to the construction contract due to the division of work between Tsuken and Active. Employee A also only transferred to Active after one of the construction contracts had been executed with Juki. In light of this, the Court considered Tsuken to be substantially in the same position as Active, and held that Tsuken and Employee A were 'fundamentally not in a position to be resolved separately and independently from defendant Active'.

Accordingly, the Sapporo District Court held that it was understood that the construction contracts between Juki and Active contemplated that all disputes arising from its execution and performance would be resolved in a unified manner through arbitration proceedings, and claims against Employee A were also intended to be resolved through arbitration. It is relevant to note that both Tsuken and Employee A had also indicated to the Court that they wished to enjoy the benefits of Active's arbitration agreement and resolve their dispute through arbitration. This reinforced the Court's decision to dismiss Juki's claim because, even if the arbitration clause had extended to include Tsuken and Employee A, it would not unilaterally deprive them of their right to a trial.

This is a reasonable and sensible approach by the courts, and a welcome decision in Japan's jurisprudence on arbitration as it deters frivolous claims in court designed to circumvent arbitration agreements by deliberately including non-signatories to the action.

Yoshimi Ohara

Nagashima Ohno & Tsunematsu

Yoshimi Ohara is a partner at Nagashima Ohno & Tsunematsu's Tokyo office. She has 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.

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 vice president of the ICC International Court of Arbitration (2015–2021) and vice president of the London Court of International

Arbitration (2013–2015). Since 2014, she has taught international arbitration for the LLM programme at Keio University Law School. She is a member of the Japanese Bar and the New York Bar.

Yusuke Iwata

Nagashima Ohno & Tsunematsu

Yusuke Iwata is an associate lawyer at Nagashima Ohno & Tsunematsu's Tokyo office. His practice focuses on dispute resolution including litigation and international and domestic arbitration under ICSID and JCAA rules. He also specialises in preventing legal disputes from arising. He has experience dealing with a wide range of subjects, including joint ventures, construction, natural resources, tax, competition law and labour law.

Annia Hsu

Nagashima Ohno & Tsunematsu

Annia Hsu is a Singapore- and New York-qualified attorney at Nagashima Ohno & Tsunematsu's Singapore office. Annia has assisted in representing and advising clients in all forms of dispute resolution, including litigation in the Singapore courts, arbitration, adjudication and mediation. Her areas of practice and experience include general commercial litigation and arbitration; shareholder disputes; mining, energy, construction and infrastructure disputes; resulting and constructive trusts; restructuring and insolvency; and probate and administration matters. She has written and oral advocacy experience in both commercial and investor–state arbitration conducted under ICSID, ICC, LCIA and SIAC rules.

NAGASHIMA OHNO & TSUNEMATSU

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The firm's international arbitration team has been representing both domestic and foreign clients effectively and efficiently in international arbitration at various seats under ICC, ICSID, SIAC, JCAA, AAA/ICDR, JAMS, CIETAC and UNCITRAL rules. The disputes that the firm handles cover a wide range of subjects, including joint ventures, M&A, corporate alliances, infrastructure, construction, investment, energy, technology transfer, intellectual property licences, joint development, and sales and distribution.

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

www.noandt.com

Yoshimi Ohara
yoshimi_ohara@noandt.com

Yusuke Iwata
yusuke_iwata@noandt.com

Annia Hsu
annia_hsu@noandt.com