The Japan Commercial Arbitration Association (JCAA) held a Commercial Arbitration Forum 2001: Mock Arbitration on International Commercial Disputes last November 9 and 15, in Tokyo and Osaka respectively, under the co-sponsorship of the Japan Chamber of Commerce & Industry, the Japan Federation of Bar Associations, the Japan Shipping Exchange, Inc. and the Japan Intellectual Property Arbitration Center. The Forum was a project funded by the Small and Medium Enterprise Agency of the Ministry of Economy, Trade and Industry, and was supported by the Ministry of Justice and ten other major organizations in Japan.

JCAA has been engaged in various activities in cooperation with public organizations in order to develop infrastructures for arbitration and to promote wider use of arbitration in Japan. At the same time, it has also autonomously held an International Commercial Arbitration Forum every year in Tokyo and/or Osaka, inviting leading experts from abroad in the field of international commercial arbitration in order to explain the latest facts in international commercial arbitration, and outline the interesting issues.

This time, as an experiment, JCAA decided to tie up with the Expert Network of International Arbitration* to hold a mock arbitration on international commercial disputes, so that people who could use arbitration as a dispute resolution mechanism, including business people and lawyers, could gain a concrete image of arbitration and more easily grasp the ins and outs of arbitral procedure. This Mock Arbitration was the first full-scale mock arbitration on international commercial disputes to be held in Japan.

In a mock arbitration case on a patent infringement and warranty problems generated between Japan and the U.S., participants played out several scenarios, which included Meeting between the Claimant and its Representative, Meeting between the Respondent and its Representative, Conciliation among Three Arbitrators and Oral Hearings.
The cast and narrators in the Mock Arbitration included professors, lawyers and businessmen with actual experience in arbitration. In the scenarios, they made good use of their experience and presented a large audience with the key points of the arbitral proceedings, providing effective explanation of the various important problems that may arise in the course of arbitral procedure.

An audience of more than 550 in Tokyo and 350 in Osaka, consisting of business people, lawyers, academics, and government officials, attended the Forum 2001. The Mock Arbitration was completed successfully due to the cooperation of the persons and organizations concerned, and we were able to obtain numerous valuable appraisals and precious comments for an even better mock arbitration next time.

JCAA again would like to express its deep appreciation to the members of the cast and the narrators for their impassioned performance in the Mock Arbitration, to the organizations concerned for their sponsorship, and to the audience for their participation.

* A network organization launched in 1999 based on the proposal of Study Group of the International Arbitration sponsored by the Ministry of Justice and the Japan Federation of Bar Associations.

There is a high level of awareness of the importance of international arbitration in Japan but for various reasons, historically, the number of international disputes settled through international arbitration in Japan has been low1.

Because the purpose of the mock arbitration was to permit many Japanese companies their first opportunity to witness how such an arbitration is implemented, the entire proceedings were conducted in Japanese, with no English language interpretation provided. This was also necessitated by the severe time limits of the afternoon schedule. The California company, Al Semiconductor, was played by members of leading Japanese legal departments (in Tokyo, by Mitsui & Co, and in Osaka, by a member of the legal department of Osaka Gas). In like fashion, a leading Japanese law firm in each of Tokyo and Osaka acted as counsel for the California claimant. The Japanese respondent, Fuji Corporation, was played by members of the legal department of Hitachi Corporation in Tokyo and by a member of the legal department of Daihatsu Kogyo in Osaka, with their counsel played by members of leading firms in each of Tokyo and Osaka.

The arbitration panel consisted of three individuals who appeared in both Tokyo and Osaka. I appeared as the Al Semiconductor appointed arbitrator in both Tokyo and Osaka (in fact, I was the only non-Japanese to appear in the entire cast). In the Tokyo mock arbitration, the well known Professor Kazuo Iwasaki, of Nagoya Keizai University, acted as the third arbitrator and as the Chair. Tadashi Ishikawa, a well known Bengoshi from the Oh-ebashi Law Office in Osaka, acted as the Fuji Corporation appointed arbitrator. Messrs. Iwasaki and Ishikawa switched their roles in Osaka, with Mr. Ishikawa acting as the third arbitrator (selected by the two party appointed arbitrators) and the Chair, in the Osaka proceedings.

