



[Articles]

Japanese Arbitration in the wake of the 2004 reforms : time to recognise the end of the Ragan myth

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Introduction

Nearly two decades ago Charles Ragan published his infamous critique of the arbitration system in Japan.¹ Some of his criticisms were undoubtedly fair at the time but others were perhaps the result of his specific bad experiences. Yet his complaints have endured as myths in the consciousness of international arbitration practitioners and their clients even after the arbitration system has been extensively overhauled. Still in 2008, I hear arbitration 'experts' reference his article as though it is still true today!

I have written elsewhere of the need to encourage in Japanese companies and, perhaps more importantly, in Japanese lawyers, a receptiveness both to arbitration generally and to arbitration in Japan, specifically if Tokyo is to become the respected regional centre for arbitration that the Japanese Government wishes it to be.² Professor Gerald McAlinn, of Keio Law School, addressed similar issues in the last edition of this newsletter³. However, while there are significant challenges of culture and perception to be overcome for arbitration to truly grow in Japan, there should no longer be questions asked of the arbitration infrastructure in Japan (i.e. its law and the rules of its principal institution). In the seventeen years since Charles Ragan's original article was published, the framework for arbitration has changed dramatically. The introduction of a modern arbitration law in 2004 "*clearly indicate[d] a desire on the part of the Japanese legal community to achieve a more prominent place in international commercial arbitration.*"⁴ It is time to recognise that Japan has the basic tools to strive for the desired prominent place in the world of international commercial arbitration. At the very least we must ensure that if Japan fails in that goal, it does not do so because of criticisms made honestly and in good faith by Charles Ragan but which now are as irrelevant as they are old.

The need for change

One of the most frequently rehearsed complaints against arbitration in Japan was that the law relating to it was inadequate and out-of-date. There was no stand-alone arbitration code and arbitration was given only limited attention in articles 786 to 805 of the old Code of Civil Procedure of 1890. However, even before the reforms of 2004, to focus on the fact that Japanese arbitration law was contained in a mere twenty articles of an outdated civil procedure law was misleading, as the law was supplemented by the institutional rules of the Japan Commercial Arbitration Association (the "JCAA") and the Japan Shipping Exchange (the "JSE"), international treaties and the largely supportive attitude of the Japanese courts. Nevertheless, recognizing the perceived weakness in its arbitration regime, Japan actively embarked upon a program of reform to make arbitrating in Japan more attractive.

The Japanese Arbitration Law (Law No. 138 of 2003) which came into force on 1 March 2004 (the "New Law") was based on the 1985 UNCITRAL Model Law on International Commercial Arbitration (the "Model Law"), providing instant familiarity and certainty to users. A useful summary of the New Law was included in the April 2004 (Number 17) edition of this newsletter.

The New Law sought to follow the general UNCITRAL objectives but it was also recognised that there was a need to depart from some of the standard provisions. One reason for this was that the 1985 model was outdated in some areas; another reason was to recognise the specific needs of the arbitration system in Japan.

Japan is not the only country that has departed from the Model Law for modernizing purposes. Certain needs were clearly not anticipated in 1985 such as

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¹ Charles R. Ragan, "Arbitration in Japan: Caveat Foreign Drafter and Other Lessons", *Arbitration International*, Vol. 7 No. 2 (1991), pp. 93-113.

² Peter Godwin, "Japan as a Centre: Two Possible Futures", 2 *Global Arbitration Review* 32 (Issue 4; 2008).

³ Gerald McAlinn, "Facilitating Arbitration in Japan: Making the JCAA a Regional Center for ADR", *JCAA Newsletter*, Number 20, July 2008.

⁴ Tony Cole, "Commercial Arbitration in Japan: Contributions to the Debate on 'Japanese Non-Litigiousness'", 40 *N.Y.U.J. Int'l L. & Pol.* 29, 112 (Fall 2007).

the fact that the requirement for written arbitration agreements would need to include agreements made by way of “electromagnetic record” such as email.⁵

A number of the modifications, however, are specific to Japanese requirements, yet none of them should undermine the New Law in the eyes of experienced international arbitrators and arbitration counsel as only the second of the three points outlined below has any potential bearing on an international commercial arbitration. These issues should not therefore prevent Japan reaching its stated goal:

- The New Law applies to both international and domestic arbitration, and to both commercial and non-commercial civil arbitration – as long as the place of arbitration is in Japan. In contrast, the Model Law only applies to international commercial arbitration.
- The New Law has included provisions to recognise that arbitrators can have a role as mediators in amicable settlements.⁶ There is no doubt that, as a general rule, lawyers from common law systems dislike the idea of arbitrators also being empowered to act as mediators. Further, it is probably fair to say that the general trend in international arbitration is for arbitrators not to take part in any amicable settlements and instead for a neutral mediator to be instructed if the parties wish to move proceedings in this direction. However, in Japan, it has been customary for both arbitrators and judges to encourage amicable settlement during proceedings. In Japanese arbitrations many cases have been amicably settled with the active involvement of the arbitrators. The same is true to an even greater degree in the Japanese courts where, on occasion, dare I suggest the judges appear to see it as a sign of failure if a case reaches judgment! Article 38(4) of the New Law has therefore provided for this Japanese custom but has also recognised that the international community may be more sceptical. The involvement of an arbitrator in a mediation is now possible but it requires prior written consent from all parties.
- The New Law has included provisions which give special treatment to consumers and individuals that are involved in arbitration agreements. This is one of the major departures from the Model Law and was included as a consequence of public pressure during the later stages of discussion about the New Law. The Japanese public wanted protection for the rights of consumers and

employees to bring claims before the court. As a result, it was decided to include articles in the supplementary provisions to the New Law to allow consumers to unilaterally cancel an arbitration agreement even when they knowingly entered into it, and to recognise the invalidity of any arbitration agreement in an individual’s employment contract.⁷ Although these provisions were established as interim measures, their inclusion “indicates a significant ongoing public scepticism in Japan about arbitration”.⁸

A number of commentators on the New Law have identified certain gaps in its content, such as the fact that it is silent on key issues like confidentiality and arbitrator’s immunity. The New Law is not alone in not expressly addressing such issues⁹. In any event, most of these gaps have been addressed in the new commercial arbitration rules of the JCAA, Japan’s primary international commercial arbitration body. The JCAA updated its commercial arbitration rules (the “New Rules”) on 1 March 2004 at the same time as the enactment of the New Law, to bring them into line with the law, the UNCITRAL arbitration rules and also with the other leading international commercial dispute resolution organizations. Parties can choose to adopt the rules or adopt them with modifications, although most parties tend to adopt the rules in full.

