A. Introduction

As is the case elsewhere in the world, internal investigations of corporate crises recently have been attracting attention in Japan. Internal investigations inevitably lead to the creation of documents, many of which may recount facts that do not paint the investigating company in a positive light. In conducting these investigations, it is therefore quite natural to wonder whether and how documents generated during such investigations might end up being used beyond their initial intended purposes. Their compelled disclosure during a dispute resolution proceeding, such as in international arbitration, is one example of a potential unintended consequence for the investigating company. A party to an arbitration confronting a company that has conducted an internal investigation concerning a disputed fact would likely be eager to see the resulting paper trails. Internal investigations are meant to determine whether there has been misconduct; thus, by its very nature, an investigation can leave behind a treasure trove of information for a counterparty in a dispute.

Can the results of an internal investigation be disclosed in this way? This article will explore the situation with respect to the documents produced during an internal investigation by a Japanese company. Suppose, for example, that you are representing a party in an international arbitration and the counterparty is a Japanese company. If you are qualified in a jurisdiction other than Japan, you would probably be asking the following questions:

(i) How might I know whether a Japanese company has conducted an internal investigation?
(ii) What types of documents are created or gathered during a typical Japanese internal investigation?
(iii) Would these documents be privileged and thus be barred from production?

The following sections address these questions.

B. Has the Company Conducted an Internal Investigation?

Learning whether an investigation has been conducted is the first step in establishing the existence of documents, which, in international arbitration, is usually a threshold requirement in requesting their production.1

As in many other jurisdictions, if the Japanese counterparty is a listed company, disclosure of the fact that an internal investigation was conducted may be required by a stock exchange. For example, the Tokyo Stock Exchange Securities Listing Regulations provide that “[d]amage arising from a disaster or damage which occurs in the course of business execution” must be disclosed in a timely manner.2 Pursuant to this rule, a crisis that carries a risk that a company will incur certain amount of damages must be disclosed, and whether an internal investigation has been undertaken to address the dispute will usually be explicitly stated in, or can easily be inferred from, the disclosure statement.

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1 For example, see Article 3(c)(ii) of the IBA Rules on the Taking of Evidence in International Arbitration.
Regardless of the rules of the stock exchange on which a Japanese company is listed, it may voluntarily disclose crises to the public to mitigate potential damage to its reputation. Thus, announcements posted on the company’s Japanese website should be checked. A company may also voluntarily disclose an investigation report to the public in accordance with the Japanese investigatory practices described below.

If the crisis involves a government investigation, the government will publicly announce any sanctions it imposes on the Japanese company. Such external investigations are also usually accompanied by parallel internal company investigations.

Another obvious source is reporting by the press. If a corporate crisis has been covered by the media, the company is likely to have conducted an internal investigation to address the problem, as well as to enable it to explain to its stakeholders (such as shareholders, employees and customers) the reasons for the crisis and measures they have taken in response.

Moreover, information regarding corporate crises is sometimes anonymously posted on internet bulletin boards or revealed on Twitter or other social media. The most famous anonymous internet bulletin board in Japan is known as “2 Channel.” Thus, it is also wise to conduct internet searches in Japanese to find out whether any information on corporate crises has been revealed that might have moved a company to conduct an internal investigation.

C. What Documents Are Expected to Be Produced or Identified in a Japanese-Style Internal Investigation?

To request the production of documents in international arbitration, it is usually required to provide a description of the documents. Thus, a familiarity with the types of documents typically produced or identified in internal investigations by Japanese companies is necessary. The answer to this question is not a surprising one, even for attorneys practicing outside Japan. The same types of documents that you would be expecting to see elsewhere in the world would be produced or identified: investigation reports, written interview reports and collected documents, including emails and personal memoranda.

Interestingly, the Japan Federation of Bar Associations has issued the Independent Investigation Committee Guidelines for Corporate Misconduct, which lay out an “ideal” investigation. The guidelines recommend the following course of action in order to establish the facts underlying a crisis: (i) interview relevant personnel; (ii) analyze the relevant documents, including electronic records; (iii) conduct a survey with the employees regarding the company’s attitude towards corporate governance and compliance; and (iv) establish a whistleblower hotline. If an investigating Japanese company has followed these guidelines, there should exist reports on the executive and staff member interviews, internal approval documents regarding the relevant company activities, emails and personal memoranda relevant to the misconduct, results of surveys, records of reports made to the whistleblower hotline, and so on.

Although this may surprise common law lawyers from the perspective of preserving privilege, the guidelines further provide that the investigation committee should draft an investigation report which should then be disclosed to the stakeholders.