The presentation in both cities relied upon the same set of facts (with a minor variation in Osaka, discussed below). Al Semiconductor, a California maker and seller of semiconductors, entered into a purchase equipment contract on November 9, 2000, with Fuji Corporation, a maker and seller of equipment for fabrication of semiconductors. Between November 2000 and February 2001, Al purchased 30 units of Fuji equipment for a purchase price of US $1 million per unit, for a total purchase price of US $30 million. In March 2001, AAA, a Delaware company, sent a warning letter to Al claiming that Al’s sale

Comments on November 2001 Mock Arbitration in Japan
By David A. Livdahl*

I appeared as the Al Semiconductor appointed arbitrator in both Tokyo and Osaka (in fact, I was the only non-Japanese to appear in the entire cast). In the Tokyo mock arbitration, the well known Professor Kazuo Iwasaki, of Nagoya Keizai University, acted as the third arbitrator and as the Chair. Tadashi Ishikawa, a well known Bengoshi from the Oh-ebashi Law Office in Osaka, acted as the Fuji Corporation appointed arbitrator. Messrs. Iwasaki and Ishikawa switched their roles in Osaka, with Mr. Ishikawa acting as the third arbitrator (selected by the two party appointed arbitrators) and the Chair, in the Osaka proceedings.

The presentation in both cities relied upon the same set of facts (with a minor variation in Osaka, discussed below). Al Semiconductor, a California maker and seller of semiconductors, entered into a purchase equipment contract on November 9, 2000, with Fuji Corporation, a maker and seller of equipment for fabrication of semiconductors. Between November 2000 and February 2001, Al purchased 30 units of Fuji equipment for a purchase price of US $1 million per unit, for a total purchase price of US $30 million. In March 2001, AAA, a Delaware company, sent a warning letter to Al claiming that Al’s sale
of its product infringed AAA’s patent due to the Fuji equipment included in the product. AI notified Fuji on April 1, 2001 of the claim. Fuji responded by providing documents it claimed showed prior art for the 123 Patent and requested AI to defend the claim on such grounds. On May 15, 2001, AAA filed a lawsuit against AI in the US District Court in San Jose, California demanding an injunction against sale of the AI products and claiming damages. Simultaneously, AAA filed a lawsuit against Z Corporation in the US District Court of New York demanding an injunction against sale of the same equipment. On July 1, 2001, the New York Court granted AAA’s claim for an injunction against Z Corporation.

AI requested Fuji’s assistance in reaching a settlement with AAA but the two parties were unable to reach agreement, and AI, fearful of the impact of a successful request for an injunction by AAA, settled with AAA on July 31, 2001 by paying it US$3 million. AI then commenced proceedings at the JCAA in Tokyo against Fuji to seek damages.

The purchase agreement between AI and Fuji required application of Japanese law and also provided that any disputes be handled in accordance with the JCAA rules in the event AI brought any claims under the agreement and that the place of arbitration be in the country of the principal office of the respondent.

In addition to the underlying claims for damages, AI made two additional claims. First, since AI had heard a rumor that Fuji was engaged in negotiations to sell most of its assets to a third party due to its business problems, AI requested that Fuji be required to post a US$3 million deposit to satisfy its claims in the event AI prevailed in the arbitration. Secondly, AI sought to remove Fuji’s party-appointed arbitrator since until 18 months prior to his appointment, the arbitrator was a partner in the law firm appointed by Fuji to serve as its legal counsel in the arbitration (the arbitrator had resigned from the law firm 18 months earlier and had established his own separate law firm).

Several aspects of the mock arbitration merit comment. In this case, the parties had not agreed upon the language of the arbitration, and although in reality the mock proceedings were conducted in Japanese, officially the arbitral tribunal determined that the parties could present evidence and testimony in either Japanese or English (JCAA Rule 62 states that the language of the arbitration shall be Japanese or English or both, and if the parties have not agreed on one or both of such languages, the tribunal shall make a determination whether translation/interpretation shall be provided and how costs for the same shall be allocated). Although it is probably difficult for the JCAA to administer arbitrations in languages other than Japanese or English, for parties wishing to use a language other than Japanese or English, it appears that they cannot do so.

