



[Articles]

Why and How Investment Arbitration Should be in the Australia-Japan FTA #

*Luke Nottage & Kate Miles **

1. International Commercial Arbitration (ICA) vs Investor-state Arbitration (ISA)

International commercial arbitration (ICA), namely cross-border commercial disputes between commercial parties (including sometimes states), is going through another round of soul-searching. Concerns about over-formalisation led to many changes to the Rules and practices of arbitral institutions from the late 1990s, resulting especially in somewhat speedier proceedings.¹ However, costs remain considerable, so the ICA world is now considering more radical measures, including ways to encourage arbitrators actively to encourage settlement (Arb-Med).²

It is tempting simply to transport such ideas and experiences into the overlapping field of investor-state arbitrations (ISA), which has grown enormously since the late 1990s. Most countries (including Australia and Japan) have not only acceded to the 1965 Washington (ICSID) Convention on the Settlement of Disputes between States and Nationals of Other States. They have also now provided the additional 'consent' to ISA that the Convention requires to subject those host states to claims directly by investors from other Convention states, for expropriation, discrimination, lack of 'fair and equitable treatment' and other substantive obligations that generally used to be enforceable only by those investors' home states. Consent to foreign investors enforcing such obligations is provided by (a) arbitration agreements negotiated between the host state and the foreign investor, (b) liberalised foreign direct investment (FDI) legislation enacted by the host state, or especially (c) a bur-

geoning corpus of bilateral investment treaties (BITs) and bilateral or now regional Free Trade Agreements (FTAs).³ Almost all such treaties providing for ISA allow foreign investors to invoke the Arbitration Rules of ICSID (within the World Bank). Many also allow the option to invoke the 1976 UNCITRAL Rules (UR, presently being revised by the United Nations). Some treaties also provide for the Rules of the Stockholm Chamber of Commerce or even other institutions, or as agreed by the investor and host state after the dispute arises.

As even this brief outline of ISA suggests, this field remains quite distinct from ICA, which centres on arbitration agreements negotiated between commercial parties that generally cover disputes about underlying contracts. ISA clearly involves a set of much stronger public interests, although ICA also does preserve some public interest elements through, for example, its conceptions of mandatory minimum standards of substantive and procedural "public policy".⁴ The International Institute for Sustainable Development (IISD) and others have recently highlighted that ISA often involves:

- Public service sectors, such as the provision of water supplies, oil and gas, electricity, transport systems, telecommunications, and waste management services;
- Government regulations (in substance or process) for the public benefit that directly or indirectly affect private investors;
- Governments increasingly subject to good governance obligations such as transparen-

This article is based particularly on Part 3 of Luke Nottage and Kate Miles, 'Back to the Future for Investor-State Arbitrations: Revising Rules for Public Interests Australia and Japan' (2008) Sydney Law School Research Paper, presented at the Sydney Centre for International Law on 2 April 2008 and freely available via www.ssrn.com or www.law.usyd.edu.au/anjel/content/anjel_research_pub.html. That full paper contains more extensive references, thanks to many individuals, and (in Part 4) many specific proposals for Rules tailored to investor-state arbitrations, particularly in the Australia-Japan context.

* Respectively, Associate Professor and Lecturer, Sydney Law School. Luke Nottage is also a Special Associate of ACICA, serving on its Rules subcommittee, which has begun examining this and other topics like Arb-Med. However, we take sole responsibility for the views expressed in this article.

¹ Luke Nottage, 'The Procedural Lex Mercatoria: The Past, Present and Future of International Commercial Arbitration' (2003) 03-1 CDAMS Discussion Paper <http://www.cdams.kobe-u.ac.jp/archive/dp03-1.pdf> (updated and translated in: 絹巻 康史 + 齋藤 彰 (編)「国際契約ルールの誕生」同文館、2006年).

² Luke Nottage, 'Arb-Med in Australia: The Time Has Come' (2007) 5 Australian ADR Reporter (Chartered Institute of Arbitrators – Australian Branch) 18, also available via www.arbitrators.org.au.

³ See eg Gonzalo Biggs, 'Investor State Settlement of Disputes under the Chile Japan Agreement' (2007) 19 JCAA Newsletter 1, also available via www.jcaa.or.jp.

⁴ Gillian Triggs, 'New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 - 50th Anniversary: Celebration, Reflection and Reform' Keynote address at the commemorative event co-hosted by ACICA and Freehills, Sydney, 27 February 2008, also available via www.arbitrators.org.au.

- cy and due process; and
- Large sums of money, both in the damages claimed and relating to costs of defending disputes.⁵

Such public interest elements in ISA have led to calls for greater transparency, broader stakeholder participation, and enhanced natural justice safeguards in ISA proceedings.⁶ Many of these proposals come from those with a background in public international law. However, we now find growing sympathy from leaders in the field of ICA.⁷

2. Incorporating Revised ISA Rules into Treaties or Rules

ICSID has already partly heeded such concerns by amending in 2006 some of its Arbitration Rules, which were already designed solely for ISA. For example, transparency has been enhanced by allowing third parties to attend hearings if parties consent (Rule 32(2)), and by allowing arbitrators to accept *amicus curiae* briefs after consulting with the parties (Rule 37(2)).⁸ Yet, somewhat ironically, ICSID itself did not widely publicise how and why some changes were made and not others. The IISD argues for more dramatic reforms. The Institute envisages changes to the UR, and has proposed a draft model for any new multilateral agreement on investment.⁹ In the late 1990s, the collapse of the OECD negotiations for the Multilateral Agreement on Investment (MAI) was in part due to similar public interest concerns, including dissatisfaction with the dispute resolution system of ISA. However, the idea of a MAI has re-emerged in WTO negotiations and other fora.¹⁰

Although we do not follow all the IISD proposals, the public interest elements distinctive to ISA do demand changes to Rules that go beyond streamlining procedures to cut costs and delays, the primary and more justifiable aim for contemporary ICA. Indeed, several of the proposals introduced in our full paper (available online¹¹) involve more generous timeframes or safeguards with significant cost implications. Nonetheless, at this stage they seem a fair price to pay to meet the growing expectations of procedural justice among ever-widening stakeholders in the still emergent field of ISA. It can then further experiment in refining a new balance struck in the perennial interplay between legitimacy and efficiency, more

familiar now in the world of ICA.¹² Longer-term, after ISA achieves the more global acceptance built up over many decades for ICA, another round of reflection and revisions to the ISA system may refocus instead on time- and cost-efficiency. Meanwhile, under the new system proposed below, and in our full paper online, arbitrators and advocates bear a heavy responsibility to minimise cost and delay implications of the new provisions aimed at better reflecting and entrenching the diverse public interests in ISA.

To keep testing and tweaking the new system, it is also important to encourage or at least allow some diversity in Rules designed for contemporary ISA. First, therefore, ICSID should consider another round of more far-reaching reforms to its own Rules. Secondly, perhaps a more likely scenario, states and private investors should be offered UR devised primarily for ISA (called eg 'UR-ISA Rules'). An alternative set of UR revisions ('UR-ICA Rules') can instead emphasise efficiency and private interests, over procedural justice and public interests. However, parties and states could be permitted to opt out of these and into the UR-ICA Rules even for ISA cases, if they truly believe the balance achieved in the latter Rules to be more appropriate than that achieved in the UR-ISA Rules. Thirdly, arbitral institutions like JCAA and the Australian Centre for International Commercial Arbitration (ACICA) should develop Rules more specifically tailored to ISA, while again preserving the parties' freedom to opt in to these institutions' more generic Rules (such as ACICA's 2005 Rules, themselves based on the UR). However, Guidelines should be widely publicised explaining why the public interests in ISA generally point towards the use of the more tailored sets of Rules.

