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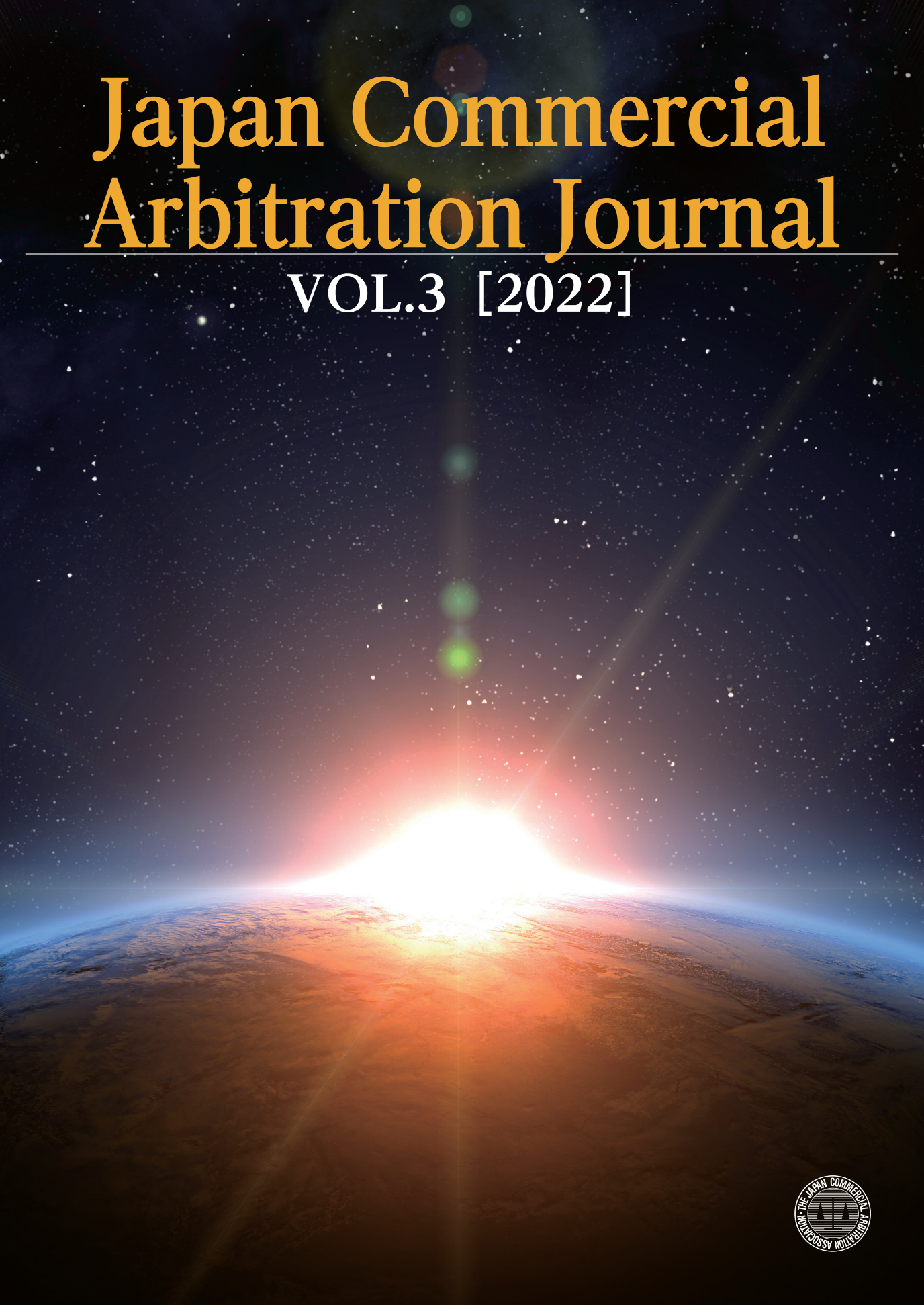

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Amendment of JCAA Arbitration Rules and Promulgation of Appointing Authority Rules

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Ⅰ. Introduction

In 2021 the Japan Commercial Arbitration Association (JCAA) revised provisions on expedited arbitration procedures and administrative fee in its existing Commercial Arbitration Rules and Interactive Arbitration Rules in order to build up a more user-friendly arbitration system. The amendments were the same for two sets of rules. Further, to make the most out of the JCAA's knowledge and database on arbitrators, the JCAA cropped up the new Appointing Authority Rules, under which the parties may request the JCAA to appoint one or more arbitrators even where the arbitration is not administered by the JCAA.

