



## [Articles]

### *The importance of UNCITRAL texts on arbitration for Japan: current status and future perspectives*

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#### *UNCITRAL texts on arbitration*

The United Nations Commission on International Trade Law (UNCITRAL, or “the Commission”) is the core legal body of the United Nations system in the field of international trade law. It is mandated by the United Nations General Assembly to further the progressive harmonization and unification of the law of international trade.<sup>1</sup>

UNCITRAL pursues its mandate by both preparing uniform texts through a formal inter-governmental process and by actively promoting their adoption and uniform interpretation by means of its technical assistance activities. The UNCITRAL Secretariat assists the Commission in carrying out legislative-drafting and technical assistance activities. In early 2012, the first UNCITRAL Regional Centre was established for the Asia and Pacific region in order to give additional momentum to UNCITRAL activities, in particular, relating to technical assistance.

UNCITRAL has been particularly active in the field of commercial arbitration. In fact, UNCITRAL texts on arbitration are widely recognized as global standards. Those texts include the UNCITRAL Model Law on International Commercial Arbitration, first adopted in 1985 and revised in 2006, and the UNCITRAL Arbitration Rules, first adopted in 1976 and revised in 2010 and in 2013. Moreover, UNCITRAL is tasked with the administration of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the “New York Convention”), a treaty

whose adoption predates the establishment of the Commission. In addition, guidance documents are also available, such as the Recommendations to Assist Arbitral Institutions and Other Interested Bodies with regard to Arbitrations under the UNCITRAL Arbitration Rules and the UNCITRAL Notes on Organizing Arbitral Proceedings. Finally, it should not be forgotten that UNCITRAL has prepared legislative texts relating to commercial conciliation, too.

Japan adopted the New York Convention in 1961. Moreover, the Japanese Arbitration Law (Arbitration Law No.138 of 2003), is considered an enactment of the UNCITRAL Model Law on International Commercial Arbitration, as adopted in 1985.

#### *Recent developments*

The most recent developments in the field occurred at the 46<sup>th</sup> Commission session, held in Vienna in July 2013. On 11 July 2013, UNCITRAL adopted the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the “Transparency Rules”). While confidentiality may be of paramount importance in arbitral proceedings involving exclusively private parties, issues of public interest often arise in investor-State disputes and therefore the public may wish to obtain additional information on those disputes. Thus, the Transparency Rules aim at increasing transparency and accessibility to the public of these disputes by balancing the public interest in an arbitration involving a State and the interest of the parties in a fair and efficient resolution of their dispute.

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<sup>1</sup> United Nations General Assembly, Resolution 2205 (XXI) of 17 December 1966, “Establishment of the United Nations Commission on International Trade Law”.

The Transparency Rules will come into effect on 1 April 2014 and will apply only to treaty-based investor-State arbitration. Therefore, the Transparency Rules will not apply to arbitrations between private parties. More precisely, the Transparency Rules will apply to investor-State arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors concluded on or after 1 April 2014, unless the Parties to the treaty agree otherwise. The Transparency Rules will also apply to investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty concluded before 1 April 2014 when: (a) the parties to the arbitration agree to their application; or, (b) the Parties to the treaty have agreed after 1 April 2014 to their application.

It should be noted that the Transparency Rules are not limited to arbitrations conducted under the UNCITRAL Arbitration Rules, but may be used as well in investor-State arbitrations initiated under other rules or in ad hoc proceedings.

Moreover, a new paragraph has been added to the UNCITRAL Arbitration Rules (as revised in 2010) to establish a link between the UNCITRAL Arbitration Rules and the Transparency Rules. Accordingly, a new set of UNCITRAL Arbitration Rules, dated 2013, was adopted, which will also come into effect on 1 April 2014.

The Commission also decided at its 46<sup>th</sup> session to prepare a convention in relation to the application of the Transparency Rules to disputes arising under existing investment treaties.

### ***The uniform interpretation of UNCITRAL texts on arbitration***

In order to increase legal predictability in cross-border trade, the application of UNCITRAL texts on arbitration, including in Japan, should take into due account their supranational nature and the desirability to promote a uniform interpretation.

That goal, inherent in all uniform law texts, has found a dedicated provision with the adoption in 2006 of article 2A of the UNCITRAL Model Law on International Commercial Arbitration, mandating that, in the interpretation of that Model Law, regard is to be had to its international origin and to the need to promote

uniformity in its application and the observance of good faith. That provision repeats a formula well-known and widely used in other UNCITRAL texts, most famously in article 7, paragraph 1 of the United Nations Convention on Contracts for the International Sale of Goods, 1980 (CISG).

Some remarkable tools have recently been prepared in order to further the uniform interpretation of UNCITRAL texts on arbitration.

In 2012 UNCITRAL released the Digest of Case Law on the Model Law on International Commercial Arbitration (“the Digest”). The Digest provides an overview of the case law on each article of the UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006). The goal of the Digest is to identify common or prevailing trends as well as provisions giving rise to diverging interpretations, while, of course, fully respecting the independence of the adjudicating bodies. Thus, the Digest contains a synopsis of the relevant case law for each article, highlighting common views and reporting any divergent approach. A large amount of cases are referred to, including, where appropriate, via hyperlinks to the full text of the decision. Updates will be periodically released to reflect future developments. Like all UNCITRAL texts, the Digest is available at no cost in electronic form on the UNCITRAL website.<sup>2</sup>

Furthermore, also in 2012 an online platform was launched that provides freely accessible case law on the New York Convention.<sup>3</sup> This platform was conceived and is being developed as a cooperative effort between UNCITRAL and private partners. Cases are reported in the form of summaries illustrating the interpretation and application of specific provisions of the New York Convention. The full text of the original court decisions is also available. The electronic nature of this tool allows for the continuous update of the material in a highly searchable format.