Secondly, with respect to the request by AI for payment of a deposit by Fuji due to the threat of a sale of its assets, the two Japanese arbitrators concluded that the JCAA did not have the power under the JCAA rules and Japanese law to issue such an order. Rule 51 of the JCAA rules provides that the tribunal may make an interlocutory award to decide a dispute during the proceedings. Although I concluded that AI had not presented sufficient evidence (only rumors) of the urgent need for such an award, and therefore the request should be denied, nevertheless I did not understand why the JCAA Rule 51 would not permit the panel to issue such an interim award where circumstances so required. Nevertheless, the decision of the majority of the tribunal was that AI would have to seek its remedies via a request to a Japanese courts for protection of its interests. The general consensus was that Rule 51 only relates to decisions on such issues as choice of language or law where not agreed by the parties.

Third, with respect to the request for recusal of the Fuji-appointed arbitrator due to his association with Fuji’s lawyers up to 18 months prior to his appointment, I was surprised that the JCAA itself would not handle the review of this issue. Under the ICC rules, the ICC Court itself reviews such matters and is empowered to rule on the merits of such a challenge (Rule 12, part...
In this case, the arbitrator in question obtained the challenging party’s consent to continue after full explanation of the facts (the Fuji appointed arbitrator did disclose his association with the respondent’s law firm in his resume which was submitted to the JCAA initially, but additional explanation was necessary to convince AI that such association was not in violation of JCAA Rule 20, which prohibits an arbitrator from having a beneficial interest in the case).

Some consideration should be given to empower the JCAA itself to make such a determination to avoid requiring either the parties to reach an agreement on such claims or in the worst case, requiring the party seeking recusal to resort to the Japanese courts for a determination of the issue. I argued that Rule 30 of the JCAA rules permits the JCAA to make such determination (The Association may remove any arbitrator who...is legally unable to perform its duties with reference to Rule 20) but the tribunal majority did not accept this argument.

Fourth, for one familiar with the ICC rules, it will come as a surprise that under the JCAA rules, the third arbitrator appointed by the two party appointed arbitrators, is not necessarily the Chair. In fact, the JCAA Rules do not specify whether a Chair is required at all, so it is possible that the three arbitrators could function without a Chair or they could agree that a party appointed arbitrator be selected among the three to serve as Chair. In addition, unlike the ICC or LCIA Rules, it is possible, as in this mock arbitration, that the third arbitrator would not be from a third country (in this case, other than Japan or the US). The reason for this is that the JCAA is concerned that it may not be able as a practical matter, to locate a qualified third country arbitrator in Japan or that the economics of appointing a non-resident of Japan would increase the costs excessively. If a party appoints an arbitrator who is not resident in Japan that party is expected to bear the expenses required for such arbitrator although the tribunal is authorized to allocate such expenses if it wishes to do so (Rule 28). Nevertheless, non-Japanese parties to an arbitration in Japan should be aware that it is possible that if they select an arbitrator from the US, for example, it is possible that the third arbitrator may well be a Japanese national.

Fifth, given the severe time limits for the mock arbitration, unfortunately the proceedings were unable to examine in any depth the substance of the claims, including the intellectual property aspects of the issues. For example, Fuji had warranted that to the best of its knowledge its equipment did not infringe the intellectual property rights owned by third parties, and furthermore that in the event any dispute arose between AI and a third party (such as AAA), Fuji and AI shall consult how to resolve it [dispute] and determine the detail through mutual consultation...In the event that either party intends to settle the dispute, it shall obtain a prior written consent of the other party...[which] shall not be unreasonably withheld. 

Because of time limits and also differences of opinions among the arbitrators regarding whether the validity of AAA’s US patent was an issue in the dispute (or could even be considered by the
tribunal as a factor in the dispute), this issue was not addressed in the mock arbitration. Although in the Osaka proceedings an additional fact was introduced proving that Fuji did not know about the AAA patent at the time of entering the purchase agreement (this was unclear in the facts used in the Tokyo proceedings), many who attended the presentations, particularly those involved in intellectual property issues, were disappointed that there was insufficient time to present arguments regarding the impact, if any, of the presumed validity of the AAA patent on the dispute (certainly under US law, an issued patent is presumed valid unless the presumption is overcome by clear and convincing evidence). We were also unable to address the question of whether a JCAA tribunal, using Japanese law, could address the validity of a US patent. Certainly a Japanese court would not address such an issue (nor would a US court issue a judgment regarding the validity of a Japanese patent).

I do hope that in future mock arbitrations presented in Japan more time can be provided to permit the parties to explore the substantive issues further. There remains the question of what type of training format is most appropriate for increasing the level of awareness of how to use international arbitration in Japan.