This paper sets out the key features of the revised Commercial Arbitration Rules and Interactive Arbitration Rules ("the 2021 Rules"), and new Appointing Authority Rules. The article numbers cited in Part II and Part III refer to those in the Commercial Arbitration Rules.

Ⅱ. Amendment of Expedited Arbitration Procedures

(1) Broader application of expedited arbitration procedures - increasing the maximum amount to 300 million yen (approximately, USD 2.2 million) (Articles 84.1 and 84.2).

In 1997, the JCAA introduced its expedited arbitration procedures. Back then, the expedited arbitration procedures applied where the amount in dispute was under 20 million yen (or approximately, USD 150,000). After 22 years in 2019, the JCAA increased the threshold amount to 50 million yen (or approximately, USD 375,000), but which was still significantly lower than the amount set by other leading arbitration institutions. While the JCAA already acknowledged such difference in the maximum amount of application during the 2019 Rules amendment process, the amount was only raised by 2.5 times at that time, since sudden and

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steep increase might cause confusions among users.

After two years of transition, the JCAA has further broadened the application of expedited arbitration proceedings. The foremost question was how much the proper upper limit would be. The Rules Amendment Committee made a draft of revised rules, according to which the maximum amount (the total amount of the claim, counterclaim and set-off defense) was set at 300 million yen - six times the previous amount. Almost all public comments were in favor of the proposed amount. Taking into account the support by the potential users, the JCAA decided that 300 million yen, as originally proposed, would be the appropriate upper limit.

(2)"Two-tier" time limits for rendering an award depending on the dispute amount (Article 88).

The next question was whether the time limit for rendering an arbitral award should be changed in line with the increase in applicable amount, as the former Rules stipulated the stricter time limit - within three months from the date of the constitution of the tribunal.

On one hand, the JCAA saw no need to extend the three-month time limit for cases with a dispute amount of less than 50 million yen. Since the entry into effect of the former amendment, out of 27 arbitration cases filed by the end of 2020, five cases have been conducted under the expedited arbitration procedures, all of which but one (in this case, the time limit was extended at the request of both parties, and the arbitral award was rendered approximately five months after the appointment of the arbitrator) were concluded with an arbitral award within three months. On the other hand, considering that arbitration cases with a dispute amount close to 300 million yen could be rather complicated and time-consuming, it seems to be unlikely practical to have an arbitral tribunal render an award within three months.

For these reasons, JCAA decided to set up "two-tier" time limits; for cases with a dispute amount of less than 50 million yen, the time limit remains to be within three months; for other expedited cases, the new time limit is within six months.

In public comments, while some were in favor of the proposed provision stipulating two-tier time limits, some expressed concerns that such provision might introduce extra complexity. After weighing up these opinions, the JCAA decided to maintain the proposed draft.

(3) JCAA' power to extend the time limit for the award (Article 89)

The provision of time limit discussed above obliges the arbitral tribunal to make reasonable efforts to render an arbitral award within the prescribed time limit. In the former Rules, the arbitral tribunal had the power to extend the time limit without approval from the JCAA. As noted above, the practice showed that the arbitral tribunal observed the time limit by issuing the final award within three months in all JCAA cases but one (where the parties agreed to extend the time limit).

In public comments, some suggested that the decision as to whether to extend the time limit should lie with the JCAA so that the rules clarify the JCAA commits to strictly managing the time limit for the benefit of the arbitration users. In response to these comments, the 2021 Rules stipulate that only the JCAA, not the arbitral tribunal, can extend the time limit in

exceptional circumstances. In practice, JCAA will decide whether to grant an extension after consulting with the arbitral tribunal and parties.

To ensure the efficiency, the expedited arbitration is conducted on a document-only basis, unless the arbitral tribunal finds it necessary to hold a hearing after consulting with the parties or unless all parties so wish. In the event of a hearing, the tribunal should minimize the days of hearing and use video conferencing or other proper means (Article 87).