D. Will These Documents Be Privileged?

Investigation reports and records of interviews of the relevant employees and executives are likely to be of the greatest use in dispute-resolution proceedings. Facts stated in investigation reports or interview records could lead to other evidence which may support the requesting party’s case. However, non-Japan-qualified lawyers, especially common law lawyers, would probably expect, or at least consider it possible, that such documents are privileged. For instance, U.S. qualified lawyers will often take the position that expect an investigation report or interview memorandum generated by counsel or under counsel’s supervision is protected by either attorney-client privilege where confidentiality has been maintained and report was generated for purposes of giving legal advice or work product doctrine where they are prepared in anticipation of litigation or other proceedings.

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3 http://www.2ch.net/
4 See, for example, Article 3.1(a) of the IBA Rules on the Taking of Evidence in International Arbitration.
6 There is some conflicting case law as to whether documents gathered for or created by an internal investigation enjoy either attorney-client privilege or work product protection. For instance, on January 21, 2015, in Wultz v. Bank of China, 2015 WL 362667 (S.D.N.Y.), the court held that attorney-client privilege did not protect from disclosure documents gathered in the course of an internal investigation where the party resisting disclosure could not demonstrate that (i) the collection of the information went beyond the non-lawyer collector’s mere expectation to later provide the information to an attorney, and (ii) that the documents were produced at the discretion of an attorney in order to allow the attorney to provide legal advice.
7 The work product doctrine is only a qualified privilege, however, and a U.S. court may order disclosure if a party shows a substantial need and inability to obtain an equivalent from another source without undue hardship.
However, this expectation is likely to be incorrect with regard to internal investigation documents prepared by Japanese companies. Understanding why requires an analysis of both (a) the applicable privilege rules for documents created by Japanese companies involved in international arbitration, and (b) the reasons for the relative lack of rigor on the part of Japanese companies regarding the application of privilege to their documents.

(a) What is the applicable privilege rules?

To determine whether internal investigation documents are privileged, we must first analyze the applicable privilege rules.

Finding the applicable legal privilege rules may not be so difficult in domestic courts. However, as is widely recognized among international arbitration practitioners, determining legal privilege is not a simple matter in international arbitration. This field does not have a default set of substantive privilege rules or choice of law rules - the *lex arbitri* usually does not stipulate privilege rules, and the arbitration rules agreed upon between the parties (likely the rules of one of the major arbitral institutions) generally will also not include privilege rules. Even if the parties agree to use the IBA Rules as guidance, those rules merely provide that privilege will be determined "under the legal or ethical rules determined by the Arbitral Tribunal to be applicable." Although most arbitral tribunals would be highly likely to recognize evidentiary privilege rules, questions will arise with regard to whether the national law of a particular jurisdiction is appropriate (when compared with international norms). Even if national laws are applied, no default choice of law rules exist, opening the door to controversy among various potentially applicable rules, including the procedural law of the arbitration, the law governing the parties’ arbitration agreement and the law most closely connected to the allegedly privileged communications.

Although there is no concrete answer on this point, in many circumstances, Japanese law likely would be applied to documents produced by a Japanese company pursuant to an internal investigation, as it would have the closest connection to the communications in question. However, to further complicate the situation, it should be noted that Japan generally does not recognize the concept of privilege. Privilege rules are the mirror image of document production / discovery rules. As common law jurisdictions have extensive document production / discovery rules, legal privilege is likewise highly developed and varied. In civil law jurisdictions like Japan, by contrast, document production and legal privilege have not been developed.

This does not mean that all communication between lawyers and clients is subject to disclosure under Japanese law. Attorney-client communications are protected from disclosure by each lawyer’s duty of confidentiality. The Japanese Attorney Act provides that Japanese lawyers and registered foreign lawyers are subject to a statutory confidentiality obligation if they acquire confidential information in the course of their professional duties. Although this duty is not a privilege *per se*, it promotes the same policy - to enable candid communications between attorneys and clients.

Thus, even if the arbitral tribunal determines Japanese law to be the evidentiary privilege rule applicable to internal investigation documents, grounds exist to refuse production - by asserting the lawyers’ duty of confidentiality.

(b) Why may documents not be privileged or protected under the lawyers’ duty of confidentiality?

Despite the above-mentioned possible production denial strategies, it is unlikely that documents created or collected in connection with an internal investigation by a Japanese company are either privileged or protected under the lawyers’ duty of confidentiality as a matter of Japanese law. This will often be clear from the formality of the investigation. Communications between the investigators and the company will usually not be limited to lawyers and relevant qualified company personnel. The investigation committee will likely include executives and employees of the company being investigated, as well as scholars, accountants, journalists, et cetera. Moreover, as mentioned

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8 The ICDR Rules, which allow denial of production due to privilege, are the exception.
9 Article 9.2(b) of the IBA Rules on the Taking of Evidence in International Arbitration. Guidance for the Arbitral Tribunal provided in Article 9.3.
12 Article 23 of the Attorney Act. Also see Article 220(iv)(1a) of the Civil Procedure Code.
above, the investigation report may even be voluntarily disclosed to the public.