Last, but not least, it should be noted that a guide on the New York Convention is under preparation for consideration of the Commission at its next session in 2014. The online platform and the guide are meant to be complementary tools as they both aim at promoting the uniform interpretation of the New York Convention through increased awareness of relevant case law, and therefore at contributing to limit the possibility of departures from that treaty’s spirit.

<sup>2</sup> At the address [http://www.uncitral.org/uncitral/en/case\\_law/digests/mal2012.html](http://www.uncitral.org/uncitral/en/case_law/digests/mal2012.html).

<sup>3</sup> The platform is available at the address [www.newyorkconvention1958.org](http://www.newyorkconvention1958.org).

## ***Suggestions for consideration by Japanese stakeholders***

The size of the Japanese economy and its intense interaction with foreign partners require a modern and predictable legal framework for domestic and cross-border trade. Arbitration must have a prominent place in that framework. It seems therefore useful to take stock of prevailing global and regional trends that may provide inputs for further consideration and possible legislative action.

Arbitration in East Asia is currently in a period of great activity and expansion. A number of arbitral centers vie for prominence, and new ones are being suggested or established. Legislators are involved as the arbitral community stresses the importance of modern legislation supportive of arbitral proceedings to attract new cases. As a result, the 2006 amendments to the UNCITRAL Model Law on International Commercial Arbitration have been quickly adopted in the region.<sup>4</sup> Similarly, arbitral centers have readily considered the 2010 revision of the UNCITRAL Arbitration Rules and often adopted their provisions for internal use.

Another emerging trend pertains to a specific formal issue. In fact, the New York Convention contains certain requirements demanding the written form for the recognition of arbitral awards and arbitration clauses. The matter is prominent given the prevailing and ubiquitous use of electronic communications in cross-border commercial relations. While certain jurisdictions may have a more flexible approach on the issue, others might adopt a more rigid position.<sup>5</sup>

Recognizing the importance of this issue, UNCITRAL adopted in 2006 a Recommendation regarding the Interpretation of Article II (2) and Article VII (1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). The Recommendation encourages States to apply article II (2) of the New York Convention “recognizing that the circumstances described therein are not exhaustive”. In addition, the Recommendation also encourages States to adopt the revised article 7 of the UNCITRAL Model Law on International Commercial Arbitration to establish a more favorable regime for the recognition and enforcement of arbitral awards than that provided under the New York Convention.

Moreover, in order to further address the matter, and bearing in mind the peculiar challenges posed by the amendment or integration of a treaty, especially when it has a very large number of parties as is the case of the New York Convention, UNCITRAL prepared the United Nations Convention on the Use of Electronic Communications in International Contracts (the “Electronic Communications Convention”), adopted by the United Nations General Assembly in 2005.

The Electronic Communications Convention deals as well with a number of issues not directly related to arbitration since its main goals include: (1) facilitating the use of electronic commerce in international trade, including in connection with the application of treaties concluded before widespread use of electronic communications (as is the case of the New York Convention); (2) reinforcing the level of uniformity in the enactment of the UNCITRAL Model Law on Electronic Commerce and of the UNCITRAL Model Law on Electronic Signatures; (3) updating some provisions of those model laws by complementing them with new rules arising from recent practice; and (4) providing modern and uniform core electronic commerce legislation to countries missing or having incomplete law in this area.

Despite the widespread and ubiquitous use of electronic communications, a general law on electronic transactions has not yet been enacted in Japan. The adoption of the Electronic Communications Convention could therefore also provide an opportunity to fill that gap.

The Electronic Communications Convention was signed by 18 States, including, in East Asia, the People’s Republic of China and the Republic of Korea. It entered into force on 1 March 2013, following adoption by three States, including Singapore, while the accession by Australia is forthcoming. Both Australia and Singapore are States that have also recently overhauled their arbitration laws in order to ensure that their legislation is fully supportive of arbitration.

## ***Commercial arbitration and the rule of law***

Finally, it seems appropriate to stress the potential role of Japan in promoting the adoption and uniform interpretation of UNCITRAL texts on arbitration

<sup>4</sup> Jurisdictions that have enacted the UNCITRAL Model Law on International Commercial Arbitration, as amended in 2006, include Australia, Brunei Darussalam, Hong Kong, and New Zealand.

<sup>5</sup> The first approach was adopted by a Japanese court with respect to the interpretation of the Arbitration Law, whose art. 13(2) demands that the arbitration agreement be in writing (NIPPONKOA Insurance Co. Ltd. v. Camellia Line Co. Ltd., Tokyo District Court, 26 March 2008, on the validity of an arbitration clause contained in a bill of lading).

abroad in the context of its work to promote the rule of law. International trade and investment are commonly recognized as engines of economic growth. Therefore, they may play a major role in fighting poverty, given that economic conditions heavily influence social development, which, in turn, has a direct impact on the prevention of internal and international conflicts. Therefore, trade law reform directly contributes to the broader United Nations agenda fostering global peace and stability through the promotion of good governance and the rule of law.