(4) Non-application or discontinuation of expedited arbitration procedures (Article 84.3, Article 85)

In the 2021 Rules, the expedited arbitration procedures generally apply when the amount in dispute falls under the maximum amount (300 million yen). Nonetheless, the ordinary procedures apply in the following situations:

a. all parties agree not to submit the dispute to expedited arbitration procedures and notify the JCAA of such in writing (Article 84.3.1); or.

b. the JCAA, before the constitution of the arbitral tribunal, finds that the parties' agreement concerning the arbitral proceedings contains provisions that are contrary to the provisions related to the expedited arbitration procedures or other circumstances exist that make it clearly inappropriate to apply the expedited arbitration procedures (Article 84.3.2).

Even after the JCAA confirms the expedited arbitration procedures apply, they can be discontinued and transferred to the ordinary procedures if:

a. all parties so agree; or

b. the JCAA decides to discontinue the expedited arbitration procedures after consultation with the arbitral tribunal and the parties (Article 85.1).

All procedures undertaken up until the transfer will remain valid (Article 85.2).

It should also be noted that where the amount of the dispute exceeds 300 million yen due to an amendment to the claim after the JCAA confirms the application of expedited arbitration procedures apply, the expedited arbitration procedures will continue to apply unless the JCAA decides otherwise (Article 84.5).

(5) Removal of prohibition on amendment to claim

The former Rules stipulated that, to avoid procedural delay, amendment to claim was prohibited after the JCAA confirmed that expedited arbitration procedures applied. In this respect, the 2021 Rules - same as in ordinary procedures- leave the arbitral tribunal to decide whether to approve an amendment to claim. This will enable the arbitral tribunal to resolve the related disputes in one single proceeding unless the tribunal finds the approval of amendment to claim inappropriate in view of causing undue delay or any other circumstances.

Ⅲ. Amendment to administrative fee (Article 103)

In the former Rules, where the amount in dispute is less than 20 million yen, the administrative fee was 500,000 yen (flat rate). This system has been amended in order to make arbitration more accessible. The 2021 Rules state that the administrative fee for cases with amount in dispute of less than 5 million yen is 10% of the amount in dispute.

Ⅳ. New Appointing Authority Rules

In some ad hoc arbitration cases, the parties agree to empower an arbitral institution to appoint one or more arbitrator. Even in institutional arbitration cases, the parties may possibly agree to request another arbitral institution to appoint arbitrators.

The JCAA had received multiple inquiries as to whether the JCAA could undertake the appointment in such circumstances. If such request for appointment arbitrators were really made, it would be difficult for the JCAA to respond since it had no relevant rules providing for the arbitrator appointment procedures and the applicable fee schedules. In 2021, to keep pace with other arbitral institutions, the JCAA launched the new Appointing Authority Rules.

Under the Appointing Authority Rules, the JCAA provides, in response to a request, one or more following service:

a. appointment of a sole arbitrator;
b. appointment of one or more arbitrators if several arbitrators are to be appointed;
c. appointment of the presiding arbitrator; and
d. appointment of a substitute arbitrator in the case of challenge, removal, resignation or death of arbitrator before the termination of arbitral proceedings.

Additionally, if any party apply for challenging an arbitrator appointed by the JCAA, the JCAA decides on such application.

As to the manner of appointment, unless otherwise specified in the agreement between the parties or the applicable arbitration rules, the JCAA presents to the parties a list of multiple candidates. The parties are respectively asked to rank the given candidates, and then the JCAA appoints an arbitrator, taking into account the parties' priority (Article 9.2). It is worthy of note that the appointment is not solely determined by the priority-based points. For instance, where there are five candidates, one candidate is ranked as first by one party and as fifth by the other (the total points are six), and another candidate is ranked as third by the both parties (the total points are six), then the latter candidate would usually be appointed.

The fees for appointment of arbitrators are 100,000 yen plus consumption tax per arbitrator. For decision of challenge application, it is 300,000 yen plus consumption tax per arbitrator.

The Appointing Authority Rules do not apply where the Commercial Arbitration Rules, the Interactive Arbitration Rules or the Administrative Rules for UNCITRAL Arbitration apply, since rules on the appointment of arbitrator(s) and challenge of them are fully stipulated there.

Ⅴ. Conclusion

The JCAA seeks to provide swift and cost-effective arbitration services to its users and to accommodate their diverse needs. The JCAA does hope that the 2021 Rules and the Appointing Authority Rules will contribute to better user experience.