This relaxed attitude to the production of documents absent the protection of privilege or a duty of confidentiality may sound surprising to lawyers practicing outside Japan, which makes the issue worthy of further exploration.

First, Japanese civil courts do not compel significant disclosure of documents. Japanese courts have the power to compel production of documents - the Civil Procedure Code provides that document holders bear the general obligation to disclose documents.\(^1\) However, in practice, the scope of disclosure required by Japanese courts is generally very limited compared to discovery in common law jurisdictions. The Japanese Civil Procedure Code provides that a party may move to compel production of a document by: (i) specifying the document, (ii) providing a summary of its contents, (iii) identifying the holder of the document, and (iv) identifying the facts to be proven by the document. The moving party must also demonstrate that it is necessary for the court to order disclosure of the document by, for example, explaining why it would be difficult to obtain it through other publicly available means.\(^2\) The policy behind this limited scope of disclosure is the understanding that compelled production is a supplementary measure only, and evidence is in principle to be collected independently by the respective parties.

Furthermore, a broad exemption to disclosure of documents exists under the Japanese Civil Procedure Code, apart from the lawyers’ duty of confidentiality,\(^3\) which makes it unlikely that corporate internal documents would be produced after taking legal privileges or the lawyers’ duty of confidentiality into consideration: the exemption for documents intended exclusively for internal use. According to the Supreme Court of Japan,\(^4\) a document will be exempt from production as intended exclusively for internal use where (i) the document was created solely for the use of internal personnel and was not expected to be disclosed externally, and (ii) disclosure would involve an unavoidable potential of prejudicing the interests of the holder of the document, in such ways as infringing the right of privacy or posing an impediment in forming corporate intent, (iii) absent exceptional circumstances. It should be noted that (i) and (ii) are determined by examining the typical characteristics of the document at issue. Courts have found that the typical characteristics of company internal approval documents fulfill requirements (i) and (ii) unless the document was created pursuant to the requirements of the law (in which case, the document would be expected to be disclosed externally). Thus, internal corporate documents will likely be precluded from production under Japanese civil procedure law unless exceptional circumstances exist.

The lack of motivation on the part of Japanese companies to apply privilege or the lawyers’ duty of confidentiality to their internal documents can also be attributed to the expansive powers of Japanese government agencies (e.g. the Japan Fair Trade Commission\(^5\) and the Financial Services Agency\(^6\)) to compel the production of documents during their administrative investigations. It is generally understood that basically no grounds exist to refuse the production of documents requested by a competent government agency. Even the lawyers’ duty of confidentiality is inadequate grounds for refusal, and failure to comply with a regulator’s production request could lead to penalties.

Lastly, Japanese criminal law procedure allows attorneys to withhold documents containing information with regard to which they owe a duty of confidentiality.\(^7\) However, companies are unlikely to be able to avail themselves of this because it does not apply to documents held by the company (in contrast to their treatment under civil procedure law).

Although international arbitration is growing in popularity in Japan as a dispute resolution mechanism for international transactions, Japanese companies currently do not widely recognize that document production procedures would likely differ from those of Japanese courts, as would the rules governing exemptions to production. Thus, given the above-described background, Japanese companies tend to be relaxed

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\(^1\) Article 220(iv) of the Civil Procedure Code.

\(^2\) Article 221 and 222 of the Civil Procedure Code.

\(^3\) Article 220(iv)(i) of the Civil Procedure Code provides that a party withholding a document (including a non-lawyer) may refuse to produce the document (i) if it contains knowledge which should be kept confidential which was acquired by Japanese lawyers or registered foreign lawyers in the course of their professional duties as lawyers and (ii) if said lawyers have not been released from their duty of confidentiality.

\(^4\) November 12, 1999 Supreme Court Judgment (1999(kyo) No.2).

\(^5\) Article 47 of the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade.

\(^6\) Articles 26, 27 to 22 and 27 to 30 of the Financial Instrument and Exchange Act.

\(^7\) Article 105 of the Criminal Procedure Code.
in producing internal documents not subject to privilege or the lawyers’ duty of confidentiality.

E. Conclusion

Whether a Japanese company has conducted an internal investigation can be learned through publicly available information from various sources, such as information disclosed to stock exchanges, the company’s website, official government announcements, press coverage and internet bulletin boards/social medias. Documents created or procured during a typical internal investigation within a Japanese company generally consist of investigation reports, written interview reports and collected documents, including emails and personal memoranda. Finally, these documents are unlikely to be privileged or protected under the lawyers’ duty of confidentiality.