In the field of technical assistance to arbitration law reform, UNCITRAL's priority is to pursue the universal adoption of the New York Convention.<sup>6</sup> The wide consensus that the adoption of that convention is a basic condition for attracting foreign business whenever a State decides to open up its economy is a powerful argument in favor of that campaign. As the UNCITRAL Model Arbitration Law and the UNCITRAL Arbitration Rules are meant to complement and implement the New York Convention, it is not sur-

prising that both texts are often discussed in technical assistance programmes promoting the adoption and uniform interpretation of that Convention.

Of course, while the recipient State is the main beneficiary of such programmes, an increase in the level of predictability of commercial dispute resolution is of benefit to all parties involved, including commercial operators based in the donor country.

It is noteworthy that Japanese stakeholders are already active in providing technical assistance in this field, for instance in Myanmar, which was the latest State to become a party to the New York Convention.

In light of the above, it would be particularly desirable to consider further intensifying the cooperation between UNCITRAL and Japanese stakeholders in the field of technical assistance to trade law reform in the joint pursuit of common goals.

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## Arbitration under Bilateral Tax Conventions

Masaharu KOGA\*

### 1. Dispute resolution mechanism under bilateral tax conventions

It is believed that there are more than 3,000 bilateral tax conventions (hereinafter "Conventions") around the world. One of the main purposes of a Convention is to eliminate international judicial or economical double taxation, and to provide a means to resolve such double taxation if a dispute arises. For the latter, the Convention contains a special mechanism which enables the concerned tax authorities of both Contracting States to communicate with each other directly (i.e., without necessarily going through diplomatic channels) to settle international tax disputes between them. This mechanism is called a mutual agreement procedure ("MAP") and is widely used by taxpayers as the principal means to solve international double taxation<sup>1</sup> which is caused, for example, by

transfer pricing adjustments.

One of the unique aspects of the MAP is that, even though it is initiated by the taxpayer, and conducted to provide tax relief to a taxpayer, actual discussions regarding the relief are done exclusively between the Contracting States. The taxpayer has a right to request a MAP, and an option to reject the outcome, but it does not have a legal right to participate in the discussion process between the Contracting States.

In general, the MAP has been regarded as an effective and efficient mechanism to settle disputes under a Convention; however, it has also been criticized by taxpayers because:

- The MAP does not guarantee the resolution of double taxation cases. The Contracting States are obliged only to "endeavor" to solve the case.<sup>2</sup>

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<sup>6</sup> United Nations General Assembly, Resolution A/RES/62/65 of 6 December 2007, "Fiftieth anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958".

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<sup>1</sup> According to the OECD statistics, there were 3,838 ongoing MAP cases reported by member countries at the end of 2011. (<http://www.oecd.org/ctp/dispute/mapstatistics20062011.htm>).

<sup>2</sup> Paragraph 2 of Article 25 of the OECD Model Tax Convention.

- The MAP may take a very long time to reach an agreement.

As a result, in 2008 the Organization for Economic Co-operation and Development (“OECD”) modified its Model Tax Convention, which has been used as a model for Conventions concluded by the OECD members (including Japan), as well as many non-OECD economies, to add an arbitration clause (paragraph 5) to Article 25 (Mutual Agreement Procedure).

Before this modification, there had been two important developments. In 1989, an arbitration procedure was introduced in the Convention between the United States and Germany. This Convention is believed to be the first Convention to contain arbitration procedures in the MAP, and the US has adopted this arbitration model in some Conventions since then. Secondly, in 1990, the member countries of the European Union signed a multilateral tax convention, named the “EU Arbitration Convention”, which functions solely as a dispute resolution mechanism to solve international economic double taxation between the EU countries. There is no doubt that these Conventions had a great influence on the OECD Model.

Three years after the introduction of the arbitration in the OECD Model Tax Convention, the United Nations included an arbitration provision in its Model Double Taxation Convention between Developed and Developing Countries (in 2011), based on the OECD Model.

While there was no internationally accepted arbitration model to the Convention before the establishment of the OECD Model in 2008, interestingly, 70 bilateral Conventions signed by many countries before 2007 contain the word “arbitration”.<sup>3</sup> However, there is no available information on how and to what extent these pre-OECD Model arbitration clauses were utilized. Also, there is no indication that these clauses had any influence on the subsequent arbitration models. Therefore, this article focuses only on the abovementioned four arbitration models: the US Model, the EU Model, the OECD Model and the UN Model.

## 2. Function of arbitration in the Convention

Each arbitration model has unique characters but it

seems that these four major models share one common aspect, that is, the arbitration functions as a supplement to the existing MAP, rather than an alternative to it. Also, other than the arbitration clause, the MAP Article contained in the OECD Model is substantially identical with those adopted by the other models. Therefore, before discussing the functions of the arbitration in the Convention, it would be useful to see how the traditional MAP<sup>4</sup> works under the OECD Model by using a typical example.

Under the OECD Model Tax Convention (Article 9), a Contracting State may make an upward income adjustment (“transfer pricing adjustment”) to a resident enterprise on transactions with a related party in another Contracting State, to reflect a pricing which would have been adopted if they were unrelated (“Arm’s Length Price”).

For example, where a Japanese company (X) sells computers to a related party (Y) in country F at JPY 30,000/unit, and also sells the same products to an unrelated party at JPY 50,000/unit with similar contractual terms and conditions, then the Japanese tax authority may make transfer pricing adjustments by replacing the pricing of the related party transactions with JPY 50,000/unit, which will increase the taxable profit of X accordingly. In country F, the related party Y has only deducted JPY 30,000/unit from its taxable income, and as a result, there is economic double taxation of JPY 20,000/unit between X and Y.