New Style of Arbitration
– The First Case under JCAA Interactive Arbitration Rules

Masato Dogauchi[1)] **Shinji Ogawa**[2)] **Jieying Peng**[3)]

Ⅰ. Introduction

In 2019, the JCAA introduced its new Interactive Arbitration Rules (the "Interactive Rules"). The first case under the Interactive Rules has been successfully concluded with a consent arbitral award. This article highlights how the Interactive Rules well functioned in the first case to achieve this satisfactory dispute resolution for the parties involved[4)] .

First, the distinctive features of the Interactive Rules will be introduced in Part II. Second, in Part III, it will outline the dispute and how the parties agreed to submit their dispute to the JCAA Interactive arbitration. Third, the gist of proceedings and the final resolution, including speed and cost thereof, and the evaluation by the parties and other points will be discussed in Part IV.

Ⅱ. Distinctive Features of Interactive Arbitration Rules

The Interactive Rules are distinctive in that, as the name suggests, they encourage "dialogue" between the arbitral tribunal and the parties. The Interactive Rules oblige the tribunal to share its views on the case with the parties at two different phases of the proceedings. First, the tribunal will provide the parties with its summary of the parties' positions and a provisional list of factual and legal issues (Article 48). Second, before the tribunal decides whether to examine a witness, it will inform the parties of its non-binding and preliminary views about the factual and legal issues that it considers important (Article 56).

In both dialogue, the tribunal will present its views in writing on which the parties have an opportunity to comment. When necessary, the tribunal will elaborate its views and share with

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4) This article is based on the interviews conducted with the parties who expressed their consent to make the general information of this case open to the public.

the parties. These two opportunities of interaction between the parties and arbitral tribunal can give them a clear view of the dispute resolution pathways. This tribunal's obligation to share its views create a further positive effect where the tribunal consists of three arbitrators: Inevitably, the arbitrators will intensively discuss the case from the early stages of the proceedings, which in turn facilitates the interaction between the arbitrators. The "dialogue", in particular the disclosure of the tribunal's non-binding and preliminary views on the parties' positions and the issues, was inspired by the traditional civil law practice.

On the other hand, in traditional common law style arbitration, we see basically one way communication - from the parties to the tribunal without the tribunal' s suggestion or implication on its understanding of the case. The parties have almost no chance of figuring out what issues the tribunal is particularly concerned about. Given the "one shot" nature of arbitration, it is understandable that the parties are reluctant to narrow down the scope of their arguments and tend to submit all arguments and evidence that might affect the outcome. Such strategy comes at a cost. Examining the parties' massive arguments and evidence places heavy burden on the tribunal and take significantly longer to render the final award and counsels' fees soar.

While common law style arbitration would be said to be a standard practice at present, "black-boxing" the process by which the arbitral tribunal's views are formed may not in practice accommodate the expectation of parties, especially from a civil law background. This is where the Interactive Rules come in.

The early step-by-step share of the tribunal's views under the Interactive Rules enables the parties not only to submit arguments and evidence in a timely manner and to the point, but also to make better informed decision should the parties steer towards settlement negotiation. These dialogue-oriented processes of building up the arbitral award will create a quality award with less cost and time, which enhance the users' satisfaction in all aspects.

Ⅲ. The First Case under Interactive Rules – How the parties selected Interactive Rules

(1) The disputes

A Japanese company (Y) supplied to another Japanese company (X) parts to be incorporated in the X' s products. Defects were found in the Y's final products at the market. X believed that such defects were caused by flaw in the parts supplied by Y, and claim for damages against Y. The main issues were (i) whether the parts supplied by Y were defective, and if yes, (ii) how much the damages should be. The amount of X's claim was over 1 billion yen (Approximately USD7,476,000).

(2) The parties agreed to submit the case to arbitration under the Interactive Arbitration Rules

The contract between X and Y contained a choice-of-court clause but no arbitration clause. Negotiations between X and Y had lasted for over one year, but these followed the parallel tracks.

Amid the deadlock and following the counsels' advice, the parties agreed to submit the dispute to the JCAA arbitration under its Interactive Rules. In addition to the widely indicated merits of arbitration, the parties expected that the Interactive Rules would achieve a quicker and reasonable resolution and cut down the overall costs, as the tribunal shared its views with the parties. At the same time, the parties agreed that the number of arbitrators should be three.