The fact that internal investigation-related documents are likely vulnerable to production in the document production phases of international dispute resolution procedures may well delight counsel opposing Japanese companies in such procedures. On the other hand, this fact could be disastrous for counsel representing Japanese companies. Thus, when contacted by a Japanese company in connection with a dispute that likely involves issues of internal misconduct, counsel should confirm whether an internal investigation has been conducted, and if so, the documents that were created or identified through the investigation process. Ideally, the relevant members of the investigation committee should be consulted so that the incident can be brought under control, and so that documents that may harm the company’s position can be identified and understood.

Mediation - a potentially ideal but underused approach to resolving disputes in Japan?

Patric McGonigal*

Introduction

With the introduction of a Mediation Ordinance in Hong Kong in 2013, the unveiling of newly revised mediation rules by the International Chamber of Commerce (“ICC”) last year1 and the recent establishment of the Singapore International Mediation Centre (“SIMC”), mediation is very much at the top of the agenda in so far as alternative dispute resolution in Asia is concerned. In Japan, although still comparatively rare in practice, mediation as a means to resolve cross-border disputes is also slowly gaining a greater prominence. In January 2009, in order to address the absence of third-party mediation and to supplement its previously released domestic provisions, the Japan Commercial Arbitration Association (“JCAA”) introduced rules for the mediation of international commercial disputes2 (the “JCAA Rules”).

In fact, Japan has had a long history of adopting various ADR methods to resolve its domestic disputes but has been slow to adopt a similar approach when it comes to settling problems with international partners. There has long been a perception that in many cases, Japanese parties would prefer to settle on less advantageous terms rather than take on their international counterparts in arbitration. By way of illustration, the number of international disputes that are arbitrated in Japan remains a fraction of the number of international disputes that are heard in Singapore. Based on the most recent statistics available, the number of arbitration cases (excluding counterclaims) presided over by the JCAA hovers at between 10 and 20 each year3 whereas the Singapore International Arbitration Centre (“SIAC”) saw 259 new arbitration proceedings commenced in 2013. However, even with such an impressive volume of cases, only 4 of the SIAC cases involved Japanese parties4. In the same vein, the ICC also reported increasing figures for the Asia-Pacific region but an annual figure of between just 10 and 20 new cases involving Japanese parties5.

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1 The new ICC Rules came into force on 1 January 2014
2 International Commercial Mediation Rules and Mediation Cost Regulations (2009)
3 JCAA Newsletter (January 2012)
4 SIAC Annual Report (2013)
5 ICC Seminar, Tokyo (23 May 2014)
There are many reasons advanced for why this may be the case ranging from there being a cultural aversion to conflict and the importance of maintaining harmony to the more practical desire to minimise costs and draw a line under difficulties as soon as possible so as to allow business and relationships to continue unhindered.

One would think therefore that other less confrontational and less expensive methods of dispute resolution, such as mediation, could provide a more attractive means by which disputes between Japanese parties and their international partners might be resolved. This is all the more so when it is considered that conciliation has been such a dominant feature of dispute resolution in domestic matters in Japan for several generations. In fact, both before and during the Edo Period, domestic civil disputes were settled by way of various out-of-court procedures although later, these were effectively institutionalised.

_Wakai and Chotei_

Today there are two separate court-connected settlement procedures available in Japan: _wakai_ and _chotei_. With a great deal of discretion in terms of the level of judicial involvement, _wakai_ is conducted by a trial judge who will often repeatedly encourage settlement negotiations during the course of a trial (and suspend proceedings in order to facilitate this) whereas _chotei_ is a special statutory form of court connected conciliation. Of the two, _chotei_ is by far the more popular but both trace their origins back to procedures adopted at the time of the Meiji Restoration and have been used in different guises in Japan for well over 100 years. The actual term _chotei_ was used for the first time in reference to tenancy related conciliation procedures in legislation enacted during the Taisho era in 1922 but was used primarily as a means by which state authority over the individual could be enforced. It was authoritarian in nature that courts were authorised to direct a matter to conciliation presided over by the relevant trial judge sitting as a conciliator and where that conciliation failed, the court was empowered to make a binding proposal to the parties. In its modern form, _chotei_ or court guided conciliation was consolidated in the Civil Conciliation Act of 1951 ("CCA"). Not surprisingly, the previous power of the courts to declare compulsory settlement proposals was not included. However, the courts did retain the power to suggest a non-binding proposal when conciliation is not successful. In practice, _chotei_ is conducted by a conciliation committee which normally comprises three persons - a judge as chair and two lay persons acting as assessors in what used to be an unpaid capacity. It is conducted in private and aims at having the parties reach agreement on a settlement agreement. The settlement agreement is private in nature and does not require approval by the court, although the court will formally record it. This is equivalent to turning the settlement agreement into a court order and therefore making it more readily enforceable. Following further legislative reform in 1974 and 2003, conciliators became paid civil servants and while the role of the judge remained the same, conciliators, upon appointment by the Supreme Court could be authorised to act as chair with similar responsibilities and powers to those of a judge acting as chair.