Under such a situation, pursuant to the Convention between Japan and F, X can request a MAP to the authorized person in the tax authority (the “Competent Authority”, hereinafter called the “CA”) of its country of residence, i.e., Japan. Then, if the case appears to be justified for the Japanese CA, he or she must “endeavor” to relieve the double taxation through consultation with the CA of F (paragraphs 1 and 2 of Article 25 of the OECD Model).

The two CAs communicate directly for the purpose of reaching an agreement for the elimination of the double taxation (paragraph 4 of Article 25). Once they reach an agreement on the Arm’s Length Price of the related party transaction, for example at JPY 40,000/unit, the Japanese tax authority must decrease the transfer pricing adjustment by JPY 10,000/unit, i.e., from JPY 50,000 to 40,000 and reduce the taxable profit of X accordingly. Also, the tax authority of

<sup>3</sup> Please note, this is a search result obtained when searching for the keyword “arbitration” in a tax treaty database (such as the IBFD’s tax treaty database).

<sup>4</sup> It should be noted that under the OECD Model Tax Convention, three types of MAP are available. This article only focuses on MAPs initiated by a taxpayer’s request under paragraph 1 of Article 25, because it is the most relevant to the arbitration.



F must make corresponding adjustment by allowing Y to increase its deduction (i.e., decrease its taxable profit) with regard to the related party transactions to reflect the Arm's Length Price (paragraph 2 of Article 9). While as a matter of good practice, most CAs endeavor to reach an agreement within two years,<sup>5</sup> it is not a legal requirement and there is a possibility that the CAs cannot reach an agreement to relieve double taxation if arbitration is not available.<sup>6</sup> In other words, without arbitration, the MAP only obliges the CA to discuss the case with the other CA, but not to reach an agreement.

As noted above, the four major arbitration models have one very important aspect in common, which is that the arbitration is a supplement and not an alternative to the MAP. So in this case, even if the Convention between Japan and F contains an arbitration clause, the taxpayer cannot directly bring the case to the arbitration process without going through the MAP process described above. The arbitration in the Convention is intended to relieve the shortcomings of the traditional MAP that it does not guarantee the resolution of the case. The arbitration is not intended to replace the MAP or create an alternative dispute resolution mechanism to the MAP.

Suppose, in the example above, the Convention between Japan and F contains the OECD Model arbitration clause. The taxpayer can request arbitration if the CAs cannot reach an agreement within two years, and if the case was not already decided by an administrative tribunal or court of either Contracting States. Unless the taxpayer does not accept the agreement to implement the arbitration decision, the decision is final and binding to both Contracting States (paragraph 5 of Article 25). The arbitration decision by independent arbitrator(s) will be generally made within 18 months after the taxpayer's request for arbitration, and will be implemented within 6 months after the decision.<sup>7</sup>

The OECD Model above clearly shows the supplementary nature of the arbitration both functionally

and procedurally. It provides certainty to the taxpayer that the case is to be solved under the MAP within a certain period of time. The arbitration process starts only if the discussion between the CAs has not resulted in agreement, and the arbitration decision is accepted and implemented as an agreement between the CAs. In this way, the arbitration in the Convention works to enhance the efficiency and effectiveness of the MAP as a dispute resolution procedure. Therefore, it has been often pointed out that the main purpose of having arbitration in the Convention is not to solve the case through arbitration, but to give incentives to the CAs to solve the case on their own, before it goes to arbitration. In fact, it is believed that around the world, only a few cases have been actually solved through the arbitration process since 1989.<sup>8</sup> It seems this "the best arbitration is no arbitration"<sup>9</sup> philosophy has been maintained by the tax authorities so far.

### 3. Comparison of the models

This section compares the main characteristics of four arbitration models. The "OECD Model" in this article means the arbitration procedure provided for in paragraph 5 of Article 25 of the OECD Model Tax Convention and also the model administrative arrangement provided for in the form of "Sample Mutual Agreement" as the annex to the Commentary to Article 25.<sup>10</sup> Similarly, the UN Model means paragraph 5 of Article 25 (alternative B) of the UN Model Tax Convention as well as the reproduction of the OECD "Sample Mutual Agreement" included in its commentary. The EU Model represents the arbitration procedure contained in the EU Arbitration Convention. The arbitration procedures adopted in the US Conventions are very similar but not identical to each other; therefore, the following comparison is made based on the arbitration in the Convention between the US and Canada.

#### 1) Initiative to start arbitration procedure

Under the OECD Model and the EU Model, the CAs

<sup>5</sup> See paragraph 3.9. of "Manual on Effective Mutual Agreement Procedures (MEMAP)" (February 2007, OECD).

<sup>6</sup> Of course even if the CAs have failed to reach an agreement, the taxpayer has a legal right to bring the case to an appeal, administrative tribunal or court process under the domestic laws of the Contracting State. The taxpayer can request a MAP irrespective of the remedies provided by domestic laws (paragraph 1 of Article of 25).

<sup>7</sup> Calculation based on "Sample Mutual Agreement on Arbitration" provided in Annex to the Commentary on Article 25.

<sup>8</sup> In the article "2008 OECD Model: the New Arbitration Provision" (Bulletin for International Taxation, May/June 2009 (IBFD)), Professor Hugh Ault and Mr. Jacques Sasseville, who played a key role as the secretariat of the OECD when it introduced arbitration in the OECD Model Tax Convention, noted that only two arbitration decisions have been produced over 13 years under the EU Arbitration Convention.