These New Rules work as a supplement to the New Law and provide a framework for any arbitration proceedings for which they are adopted. It is therefore significant to look at some of the inclusions in the New Rules which show Japan’s efforts to both promote informality for its arbitration proceedings, but also tighten up controls over the impartiality and independence of the arbitrators. In line with international norms, the New Rules delegate more control of the case and proceedings to the arbitrators. However, there are tighter guidelines for insuring their independence and an established process for removing them in the event of a breach of impartiality. Additionally, the New Rules impose confidentiality obligations on all parties involved, their representatives and the arbitrators themselves.

Key reforms

A number of key reforms were made in 2004 to address some of the repeated criticisms of the Japanese arbitration system.

Hearing procedures

Arbitration proceedings in Japan often used to be criticised for being extremely lengthy and slow. There

⁵ Article 13(2) Japanese Arbitration Law 2003.

⁶ Article 38(4) Japanese Arbitration Law 2003.

⁷ Articles 3 and 4 of Supplementary Provisions of Japanese Arbitration Law 2003.

⁸ Tony Cole, *supra* note 4 p. 31.

⁹ See for example the arbitration laws in England, France and Singapore. Although all of these jurisdictions follow general principles that arbitration proceedings should be confidential, none of them have set this out in statute.

was no limitation on the number of document exchanges that could be made and witnesses that could be called. One of the most frustrating situations was for parties that found themselves stuck in arbitral paralysis when decisions were delayed because the arbitrator did not want to offend or “de-face” one of the parties. Whilst this was an issue that could, and should, have been addressed by the arbitrators in those cases, as has already been mentioned, one of the main focuses of the reforms of 2004 was to improve the efficiency of the system.

A number of provisions have been brought into force in an attempt to speed up the arbitration process in Japan. Article 31 of the New Law sets out that the arbitral tribunal can establish time restrictions for the parties’ statements, and refuse to accept supplements and amendments to these after the end of the time period allocated, if it is thought that they are being made to delay the proceedings. In the New Rules, the JCAA has sought to give the arbitral tribunal the power to speed up the proceedings and prevent unnecessary delay. If one of the parties fails to submit evidence or fails to appear at a hearing without good cause, the tribunal can proceed regardless.¹⁰ Furthermore, documents are to be submitted to the tribunal directly rather than through the JCAA and they can be submitted via electromagnetic record or facsimile if the tribunal agrees.

These small changes are not of themselves significant save in relation to the message they are designed to send to parties wishing to delay proceedings. In my view, far more significant is the change in practice of arbitrators sitting in Japan. Largely consigned to history are the days of numerous short hearings spaced a few weeks apart (akin to the system used in the Japanese courts). In their place are single longer evidentiary hearings of the type familiar to arbitrators and arbitration counsel in all the major arbitration centres. The trigger for this change has it seems been twofold. First, we are seeing increasing numbers of experienced international arbitrators being appointed from outside Japan and they are naturally bringing with them international practices. Secondly, and very much to their credit, Japanese arbitrators and counsel are recognising the merits of this change, particularly in cases where often at least one of the parties, their witnesses, their counsel, and even their co-arbitrators are travelling from abroad.

Settlement

One of Charles Ragan’s criticisms about his experiences in Japan was the role that the arbitrator played in settlement negotiations and the clear preference

that the arbitrator showed for amicable settlement. However, as mentioned above, this is a long established tradition of Japanese legal culture and one of the important features that had to be recognised and accepted during the 2004 reforms. By inserting an article that deals with this specifically in the New Law, the Japanese system has appropriately allowed the decision to use such a procedure to be determined by the parties.

Selection of Arbitrators

In the past, the selection of arbitrators was hugely restrictive. There was a general bias in favour of a single arbitrator, and any attempt to avoid this needed early action from one of the parties. Furthermore, the choice of arbitrator was limited given that arbitrators had to be resident in Japan on appointment and only a small number were registered with the JCAA, most of whom were Japanese.

In line with international norms, the New Law gives the parties the freedom to determine the number of arbitrators, and then implements default provisions for occasions when the parties fail to do so. The default provisions are that there will be three arbitrators (in an arbitration involving two parties) or the court will decide the number (in a multi-party arbitration).¹¹ The New Law also sets out a procedure for appointing arbitrators when there is a disagreement between the parties.

Importantly, the New Law does not require any specific qualifications for arbitrators, therefore there is complete freedom to appoint the arbitrators most suitable for the case. There are also no restrictions on nationality or residence of arbitrators. This leaves the parties to choose from the widest possible pool. Furthermore, where the JCAA is called upon to make an appointment, it has recognised the need to internationalise its panel of arbitrators and this process is proceeding apace at the time of writing.

Any criticisms about the lack of impartiality of arbitrators are dealt with by a number of provisions in the New Law and New Rules which require impartiality and independence from arbitrators, as well as full disclosure of any interest they may have in the proceedings. There are also grounds to challenge an arbitrator if there is a justifiable doubt as to his or her impartiality, and there are criminal penalties for corruption of an arbitrator, such as bribery.¹²

Language

Under the old law, there were no specific provisions dealing with the language of the arbitration. This

¹⁰ Rules 32 and 35 JCAA Rules.