The short point is that there is no procedure for the reference of disputes to conciliation or mediation conducted outside the judicial system in Japan and in an international context, there is apparently little or no demand for such an option from Japanese parties. Whether this is because of an innate deference to the hierarchy, formality and tradition associated with the courts’ role in Japan of resolving disputes (and perhaps therefore a wariness in respect of any third-party mediation) or simply a lack of available resources or experts in the private context is unclear. What is clear however is that beyond the more heavily judge-controlled conciliation process experienced in a domestic context, Japanese parties are not familiar with the more facilitative concept of mediation used in other (primarily common law) jurisdictions to resolve cross-border disputes and this lack of familiarity may to some extent have resulted in a reluctance to explore the possibility of third-party mediation.

_Some telling statistics_

While statistics illustrating the use of third party mediation in an international context are by their nature difficult to come by, from 2010 to 2014, only 6 mediations in total were held using the JCAA.
Rules\(^{15}\). It was also notable from the mediation sessions held during the recent International Bar Association conference in Tokyo\(^{11}\) that there was unanimous agreement by those counsel attending who either work in Japan or with Japanese clients that Japanese parties are not familiar with and do not trust the process to such an extent that even when encouraged by their legal advisors, they will invariably refuse to pursue mediation. Delegates discussed various reasons for this such as a fear of appearing weak, a concern that mediation would contribute little beyond additional costs and delay or perhaps even the risk that sensitive information or case strategies may be disclosed prematurely. It is submitted that the mere fact that concerns such as these were raised is in itself a good illustration of how third-party mediation in Japan is often rejected for the wrong reasons.

This could not be in greater contrast to the increasing popularity and growth of mediation seen in other jurisdictions, particularly common law jurisdictions such as the US, London and elsewhere in Asia such as Hong Kong and Singapore. Recent figures released by the Centre for Effective Dispute Resolution ("CEDR") show that the UK mediation market continues to grow at a rate of 9%, with approximately 9,500 mediations over a 12-month period ending in May 2014\(^{12}\). One of CEDR’s key findings was that just over 75% of cases settled on the day of mediation and a further 11% shortly afterwards. In Singapore, the Singapore Mediation Centre ("SMC")\(^{13}\), boasting a record of over 2,300 cases since its establishment in late 2007, reports a success rate of 75% (with 90% of these cases settled in just one day). Similarly, last year’s introduction by the ICC of a new set of mediation rules dealing specifically with mediation is an acknowledgement of both the popularity and success of mediation outside of Japan. The ICC’s General Secretary has stated that the replacement of the former ICC ADR rules by the new mediation rules “reflects the reality that 90% of [ADR] cases are mediation cases”\(^{14}\). The ICC’s settlement rate is reported to be 74% and as high as 80% in cases where a first meeting is held with a mediator rather than heading straight into arbitration\(^{15}\).

### A Pledge to mediate and cost incentives to agree

In fact, the success of mediation in a business context is a theme which has been acknowledged also by some of the world’s biggest corporations and law firms. On 12 November 2013\(^{16}\), a new 21st Century Pledge (the “Pledge”) was announced in the UK by the International Institute for Conflict Prevention & Resolution ("CPR") by which a series of global companies including BP, Microsoft, GE, Pepsico, IBM, Bechtel and Shell made an open commitment to try and use mediation and other ADR processes when disputes arise\(^{17}\). This has been supported in some jurisdictions like the UK where the courts have become increasingly willing to penalise parties with adverse costs orders when they are found to have refused on unreasonable grounds to explore alternative means of resolving disputes. It is no longer good enough to say for example, that because the merits of a case are so one-sided or there is a particular point of law which will not be compromised, there is no point in even considering mediation. In the UK, there are now only very limited circumstances in which it might be considered reasonable for a party to refuse to mediate as opposed simply to ploughing ahead with litigation in the misplaced belief that it should still be possible to recover a majority of one’s costs\(^{18}\). For example, in one of the leading cases on this issue, Halsey v Milton Keynes General NHS Trust\(^{19}\), the Court of Appeal stated: “All members of the legal profession who conduct litigation should now routinely consider whether their disputes are suitable for ADR. But we reiterate that the court’s role is to encourage not to compel. The form of encouragement may be robust.”\(^{20}\) The Court of Appeal confirmed that parties will now be penalised in costs if they refuse unreasonably to consider mediation. Importantly, the Court of Appeal also empha-