<sup>9</sup> This phrase was said to be the expression from one of the participants to the OECD's working group which drafted the arbitration clause (Tax Note International, Feb 12, 2007).

<sup>10</sup> This "Sample Mutual Agreement on Arbitration" is provided as a basis for the implementing procedure of arbitration. This is not binding and CAs are free to modify, add or delete any provisions of this sample. Therefore, the actual Arbitration Arrangement may differ from what is provided here. For example, see Implementing Arrangement between the CAs of Japan and the Netherlands (<http://www.nta.go.jp/sonota/kokusai/kokusai-sonota/1009/01.pdf>).

do not have the option of not going to arbitration if certain conditions are satisfied. On the other hand, under the UN Model, the case will only go to the arbitration if either CA requests this. Under the US Model, basically all cases that satisfy certain requirements go to arbitration, but the CAs may decide otherwise, that is, arbitration is not available if the CAs agree that a particular case is not suitable for arbitration.

## 2) Scope

As for the type of cases, the OECD Model and the UN Model cover all the double taxation cases (including economic double taxation, judicial double taxation and other forms of taxation not in accordance with the treaty provisions) realized by the application of any Article of the Convention. The scope of the EU arbitration convention is narrower and limited to transfer pricing cases and attribution of profits to a branch office of a foreign enterprise.

The scope of the US Model can be said to be broader than others because it covers not only cases in which double taxation is realized, but also cases requested to avoid the risk of double taxation in the future (i.e., MAPs on Advanced Pricing Arrangement).<sup>11</sup>

## 3) Minimum time period for the case to go to arbitration

As noted above, most CAs try to solve each case within two years from the start of the MAP. Probably reflecting this practice, the arbitration models (excluding the UN Model) set the time period of two years for each case to be submitted to arbitration. Under the OECD Model, the concerned taxpayer can request arbitration after this two year period, and can do so anytime after that as long as the case is under consideration by the CAs. Rather, under the EU Model, it seems that the case goes to the arbitration process automatically if the CAs have failed to solve the case within this period. Under the US Model, the arbitration process also begins automatically after a two year period if other conditions<sup>12</sup> are met.

The UN Model adopts “three years” instead of two

years.

## 4) Number of arbitrators

Under the US Model, each CA selects one arbitrator, then the two selected arbitrators select a third arbitrator (chair). This process is the same with the OECD Model and the UN Model, however, both of these models permits “streamlined” arbitration<sup>13</sup> where an arbitration decision is made by one arbitrator.

On the other hand, under the EU Model, the number of arbitrators would generally be five, because the arbitration panel (“advisory commission”) consists of two representatives of each CA, an even number of “independent persons of standing” and a chair. Each EU member country nominates up to five “independent persons of standing” to create a list of candidates for arbitrators.<sup>14</sup>

## 5) Decision-making by the arbitration panel

The US Model adopts “baseball arbitration” where an arbitration decision by the arbitration panel is limited only to choosing one of the proposed solutions provided by the CAs. Furthermore, the panel is not allowed to explain to the CAs how and why the panel has reached a particular decision.

Under the other models, an arbitration decision is not restricted to proposed solutions from the CAs and the panel can make its own decision. However, baseball arbitration is not excluded in either model.<sup>15</sup>

## 6) Effect of the arbitration decision

In all the models, dispute settlement is ensured by arbitration. Except for the EU Model, the arbitration decision is final and binding to the Contracting States if the concerned taxpayer accepts the decision. Under the EU Arbitration Convention, the CAs can agree to a different resolution within six months of the arbitration decision being made.

In either model, the arbitration procedure will be terminated if the CAs have reached an agreement before the arbitration decision is provided. Again this

<sup>11</sup> The mutual agreement procedure can be used as a “dispute prevention” measure. In Japan, such MAPs (MAP for Advanced Pricing Arrangement: MAP APA) account for more than 80% of entire MAP cases. For further information on MAP APA, see for example: [http://www.nta.go.jp/foreign\\_language/MAP-Report/2012.pdf](http://www.nta.go.jp/foreign_language/MAP-Report/2012.pdf)

<sup>12</sup> “Conditions” includes the submission of a statement by the taxpayer and his/her representative whereby they agree to keep all information related to the arbitration confidential. Therefore, a case will not go to arbitration against the taxpayer’s wishes.

<sup>13</sup> See paragraph 6 of the OECD Sample Mutual Agreement Procedure.

<sup>14</sup> This list is available at the European Commission’s Webpage (<http://ec.europa.eu/>).

<sup>15</sup> For example, baseball type decision-making is adopted in the abovementioned “streamlined” arbitration procedure.

reflects the supplementary nature of the arbitration under the Convention as it is part of the MAP and not the independent dispute resolution mechanism.

#### **4. Situation in Japan**

Japan introduced arbitration procedures for the first time in its Conventions with the Netherlands and Hong Kong, both of which were signed in 2010. These first two Conventions, as well as the subsequent two Conventions with Portugal (2011) and New Zealand (2012) adopted the OECD Model. The arbitration in the renewed Convention with the US signed in 2013 is very unique, and has features of both the traditional US Model and the OECD Model.<sup>16</sup>

As the arbitration under these Conventions is available only if the CAs have not reached an agreement within two years from the start of the MAP, it is currently not yet possible for the taxpayers to request arbitration. Furthermore, the CA of Japan will continue to try to solve MAP cases by themselves before the case goes into arbitration.