¹¹ Article 16 Japanese Arbitration Law 2003.

¹² Articles 50 through to 55 Japanese Arbitration Law 2003.

could lead to difficulties, especially if the parties involved were of different nationalities, which of course is commonly the case in international arbitrations. There were criticisms that the non-Japanese party often faced huge expenses due to translation requirements.

In an effort to make the law fairer, the New Law provides that parties are now free to agree on the language or languages to be used in the arbitral proceedings, or in the absence of such an agreement, for this to be determined by the arbitral tribunal. In practice, more and more JCAA arbitrations are now being conducted in English.

Representation

One of the most enduring issues in Japanese arbitration has been the lack of clarity as to who may represent a party in arbitration proceedings. For a lengthy time, and certainly still at the time that Charles Ragan wrote his criticism of the system, the JCCA and Japanese Bar interpreted the Lawyers' Law (*Bengoshi Ho*) (Law No. 205, 1949) as prohibiting all foreign lawyers from acting as arbitration counsel of record. However, it has since been acknowledged that a foreign lawyer registered as a *gaikokuho jimu bengoshi* may conduct arbitration in Japan, importantly in return for the payment of fees! Furthermore, foreign lawyers may represent clients in an international arbitration case when they are appointed outside of Japan.

Although the New Law does not contain any specific provisions concerning foreign lawyer representation in arbitral proceedings in Japan, it appears to be accepted in practice that this is no longer a concern. That said, the author would still prefer to see this issue resolved in the near future in clear unambiguous legislation as, rather like the Ragan myth, it is extraordinary how often time is spent by the local arbitration community discussing this issue; time which could be much more effectively used to further

Settlement in International Commercial Arbitration: Presumption vs. Empirical Insight

The settlement rate in international arbitration has largely been subject to speculation due to the limited data available on the subject. Since many view arbitration as incorporating parts of conciliation,¹ there is presumption that a majority of arbitration is resolved by a settlement agreement instead of a final arbitration award. This presumption may come from the

promote arbitration in Japan.

Conclusion

Japan has addressed the criticisms (Charles Ragan's and others') which for many years were made about its arbitration system. More could be done and more is likely to be done, especially in keeping up-to-date with any changes that are made by UNCITRAL to its Model Law and rules.¹³

The New Law and New Rules together allow for a very flexible and progressive arbitration system in Japan. They have created much greater autonomy for parties involved, and while they set out a default standard for arbitration practice, they also allow parties to vary any of the provisions that they find unacceptable to their circumstances. The reforms are "*consistent with the basic philosophy behind Japan's judicial system reform, designed to encourage self-responsibility and active engagement by the citizenry in the operations of the legal system*".¹⁴ Japan has established a framework suitable for use in both domestic and international arbitration.

In short, there is no longer any reason (legal or procedural) why an international commercial arbitration conducted in Japan should not look identical to one conducted in any of the major arbitration centres. However, the challenge still remains to encourage its use.

Finally, all that remains is for me to say thank you to Charles Ragan. To the extent his original article sparked debate and raised awareness of arbitration in Japan and so contributed to the enactment of the New Law and the introduction of the New Rules, (even if it took 13 years to get there) he has done Japan a service. Thank you Charles but I hope your article is never mentioned to me again! Now it is time to move on as only then can Japan hope to progress along its journey to prosper as a recognised international arbitration centre.

Jacob Rosoff *

perception that parties have an incentive to cooperate during arbitral proceedings, both to appear favorably in front of the arbitral tribunal and also to agree on arbitral procedure.² Therefore, it comes as no surprise that some practitioners estimate that approximately 60% of all arbitrations end in settlement.³ Yet, contrary to this presumption, empirical data gathered

¹³ See www.uncitral.org, Working Group II, for more information.

¹⁴ Gerald McAlinn and Luke Nottage, "Changing the JCAA Rules: Improving International Commercial Arbitration in Japan", *Journal of Japanese Law*, vol.18, page 26.

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¹ Christian Bühring-Uhle et al, *The Arbitrator as Mediator: Some Recent empirical Insights*, 20 *Journal of International Arbitration*, 81, 82 (2003); Alexander Petsche and Martin Platte, *The Arbitrator as Dispute Settlement Facilitator*, *Austrian Arbitration Yearbook* 88, 88 (2007).

² For example, parties may reach an agreement on various procedural rules over the course of arbitration, such as the location and length of hearings, the scope of discovery, and the admissibility of evidence. See: Redfern, Alan et al., *Law and Practice of International Commercial Arbitration*, §6-41 to §6-126 (4th ed. 2004) for a detailed explanation of all the various procedures parties may agree on after arbitration has begun.

by the International Chamber of Commerce Court of Arbitration (ICC) in Paris and the Japan Commercial Arbitration Association (JCAA) in Tokyo suggest that most arbitrations are resolved by an arbitration award instead of by settlement between the parties.⁴ This article explores the differences between the presumption that most arbitration is resolved via settlement and the empirical statistics contradicting this presumption.

Empirical Data

In general, it is difficult to find empirical data on arbitration due to the private nature of the arbitration process.⁵ *Ad hoc* arbitrations are rarely reported⁶ and there are no international standards requiring arbitration institutes to disclose arbitration statistics to the public.⁷ Fortunately, the ICC and the JCAA both publish various statistics on the number of arbitrations that are ultimately resolved by settlement.