Thus, for example, in the FTA now being negotiated between Australia and Japan, its investment chapter could allow the claimant investor to proceed "under ICSID Arbitration Rules, UR-ISA Rules, ACICA-ISA Rules or JCAA-ISA Rules, unless the parties agree in writing to follow the general UR, ACICA Rules or JCAA Rules". By allowing states, investors and arbitral institutions to differentiate themselves somewhat and to promote experimentation with new sets of Rules, albeit with some guidance and recommenda-

⁵ IISD and International Institute for Sustainable Development, 'Revising the UNCITRAL Arbitration Rules to Address Investor-State Arbitrations' (2007) available at http://www.iisd.org/pdf/2007/investment_revising_uncitral_arbitration_september.pdf

⁶ See eg Gus Van Harten, *Investment Treaty Arbitration and Public Law*, Oxford University Press, Oxford, 2007; and Kate Miles, 'Reconceptualising International Investment Law: Bringing the Public Interest into Private Business' manuscript, forthcoming and available on request.

⁷ Nigel Blackaby, 'Investment Arbitration and Commercial Arbitration (or the Tale of the Dolphin and the Shark)' in L A Mistelis and J D M Lew (Eds), *Pervasive Problems in International Arbitration*, Kluwer Law International, Alphen aan den Rijn, 2006, p 217.

⁸ Mabel Egonu, 'Investor-State Arbitration under ICSID: A Case for Presumption against Confidentiality?' (2007) 24 *Journal of International Arbitration* 479 at p 483.

⁹ See, respectively, "http://www.iisd.org/pdf/2007/investment_revising_uncitral_arbitration_september.pdf and http://www.iisd.org/pdf/2005/investment_model_int_handbook.pdf.

¹⁰ Kate Miles, 'Transforming Foreign Investment: Globalisation, the Environment, and a Climate of Controversy' (2007) 7 *Macquarie Law Journal* 81.

¹¹ Kate Miles and Luke Nottage, 'Back to the Future for Investor-State Arbitrations: Revising Rules for Public Interests' (2008) *Sydney Law School Research Paper* available via www.ssrn.com.

¹² William W. Park, 'Two Faces of Progress: Fairness and Flexibility in Arbitral Procedure' (2007) 23 *Arbitration International* 499.

tions for specific sets of ISA Rules, we should generate a better sense of whether and how to rebalance the system even further over the longer term.

2.1. Why to Retain ISA

The already more tailored and balanced Rules along these lines should also allay some concerns about allowing ISA at all nowadays for investment disputes. In particular, ISA was left out of the investment chapter of the Australia-US FTA (in force from 2005). An official reason was that each “developed country” trusted the others’ courts for investors to initiate claims against the host state, and ultimately venues like the International Court of Justice for the investor’s home state to pursue claims against the host state. In fact, around the time Australia intensified negotiations for that FTA, the US had started to face various claims brought by Canadian investors under the North American FTA. Ultimately, the US successfully defended challenges to a Mississippi jury verdict and to rulings in Massachusetts.¹³ Nonetheless, these claims shocked many in the US. They had assumed that ISA was more likely to work in their favour regarding their investments in Mexico, or belatedly realised the ISA system can sharply constrain the powers of regular courts as well as government agencies. NGOs and state governors, in particular, voiced strong discontent about ISA. The 2002 Trade Act (19 USC 3802) therefore called for significant modifications to ISA.

In early 2004, revised provisions for ISA were included into the State Department’s ‘model BIT’, modified to reflect experiences and public comment from concluding the US-Uruguay BIT later that year. ISA has been included in every subsequent bilateral investment treaty, as well as FTAs concluded by the US, but with additional safeguards primarily favouring host states.¹⁴ These include greater transparency (eg, public initial pleadings and hearings, and amicus briefs, in the US-Chile FTA in force from 2004), and even sometimes an appellate review process going beyond the limited procedural grounds under the ICSID Convention (eg, Art 28(10) of the US-Uruguay BIT, in force since November 2006).

Yet in the negotiations with the US for their own FTA concluded on 3 March 2004, the Australian government was happy to go along with the new cautiousness of the US towards ISA. One less overt but more

pragmatic reason appears to have been that Australia has traditionally been a net FDI importer vis-à-vis the US, although flows have been roughly balanced in recent years. Thus, American investors are more likely to bring claims against the Australian government than vice versa, yet find themselves without the benefits of ISA procedures. Conversely, in countries Australia might expect to be or become a net FDI exporter, we would expect ISA provisions, even if the country has a developed and familiar legal system. Unsurprisingly, we find ISA provisions in the Singapore-Australia FTA (SAFTA) in force since 2003, but also – albeit without the option of ISA through ICSID – in the Thailand-Australia FTA (TAFTA) 2005, brought into force the year after the Australia-US FTA. Australia is also about to conclude a FTA with Chile, which apparently will include ISA provisions.¹⁵

In early 2008, however, the word in Tokyo was that the Australian government was pushing the same official line as with the US – no need for ISA at all – in its current FTA negotiations with Japan. The Japanese government has not faced domestic opposition to ISA, but it may be flattered that Australia considers the country to have a “developed” court and legal system – and indeed it does.¹⁶ Again, however, Australia remains a net FDI importer, despite some high-profile recent forays by Macquarie Bank and others into infrastructure and tourism developments in Japan.

If trust in the other’s courts is truly such a major reason for excluding ISA from investment chapters in bilateral FTAs, then Australia should offer Japan a bilateral enforcement of judgments regime like that proposed to New Zealand in 2005. That proposes enforceability of judgments from an Australian court in the other country, even if the foreign defendant has not submitted to that court’s jurisdiction. Yet negotiations have stalled despite almost two decades of soft “business law harmonisation” between Australia and New Zealand, and a shared common law tradition. Perhaps there is still not much trust in each others’ courts after all! On that logic, there should be less resistance to adding ISA to the investment chapter that those two countries are considering adding to their longstanding CER Agreement (an FTA which came into effect from 1983). However, the net FDI importer (New Zealand) may take a leaf out of Australia’s book and propose excluding ISA.¹⁷

¹³ See, respectively, *Loewen*, ICSID Case No ARB (AF)/98/3, Final Award 26 June 2003 (tribunal chaired by Sir Anthony Mason, former Chief Justice of Australia); and *Mondev*, ICSID Case No ARB (AF)/99/2, Award of 11 October 2002.

¹⁴ William W. Park, ‘Procedural Evolution in Business Arbitration: Three Studies in Change’ in *idem* (Ed.) *Arbitration of International Business Disputes: Studies in Law and Practice*, Oxford University Press, Oxford, 2006 at pp 33-9.

¹⁵ Further, although Australia has not concluded many BITs in recent years, it concluded a BIT with Mexico in 2005 that also includes ISA provisions: see <http://www.austlii.edu.au/au/other/dfat/ia/2006/24.html> (searched via www.dfat.gov.au/treaties/).