Ⅳ. Proceedings and final result

(1) Outline of the proceedings

During the proceedings, interaction took place in several times between the tribunal and the parties: The tribunal made the most of the purpose of the Interactive Rules at the very first meeting. Having reviewed the X' s request for arbitration and the Y's answer, the tribunal discussed the case with the parties by referring to a document jotting down what the tribunal is tentatively interested in with regard to the parties' positions and the provisionally identified issues. After that, the parties submitted their arguments and evidence corresponding to the tribunal' s tentative and provisional interests.

At the second meeting, the tribunal presented to the parties a provisional but refined summary of the parties' positions and issues, and exchanged views with the parties.

Later, the parties submitted their written comments on the provisional summary. The tribunal then emailed a draft of document illustrating the grounds of the parties' case and the factual and legal issues that the arbitral tribunal ascertained. Following this, the tribunal further revised the draft and shared it with the parties, taking into account the parties' comments and additional documentary evidence.

Subsequently, the tribunal provided to the parties in writing its non-binding and preliminary views on important issues, along with a detailed explanation. The tribunal at its discretion shared its preliminary views on a part of the issues on the originally scheduled date, and then presented the views on the remaining issues at a later date. The tribunal invited the parties to submit their written opinions on the preliminary views and asked them how they wished to conduct the further proceedings. Through the interaction, both the tribunal and the parties had reached the same view that witness examination was not needed. The questions left were whether the parties asked the tribunal to proceed with drafting the arbitral award or explored a path for amicable settlement by mediation or in any other manner.

The parties preferred the later approach. They agreed to conduct the mediation under the JCAA Commercial Mediation Rules. They also agreed to appoint the three arbitrators as mediators. Finally, the parties reached a comprehensive settlement, which includes the share of losses arising from possible future defects. Upon request by the parties, the tribunal issued the consent award.

(2) Final result – speed and costs

Speed: This case was settled with the consent award after 12.5 months from the request for arbitration, or after 12.3 months from the constitution of the tribunal (10 months

excluding the period of the mediation).

Costs: The total amount of the arbitrators' remuneration was 9.9 million yen. The administration fee was approximately 4.2 million yen. The arbitrator's expenses and other costs were approximately 130,000 yen (consumption tax included in these amount). In addition to these, the parties bore their own legal fees, the amount of which was unknown to the JCAA.

In the questionnaire and interview done some weeks after the final resolution, the parties gave an overall positive evaluation of the Interactive Arbitration. They were content with the tribunal's early disclosure of preliminary views, the duration of the proceedings, the costs and the JCAA's extensive administrative support. In particular, the parties found that the tribunal's non-binding and preliminary views on the important issues were helpful to decide the further course of action that they should take. One party also expressed that while it was not familiar with arbitration before this case, it would be more open to including an arbitration clause in its contracts.

Ⅴ. Conclusion

This above case under the Interactive Rules would not have been born without the counsel who recommended the Interactive Arbitration to its clients with the belief that it would meet their client's needs, and the parties who opted for arbitration with which they had no previous experience and gave the new arbitration rules a try. In addition, the efficient and satisfying resolution of the case was attributed to the arbitrators who enthusiastically employ the imaginative and creative approach to resolve the case amid unprecedented.

This case illustrated that the new style of arbitration under the Interactive Rules can well serve certain existing needs of arbitration users. The JCAA hopes that the merits of the Interactive Arbitration will be more widely acknowledged, and the Interactive Arbitration will become a viable and leading option for dispute resolution.

The Appropriate Role of Burdens of Proof in Document Disclosure Exercises: A Close Reading of Article 54 of the JCAA Commercial Arbitration Rules

Mori Hamada & Matsumoto

Daniel Allen

Ⅰ. Introduction

1. Different legal traditions take vastly different approaches to the scope and availability of document disclosures. On the permissive end of the spectrum is the United States, where broad disclosure is the expectation. Meanwhile, many civil law jurisdictions (including Japan) restrict the parties' ability to obtain document disclosures to an exceptional circumstance, rather than the rule. As a result, in international commercial arbitration, beginning the document disclosures phase often can feel like venturing into uncharted waters—particularly to parties but even to counsel.