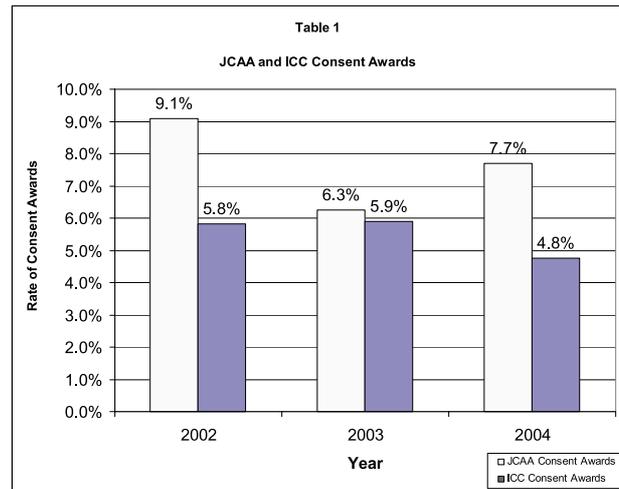
When examining these statistics, it is important to note that parties have two options when they reach a settlement agreement during arbitration proceedings. Parties can either request that the arbitral tribunal issue their settlement agreement as a consent award, or they can simply consent to withdraw from the arbitration. On average, these settled arbitrations account for less than half of all arbitrations terminated on a yearly basis at either the ICC or the JCAA.⁸

Consent Awards

The ICC and the JCAA both allow arbitral tribunals the ability to issue consent awards. A consent award is where parties to an arbitration reach a settlement, with or without assistance from the arbitral tribunal, and elect to have the arbitral tribunal issue the settlement as a final award. This award would be recognized in the same way as a final award on the merits⁹ assuming that arbitration was started before a settlement was reached.¹⁰

After examining the empirical data from 2002 to 2004, it appears that tribunals at the JCAA issued slightly more consent awards per year than tribunals

at the ICC. From 2002 to 2004, approximately 4.8% to 5.9% of arbitrations terminated at the ICC were terminated by a consent award.¹¹ By contrast, approximately 6.3% to 9.1% of arbitrations administered by the JCAA from 2002 to 2004 produced a consent award.¹² These findings are reflected below in Table 1.



Perhaps the most striking conclusion that can be drawn from these numbers is the slim difference in the rate at which consent awards are procured at each institution. From 2002 to 2004, an average of 5.5% of arbitrations at the ICC produced consent awards while the JCAA averaged consent awards in 7.7% of its arbitrations. It appears that parties decided to have arbitral tribunals issue settlement agreements as consent awards about as often under either the ICC or the JCAA.

The JCAA and the ICC differ significantly in geographic presence. While the JCAA is capable of administering arbitrations outside of Japan, JCAA arbitrations are mostly seated in Japan. Conversely, the ICC has a much broader geographical presence and annually has hundreds of arbitrations seated outside of France. Since the percentage of consent awards does not vary significantly between these two institutions, it may be possible to conclude that,

³ Klaus Peter Berger, *Integration of Mediation Elements into Arbitration 'Hybrid' Procedures and 'Intuitive' Mediation by International Arbitrators*, 19 No. 3 *Arbitration International* 387, 397 (2003); Also cited in Alexander Petsche, *Supra.*, at 88.

⁴ This includes consent awards issued by the arbitration tribunal and arbitrations that end before a final award is issued because the parties settled their disputes.

⁵ Christopher R. Drahozal, *Arbitration by the Numbers: The State of Empirical Research on International Commercial Arbitration*, 22 *Arbitration International* 291 (2006). Mr. Drahozal attributes this to the lack of statistics available from arbitration institutions and the privacy of *ad hoc* arbitrations.

⁶ It is difficult to imagine how comprehensive data could be collected on how many *ad hoc* arbitrations end by settlement. Outside of anecdotal accounts, it seems unlikely that parties who settle their disputes during *ad hoc* arbitration would necessarily desire to disclose such a fact.

⁷ The notion of such a standard would take away one of the most prominent advantages of arbitration, privacy.

⁸ Settled arbitrations are calculated by adding together all consent awards and all arbitrations withdrawn due to settlement in a given year.

⁹ In Redfern, Alan, *Supra.*, §8-48 to 8-51. The authors argue that consent awards are permitted wherever arbitration is permitted. The argument is that countries that permit arbitration define what matters are arbitrable and what matters are not arbitrable. It follows that any matter that the parties can agree to arbitrate is also a matter that the parties can agree to settle and have recorded as a consent award.

¹⁰ Christopher Newmark & Richard Hill, *Can a Mediated Settlement Become an Enforceable Arbitration Award?*, 16 No. 1 *Arbitration International* 81, 81 (2000). The authors contend that a consent award may not be enforceable under the New York Convention if arbitration began after the parties had settled their disputes. They argue briefly that it would be possible to challenge any such award under the New York Convention because there was no dispute between the parties when arbitration began.

¹¹ ICC data from 14 ICC *International Court of Arbitration Bulletin* (Spring 2003), 15 ICC *International Court of Arbitration Bulletin* (Spring 2004); 16 ICC *International Court of Arbitration Bulletin* (Spring 2005).

¹² JCAA data from the JCAA Report dated January 4, 2007.

regardless of geographic location, parties at either institution are equally willing to have an arbitral tribunal issue their settlement agreement as a binding arbitration award. However, it would be overly presumptuous to apply this finding wholesale to all international arbitrations because there are simply too many differences between international arbitration institutions to extrapolate findings from two international arbitration institutions as representative of the rest.¹³

Settlement Rates

Empirical data from the ICC and the JCAA dispute the presumption that most arbitrations end via settlement either outside of arbitration proceedings or finalized in a consent award. While both the ICC and the JCAA report the number of consent awards tribunals issue per year, only the JCAA reports the number of arbitrations that are withdrawn as a result of settlement between the parties.¹⁴ Therefore, some latitude must be taken in order to compare settlement rates at these two institutions.