¹⁶ J. J. Spigelman, ‘Judicial Exchange between Australia and Japan’ (2006) 22 *Journal of Japanese Law* 1. Ironically, Japan’s impressive judicial system is one reason for the relative paucity of ICA proceedings brought in Japan, as opposed to arbitrations fought by Japanese corporations outside their country: Luke Nottage, ‘Japan’s New Arbitration Law: Domestication Reinforcing Internationalisation?’ (2004) 7 *International Arbitration Law Review* 54.

¹⁷ See eg <http://www.beehive.govt.nz/node/23850>. In 2007, Australia put forward an “ambitious” proposal for a CER Investment Protocol, but details were not made public (including, whether or not ISA was included), and New Zealand has not yet responded formally. Both governments also agreed to keep negotiating a treaty on Court Proceedings and Regulatory Enforcement: http://www.trademinister.gov.au/releases/2007/wtt070731_joint_statement.html

Such pragmatism on the part of government negotiators is understandable, since it reduces the possibility of claims being brought more efficiently against their home state, impacting on the public purse. However, the shorter-term interests are less obvious for firms in the home country that may be more subject to foreign investment impacts than the originators of investment directed abroad. For example, they may believe some econometric studies suggesting that ISA protections lead to more FDI over the longer term.¹⁸

Admittedly, anecdotal and quantitative evidence is mixed regarding such effects even from investment treaties overall, including both substantive and procedural advantages for foreign investors.¹⁹ The effects are even less certain regarding ISA itself. Japan attracted considerable FDI without including ISA in its 'Treaties of Friendship and Navigation' or the like. One example is the 1976 Australia-Japan Basic Treaty of Friendship and Cooperation.²⁰ Art IX(3) guarantees substantive protections such as "fair and equitable treatment" and non-discrimination regarding the business activities (including investments) of each other's nationals. Japanese corporations also invested heavily worldwide without concluding many BITs, although the dozen or so since 1977 all include ISA and those with Korea and Singapore extended "fair and equitable treatment" to the pre-establishment phase of the investment.²¹ Further, Franck points out that China, Brazil and Ireland have enjoyed even more dramatic inflows of FDI without offering ISA protections.²² Nonetheless, there may be indirect benefits to home state economies through ISA enhancing local court systems and more broadly the rule of law. On the other hand, some empirical evidence contradicts this link especially for developing countries, suggesting that ISA substitutes for – rather than complementing – transparency in local courts and other institutions.²³ The link proposed by Franck also requires a further controversial assumption about a particular vision of the rule of law having a causal effect on economic growth.²⁴

Despite this ongoing empirical and theoretical debate, local firms may give weight to anecdotes or studies claiming that ISA leads to more FDI. Further,

even where ISA is made available, if foreign investors bring a successful claim it is the host state – not a local investment target – which is directly liable. Indeed, having obtained relief under ISA, a successful claim against the host state may obviate the investor's need to claim under any separate or related contracts with investment targets. In addition, some firms (eg in Australia) may be tempted to route their investment (eg destined for Japan) through a subsidiary created in a third country (eg, soon, Chile) with which it has negotiated a FTA liberalising investment flows (and perhaps indeed itself allowing ISA, as in the new Australia-Chile FTA). The subsidiary might then invoke any ISA provisions in a treaty between that third country and the ultimate destination country (as under the Chile-Japan FTA). Whether this is possible, and conversely investments from Japan into Australia via Chile, will depend on the precise wording of the FTAs, which may impose "rules of origin" restrictions for investments as well as goods. Yet any such forum-shopping increases transaction costs, as well as possibly exacerbating "investment diversion" (like "trade diversion") already created by liberalisation under bilateral FTAs. Lastly, as a final reason for firms to push for ISA perhaps more vigorously than their own governments, some investment target firms (eg those involved in large infrastructure developments) may also be actual or potential investors in the country with which Australia is negotiating an FTA.

There are also longer-term interests for both governments and firms to consider when negotiating ISA processes, even when their country is a net FDI importer. Firstly, if developed countries begin to exclude ISA, there is a chance that it will atrophy or become more biased against developing countries – or, at least, be perceived to be so. Thus, involving developed and developing countries in applying and refining the ISA system is important for the legitimacy of both its procedures and the substantive law principles it generates. That has also been important for the now more "judicialised" WTO system.

Second, just as that system has some direct as well as more diffuse overlaps with ICA,²⁵ ICA has even more overlaps with ISA. Leaders in ICA already, and perhaps increasingly, serve as arbitrators or advocates in

¹⁸ Eric Neumayer and Laura Spess, 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?' (2005) 33 *World Development* 1567.

¹⁹ See eg Joseph Yackee, 'Do BITs Really Work?' (2007) 1054 *Univ. of Wisconsin Legal Studies Research Paper* <http://ssrn.com/abstract=1015083>.

²⁰ Known as the 'Nara Treaty': http://www.dfat.gov.au/GEO/japan/japan_treaty.html.

²¹ Shuji Yanase, 'Bilateral Investment Treaties of Japan and Resolution of Disputes with Respect to Investment' in A Van Den Berg (Ed.) *International Commercial Arbitration: Important Contemporary Questions*, Kluwer, The Hague, 2003, p 426 at pp 429-30.

²² Susan Franck, 'Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law' (2007) 19 *McGeorge Global Business and Development Law Journal* 337. However, now that Brazil is a net FDI exporter particularly to other South American countries, it is apparently now including ISA in some of the BITs it initiates.

²³ Tom Ginsburg, 'International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance' (2005) 25 *International Review of Law and Economics* 107.

²⁴ Cf eg Frank Upham, 'Speculations on Legal Informality: On Winn's "Relational Practices and the Marginalization of Law"' (1994) 28 *Law and Society Review* 233.

²⁵ See eg Jan Bohannes and Hunter Nottage, 'Arbitration as an Alternative to Litigation in the WTO: Observations in the Light of the 2005 Banana-Tariff Arbitrations' in Y Taniguchi and J Bohannes (Eds), *The WTO in the Twenty-First Century: Dispute Settlement, Negotiations, and Regionalism in Asia*, Cambridge University Press, Cambridge, 2007. A more indirect example is the "cross-over" of one of the most prominent Asia-Pacific ICA experts, Professor Yasuhei Taniguchi, to serve on the WTO Appellate Body (2000-7).

ISA proceedings, for example. The UR revision process shows how Rules and practices in each field can influence – for better or worse – those in the other. Such overlaps are particularly important for countries like Australia and Japan. They continue to give national priority to attracting more ICA to their shores, rather than seeing cases continuing to go to ‘core’ jurisdictions in Europe and the US, or nowadays the regional leaders like Singapore (which, incidentally, has ISA in its FTAs with Australia, Japan and New Zealand concluded over 2002-3).

Third, the professed longer-term goal of countries like Australia and Japan is to begin to link up the “spaghetti bowl” of bilateral FTAs. Japan, in particular, is the fulcrum in many “ASEAN+” proposals or detailed negotiations already underway.²⁶ It will be much easier to ensure ISA is included in such regional agreements involving both developing countries like those in the Association of South-East Asian Nations, and developed countries like Japan or Australia, if the developed countries have already included ISA in their own bilateral treaties. Developed countries that have excluded ISA in their bilateral arrangements may be able to exert diplomatic and economic pressure to have ISA included in the regional agreements. However, this risks generating considerable resentment towards ISA and may ultimately undercut the original exclusion of ISA from the bilateral agreements.