2. This article takes a closer look at a particular area of uncertainty: whether and to what extent (if any) requests for document production must be related to the requesting party's burden of proof. Views differ as to whether sources of soft law like the IBA Rules express a position on this issue, and most arbitral rules are either silent or inconclusive. This article argues that Article 54 of the JCAA Commercial Arbitration Rules, however, does commit to a general position that document production in a JCAA Commercial Rules arbitration should be more focused and limited than has become typical in international commercial arbitration, as well as a specific position that document requests should not be granted in a JCAA Commercial Rules arbitration unless their purpose is to contribute to the requesting party's fulfillment of its burden of proof.

Ⅱ. The role of soft law in determining approaches to document disclosures in international commercial arbitrations

1. Sources of soft law like the IBA Rules on the Taking of Evidence provide some guidance as to what parties might expect in an international arbitration, but leave many practical points unaddressed. That is by design. Parties and Tribunals therefore enjoy flexibility, which certainly has its merits. But that flexibility comes at the cost of uncertainty.

2. A particular issue is whether and to what extent requests for production of documents

should (or must) relate to the requesting party's burden of proof. Parties often seek production of documents that they expect to contradict their opponent's case. Moreover, a type of request for production that has become commonplace in international arbitration is one that does not sincerely seek the production of any document at all, but simply confirmation that a type of document (related to the opponent's burden of proof) does not exist.

3. In practice, document requests of that nature often do not contribute positively to the efficient resolution of a dispute; the point that these requests seek to make is one that can be made through advocacy and then addressed, to the extent necessary, by a tribunal when assessing the weight of evidence (or even through more formal procedural mechanisms such as adverse inferences). However, absent any rule forbidding such requests (such as a rule requiring requests for production to advance the requesting party's burden of proof in some way), they will remain attractive to make. There is little downside for the party making the request, and there is the potential upside of smoking out an opponent who might have been holding something important back for later ambush (another unfortunate tactic that has become all too common in contemporary practice).

4. The IBA Rules, in particular, do not take a clear position on this point. Article 3(b) of the IBA Rules requires no more than that a party requesting production provide a statement explaining the requested document's relevance to "the case" and materiality to "its outcome" —with no mention of the parties' respective burdens of proof. Some consider Article 3(b) to be the end of the matter, taking the view that the IBA Rules simply do not require a party to demonstrate a link to its burden of proof[1)] . A number of prominent commentators endorse that approach in principle—Jeffrey Waincymer, for example, advocates against a "blanket rule" that requests should be tied to a party's burden of proof, chiefly on the basis that it can sometimes be difficult for tribunals to determine which party bears the burden of proof on a particular issue, and to what extent.[2)]

5. On the other hand, it is not hard to find prominent commentators who disagree, particularly those writing from civil law perspectives. Yves Derains, for one, wrote a seminal article on the topic in 2006, in which he argued that a link to the requesting party's burden of proof should be considered a "requirement" for a document request to be accepted.[3)] Bernard Hanotiau also took up the banner, arguing that requests should generally be denied unless they relate to the requesting party's burden of proof.[4)]

6. The IBA Rules certainly do not forbid (or even dissuade) arbitrators from taking that sort of approach. On the contrary, Article 9(2)(g) explicitly permits objections to requests for

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1) Burden of Proof as a Prerequisite to Document Production Under the 2010 IBA Rules: An Obituary by M.E. Jaffe, J.T. Dulani and D.J. Stute

2) Waincymer, Procedure and Evidence in International Arbitration (2012), Section 11.7.1.2.

3) Yves Derains, Towards Greater Efficiency in Document Production before Arbitral Tribunals—A Continental Viewpoint, ICC BULLETIN, SPECIAL SUPPLEMENT 83 (2006).

4) Bernard Hanotiau, Document Production in International Arbitration: A Tentative Definition of 'Best Practices', ICC BULLETIN, SPECIAL SUPPLEMENT 113 (2006)

production on the basis of "considerations of procedural economy, proportionality, fairness or equality of the Parties" . It does not take too much creative vigor to argue that whether a document request advances the requesting party's burden of proof is a valid "consideration of procedural economy" , not to mention a factor relevant to "proportionality" and "fairness" . The interpretation of the IBA Rules on this question tends, therefore, to vary from case to case.