* Mr. Livdahl is a partner in the Squire Sanders Tokyo office. He is a Fellow of the Chartered Institute of Arbitrators and an appointed arbitrator at the China International Economic and Trade Arbitration Commission.

I have read with interest the comments made by David A. Livdahl, Esq. With respect to the points he raises on the JCAA B Rules, firstly, it is considered that in parallel with the new arbitration legislation, the JCAA should make necessary amendments to the present Rules as soon as practicable. Those amendments include, but not limited to, points regarding the challenge of arbitrators, and the interim measures of protection ordered by the Arbitral Tribunal. Secondly, with respect to the third arbitrator, in JCAA B arbitration practice, unless extraordinary circumstances pertain, there is no case where a co-arbitrator serves as Chair. In other words, the Chair is always a third arbitrator, and in this respect the JCAA B practices do not depart from those of the current international commercial arbitration. Further, with respect to the nationality of the third arbitrator, JCAA Rules provide that the JCAA shall give due consideration to a request from a party that the third arbitrator be of a different nationality from those of the parties (Rule 24.3 and Rule 25.5). In fact, if such a request is made to the JCAA by either party, in keeping with the usual practice in international commercial arbitration, the JCAA does appoint a third country national, although it is true that it is not easy to locate qualified foreign arbitrators in Japan. Thus, it would be as well for non-Japanese parties to an arbitration in Japan to be aware that at least in the JCAA B arbitration, a third national will be appointed by the JCAA if the parties so request. In this respect, please see my essay titled Continuing Misconceptions of International Commercial Arbitration in Japan published in the Journal of International Arbitration, Vol. 18, No.6 (2001) pp. 641-647.

Tatsuya Nakamura
Deputy General Manager,
Arbitration Department, JCAA

This work was subsidized by the Japan Keirin Association through its Promotion funds from KEIRIN RACE.
The Japan Commercial Arbitration Association (JCAA) featured a mock arbitration trial in Tokyo on November 9th, 2001 (and another one on November 15th in Osaka). Despite the bad weather conditions on that day in Tokyo, the mock forum, being the first of its kind in Japan, drew a large audience of about 500 participants in Tokyo and 350 in Osaka.

The participants of the mock arbitration probably learned many new things when one looks at the rather small number of international cases being handled so far under the auspices of the JCAA. The mock arbitration trial touched upon all the points that needed to be addressed, namely the request for arbitration by the American Claimant against the Japanese Respondent, the initial phase (selection of the respective counsel and arbitrators by the parties), the contracting phase (accepting the mandate as arbitrator), the proceeding phase, and the award phase (how the arbitral tribunal deliberates and makes an arbitral award), which were similar to the deliberations presented in the International Commercial Arbitration Forum '99 in Tokyo.1

The case concerned an agreement for the sale and purchase of equipment for fabrication of semiconductors, a possible patent infringement and a payment claim of USD three million. The relevant arbitration clause in the agreement provided that the case be settled by arbitration pursuant to the Japanese-American Trade Arbitration Agreement dated September 16, 1952 and that the place of arbitration should be the country in which the principal office of the respondent was located, in this case Japan. The Claimant filed the Request for Arbitration in accordance with the Commercial Arbitration Rules (CAR) of the JCAA, and the number of arbitrators was requested to be three in accordance with the provisions of Rule 23 of CAR.

The acting attorneys for the Claimant gave their best efforts in presenting all the questions that normally come up in a real case.

The materials were presented in English and Japanese, and they included legal briefs by the counsels of the parties.

Subsequent sessions and proceedings were presented like in a theatre with the arbitrators, counsels and parties on a stage with the spotlights on them.

It was all very real and gave the audience a good impression of how an arbitration case actually is handled and solved in Japan.

The three arbitrators succeeded to make the audience understand how to review a case and how debates on the merits and de-merits of the claim are handled, how the arbitrators weigh the pros and cons of the case and how they come to a conclusion in the end. One of the arbitrators being an American attorney-at-law who speaks Japanese, proved that even non-Japanese lawyers can handle international arbitration cases in Japan with the help of their knowledge of Japan, the Japanese legal system, the Japanese language, its customs etc.