The number of Conventions which contain arbitration clauses would continue to increase with the OECD member countries, and hopefully with non-OECD economies as well. However, as long as the CAs around the world maintain the current policy of “the best arbitration is no arbitration”, it is likely that arbitration will continue to function primarily as a measure to promote more timely resolution between the CAs, rather than as a means to solve cases.

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## **[Report] Report on APRAG Beijing 2013**

### **Introduction**

The Asia Pacific Regional Arbitration Group (APRAG) held its biannual conference from June 27<sup>th</sup> to the 29<sup>th</sup> in Beijing, China. APRAG 2013 was sponsored by The China International Economic and Trade Arbitration Commission (CIETAC) under the general theme of “International Arbitration in Asia-Pacific Region in the Next Ten Years--Opportunities and Challenges.” A small contingent from Japan was in attendance, including the President of the JCAA. The next APRAG conference will be held in Melbourne in 2014 to commemorate the 10<sup>th</sup> anniversary of APRAG. The host for APRAG Melbourne 2014 will be the Australian Centre for International Commercial Arbitration (ACIC).

Opening remarks were delivered by many luminaries in the field of international commercial dispute resolution with the keynote address being delivered by H. E. Mr. Zhou Qiang, Chief Justice, President of the Supreme People’s Court of the People’s Republic of China. Chief Justice Zhou noted the growing importance of international commercial arbitration in China, as well as the overwhelming support Chinese courts now give to arbitration. It was also reported that CIETAC, the Hong Kong International Arbitration Centre (HKIAC), and the Singapore International

### **Gerald Paul McAlinn\***

Arbitration Centre (SIAC) have all experienced substantial rises in their caseloads over the past year. Both CIETAC and HKIAC are up 40%, while SIAC saw its volume of cases increase by 25%. This reflects the growing economic strength of the Asia-Pacific region and has led to predictions of a “Golden Age for Arbitration.”

Following a warm welcome and stimulating opening remarks, the conference was organized into eight working sessions covering the following topics: Session 1 New Trends and Innovations in International Arbitration Rules: an Update; Session 2 Emergency Arbitration and Interim Measures; Session 3 Managing Arbitration Proceedings Offshore; Session 4 Development of Mediation: Challenging Litigation and Arbitration and Mediation; Session 5 Maritime Arbitration in the Region; Session 6 Enforcement of Arbitral Awards in the Region; Session 7 Investment Treaty Arbitration; and Session 8 Cultural Differences and Predictions for Arbitration in the Next Ten Years.

### **Session 1: New Trends and Innovations in Arbitration Rules**

In this session, presentations were made by officers from CIETAC, HKIAC, the Korean Commercial Arbitration Board (KCAB), SIAC, the ICC International

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<sup>16</sup> The Conventions with Portugal, New Zealand and the US are not yet in force as of 31 May 2013.

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Court of Arbitration (ICC) Asia Office in Hong Kong, and the Thailand Arbitration Institute (TAI). All of the speakers noted the growing effort to control costs and to ensure the timely resolution of disputes. For example, the HKIAC Administered Arbitration Rules allow the parties a choice between paying arbitrators based either on the amount in dispute or on an hourly basis. The 2013 HKIAC Rules have introduced a cap on the hourly rate unless the parties to the dispute agree differently.

As another example of innovation, the representative from the KCAB reported on the opening of the Seoul International Dispute Resolution Center on May 27, 2013. The Center is supported by Seoul City, the Korean Bar Association and the KCAB, and its state of the art facilities are located within Seoul City Hall. It is modeled on Maxwell Chambers in SIAC, and like Maxwell Chambers, the Center houses the offices of a number of international arbitral institutes and is available to host HKIAC, SIAC, London Court of International Arbitration (LCIA), the ICC, the International Centre for Dispute Resolution (ICDR) and KCAB arbitrations. Clearly, the KCAB intends to position the Center as a major competitor to Singapore and Hong Kong, especially for North Asia including disputes between Japanese and Chinese parties.

Other major topics in the area of trends and innovations involve dealing with multiple parties and multiple contracts, the appointment of emergency arbitrators, and interim measures of relief. These issues are at the center of rules development at leading arbitral institutions around the world. Readers of this Newsletter will be aware that the proposed Commercial Arbitration Rules of the JCAA submitted for public comment in early August and due for enactment from January 1, 2014, contain provisions on all of these cutting edge topics.

### ***Session 2: Emergency Arbitration and Interim Measures***

The second session focused on one of the hottest topics in commercial arbitration. A lively debate ensued over whether emergency arbitrators are really necessary and how courts (and the parties) will react to any interim measures actually imposed on a party. Another issue relates to whether an emergency arbitrator can make an *ex parte* order. The consensus is that the appointment of emergency arbitrators is still in the developmental stage and many aspects still need to be resolved. However, having provisions for the appointment of an emergency arbitrator with the power to order interim measures, such as conserva-

tion, prior to the empanelment of the arbitral tribunal is beneficial to parties facing urgent situations.

It was noted that there have been a relatively few instances of appointment, although increasingly the rules of many arbitral institutions provide for it. For example, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) had four cases in 2010 when the emergency arbitrator provisions were first introduced, two in 2011, two in 2012, and one in 2013 as of April 30, 2013. The ICDR appointed an emergency arbitrator in South Korea recently.