Ⅲ. The role of arbitral rules

1. Another potential source of guidance on this point could be the rules applicable to the arbitration, but the rules of several of Asia's most popular institutions (e.g., the ICC, SIAC and the LCIA) do not address burdens of proof at all, and most institutional rules tend toward generality on document disclosures. Institutional rules typically affirm that the tribunal shall have the power to order disclosure of documents, usually with no further restriction than the tribunal's estimation of "relevance" to the outcome of the dispute.[5)]

2. That is, to be clear, a perfectly sensible approach, consistent with an emphasis on flexibility and party autonomy. And, of course, there are exceptions—for instance, reflecting their origin in the US, the ICDR International Arbitration Rules include a relatively more detailed rule (Rule 24) addressing the exchange of information between the parties, although even the ICDR International Arbitration Rules prioritize flexibility and the tailoring of specific document disclosure rules for each dispute.

3. On the issue of burdens of proof, however, there is a bit more of a split—and, whether or not one agrees with the view expressed by Waincymer and others that burdens of proof can sometimes be slippery creatures, more attention should be paid to what the rules chosen by the parties have to say on the matter. Notably, the UNCITRAL Rules adopt an approach that differs from many institutional rulesets. Rather than avoiding the issue, Article 27(1) provides that "Each party shall have the burden of proving the facts relied on to support its claim or defence" . Perhaps reflecting the divide on this topic between civil and common law traditions, versions of this rule are implemented in the KCAB International Rules and the CIETAC Arbitration Rules, as well as the JCAA Commercial Arbitration Rules.[6)]

4. While the rule is phrased as a general proposition, As Paulsson and Petrochilos explain in UNCITRAL Arbitration (2017), at least part of the idea behind Article 27(1) is to "prevent parties from making factual assertions without providing evidential support for them" , setting up the potential for a "trial by ambush" at the main hearing.[7)] Read in conjunction with Articles 20(4) and 21(2) of the UNCITRAL Rules, that appears to be right: the parties' principal pleadings are to be accompanied by all evidenced relied upon (per Articles 20 and

5) See, e.g., SIAC Rules, Rule 27(f); LCIA Rules, Article 22.1(v).

6) The CIETAC Rules notably go even further, including a peremptory warning on the topic in their Article 41(3): "If a party bearing the burden of proof fails to produce evidence within the specified time period, or if the produced evidence is not sufficient to support its claim or counterclaim, it shall bear the consequences thereof."

7) Paulsson & Petrochilos, UNCITRAL Arbitration (2017), p. 238.

21), and then Article 27(1) clarifies that those pleadings are to discharge the parties' respective burdens of proof.

5. Importantly, Paulsson and Petrochilos also identify the relationship between these principles and the circumstances under which a tribunal may order production of documents—a power addressed in Article 27(3) of the UNCITRAL Rules.

> *A number of further points follow. [···] Secondly, there are circumstances where evidence may be unavailable to one party (for example, it has been destroyed) but in the possession or control of the other party. That is the kind of justified explanation for a party's failure to adduce evidence, seeking instead the tribunal's intervention to call for disclosure by virtue of article 27(3).*[8)]

6. In other words, the UNCITRAL rules link a party's ability to seek production of documents to the party's duty, in the first place, to discharge its burden of proof. In that conception, the real purpose of allowing a party to seek documents in the first place is to allow the party access to evidence that it would have used for that purpose but for the fact that, for a justifiable reason, the evidence is not in its possession.

Ⅳ. Applying Article 54 of the JCAA Commercial Arbitration Rules to document disclosures

1. Against that backdrop, let us turn to focus on the JCAA Commercial Arbitration Rules—and Article 54, in particular. The key question is how Article 54 should be brought to bear on the scope of document production, as well as the particular issue of whether requests to produce must relate to the requesting party's burden of proof. In the remainder of this article I will argue that, an arbitral tribunal charged with applying Article 54 of the Commercial Rules should be at all times mindful of holding the parties to their burdens of proof, with principally the two consequences introduced above and restated here: (i) in general, document production in a JCAA Commercial Rules arbitration should be more focused and limited than has become typical in international commercial arbitration; and (ii) in particular, document requests should not be granted in a JCAA Commercial Rules arbitration unless their purpose is to contribute to the requesting party's fulfillment of its burden of proof.

2. The starting point for an analysis of Article 54 is Article 54(1), which, as mentioned above, tracks Article 27(1) of the UNCITRAL Rules. As Paulsson and Petrochilos have argued, Article 27 of the UNCITRAL Rules is already susceptible to the reading that the tribunal's power to order production of documents should be considered linked to the parties' respective burdens of proof.