\(^{10}\) The author is grateful to Mr Toshiyuki Nishimura of the JCAA for providing the Association’s mediation statistics

\(^{11}\) Sessions held on 22 October 2014

\(^{12}\) From a level of just under 2,000 cases in 2003, to just over 9,500 in 2014: CEDR “The Sixth Mediation Audit” [May 2014]

\(^{13}\) Although SMC’s case load is a mix of primarily domestic and some international cases, it is at least third party based as opposed to court directed

\(^{14}\) Andrea Carlevaris, Secretary General of the ICC

\(^{15}\) ICC website: “Mediation and ADR statistics” [2014]

\(^{16}\) First launched in the US in January 2013

\(^{17}\) It is also notable that the World Bank through the International Finance Corporation (“IFC”) is engaged in a process of promoting international commercial mediation in the Western Balkans, the Middle East and North Africa - in the latter two cases in conjunction with CEDR who will lead a multi-staged training program (CEDR Press Release [Feb 2012])

\(^{18}\) See PGF II SA v Omfs Co 1 Ltd [2013] EWCA (Civ) 1288 (denying costs to a party because of its "unreasonable refusal to recognise a request to mediate”); see also Northcote Cranham Mission Systems Europe Limited v BAE Systems (Al Diyab C4I) Limited [2014] EWHC 3148 (ICC)

\(^{19}\) [2004] EWCA Civ 576

\(^{20}\) At para 11 of the judgment in Halsey
sised that the concern is not that parties may fail to reach agreement but that they fail to even explore the possibility - the courts will not investigate why a mediation did not result in agreement but will scrutinise a party's refusal to mediate21.

In this same context, while it is not yet clear whether the courts will take into account the fact that a party has signed the Pledge when considering whether mediation has been rejected on unreasonable grounds, the Pledge may in any event be helpful in that as explained by CPR, it “serves as a 'neutral' basis for beginning negotiations with the other party without any implications of weakness or fault.”

Indeed, at last year’s annual Singapore Mediation Lecture, the key note speech was delivered by GE’s Vice President of Litigation and Legal Policy22, who expressed the view that “a willingness to mediate is not a sign of weakness. To the contrary, it shows respect for your business partner; that you value the other side’s views and relationship; that you are willing to listen, and to engage in a principled dialogue rooted in the facts, law, and a clear-eyed appraisal of probabilities that is designed to find a solution that meets both your needs. It is aimed at restoring harmony, rather than perpetuating conflict.” Surely this is a sentiment which would not sound out of place if spoken by the head of legal at a Japanese corporation.

In Asia, a pledge of a similar type to that discussed above was given in 2007, when various mediation centres in Asia signed a memorandum of understanding in establishing the Asian Mediation Association (“AMA”). While not a founding member, this group of mediation centres now counts the JCAA as one of a group of eleven members across Asia23 and together, the members’ aims are to facilitate cross-border mediation, cooperate in training and raise awareness of the advantages associated with mediation. This is important because as has been seen in Japan, a general lack of awareness of the potential advantages of mediation does appear to have contributed to a general reluctance to move away from more familiar dispute resolution procedures.

Of course, mediation will not be appropriate in all cases - some cases may be too complex, have too much at stake or simply involve too many parties to enable easy agreement. However, there is little or no risk associated with at least exploring mediation - one need not disclose any confidential or sensitive information to either the mediator or the other side unless you wish to do so; it can result in significant savings in terms of time and costs resulting in greater control over legal spend and the better management of risks; it can preserve relationships; it is private; and save for the risk of undermining your position on costs if mediation is rejected without good reason, mediation is essentially voluntary in nature - a settlement can only be agreed with the consent of both sides, it cannot be imposed by the mediator.

**Enforcement**

With some of these points, there is a degree of overlap to be seen with arbitration - although there is no doubting the fact that it is a long time since arbitration was seen as a faster, cheaper alternative to court. Nevertheless, if mediation has been at a disadvantage to arbitration in any particular respect it is primarily with respect to enforcement. With the New York Convention on the Recognition and Enforcement of Awards24, the enforcement of arbitral awards in contracting states to the convention is (at least in theory if not always in practice) a relatively straightforward process. The same cannot be said for either judgments or settlement agreements. However, even this is now being addressed. At the time of writing, the UN Commission on International Trade Law (“UNCITRAL”) Working Group II (Arbitration and Conciliation) met in New York to determine the merits of a convention on the recognition and enforcement of international settlement agreements reached through mediation25.