It was noted that Article 29.2 of the ICC Rules obligates the parties to comply with any order made by an emergency arbitrator, while Article 29.3 expressly provides that any order by an emergency arbitrator will not bind the arbitral tribunal once it is constituted. Finally, Article 29.4 authorizes the arbitral tribunal to take into consideration compliance or non-compliance with an emergency arbitrator's order when deciding costs and damages.

### ***Session 3: Managing Arbitration Proceedings Off-shore***

The most stimulating issues in this session concerned the appointment of party-nominated arbitrators and dealing with cultural expectations and the differences in legal systems. The noted arbitration expert, Professor Jan Paulsson, has called for the appointment of all arbitrators by arbitral institutions instead of by the parties. His seminal paper "Moral Hazard in International Dispute Resolution" delivered on April 29, 2010 is available at [http://www.arbitration-icca.org/media/0/12773749999020/paulsson\\_moral\\_hazard.pdf](http://www.arbitration-icca.org/media/0/12773749999020/paulsson_moral_hazard.pdf). He advances many reasons for his conclusion that unilateral appointment should be eliminated, chief among them being that a party-nominated almost invariably feels compelled to advocate for the party making the nomination. Professor Paulsson cites a study showing that 95% of the dissenting awards written are by the party-nominated arbitrator of the losing party.

Contrasted with the view of Professor Paulsson are the findings of the 2012 Queen Mary, White & Case International Arbitration Survey revealing that 76% of respondents were opposed to ending the unilateral appointment of arbitrators by the parties. The reasons given for this preference are that it gives the parties some measure of control over the proceedings and ensures that cultural and other factors will be duly considered in the deliberations of the arbitral tribunal.

Another criticism of arbitral institution appointment of all three arbitrators is that it could lead to cronyism or cultural bias. Cronyism might exist, for example, in the form of a non-transparent short list of arbitrators who are regularly tapped by the arbitral institution. The situation would be even worse if an institution were to regularly appoint nationals from its own country.

#### **Session 4: Development of Mediation**

Mediation is rapidly rising as an alternative to arbitration, in much the same way that arbitration has grown to challenge litigation. As arbitration becomes increasingly complex, time-consuming and expensive, Med-Arb becomes more attractive. One distinguished speaker went so far as to observe that arbitration has failed to learn from many of the problems that have made international litigation unattractive to international commercial parties.

Arguments were advanced that mediation is actually a large part of the social fabric in many cultures in the Asia-Pacific region. This should result in its being adopted readily by parties. Mediation enjoys many of the same benefits as arbitration, such as party autonomy and confidentiality, minus some of the negative aspects such as being bound by the award of an arbitral tribunal that may have failed to fully appreciate all of the nuances of the relationship between the parties. Moreover, if the primary interest of the parties is to find a solution to a problem that will allow them to move forward in an otherwise productive business relationship then mediation is likely to be less contentious and damaging to their long-term interests.

#### **Session 5: Maritime Arbitration**

The Asia-Pacific region remains heavily reliant on sea trade. Shipping disputes in all of their many forms (from shipbuilding to chartering to insurance) share common characteristics in the same way as construction disputes requiring a strong measure of industry specific technical, legal and practice knowledge. The practicing maritime bar tends to be specialized for this reason. Reflecting this reality, many countries have separate arbitral institutions dedicated to resolving maritime disputes with their own arbitration rules. The Tokyo Maritime Arbitration and Commission of The Japan Shipping Exchange, Inc. (TOMAC) is an example of such an institution existing along side the JCAA. Other examples are The Australian Maritime and Transport Arbitration Centre (AMTAC). The presentations highlighted various trends in arbitration rules throughout the region.

#### **Session 6: Enforcement of Arbitral Awards**

The panel for this section did a review of leading jurisdictions from the perspective of support for arbitration and, in particular, the recognition and enforcement of arbitral awards by local courts. The jurisdictions represented on the panel included the PRC, Hong Kong, Taiwan, South Korea, and Japan. All reported a generally favorable response from domestic courts to the recognition and enforcement of arbitral awards. Outlying cases, such as the recent case of *X Co. v. Y Inc.*, 2128 Hanrei Jiho 58, Tokyo District Court (13 June 2011), *see also*, Nakamura, Tatsuya, "The Recent Japanese Court Decisions on Arbitration", 28 JCAA Newsletter September 2012, at p. 7-9, were reported for most of the jurisdictions but there is no indication that domestic courts throughout the region are softening in their support for international commercial arbitration.

#### **Session 7: Investment Treaty Arbitration**

Panel members for this session uniformly noted the proliferation of Bilateral Investment Treaties (BITs), Multilateral Investment Treaties (MITs) and Free Trade Agreements (FTAs) containing arbitration dispute resolution mechanisms. The Secretary-General of the United Nations Commission on International Trade Law (UNCITRAL) discussed the work UNCITRAL is doing to enhance transparency in treaty-based Investor-State arbitration, including the preparation of a uniform legal standard. Other speakers noted that, contrary to a common perception, states do not overwhelmingly lose Investor-State arbitration cases. Finally, it was reported that Australia has announced a policy shift and will now reject Investor-State dispute settlement provisions in future BITs, MITs and FTAs. This shift is attributed to public policy concerns surrounding the "greater legal rights conferred on foreign businesses than those available to domestic businesses" and the impact on the power to make domestic laws.