This situation therefore generates a problem familiar to economists and political scientists. Short-term considerations, which seem to favour the ad hoc exclusion of ISA, are impeding the likely potential net benefits of a broader bilateral and ultimately multilateral network of ISA. However, that potential will only come about or be maximised, in terms of social welfare rather than dollars or yen, if the ISA system evolves to meet the problems it encounters in practice, in particular to address the public interests involved. If the system can be reformed along such lines, as elaborated in our full paper available online, it should result in a better balance of both legitimacy and efficiency.

2.2. How to Retain ISA

Even accepting such arguments for including revised ISA provisions into international agreements, there remains the question of how best to do so. One possibility is for countries to negotiate such rules on a case-by-case basis, in their bilateral FTAs. A problem with this approach is the risk of ad hoc inconsistencies. For example, SAFTA 2003 allows investors to bring ISA cases under the UR or ICSID Rules; TAFTA 2005 only allows the UR; and the Australia-US FTA

2004 does not provide for ISA at all. SAFTA and TAFTA also have quite significant differences regarding timeframes for ISA proceedings and interim measures (as outlined in Parts 4.3 and 4.4 of our full paper online). The rationale for such differences has not been publically articulated.

Inconsistencies even among one country’s bilateral FTAs will multiply if that country has less negotiating power, as with Australia compared for example to the US. The unique economic and diplomatic clout has allowed the US to apply successfully a ‘model BIT’. Many other countries are developing model BITs, including Germany and the Netherlands, but they tend to be net FDI exporters. Even if some add provisions on transparency and third-party transparency that may appeal to FDI importer countries, as in the 2007 Norway model BIT, the wording and impact may be disparate especially when smaller economies are involved.²⁷ A related problem for countries like Australia comes from the limited budget and personnel available for negotiating proliferating international agreements. There was apparently not much overlap in the staff assigned to negotiate its recent bilateral FTAs, and some key personnel negotiating the FTA with Japan are different again.

A further argument against leaving the development of ISA rules to ad hoc incorporations into bilateral agreements is the problem posed by *regional* agreements now under consideration, especially in the Asia-Pacific region. These need a common starting point, yet this becomes more and more ephemeral as countries like Australia negotiate bilateral FTAs and BITs in a disparate manner.

A second possibility is therefore the elaboration of a multilateral framework for ISA. One option is a protocol or revision to the ICSID Convention itself. However, as with the 1958 New York Convention, there is always reluctance to alter formally a treaty that already has so many accessions. There is a risk of confusion about whether the original or revised treaty regime applies, even if enough parties sign up and then accede to the revised treaty. It also seems too early for many countries to agree yet on the substantial ISA rule changes proposed in our full paper online. All the more so, regarding another option: a multilateral investment treaty covering substantive principles, as well as dispute resolution processes. The controversy over the OECD’s MAI, and now regarding adding new fields to the WTO regime, is too fresh in everyone’s mind.

This leaves the third possibility, outlined above and detailed in the latter half of our full paper available

²⁶ See eg the ANU/ERIA/JETRO conference ‘Roadmap Towards Economic Integration in East Asia’, Sydney, 25 February 2008, <http://www.jetro.go.jp/australia/events/upcoming/eriaseminar.html>.

²⁷ See eg <http://ita.law.uvic.ca/investmenttreaties.htm>, and generally Thomas Pollan, *Legal Framework for the Admission of FDI*, Eleven International Publishing, Utrecht, 2006.

online: devising new sets of ISA Rules, to be incorporated as options for foreign investors into bilateral and future regional international FTAs and BITs. In particular, national arbitration centres like ACICA and JCAA can quite easily take the lead in developing tailored ISA Rules. Those, in turn, can inform debates underway for revisions to the UR and ultimately again the ICSID Rules, which have struggled to achieve major reforms due to the many states involved in those revision processes. Investors will hopefully choose “ACICA-ISA” or “JCAA-ISA” Rules, recognising the chances of less backlash in the host state to any rulings in their favour by tribunals operating under fairer Rules, as well as the longer-term and more disparate benefits of following such Rules. Positive experiences should encourage similar amendments to the UR and ICSID Rules. Such a bottom-up ‘emerging consensus’, in turn, should provide a broader and firmer basis for elaborating and imposing more standardised rules in bilateral, regional and multilateral agreements among states.

For this to work best, however, we may need to recreate some specific advantages of arbitrations conducted under the ICSID Rules – largely “delocalised” from national court involvement. In particular, ICSID Rules arbitrations involve a self-contained mechanism for challenging the award. Section 5 of the Convention allows a party to seek interpretation or revision (based on certain later-discovered facts), usually by the same arbitral tribunal (Arts 50-1), or annulment (Art 52) by a new tribunal but primarily on limited procedural grounds. Article 53 clarifies that these are the only avenues for appeal. Article 54(1) requires the host state to recognise and enforce pecuniary obligations imposed by an ICSID award “as if it were a final judgment” of its local courts. ICSID Arbitration Rules 50-55 elaborate on these aspects.

By contrast, investment arbitration awards that are not rendered under the ICSID Rules do not benefit from the Convention’s self-contained regime.²⁸ This applies even to arbitrations administered by ICSID under its Additional Facility Rules, available for example for investment disputes where one party is not (from) a Convention state, eg involving Mexico. It also applies to investment arbitrations resolved under other institutional Rules, or ad hoc under the UR. This opens up the possibility of challenge in courts at the agreed “seat” of the arbitration, eg in Canada when US investors claim against Mexico in NAFTA arbitrations, pursuant to national arbitration legislation.²⁹ The award can also be challenged in courts of the enforcing state, such as Mexico. However, most states have now acceded to the NYC and over the decades their courts have generally learned and

applied its principles, including limited grounds for refusing enforcement. As the cornerstone of their legislation applicable to arbitrations with their seat in that state, many have also adopted the ML, which replicates for setting aside applications the limited grounds found in NYC Art V. These tendencies help explain why many investor-state arbitrations are conducted outside the ICSID Rule framework, but the majority of investors still apparently choose ICSID Rules.

If we wish tailored ISA Rules to compete on a level playing field with ICSID Rules in this respect, therefore, it is important first to build into those ISA Rules themselves self-contained mechanisms for review by arbitrators, and direct enforceability. The Rules should also clarify that parties agree to waive rights to apply for courts to set aside at the seat or to refuse enforcement. Because arbitration law (even based on the ML) may not clearly allow such waivers, it may be prudent secondly to build such mechanisms into the relevant treaties (and corresponding domestic legislation). Foreign investors and states would also have to agree to arbitrate under the specified ISA Rules with the seat (and hearings) in one or other of the treaty states. Otherwise, a disgruntled or obstructive party may seek to have the award set aside by courts of third states specified as the seat, which states of course cannot be forced to uphold waivers of such rights. However, even without such complications added to bilateral treaties and legislation, hopefully we can build other attractions into the new ISA Rules to encourage investors to choose them over the venerable UNCITRAL Rules, and even the ICSID Rules.