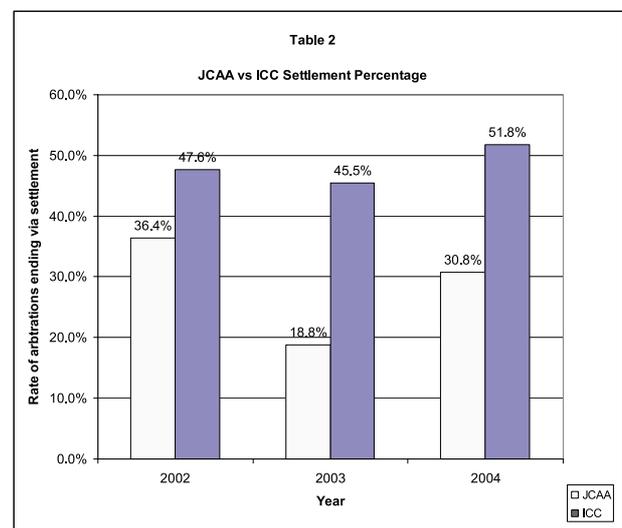
The ICC reports the total number of arbitrations terminated by an arbitration award and the total number of arbitrations that are withdrawn each year but does not report how many of those withdrawals are caused by settlement between the parties.¹⁵ This leaves the actual rate of settlement at the ICC open to speculation. However, even if we assume that all withdrawals from the ICC resulted in settlement, settlement would still account for less than half of all arbitrations terminated at the ICC averaged on a yearly basis.

From 2002 to 2004, the maximum percentage of arbitrations at the ICC that could have ended by settlement ranged from 45.4% to 51.8%. These statistics include settlements issued as consent awards and assume that any arbitration withdrawn was withdrawn because of a settlement agreement between the parties. This assumption is not supported by the ICC, but is merely included to show the maximum possible percentage of arbitrations that could have ended via settlement.¹⁶

Unlike the ICC statistics, no assumption is needed to determine how many arbitrations at the JCAA were settled in lieu of an arbitration award. This is because the JCAA reports the total number of arbitrations terminated due to settlement between the parties. Including arbitrations terminated by settlement

between the parties and settlements issued as consent awards, 18.8% to 36.4% of total arbitrations at the JCAA ended in settlement agreements from 2002 to 2004.

The statistical data from both the ICC and the JCAA suggest that the percentage of arbitrations resolved by settlement between the parties was below 50% for the years 2002 to 2004. As is evident from Table 2 below, the maximum percentage of arbitrations settled at the ICC peaks at 51.8% and averages 48.3% per year, while the settlement rate at the JCAA peaks at 36.4%, averaging around 28.7% per year. Both institutions averaged yearly settlement rates below 50% and it is likely that the actual yearly settlement rate at the ICC is much lower than 48.3% per year.



While these statistics dispute the commonly held perception that a majority of arbitrations end in settlement, they nevertheless show that parties often settle their disputes. This may be because parties expect arbitration to be a conciliatory process through which they can resolve their disputes. According to one empirical study that surveyed 53 prominent users and providers of dispute resolution services, approximately 90% of those responding to the survey “thought that facilitating a consensual solution is one of the functions of the arbitral process.”¹⁷ It is undeniable that settlement plays an important role in arbitration even if a minority of international arbitrations are settled.

Conclusion

It is impossible to say with any amount of certainty that the majority of international arbitrations world-

¹³ Arbitration institutions have different sets of institutional rules, which make it impossible to infer that settlement rates at two international arbitration institutions would necessarily be indicative of settlement rates at other international arbitration institutions.

¹⁴ This could be attributed to the volume of arbitrations at each institution. The average arbitrations terminated at the ICC, including partial awards issued, amount to approximately 625 arbitrations per year while the average arbitrations that are terminated at the JCAA amount to approximately 15 arbitrations per year. The higher volume of arbitrations at the ICC may make it extremely difficult to keep accurate statistics of settlements between parties, especially if the parties settle outside of arbitration proceedings.

¹⁵ Parties have no obligation to inform the ICC of why they choose to withdraw from arbitration, which may be why the ICC does not report such statistics.

6 ¹⁶ It is highly unlikely that the 100% figure is correct, as there are many other reasons why parties may withdraw from arbitration, such as a court ruling mandating the parties litigate in national court or factors unrelated to the dispute in issue.

¹⁷ Christian Bühring-Uhle, *Supra.*, at 81; Alexander Petsche, *Supra.*, at 88.

wide are terminated by a final arbitration award. Part of the problem lies in the difficulty associated with collecting data on arbitration. Many notions about norms in arbitration are based on anecdotal evidence, which is useful but limited. Perception is undoubtedly necessary to study the field of arbitration where much still remains private. However, in the circumstances where empirical evidence is available and privacy is not compromised, perception should be checked against any available data on the subject matter.

The empirical data discussed above support the notion that most arbitrations, at least at the ICC from 2002 to 2004 and the JCAA from 2002 to 2004, are terminated by a final arbitration award and not by settlement between the parties. Although the data annually account for an average of 640 arbitrations per year, which exceeds the amount of anecdotal accounts available per year, there is still an issue regarding how representative the data are for international arbitrations worldwide. While analyzing data from the JCAA and ICC is a good start, the data still annually account for less than a third of all international arbitrations.¹⁸ More data are needed to make a

concrete conclusion about the rate of settlement in arbitration.

The question remains, is the presumption true that a majority of arbitrations are concluded by settlement? While the empirical statistics available are not absolute, all indications are that this presumption is likely false. Taking volume of arbitrations into consideration, empirical data should be preferred over perception. While practitioners may feel their collective experience justifies the presumption, and in many cases, their presumptions are necessary to understand the current trends in arbitration, the sheer number of arbitrations a year at the ICC and the JCAA create a more reliable data set than anecdotal accounts. Despite the fact that the empirical data in this article fail to cover all of international arbitration, the empirical data offer an objective and more comprehensive alternative to presumption. In the end, the question of what role settlement plays in arbitration cannot be answered with certainty, but we can say with certainty that in a significant number of arbitrations per year at two international arbitration institutions, settlement took a back seat to final and binding arbitration awards.