#### **Session 8: Cultural Differences and Predictions**

The results of the International Arbitration Survey 2013: Corporates choices in International Arbitration (Queen Mary Survey 2013) were discussed. Significant findings include that 52% of survey respondents prefer arbitration while 28% favor court litigation. The suitability of arbitration for resolving international commercial disputes remains high with 73% of survey respondents in agreement with this proposition. While it cannot be denied that there are cultural differences (social, business, legal, dispute resolution,

etc.) between countries, and between civil and common law traditions, the clear trend has been to harmonize international commercial arbitration. Arbitration is, in fact, the most effective manner of taking purely domestic values and practices out of the equation so that international transactions can be conducted, and disputes resolved, without either party enjoying an overwhelming “home court” advantage.

### **Conclusion**

As we are now living in the “Pacific Century”, it seems safe to conclude that international commercial disputes will inevitably increase as import-export trade grows, bilateral and multilateral trade agreement proliferate, foreign direct investment increases, and regional economies expand. It is equally apparent that the major regional arbitration centers are in competition to become the venue of choice for prac-

tioners and parties alike. The establishment of Maxwell Chambers in Singapore and the Seoul International Dispute Resolution Center are evidence enough for this proposition. The English have long recognized this in the promotion of English law and dispute resolution in London as a reliable solution to concerns about local bias and unpredictability. The battle for preeminence has widespread implications for every country in the Asia-Pacific region, including the long-term fate of local lawyers. It would be a pity if Japan, the third largest economy in the world, were to remain on the sidelines only to see CIETAC, HKIAC, and SIAC grow in importance as centers for international commercial dispute resolution. The Government of Japan, the JCAA, industry, and the Japanese and international arbitration community in residence all have a vital interest in making sure Japan does not lose this competition by default.

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## ***[JCAA Activities]***

### ***Working on Amendments to JCAA Arbitration Rules***

The JCAA is now working on amendments to the Commercial Arbitration Rules (the “Rules”). The Rules were substantially amended by the JCAA at the time of the enactment of the Arbitration Act, Act No. 138 of 2003, effective from April 1, 2004. Thereafter, minor amendments were made in 2006 and 2008. Nearly 10 years have passed since the 2004 amendments and, during this period of time, the JCAA has identified certain points to be further improved in the Rules from the viewpoint of JCAA practice, as well as those to be reviewed from the perspective of the expeditious and proper conduct of arbitral proceedings. The JCAA has determined that it should review and amend the Rules in light of recent trends in the amendment of arbitration rules, such as the 2010 Amendments to the UNCITRAL Arbitration Rules, and those of other arbitral institutions.

The JCAA established the Committee on July 17, 2012. The Committee consists of the following prominent experts, assisted by the Secretariat of the JCAA.

Chairperson:

Prof. Masato Dogauchi (Waseda University)

Members(Alphabetical):

Prof. Yoshihisa Hayakawa (Rikkyo University)

Kazuyuki Ichiba, Esq. (Nishimura & Asahi)

Naoki Idei, Esq. (Kojima Law Offices)

Prof. Shusuke Kakiuchi (Tokyo University)

Shinji Kusakabe, Esq. (Anderson, Mori & Tomotsune)

Prof. Gerald Paul McAlinn (Keio University)

Masatoshi Ohara, Esq. (Kikkawa Law Offices)

Hiroyuki Tezuka, Esq. (Nishimura & Asahi)

The Committee has extensively considered the amendment of the Rules so far, which includes in particular the possibility of handling multiple claims in a single arbitration, interim measures by an emergency arbitrator before the establishment of the arbitral tribunal and combining arbitration with the mediation in accordance with the JCAA International Commercial Mediation Rules.

This summer, the JCAA called for public comments on the draft Amendments to the Rules and received many comments from legal experts, academics and businesspersons. The Committee is currently in the process of considering the comments received to refine the Amendments and will finalize the Proposed Amendments to the Rules by November, 2013. After a review by the Advisory Committee of Commercial Arbitration, the Amendments to the Rules will be submitted for approval by the Board of Directors in early December, 2013. The amended Rules are expected to come into force from January 1, 2014 and will apply to arbitration cases filed after the date when the amended Rules become effective.

## 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: [arbitration@jcaa.or.jp](mailto:arbitration@jcaa.or.jp)

## The Japan Commercial Arbitration Association

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

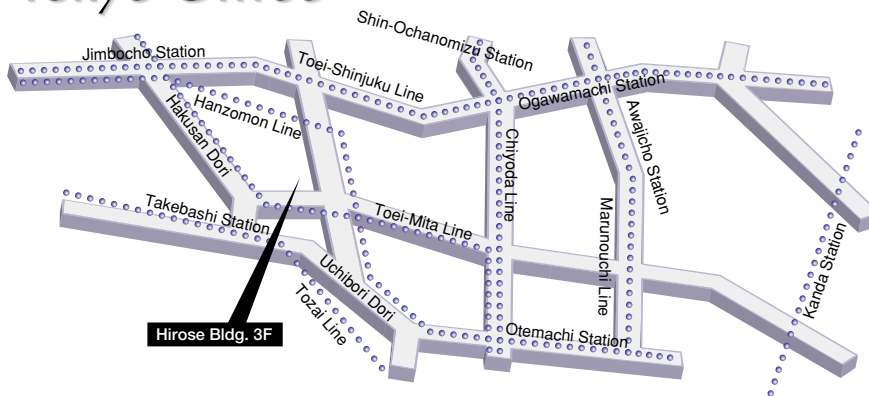
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