3. “Back to the Future” for ISA

In the 1950s, investment disputes provided a major impetus for developing the legal and institutional infrastructure also for ICA, turning arbitration into the preferred mechanism for resolving cross-border disputes. It is tempting to take the lessons learned from ICA back to the new generation of investment disputes, but ISA involves more public interests. The legitimacy of ISA needs to be improved in various ways. At the least, we urge institutions like JCAA and ACICA to develop institutional Rules tailored to ISA. Both institutions should then encourage governments in both countries to provide them as an option in the FTA they are now negotiating, and educate investors to select such Rules as the preferred option for resolving disputes if and when they eventually give rise to claims. Longer-term, this “bottom-up” voluntarist approach should provide a basis for imposing more consistent rules for ISA, balancing legitimacy and efficiency, in bilateral, regional and multilateral treaties.

²⁸ Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law*, Oxford University Press, Oxford, 2008, 277-90.

²⁹ See eg *The United Mexican States v. Metalclad Corporation* (2001) BCSC 664. Nonetheless, the Supreme Court of British Columbia upheld the NAFTA award under the International Commercial Arbitration Act 1996s. 34 (adopting the ML, like Australia’s International Arbitration Act 1974 and Japan’s Arbitration Act 2003).

Facilitating Arbitration in Japan: Making the JCAA a Regional Center for ADR

Gerald Paul McAlinn*

Introduction

Much as has been written to explain why Japanese companies are not more litigious, including the profound reluctance to use readily accessible and private alternative dispute resolution mechanisms such as arbitration. Theories ranging from a deep-rooted cultural aversion to disputes, to structural impediments making avoidance of institutional dispute resolution a rational choice, and everything in between, have been advanced.¹ The psycho-sociological dimensions of this question are important to be sure, but the consequences, regardless of causation, are of even more vital importance.

In an era of rapid globalization, parties have multiple options for investing and doing business. The reputation of Japan as a place that is “open for business” and possessed of the infrastructure necessary to protect the legitimate expectations of foreign investors is at stake. Unfortunately, Japan has never enjoyed a positive reputation in this regard whether by design or otherwise.

The troubling trend towards “Japan Passing”² is indicative of the problem, and is a development that should give policy makers and business people alike severe cause for concern. Nothing short of the long-term economic viability of Japan as a regional and global force hangs in the balance. It would be foolhardy in the extreme, given intense scrutiny by the international community, to ignore this situation or to fail to implement meaningful reforms aimed at changing the way things are done in Japan.³

The rise of China as a highly coveted investment destination presents Japan with an opportunity to transform itself into a leading regional center for international dispute resolution. Positioning Japan to take advantage of this situation by playing a role similar to that played by Singapore and Hong Kong in the Asia-Pacific region will yield many benefits over the medi-

um to long-term. Manufacturing and exports have carried the country far, but there is a growing need to develop the service economy. This will take political will and determination, and no small measure of tolerance for change.

Ordinarily, one would expect legal infrastructure, including access to a diverse and well-trained cadre of legal professionals and ADR institutions, to follow, not lead, economic development. The historically closed nature of Japanese markets, however, makes the normal situation inapplicable. The JCAA can play a leading role in creating a vibrant internationally-oriented business environment, but it cannot do it alone. Japanese companies must play a starring role by insisting on resolving disputes by arbitration, and Japanese lawyers need to actively promote the JCAA to clients.

Before turning to the main point, it will be helpful to examine the present situation and to mention briefly some of the problematic factors foreign practitioners have identified in the past for eschewing dispute resolution in Japan. Virtually all of the shortcomings have, in fact, been remedied, although negative impressions continue to linger. This is also an important lesson for Japan and it should spur bold initiatives.

The Present Situation

Regardless of cause, the fact remains that the number of international commercial arbitrations taking place in Japan remains remarkably low when compared to the experience in virtually every other major industrial nation. The JCAA has averaged an annual caseload in the single or low double digits since its establishment as an independent entity in 1953.

Statistics prepared by the Hong Kong International Arbitration Association clearly demonstrate the lack of appetite for arbitrating disputes in Japan.⁴

* Professor of Law, Keio Law School, Tokyo, Japan. This article is adapted from a presentation given at a symposium sponsored by The Japan Commercial Arbitration Association on December 12, 2007, in Tokyo. The author would like to acknowledge, with gratitude, the generous assistance of the staff of the JCAA, and in particular Tatsuya Nakamura and Toshiyuki Nishimura.

¹ A recent article by Professor Tony Cole summarizes these arguments succinctly. See, A. N. Cole, *Commercial Arbitration in Japan: Contributions to the Debate on “Japanese Non-Litigiousness”* 40 *NYU Journal of International Law and Politics* 29 (Number 1, Fall 2007).

² *Japan Passing* refers to the trend on the part of US and other foreign executives to look past Japan to “hot” markets and, in particular, China and India. The American Chamber of Commerce in Japan recognized this problem in 2003, making it the focus of a Washington, D.C. “Doorknock” campaign. See, ACCJ Press Release dated July 11, 2003, available at <http://www.accj.or.jp/UserFiles/Image/PressReleases2003/006-ACCJ%20Delegation%20To%20Counter.pdf>. The Japanese media has also identified “Japan Passing” as an important issue. See, for example, NHK Special Series: *Japan and the U.S.: Part 2 of 3, “Japan Passing: Struggling Against A Loss Of Interest In Japan.”*

³ Many of the promising reforms instituted under the Koizumi Administration appear to have been delayed, watered down beyond recognition, or abandoned outright in favor of returning to the more comfortable status quo ante. For example, in the area of professional legal education, the rapid retreat from the promised bar passage rate of 70 to 80% in favor of limiting the number of new lawyers arbitrarily may serve to protect vested economic interests of a few, but it cannot be good for the long-term interests of Japan. Legal infrastructure is increasingly recognized as an essential element to a healthy and equitable investment environment, not to mention a free and fair society.

⁴ See, http://www.hkiac.org/HKIAC/HKIAC_English/main.html. Reprinted with the permission of the HKIAC.

INTERNATIONAL ARBITRATION CASES RECEIVED

	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
AAA	387	453	510	649	672	646	614	580	N/A	N/A
CIETAC	645	609	543	731*	684*	709*	850*	979*	981*	1,118*
HKIAC	240	257	298	307	320	287**	280	281	394	448
ICC	466	529	541	566*	593*	580*	561*	521*	593*	N/A
JCAA	14	12	10	17	9	14	21	11	11	15
KCAB	59	40	40	65	47	38	46	53	47	59
KLRCA	7	10	11	1	2	4	3	6	1	N/A
LCIA*	70*	56*	81*	71*	88*	104*	87*	118*	130	N/A
SIAC	67	67	83	99	114	100	129	103	119	119
STOCKHOLM	92	104	73	74	55	82	50	56	141	87
VANCOUVER*	49*	60*	88*	88*	71*	76*	84*	77*	76*	82*
VIENNA	100	100	100	100	33	45	50	55	N/A	40