It would have been positive, if also one or more of the parties counsels would have been foreign lawyers, as it is now possible that parties in international arbitration engage foreign lawyers in their arbitration proceedings.2

It is a great asset to go through the proper motions in such an arbitration case and reach a just result taking into consideration all the aspects of the case.3

A point to be considered in the future in another mock arbitration trial should be that, before a verdict or settlement is reached by the arbitrators, the procedures the arbitrators take to reach such a settlement should be explained in more detail in order to make the process more transparent and easier to understand for the audience. The development between the last hearing.
and the reaching of a conclusion is one of the most important parts of arbitration trials and the participants in such a case probably want to know how conclusions are reached in reality.

All in all, I think that the participants learnt a lot about the practical aspects of arbitration in Japan. It can be also hoped that more foreigners would participate in such mock arbitration cases, as I only registered about a handful of foreigners listening to the developments on stage.

Thanks to the superb preparation through the offices of the JCAA and the arbitrators, their parties and their counsel, the mock trial was a full and satisfying success.

The events of November 9th and November 15th have deepened the knowledge about arbitration, a tool to settle claims without going through a lengthy court trial. Arbitration in my opinion will become more and more important in the future. Therefore I hope more mock arbitration proceedings will be staged soon.

1 See: JCA Newsletter 6; (2000)

---

**Arbitration Law Reform Underway**

Based on the Law on Promotion of Judicial Reform, which went into effect on December 1, 2001, the Japanese government established on the same day the Judicial Reform Promotion Headquarters to create a new judicial system appropriate to the needs of modern Japan.

The Headquarters, headed by Prime Minister Junichiro Koizumi, has replaced the Judicial Reform Preliminary Office to spearhead efforts to carry out recommendations submitted last June by the Judicial Reform Council (see JCA Newsletter No. 11).

The recommendations include the establishment of an appropriate legal scheme for arbitration at an early date. To frame new arbitration law, the Headquarters has set up an 11-member study group consisting of arbitration experts. Mr. Tatsuya Nakamura, Deputy General Manager of the Arbitration Department, is one of its members.

If all goes as planned, a bill to replace Japan's century-old arbitration law will be submitted to the ordinary Diet session in 2003.

---

**Recommended Arbitration Clause**

In drawing up contracts, parties are recommended to include the following arbitration clause:

- All disputes, controversies or differences which may arise between the parties hereto, out of or in relation to or in connection with this Agreement shall be finally settled by arbitration in (name of city), Japan in accordance with the Commercial Arbitration Rules of The Japan Commercial Arbitration Association.
  The award rendered by the arbitrator(s) shall be final and binding upon the parties hereto.
Speech Delivered at Joint Chamber Seminar

On November 12, 2001, a seminar on international commercial arbitration was held at the Canadian Embassy, Tokyo. The seminar was organized by the Canadian Chamber of Commerce in Japan in cooperation with JCAA, as well as the American, Australian/New Zealand, British, Finnish, German and Swedish Chambers of Commerce in Tokyo, respectively.

After opening remarks by Mr. Peter Campbell, Economic/Commercial Minister of the Canadian Embassy in Tokyo, Mr. Kosuke Yamamoto, President of JCAA, delivered a speech introducing JCAA and recent developments in arbitration to the audience, most of whom were foreign businessmen and international lawyers in Tokyo.

Mr. Yamamoto assured the audience of the reliability of international commercial arbitration proceedings in Japan, pointing out such factors as the enforceability of arbitral awards and participation of foreign lawyers practicing outside of Japan as well as foreign law solicitors registered in Japan.

Other invited speakers were Mr. Haig Ogigian, Mr. Toshio Sawada, Mr. Reinhard Neumann and Mr. Robert Grondine. Each presented the audience with an overview of international commercial arbitration, its functions and various forms of dispute resolution.

Mr. Sawada, Vice-Chairman of the International Court of Arbitration, ICC, and Senior Advisor to JCAA, reviewed the roles of ICC and JCAA. In his speech, he included an explanation of the features of JCAA arbitration, namely, that no requirements exist regarding nationality in order to serve as arbitrator in JCAA proceedings; that the language used can be either English or Japanese, or indeed both; that hearings can take place in different places in the world; and that representation by foreign lawyers is permitted. He noted that although the case load is relatively small, the nature of disputes range over various issues such as license, franchise and sale of goods; and he also introduced some statistics about JCAA arbitration.

The participation by JCAA in the seminar is one example of the strenuous efforts it is making to make international commercial arbitration more widely known to people in Japan whose positions may relate to arbitration in various ways (either as arbitrators, parties and their representatives).