In Europe (where unlike in the UK, mediation has been slow to take off) the European Parliament approved an EU Mediation Directive in 2008 (the “Directive”). In the UK, through changes made to the Civil Procedure Rules and by the introduction of a statutory instrument, the provisions of the Directive were implemented in 2011. The objective of the Directive is to promote the amicable settlement of cross-border disputes through mediation, and in support of this, it is a key provision of the Directive that agreements reached through mediation may be given

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21 See generally, para 14 of Halsey
23 AMA members comprise respective organisations in Bahrain, India (2), Fiji, Hong Kong, Indonesia, Japan, Malaysia, Philippines, Singapore and Thailand
24 UNCITRAL’s Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958
25 Working Group II: 62nd session, 2-6 February 2015, New York
similar status to court judgments in order to assist enforcement. Member states are therefore obliged to establish a mechanism by which agreements can be made enforceable if both parties request it\(^26\). Without such a mechanism, an agreement resulting from a successful mediation is only enforceable as a contract and requires court proceedings to ensure enforcement in the event of a breach of that contract\(^27\). It is hoped that although the adoption of mediation in Europe has been slower than in the UK, member states will in due course recognise it as a valuable mechanism for dispute resolution and formal legislation of this type can only help to establish a more balanced and effective framework across the EU\(^28\).

**Med-Arb**

Returning to Asia, one of the more recent topical developments is the concept of mediation in arbitration or the Singapore “Arb-Med-Arb Protocol” (“AMA Protocol”) whereby once SIAC arbitration has been started, the parties then commit to SIMC mediation. The resulting mediated agreement can then be sent back to SIAC to become the subject of a consent order for the purposes of enforcement. And while some have questioned whether such an award (i.e. one which has been produced without an actual arbitration taking place) should still qualify as an enforceable award under the New York Convention, it is not an entirely innovative development in that similar (Med-Arb) provisions have been addressed by amongst others, the ICC, HKIAC and the International Centre for Dispute Resolution (“ICDR”). It is however yet another positive step in the formal recognition by institutions of an already familiar practice in some parts of Asia and by enhancing further the prospects of enforcement, helps place mediation on a more even footing with arbitration - or arguably, an even more advantageous footing.

The JCAA Rules are broadly similar to those of other leading institutions in Asia and also incorporate provisions allowing for the possibility of a voluntary “Med-Arb” process\(^29\). Although, perhaps unusually, if the parties agree, JCAA Rule 8 expressly permits a mediator to act as arbitrator in the same matter should mediation have failed\(^30\). In addition, mirroring to some extent the AMA Protocol described above, JCAA Rule 11 provides that where mediation has been successful and, the parties agree, the mediator may be appointed as an arbitrator for the purposes of turning the mediated settlement agreement into an arbitral award - it is assumed, for the purposes of enforcement.

While there are some who will say that mediation does not require a formal structure of this type - many mediators will in any event prefer to use their own form of mediation agreement to focus the parties' minds from the outset and guide them through the process - there is a strong case in favour of this approach in a jurisdiction like Japan where there is a relatively small pool of mediators and third party commercial mediation is yet to gain much traction. A ready-made framework of the type provided by the JCAA can only help in breaking down the barriers that hinder the use of mediation by Japanese corporates.

**Effective pain-relief**

The importance of social harmony, avoiding conflict and the significance of saving “face” remain at the heart of Asian culture. As a tool for resolving disputes, mediation can help to preserve relationships and promote social harmony - therefore, in this sense, mediation is entirely Asian in nature. Japanese corporates, although currently reluctant to move away from more familiar methods for dealing with problems but also resistant to becoming embroiled in adversarial and increasingly time-consuming and expensive arbitration, should want to learn more about commercial third party mediation. It therefore seems appropriate to leave this as a question of not if but when third party mediation as practiced in common law countries will have a more widespread role in the resolution of cross-border disputes involving Japanese parties. As a former Chief Justice of the United States Supreme Court once noted well over 20 years ago:

\(^{26}\text{A mediation settlement enforcement order - such an order then becomes enforceable in all other member states in accordance with the Brussels Regulation (44/2001)/Recast Brussels Regulation}\)

\(^{27}\text{In some jurisdictions such as the US, it is possible to apply to court in order to enter a settlement agreement as a consent judgment for the purposes of enforcement}\)

\(^{28}\text{Indeed, in recognition of the fact that the European institutions clearly regard the adoption of mediation in the EU as important, proposals to introduce a compulsory element to mediation are currently being debated: see “Rebooting the Mediation Directive”, a study authored primarily by members of JAMS International and requested by the European Parliament’s Committee on Legal Affairs in 2014}\)

\(^{29}\text{Similarly, the KCAA Commercial Arbitration Rules envisage the possibility of “Arb-Med” and again, expressly permit an arbitrator to act as mediator should the parties agree: see Rules 54 and 55}\)

\(^{30}\text{The rules of other institutes do not always refer to this possibility expressly and in fact, the HKIAC Rules prohibit it}\)
“The notion that most people want black-robed judges, well-dressed lawyers, and fine paneled courtrooms as the setting to resolve their dispute is not correct. People with problems, like people with pains, want relief, and they want it as quickly and inexpensively as possible.”