*Statistics include domestic as well as international arbitrations

**As a result of Severe Acute Respiratory Syndrome, the caseload for 2003 was down compared to 2002

Legend: AAA—American Arbitration Association

CIETAC—China International Economic and Trade Arbitration Commission

HKIAC—Hong Kong International Arbitration Centre

ICC—International Chamber of Commerce

JCAA—Japan Commercial Arbitration Association

KCAB—The Korean Commercial Arbitration Board

KLRCA—Kuala Lumpur Regional Centre for Arbitration

LCIA—London Court of International Arbitration

SIAC—Singapore International Arbitration Centre

Stockholm—Arbitration Institute of the Stockholm Chamber of Commerce

Vancouver—British Columbia International Commercial Arbitration Centre

Vienna—International Arbitral Centre of the Austrian Federal Economic Chamber

If these results reflect the fact that Japanese companies, and those doing business with them, conduct their affairs in a manner obviating the need for recourse to formalized dispute resolution, then we can stop here and applaud all concerned. Acting in good faith and honoring contractual agreements is laudable, and fewer disputes are good all else being equal. However, if the low incidence of arbitration means, as many will suspect, that barriers remain to effective ADR, then it may well be that business people are foregoing the enforcement of valid contractual rights, rather than becoming entangled in a dispute resolution system they neither trust nor understand. A well-used dispute resolution forum that is capable of delivering prompt, just and commercially reasonable decisions can, in this sense, be viewed as a proxy for an internationally sophisticated business environment. This, in turn, can be an important gauge of the nature of good corporate compliance and governance.

It seems unnecessarily risky to ignore the profound changes taking place in Japanese society, especially in the fields of business and law, and to continue under an increasingly outdated business model. Japan is in the beginning stages of a systematic and far-reaching socio-legal revolution aimed at nothing less than transforming from a regulatory administra-

tive state into a private rights based society. This will have important implications in the field of corporate compliance and governance.⁵

Two of the three major prongs of the 2001 Report by the Judicial Reform Council⁶ were aimed at promoting greater involvement of people and businesses in the Japanese judicial system. Arbitration did not go unnoticed as seen in the following excerpt:

In addition to the increase of legal disputes in the international scale due to globalization of social/economic activities, it is also a demand from the international community to make the Japanese society more rule-oriented, transparent and open. Therefore, we must discuss the judicial reform with a global viewpoint. As we previously suggested, Japan must not limit itself to passive acceptance of international rules and harmonization of judicial systems but must actively participate in making/developing international rules. We must also study measures such as the coordination of international arbitration scheme to smoothly solve international disputes.⁷

In short, there was a clear recognition on the part of

⁵ For a comprehensive overview of the wide-ranging changes to Japanese commercial law over the past decade, see, G. P. McAlinn, ed. *Japanese Business Law* (Kluwer Law International 2007).

⁶ The Judicial Reform Council, "Recommendations of the Judicial Reform Council—For a Justice System to Support Japan in the 21st Century" June 12, 2001, available at <http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html>

⁷ The Judicial Reform Council, "Points at Issue in the Judicial Reform" December 21, 1999, available at <http://www.kantei.go.jp/foreign/judiciary/0620reform.html>

policymakers that heightened legal awareness, when coupled with more and better trained lawyers and a modern system of justice, would produce a more vibrant economy and business environment.

Third party dispute resolution should not be seen as a failure when looked at from this perspective. Management that fails to exercise its fiduciary duty to protect the rights, financial or otherwise, of the corporation and its stakeholders could become targets of derivative lawsuits and/or hostile take-over bids. The same advice applies with equal vigor to in-house law departments and outside legal advisers who advise management. Resolving disputes through arbitration may not be as desirable as avoiding disputes, but it is substantially better than suffering unjust losses in order to avoid a perceived loss of face from pursuing bona fide rights through the law.

The Foreign Image of Arbitration in Japan

In the past, foreign practitioners leveled many justified complaints against arbitration in Japan. These mirrored the complaints raised with going to court. One widely cited article by Charles Ragan, a prominent California lawyer with expertise in international dispute resolution, identified a number of unsatisfactory features stemming from a JCAA arbitration held the mid-1980s.⁸ The main objections were as follows:

- The civil law discontinuous hearing system produced a large number of hearings (30) and caused the arbitration to last for 5 years;
- The need to proceed in Japanese resulted in translation and interpretation costs of more than \$100,000;
- The parties were provided with little chance to participate in selection of the third arbitrator;
- The US lawyers were not permitted to appear for the US client under *the Bengoshi Law*;
- Discovery was unduly limited under the Civil Procedure Law;
- The arbitrators were reluctant to make decisions to expedite proceedings; and
- The arbitrators exerted undue pressure on the parties to settle.

Others have noted the following additional factors making arbitration in Japan an unattractive proposi-

tion:

- The high cost of getting to, staying in, and moving around Japan;
- The relatively small number of lawyers with expertise in international commercial litigation and/or commercial arbitration;
- The reluctance of Japanese lawyers to advocate aggressively on behalf of foreign clients;
- A suspicion that Japanese lawyers and arbitrators were either unaware of, or unwilling to, follow global ethical standards;
- The relatively small number of qualified arbitrators, especially those from countries other than Japan, the US and the UK;
- Ambiguity as to who could engage in arbitration under *the Bengoshi Law*; and
- The relatively low level of English language proficiency.

These near fatal grievances were, unfortunately, all too accurate at the time. While most are no longer true today, the lingering image of Japan as a place where foreign parties cannot get a “fair shake” has undoubtedly contributed to a strong reluctance of many international lawyers to recommend arbitration in Japan. The ability to undo this image has been retarded by the failure of Japanese companies to use their bargaining power to push for arbitration before the JCAA, settling instead for arbitration outside of Japan when ADR is selected at all.

Efforts to Facilitate Arbitration in Japan

The JCAA has actively led a strong effort to facilitate arbitration in Japan. It has conducted periodic surveys of Japanese companies to determine attitudes towards arbitration, and has embarked on an informational program aimed at educating law departments on the many merits of international commercial arbitration.⁹ The JCAA revised its Commercial Arbitration Rules in 2004, to bring them in-line with the UNCITRAL Model Law adopted by Japan.¹⁰

The JCAA should be applauded for responding promptly to problem areas. Its Rules and practices now conform to global standards. Gone is any concern regarding the freedom of the parties to select their lawyers, including registered foreign lawyers (*gaikoku-ho jimu bengoshi*) and lawyers coming from outside of Japan.¹¹ Regarding language, nobody would seriously contend today that an international

⁸ Charles R. Ragan, “Using ADR in Japan to Resolve Disputes between Japanese and American Companies,” 11 *Alternatives to High Cost Litig.* 99 (July 1993). This article was written as follow-up to a series of more critical articles written by the same author in 1991. The 1993 article acknowledged the strong efforts made by the JCAA to address many of the earlier criticisms.

⁹ The Symposium held last December is just one example of efforts by the JCAA to educate potential users. The JCAA has also undertaken two studies to explore attitudes of Japanese companies, and to examine international arbitration and ADR in China. See, 19 JCAA Newsletter 12 (November 2007), available online at <http://www.jcaa.or.jp/e/arbitration-e/syuppan-e/newslet/news19.pdf>.