First Enforcement Order Granted Under Japan's Arbitration Act

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1. Introduction

This is a report on the very first case of an enforcement order being granted under Japan's Arbitration Act, which came into effect on March 1, 2004, based on an arbitral award where the authors hereof served as attorneys for the claimant and engaged in arbitration proceedings before the Osaka branch of the Japan Commercial Arbitration Association ("JCAA").

As provided in Article 46 of the Arbitration Act, an enforcement order is a decision made by a court in response to a petition by a party for the purpose of allowing civil enforcement of an arbitral award. Before the Arbitration Act came into effect, it was necessary to obtain an enforcement judgment from a court to enforce compulsory execution of an arbitral award; however, the Arbitration Act now facilitates the prompt granting of court authorization for enforcement by replacing an "enforcement judgment" with an "enforcement order", which enforcement order is supposed to be obtained more quickly through a simpler court procedure called "*Shinjin*"

than a public court procedure called "*Koutou Benron*" in which public oral arguments along with direct/cross examination of witnesses are to be made.

Since the case described herein is a groundbreaking case with respect to obtaining an enforcement order, we intend to explain such case with a focus on specific practical steps taken in the course of enforcement proceedings as well as how the Arbitration Act expedited the process of satisfying the requirement for court authorization.

2. Outline of Arbitration Case

Before explaining the court proceedings relating to the petition for an enforcement order, we will provide, for reference purposes and to the extent our confidentiality obligations allow, an outline of the arbitration case in question prior to the filing of the petition.

The case involved a contract dispute between a foreign individual claimant and a foreigner-owned enti-

¹⁸ Data from the Stockholm Chamber of Commerce (SCC), the London Court of International Arbitration (LCIA), the Hong Kong International Arbitration Centre (HKIAC), the China International Economic and Trade Arbitration Commission (CIETAC), and the American Arbitration Association (AAA) account for at least 1,500 international arbitrations a year according to the statistics link at http://www.hkiac.org/HKIAC/HKIAC_English/main.html. Additionally, international *ad hoc* arbitrations are not reported and comprise a significant portion of international arbitrations worldwide.

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ty as respondent, both located in Japan. The claimant submitted the dispute to arbitration in mid-January 2004 claiming recovery of the money which the claimant paid under an agreement containing an arbitration clause as well as provisions relating to payment of damages and confirmation of absence of any other liabilities. In response, the respondent submitted a counterclaim which demanded payment of the very liabilities which the claimant asserted not to exist.

Because the aggregate amount (value) of the claim and counterclaim was less than 20 million yen, summary proceedings were applied to this case pursuant to the JCAA Commercial Arbitration Rules. Both parties agreed to appoint one arbitrator (a Japanese attorney) fluent in English by the deadline designated by the said rules (late February). The arbitrator arranged a preliminary hearing in mid-March 2004. At such hearing, it was agreed that the languages used in the arbitration hearing would be both English and Japanese and that the arbitral award would be made in Japanese. In addition, the deadlines for submitting briefs and exhibits were set.

The first (and only) hearing was conducted in late April 2004 in order to examine both parties, and all procedures with respect to such hearing were completed on that day. In late May 2004, an arbitral award in favor of most of the claimant's claims was rendered. This means that the award was given within a very short period of time, only four and a half months after the request for arbitration was filed in mid-January 2004.

3. Process from Obtaining Arbitral Award to Obtaining Enforcement Order

After obtaining the arbitral award as mentioned above, we filed a petition for an enforcement order with the court of competent jurisdiction on July 20, 2004. The reason it took approximately two months from the time the arbitral award was rendered is that we first negotiated with the other party's attorney based on the arbitral award in an attempt to settle the case by means of voluntary payment, but were not able to reach a settlement. Consequently, we proceeded with filing for an enforcement order.

The next step following such filing was designation of the date for a court hearing. Partly due to our concern that the respondent might try to conceal his assets, we first expected that the court hearing date would be designated within one or two weeks after the filing as in the case of a provisional seizure. However, our filing for an enforcement order was

assigned to one of the ordinary court divisions instead of the specialized court division dealing with temporary orders or provisional seizures. In addition, the division in charge of this case happened to begin its summer vacation the day after the filing, and as a consequence, the hearing was set for approximately forty days after the filing.

Generally, it would be possible for a claimant to make arrangements to some extent to file during a time when the court is not on summer vacation; however, we found it rather incomprehensible and unacceptable that even an enforcement order could not be obtained simply due to the summer vacation of the court division to which the case was assigned. We continue to hope that courts will improve their internal scheduling and operations in this respect.

In addition, both parties are supposed to be offered an equal opportunity to be present on the hearing date of a "*Shinjin*" procedure, and therefore, we should point out that there is another possibility of prolonging the time before obtaining a ruling at the stage where arrangements are made to set a date when the respondent's attorney will be available. Although this was not an issue with the case described herein, in the event the respondent's attorney refuses to cooperate with respect to prompt designation of a hearing date of a "*Shinjin*" by insisting on such attorney's unavailability, we would expect the court to take a firm stance and direct hearings to be conducted without delay.

As described above, it took an unexpectedly long time before the hearing date was set; however, on the hearing date, the respondent's attorney did not attend based upon the statement that, "there is nothing specifically the respondent wishes to claim", and as a result, the enforcement order was rendered eight days after the hearing date.

After the enforcement order was rendered, the respondent's side offered to voluntarily pay the claimant an amount basically equivalent to that determined in the arbitral award. The claimant accepted such offer, and consequently, the case came to an end without having to further pursue compulsory enforcement of the arbitral award.