Mediation - fast, effective pain relief for reluctant litigants in Japan?

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[Report]
Post Event Report of Young ICCA Skill Training Workshop in Tokyo
Shinji Ogawa*

A Young ICCA workshop was organized in Tokyo, Japan on October 18, 2014, which was hosted together with the International Centre for Dispute Resolution’s young arbitration practitioner group (ICDR Young & International). JCAA sponsored this event. Approximately 40 young practitioners and students attended this event at Nishimura & Asahi office. Participants discussed the following topics:

Topic 1 - Getting into International Arbitration
Elaine Wong, Senior Associate, Herbert Smith Freehills, Tokyo
David MacArthur, Partner, Bae, Kim & Lee, Seoul

Topic 2 - Getting Grip on International Arbitration
Yutaro Kawabata, Senior Associate, Nishimura & Asahi, Tokyo
Nicholas Lingard, Senior Associate, Freshfields Bruckhaus Deringer, Tokyo

Topic 3 - Getting Ahead in International Arbitration
Yoshimi Ohara, Partner, Nagashima Ohno & Tsunematsu, Tokyo
Helena Chen, Partner, Pinsent Masons, Beijing

Participants were seated in a circle with no desk, and they shared their views, personal backgrounds, and experiences as to how to begin and advance a career in the field of international arbitration. Below are the powerful and encouraging messages obtained during the discussion, which particularly impressed the writer.

1. **Take advantage of rapid growth of arbitration**

Many of young arbitration practitioners “accidently” entered the arbitration world. Moreover, they did not have any knowledge nor they ever studied about arbitration before beginning their career as lawyer. In contrast, we recently see growing attention to inter-

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31 US Supreme Court Chief Justice Warren E. Burger

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national arbitration from young associates and students. Now they have many learning opportunities before getting involved in arbitration. Take advantage of this trend to get into arbitration.

2. Meet people and keep them informed about your current information

Young practitioners and students have many opportunities to meet senior arbitration practitioners including through Vis competition, internship, and LL.M. program. Go abroad to meet them, and keep them informed about everything as to what is happening in your career, so that you can possibly be the first person that comes into their mind when they need a new teammate. Discover the best opportunity to get into arbitration.

3. Show your difference

Enjoy cultural difference. Show your difference to clients. Any lawyers can play an important role to explain the concepts of their own local law to their clients who are unaware of such concepts. Expose yourself to different legal jurisdiction to obtain flexibility and resilience as well as an international experience and perspective, which are essential for young associates to get grip on and get ahead in international arbitration.

4. Know best your case

Young associates are best placed to know the basic facts about their case. Managers do not know the details even though details can change the entire case. Just respond to documents. Create value to your case as young associates.

5. Who is your client?  Not your partner!

Do not be shy, which does not benefit your clients. Do not be afraid that you are unsure about your case. If your partner asks you about the basic facts for which your memory is fuzzy, you should honestly say “Just give me 5 minutes? I’ll check and get back.” Honesty can change the outcome of your case. Create and arrange rules and strategies in arbitration for your client’s benefits.

Difference can create a value for clients, and any young associates can distinguish themselves, especially outside their own countries. The Young ICCA workshop has reminded the writer that if young associates want to get into, get grip on and get ahead in international arbitration, they not only need to make persistent efforts to be more creative, flexible, and honest for client’s benefit but also should proactively be different.

[JCAA Activity]
Cooperation Agreement with SHIAC

On February 5, 2015, the Japan Commercial Arbitration Association (JCAA) signed a cooperation agreement with the Shanghai International Economic and Trade Arbitration Commission (Shanghai International Arbitration Center; SHIAC).

The agreement aims to facilitate cooperation in the advancement of arbitration as a means of settling disputes arising out of international commercial transactions, and they may recommend suitable individuals to each other to serve as arbitrators or mediators.

This is the forty-eighth cooperation agreement that JCAA has concluded among those with the other arbitral and ADR institutions.

The complete agreement is available on JCAA’s website at http://www.jcaa.or.jp/e/arbitration/agreement/index.html.

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