¹⁰ See, Tatsuya Nakamura, “Salient Features of the New Japanese Arbitration Law Based Upon the UNCITRAL Model Law on International Commercial Arbitration” and Gerald McAlinn, “New Rules for International Commercial Arbitration in Effect from March 1, 2004” both appearing in 17 JCAA Newsletter (April 2004), available online at <http://www.jcaa.or.jp/e/arbitration-e/syuppan-e/newslet/news17.pdf>.

¹¹ A thorny question as to whether resident foreigners, licensed or otherwise, can serve as arbitrators under the *Bengoshi Law* remains as a theoretical matter, although the clear practice is that there is no legal bar, and many serve in fact.

arbitration in Japan must be conducted in Japanese (while of course it can be) or that the Arbitral Award must be written in Japanese. Likewise, arbitration proceedings have, for the most part, dispatched with the discontinuous hearing process and opted instead for the efficiency of holding evidentiary hearings from start to finish in a continuous manner.

While discovery is still substantially more limited than a common law trained lawyer might desire, the Rules are broad enough for an arbitrator to request the production of documentary evidence necessary to achieve a just result. Indeed, in a recent arbitration case a party successfully applied to the court to compel the testimony of a recalcitrant witness. Japanese courts seem to have embraced arbitration.¹²

As for logistical considerations, the deflationary effects of the “Lost Decade” of the 1990s have largely taken care of these issues. Readers who travel to London, Paris or New York will readily appreciate how reasonably priced goods and services, especially first class hotels, are in Tokyo and Osaka on a comparative basis. Japan has in many respects become a much more welcoming environment, and this can be easily promoted in the effort to make the JCAA a regional center for ADR.

Do these overwhelmingly positive developments mean that all barriers to Japan as a regional center for dispute resolution have been cleared? The answer to that question is still no. For example, language remains a problem at many levels in Japan. English is the international language of business, but many Japanese business people still do not feel comfortable working in it.

On a substantive level, the perception among many foreigners remains that ethical standards in Japan lag behind those in the West when it comes to preserving the ethical integrity of the arbitral process. Anecdotal evidence suggests that Japanese party-nominated arbitrators will sometimes talk freely about the merits of an arbitration case with the lawyer for the party who nominated them. There is no way of knowing if this is true, but perception can sometimes be as harmful as reality. Principles of neutrality and independence, including avoiding even the appearance of a conflict, strictly prohibit *ex parte* contact between an arbitrator and the nominating party once the tribunal is constituted.¹³ Similarly, there is a worry that the relatively small community of Japanese

lawyers and experts will almost inevitably mean that a tangled web of social and professional relationships could result in bias to outsiders. These perceptions will have to be addressed by the JCAA and the Japanese arbitration bar.

The JCAA as a Regional Center for Arbitration

Japan must make the utmost effort to position itself as a regional center for dispute resolution. This is necessary to remain competitive in the face of growing economic challenges from China and India. Becoming a recognized center for ADR can be an important first step in transforming the economy into a healthy blend of manufacturing and services. To be accepted as such, however, arbitration in Japan must be perceived as being “free, fair, and global” in all respects.¹⁴

Peter Godwin, a leading international dispute resolution expert and a partner of Herbert Smith in Tokyo, has made a similar argument. In a recent article he posits the following three challenges that must be met: (1) Japanese companies must embrace arbitration; (2) they must use their negotiating leverage to insist on arbitration in Japan; and (3) the international business community must be persuaded to think of Japan as a leading ADR forum.¹⁵ Points (1) and (2) are domestically driven prerequisites to (3), which can only come via promotion and observable results.

Domestic interests, as argued by Godwin, must clearly be prime drivers of this initiative. But, this is not the only possible source of impetus. Japan is an ideal forum for resolving disputes involving Chinese companies and those from the US and Europe. It is a neutral venue, free of corruption and political influence, with a perhaps unique awareness of Asian traditions and Western institutions. With the structural impediments largely remedied, there is no reason why the JCAA cannot emerge as a leading center for dispute resolution in Asia. Japan and the JCAA have much to offer. The ADR infrastructure is excellent. Support from the courts is strong and reliable. There is virtually no bias in the system. And, the geographical location of Japan as the gateway to the Asia Pacific region makes it ideally situated to play this role.

On the soft side, the JCAA should certainly continue its fine efforts at outreach and education. Projects like the Intercollegiate Negotiation Competition held annually at Sophia University in Tokyo also serve to develop the next generation of business leaders and

¹² See, Junya Naito, “Examination of Witnesses in Court for Arbitration Proceedings” 18 JCAA Newsletter 5 (March 2007), available online at <http://www.jcaa.or.jp/e/arbitration-e/syuppan-e/newslet/news18.pdf>.

¹³ See, Yves Derains and Eric A. Schwartz, *A Guide to the ICC Rules of Arbitration 2d* (Kluwer Law International; 2005) at p. 132. Rule 5.3 of the International Bar Association Rules of Ethics for International Arbitrators provides in relevant part as follows: “Throughout the arbitral proceedings, an arbitrator should avoid any unilateral communications regarding the case with any party, or its representatives.” The JCAA does not, as yet, have a code of ethics for arbitrators.

¹⁴ Readers will recognize this slogan from a 1996 reform initiative launched by then Prime Minister Hashimoto at the time of “Big Bang” financial deregulation. See, Ministry of Foreign Affairs, “Reforms and the Creation of a New Era Society—The Six Reform Packages of the Hashimoto Administration”, available at http://www.mofa.go.jp/j_info/japan/ad_reform/admin/6reforms.html.

¹⁵ Peter Godwin, “Japan as a Centre – Two Possible Futures” 2 *Global Arbitration Review* 32 (Issue 4; 2008).

advocates with ADR knowledge and experience.¹⁶

There is more work to be done for sure. More formalized training programs for lawyers and arbitrators, including expanding the available pool of arbitrators to non-lawyers, should be high on the agenda. Arbitrators must be trained to realize that their prime role is to decide disputes efficiently and fairly. While mediation can be effective in resolving suits by voluntary settlement, parties should not feel that they will be subjected to undue pressure to settle, a long-standing criticism of the judicial system in Japan. The JCAA should consider initiating a formal international mediation process that would be available before the commencement of arbitration.

Language skills must be raised so that Japanese companies feel comfortable resolving disputes in English.¹⁷ Japan will never be an international center for anything, including dispute resolution, if the rest of the world is expected to use Japanese. As rich as the language may be, it is not the language of international business.

Finally, the JCAA should institute a system of publishing redacted awards so that international practitioners

can see the kind and nature of decisions rendered in Japan. This would lead to a rise in confidence among foreign parties and would clearly contribute to enhancing the reputation of the JCAA as a regional center.

Conclusion

The government and the JCAA alike have a keen awareness of the need to bring alternative dispute resolution up to global standards. Past flaws in the system, and reluctance by Japanese companies to insist on JCAA arbitration in international contracts, have contributed to the negative image of Japan as a forum for dispute resolution. While the former have been largely rectified, attitudes remain a problem.

Japan and the JCAA are ready to take the next steps in their evolutionary development. Those steps should be in the direction of positioning Japan as a regional center for ADR, with US/EU-China disputes being the prime target area. The benefits are too numerous to list. Japanese companies and practitioners will be well-served long into the future by committing themselves now to working hand in hand with the JCAA to ensure that Japan emerges as a leading regional center for dispute resolution.