4. Conclusion

Undoubtedly, enforcement proceedings in arbitration cases have been accelerated by replacement of enforcement judgments with enforcement orders under Japan's Arbitration Act. Nonetheless, it is undeniable that a hearing date is very likely to be set

much later than expected at the discretion of the court due to the availability of the court or the respondent's attorney (in fact, the court clerk in charge of the case described herein first proposed a much later date). However, in light of the result that the enforcement order was obtained approximately fifty days in total after the initial filing date, it is fair to say that, in the case described herein, the enforcement order was rendered promptly in accordance with the purpose of the relevant provision of the Arbitration Act.

One should also keep in mind that, in filing for an enforcement order which involves numerous or complicated issues, the court may require "*Kotou Benron*", which would entail more formal proceedings. We are very interested in seeing, in the event of a controversial case, how carefully Japanese courts will handle these types of issues and how many days such proceedings will require.

Lastly, considering that the exhibits in the case

described herein consisted mostly of English documents and English was the only language spoken by both parties, it could have taken a considerable amount of time and money had we pursued a civil lawsuit (we later learned of a similar case involving the same respondent which was litigated in a Japanese court wherein the accuracy of translation was highly disputed, and the parties eventually reached a settlement to waive all claims and counterclaims after eleven court hearings). In contrast, by significantly reducing the time and cost by means of summary proceedings to obtain the arbitral award and promptly obtaining the enforcement order, we could proceed with negotiations to our advantage, and as a consequence, we believe that we were able to achieve an almost ideal resolution for our client. Consequently, we were able to enjoy the benefits of Japan's arbitration system and would like to conclude this report with the hope for increasing effective use of Japan's arbitration system and related enforcement procedures in the future.

SEVEN WAYS TO IRRITATE COUNSEL IN AN ARBITRATION

Gerald Paul McAlinn*

My good friend and colleague, Haig Oghigian, recently wrote a thought-provoking piece for the JCAA Newsletter entitled "Eight Ways to Irritate an Arbitrator."¹ It is recommended reading for all lawyers who practice regularly, or even occasionally, at the arbitration bar. Having served as an arbitrator in multiple arbitration cases (including a recently concluded one where I was honored to serve on a panel chaired by Haig), I thought it might be equally instructive to turn his harsh light on the other side of the table.

Before turning to my list, I recognize experienced arbitration lawyers may well remark that there are surely more than seven ways an arbitrator can irritate counsel. This point is duly noted for the record. In my judgment, however, it would not be prudent for many reasons to list more than seven in this essay.²

1. Come to the hearing unprepared

The golden rule of being prepared applies with equal or greater force to arbitrators. Parties to arbitration have paid substantial institutional fees for the right to have their dispute resolved by knowledgeable, experienced and informed professionals. Counsel will have spent many hours preparing their cases and formulating strategies with their clients. The arguments necessary to resolve matters fairly are often complex and sophisticated. They cannot be fully appreciated

or grasped "on the fly." The main function of the hearing is to focus the attention of the arbitrators on critical factual and legal points in dispute, not to waste time having to educate the arbitrators about things that already appear in the written submissions.

2. Carry on a debate directly with the other arbitrators

Some interchange among arbitrators during hearings is necessary and can be productive. It should go without saying, however, that arbitrators should not engage in prolonged repartee or idle chit chat among themselves while counsel is speaking or witnesses are testifying. Arbitrators are free to disagree among themselves and there is no obligation to reach unanimous decisions on rulings or even the final award. But, if the arbitrators are going to disagree as to a particular point and it is important to the forward movement of the proceedings, they should adjourn to a private room and discuss the issue internally. They should not debate openly among themselves during the proceedings, or otherwise disrupt counsel or witnesses. This is especially important for tribunals where two of the arbitrators are party nominated. Having accepted such an appointment, a party nominated arbitrator undertakes a duty of independence and is not a "second" advocate in the hearings for the party that nominated the arbitrator.

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¹ Haig Oghigian, "Eight Ways to Irritate an Arbitrator", 19 JCAA Newsletter 11 (November 2007)

² See, e.g., Way 6 "Come up with as many arguments as possible, regardless of their worth" *Id.* at 11.

3. Badger a witness or counsel

This irritant follows closely from what was said in the previous paragraph. Counsel has been engaged to present the case for his or her client and to expose the weaknesses in the case of the other side. The role of the arbitrators is to listen and to ask questions when there is a genuine need to clarify evidence or to understand legal arguments. At the risk of being overly blunt, arbitrators should come to the hearing to listen, not to talk. An arbitrator may, on occasion, feel a measure of disdain for the testimony of a witness, or the skill of counsel. Nevertheless, everyone involved in the process is entitled to be treated with dignity and respect at all times. Utterances from tribunal members such as “You must be joking” or “That is the most ridiculous thing I have ever heard” or “Are you seriously asking us to believe...” or “You cannot really be arguing that...” have no place in arbitral proceedings.

4. Contact counsel or a party about a case in progress

Believe it or not, it sometimes happens that a party nominated arbitrator will initiate contact with counsel for the party that nominated the arbitrator. Anecdotal stories abound from arbitrators who have experienced instances where tribunals have discussed various shortcomings during end of the day internal deliberations only to have counsel start the next day as if he or she were responding to a question or concern from the tribunal. Coincidence? Possibly, but the suspicion is, of course, that one of the arbitrators leaked information about the internal deliberations to counsel. The integrity of the arbitral process demands that arbitrators avoid all *ex parte* communications with the parties and counsel, which means in no uncertain terms *never* initiating it.