[News]

The JCAA New Regulations for Arbitrators' Remuneration

The JCAA has revised its Regulations for Arbitrators' Remuneration to meet the international standards for arbitrator's fee levels by increasing the hourly rate for arbitrators' remuneration.¹ The JCAA previously provided for three different hourly rates such as ¥25,000, ¥30,000 and ¥40,000 for each arbitrator and taking into consideration their experience as arbitrators, the complexity of the case and related matters for each arbitration case, the JCAA has determined the hourly rate for arbitrators.

In general, there are two methods of determining the arbitrators' fees by arbitral institutions. One is the *ad valorem* method by which the fee is calculated as a proportion of the amounts in dispute; another is based on an hourly or daily rate for work done by an arbitrator on the case. The former method is adopted by the ICC, for instance, and the latter by the LCIA. The JCAA presently adopts the latter method, but it has been pointed by practitioners in international arbitration that its above hourly rates should be increased so as to meet the fee levels generally

applicable to international arbitrators in other international arbitration leading countries, and that otherwise it is rather difficult for international arbitrators to serve for the JCAA arbitration.² In response to this demand, the JCAA has considered its hourly rates, making reference to the practice of the other arbitral institutions. In particular, the LCIA presently sets its fee rates for arbitrators within the range between £150 and £350 per hour and JCAA has adopted a similar method to determine the hourly rate for each arbitrator ranging between ¥30,000 to ¥80,000.³ It ranges between US\$300 and US\$800 if the approximate current exchange rate of US\$1 equivalent to ¥100 is applied. For exceptional cases where this range will not apply, the JCAA may determine any other hourly rate; however, this is subject to the agreement of the parties.⁴

The JCAA expects that such revised fee regulations will meet the requirements of international arbitrators and will pose no obstacles for arbitrators to serve for the JCAA arbitration. In addition, the JCAA considers

¹⁶ See, <http://www.osipp.osaka-u.ac.jp/inc/eng/index.html>. This past year's competition saw an increase in the number of younger Japanese company employees serving as judges.

¹⁷ The importance of English to Japan as a financial center has been recognized by the Financial Supervisory Agency. Mean TOEFL scores for Japan for the period of September 2005 to December 2006, placed substantially below Singapore, India, the Philippines, China and Thailand. In terms of competitiveness as a financial center, Japan ranked 9th out of 10, beating only Geneva. A. H. Rowley, "Here Comes Big Bang 2" ACCJ Journal April 2008, p. 30, 32-33.

¹ New Regulations for Arbitrator's Remuneration came into force on January 1, 2008 (Regulations) / http://www.jcaa.or.jp/e/arbitration-e/kisoku-e/pdf/e_houshou.pdf

² Joel Greer, "Arbitrator Remuneration in Japan: Too Low for Its Own Good?", [2007] vol.10(6), Int.A.L.R,189

³ Regulations Art.3(2)

⁴ Regulations Art.3(3)

that the time-spent method is not necessarily appropriate, especially since there are problems with this method, in that it cannot assess the quality of time spent by arbitrators; also, in practice there are often considerable differences in the time spent by an arbitrator among the arbitrators of an arbitral tribunal. In this respect, the *ad valorem* method is superior; how-

ever, there is also a problem in that even by this method, the amount of dispute does not necessarily correspond to the time spent by an arbitrator. Therefore, the JCAA will oversee the application of the revised regulations, and in the near future will review the regulations, including the comparison of the *ad valorem* and the time-spent methods.

[JCAA Activities]

Research Study Projects on International Commercial Arbitration in Japan

The JCAA has completed a research study project into the activation of international commercial arbitration in Japan and submitted the final report to the Japan Economic Foundation, a sponsor of this project. The purpose of the project is to research policies and practices on dispute resolution of Japanese corporations and to study practical measures to increase the number of arbitration cases in Japan. Last September, the JCAA set up a committee consisting of 15 members, including scholars in the field of international commercial arbitration and businesspersons in the legal sections of major Japanese corporations. Last October and November, questionnaire surveys of companies in Japan and Japanese-affiliated companies in the UK, France, Germany, Holland, and Italy were conducted. The survey of companies in Japan shows that 40% of international contracts include arbitration clause stipulating Japan as the place of arbitration, but that almost all disputes are resolved by means of negotiation. On the other hand, the survey of Japanese-affiliated companies in Europe shows that almost all of their international contracts provide not Japan but European countries as the place of arbitration. Based on the results of the questionnaire surveys, the businesspersons of the committee members report policies and practices on dispute resolution of their companies, and present suggestions to activate arbitration in Japan from the standpoint of the user of arbitration. In addition, the three scholars analyze the results of questionnaire surveys and reports of the businesspersons, and make proposals to promote arbitration in Japan from their own views. The final report (only in Japanese) will be available soon at the website of granted projects of JKA(<http://ringring-keirin.jp/>).

The JCAA has also completed a research study pro-

ject in the activation of international commercial arbitration in Japan under the consignment of the Ministry of Economy, Trade and Industry (METI). The purpose of this research project is to promote the utilization of arbitration for commercial disputes between Japanese and Chinese companies in China, and to activate the international commercial arbitration in Japan. For achievement of this purpose, a working committee was set up in the JCAA, composed of specialists who have a great knowledge of the arbitration. To research the awareness and realities of international arbitration of businesspeople in China, Beijing and Shanghai were chosen as the investigation ground where many Japanese companies were doing business activities. In Beijing on November 27 and in Shanghai on December 18, the JCAA held half-day International Arbitration Seminars, "Commercial Dispute Resolution between Japanese and Chinese enterprises," featuring lectures and panel discussions, with speakers invited from the China International Economic and Trade Arbitration Commission (CIETAC), Beijing Arbitration Commission, China Council for the Promotion of International Trade (CCPIT) and Shanghai Arbitration Commission. To hear opinions on international arbitration, the working committee conduct a hearing survey of the participants at the Seminars; 67 persons in Beijing and 70 persons in Shanghai. Furthermore, the committee again visited Beijing and Shanghai in January, 2008, and executed a hearing at a detailed and concrete level through direct interviews of those who seemed to have high concerns for arbitration from the results of the answers at the Seminars. The working committee analyzed the data acquired from the above hearings, and the issues and problems for promoting the utilization of arbitration were clearly clarified.

Notes to Contributors for Article Submissions

The Editor welcomes submissions of articles and essays on international arbitrations. Articles should not normally exceed 2500 words in length including notes. Manuscripts must be submitted in the format of MS Word together with CV. Material accepted for publication becomes the property of JCAA. However, author may use the article without permission from JCAA. Submission must be sent via E-mail: nishimura@jcaa.or.jp

The Japan Commercial Arbitration Association

URL: <http://www.jcaa.or.jp>

Tokyo office

Hibiya Sankei Bldg. 4F, 9-1, Yurakucho 1-chome, Chiyoda-ku, Tokyo 100-0006 Japan
Tel: +81-3-3287-3061 Fax: +81-3-3287-3064 Email: arbitration@jcaa.or.jp

Osaka Office

The Osaka Chamber of Commerce & Industry Bldg. 2-8, Hommachibashi, Chuo-ku, Osaka 540-0029 Japan
Tel: +81-6-6944-6163 Fax: +81-6-6946-8865 Email: osaka@jcaa.or.jp