5. It's great to be the judge

Many lawyers have a secret longing to cap their distinguished careers with a judicial appointment. How wonderful to be addressed as “Your Honor” or as “My Lord” while presiding at trial and striding the halls of justice! But, even the most respected judges must submit to appellate review. Likewise, the calls of sports umpires and referees are subjected to the scrutiny of “instant replay.” Arbitrators, on the other hand, are granted broad and virtually unfettered discretion to find facts and apply the law as they see it. There is no meaningful appellate process, apart from enforcement challenges, to rein in egregious errors or abuses. The power to tell other lawyers what you

what them to do and by when can be heady stuff. A good arbitrator resists the dark side of this authority. A corollary to this point is what might be called the “King Solomon Syndrome.” Arbitrators with this syndrome have a tendency to pressure parties to “split the baby” in order to force a settlement. Amicable settlement of disputes is admirable when the parties want it, but the parties have bargained for, and are entitled to, a decision without undue pressure to compromise.

6. The smartest person in the room

Many an arbitrator has had to resist the urge to jump over the table to cross-examine a witness or to make an obviously effective argument when counsel seems to be bumbling. While the objective of the proceedings is to achieve a just result, it is for counsel to decide how best to present the case for the client. Counsel must be given leeway to draw out facts and to make arguments in accordance with a pre-determined strategy. It is not for the arbitrators to disrupt this process by assuming they are smarter than the lawyers and know the real issues in the case from the outset. It is wise to remember that counsel will have spent vastly more time understanding what happened between the principals and in researching the applicable law.

7. Show disrespect for the process

Arbitrators have a duty to maintain a judicial demeanor and to preserve the dignity of the arbitral proceedings at all times. Clients are usually present for all or most of the hearings. In court, they are easily reminded of the high purpose they are about by the trappings of the courtroom. Arbitral hearings are, in contrast, frequently conducted in conference rooms, which can make proceedings appear to the principals as being little different from business meetings or negotiations. Glancing through tour books, or pecking feverishly at one's Blackberry, during hearings is a sure way to leave the participants wondering why they chose arbitration in the first place.

In conclusion, arbitrators can greatly enhance the legitimacy of the arbitral process by ensuring the parties have a fair, unbiased, and equal chance to present their cases, and by giving counsel and witnesses their full attention. When arbitrators act in an honest, principled, even-handed and transparent manner, parties and their lawyers are more likely to accept even a losing result and to leave the process with a feeling that they got a fair shake.

[JCAA Activities]

1. Formulation of JCAA's Commercial Arbitration Rules in the Chinese Language

(<http://www.jcaa.or.jp/arbitration-j/pdf/pamph-c.pdf>)

JCAA's Commercial Arbitration Rules revised in 2004 were amended and put into effect on January 1, 2008 to meet with the current and global standards. Its Rules were prepared and maintained in Japanese and English, and recently the Chinese translation of the Rules was completed. Situations exist in the background to the translation of the Rules in Chinese such as that Chinese companies and Chinese attorneys do not have sufficient knowledge and information about JCAA's arbitration proceedings and practices. In order to improve these situations, the JCAA published JCAA's Commercial Arbitration Rules in the Chinese language, which would be useful for promoting JCAA's arbitration in China.

2. Launching Promotional Activities for JCAA's Arbitration in China

The JCAA launched promotional activities in many cities in China in order to expand and deepen the understanding of Japanese arbitration and JCAA's arbitration among Chinese attorneys, Chinese business persons and others. As the first step for the promotion, a seminar on the arbitration system in Japan and JCAA's arbitration was held on October 22 in Shanghai under the sponsorship of the Shanghai Bar Association and in cooperation with the JCAA. The speakers included Chinese attorney Mr. Chonghua

Yao, Co-effort Law Firm; Chinese attorney Mr. Fang Xin, Zhong Lun Law Firm; and Mr. Masaharu Onuki, Executive Director in charge of International Arbitration of JCAA. In addition, Mr. Onuki visited many Chinese law firms and arbitration institutions in Shanghai, Qingdao and Beijing, and exchanged various opinions concerning arbitration. In Beijing, the JCAA and King & Wood PRC Lawyers, a Chinese law firm, jointly organized a workshop on the current topics of international arbitration in Japan and China, and JCAA's arbitral practices drawing the attendance of both Japanese and Chinese business persons.

3. Participation in the International Arbitration Conferences in Mongolia and China

The JCAA was invited to the "Multilateral Arbitration Meeting 2008" in Mongolia from October 9-10 by the Mongolian National Arbitration Center at the Mongolian National Chamber of Commerce and Industry. Mr. Masaharu Onuki, as a representative of JCAA, participated in the Conference and made a presentation in English on the theme, "Contemporary Arbitration Trend and its Practice in Japan and UNCITRAL's Contribution to the Development of Arbitration." Mr. Onuki was also invited by the Beijing Arbitration Commission (BAC) to participate as a speaker at the "International Commercial Arbitration Forum Beijing 2008 – 50th Anniversary of New York Convention" on October 27 where he spoke about "Interaction between Arbitration and the Legal System in Japan."

Standard 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) in accordance with the Commercial Arbitration Rules of the Japan Commercial Arbitration Association.

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

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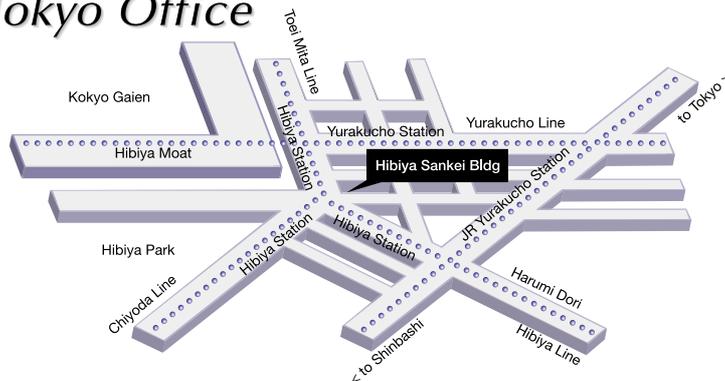
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