3. That interpretation is even more appropriate for Article 54 of the JCAA Rules. While Article 54(1) of the JCAA Rules simply mirrors Article 27(1) of the UNCTRAL Rules, Article 54(4) of

8) Paulsson & Petrochilos, UNCITRAL Arbitration (2017), p. 239.

the JCAA Rules differs materially from its UNCITRAL counterpart—Article 27(3).

4. Again, Article 27(3) of the UNCITRAL Rules, to which Paulsson and Petrochilos refer in the excerpt above, provides no more than that "At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine." It does not restrict the tribunal's discretion in any way, and does not set any particular standard for a party first to meet, such as a showing of materiality or relevance.

5. Article 54(4) of the JCAA Rules, on the other hand, does contain such restrictions. Article 54(4) provides as follows.

> *The arbitral tribunal, at the written request of a Party or on its own motion, may order any Party to produce documents in its possession that the arbitral tribunal considers necessary to examine after giving the Party in possession an opportunity to comment, unless the arbitral tribunal finds reasonable grounds for the Party in possession to refuse the production.*

6. The most important language here is "necessary to examine" . In terms, Article 54(4) of the JCAA Rules requires the arbitral tribunal to make a threshold determination that a document request seeks production of a document that it is not just relevant or material to the outcome of the case, but "necessary" for the tribunal to examine. Lest there be any doubt, the Japanese version of the JCAA Commercial Rules, which prevails over the English version pursuant to Article 6, uses the word "hitsuyou" . That is not a soft way to say "necessary" —another way to translate the word would be "indispensable" .

7. The requirement of necessity on the one hand should then be balanced against the relatively relaxed standard for a party to meet when refusing production: no more than "reasonable grounds" . In other words, the document must be necessary, and the party on the receiving end of the document request must have no reasonable basis to refuse.

8. Reading Articles 54(1) and 54(4) of the JCAA Commercial Arbitration Rules together in the same way that Paulsson and Petrochilos read Articles 27(1) and 27(3) of the UNCITRAL Rules together points not only to the conclusion that the mechanism of document production is made available to enable parties to obtain documents that they would have submitted if they had possessed them, but to the further conclusion that parties should be considered entitled to obtain only what is reasonably "necessary" for them to present to the tribunal, vis-à-vis their burdens of proof. Put another way, a document should be considered to be "necessary" for the tribunal to examine (and therefore subject to an order to produce under Article 54(4)) only if there is a reasonable likelihood that a party's ability to meet its burden of proof as to a particular fact might depend on the document—and not otherwise.

Ⅴ. Conclusion

1. While the approach advocated here would be less solicitous toward parties hoping to seek

discovery than the approach reflected in the IBA Rules, and that has become customary in international commercial arbitration, it is of course perfectly fair. Expansive (and expensive) discovery exercises are not required for due process, particularly in commercial disputes. Tribunals and courts alike generally do not need to examine every piece of potentially relevant evidence to decide a commercial dispute between sophisticated parties.

2. In any event, it is also just a starting point—a default approach for tribunals to take when the parties have made a bare selection of the JCAA Commercial Arbitration Rules. Parties would always be free to agree to a more permissive or expansive document production exercise in any particular instance, notwithstanding the default position articulated in Article 54 of the JCAA Rules. That flexibility is, and always will be, one of the core advantages of choosing arbitration.

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Comparison in Practice between "Japanese" Arbitration and Foreign Arbitration

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Ⅰ. Introduction

1. The authors have been involved in numerous domestic and international arbitral proceedings including arbitrations administered by the International Chamber of Commerce (ICC), Japan Commercial Arbitration Association (JCAA), Hong Kong International Arbitration Centre (HKIAC), Singapore International Arbitration Centre (SIAC) where the places of arbitration were Tokyo, Osaka, New York, Paris, Amsterdam, Zurich, Tel Aviv, Bangkok, Singapore, and Hong Kong. In addition, they had the opportunity to be involved as counsel to a party in the first case involving the Interactive Arbitration Rules of the JCAA that came into effect on January 1, 2019, as well as having experience as an arbitrator before the JCAA.

It is common in Japan for parties to select the Japanese courts (three-tiered court system) as the means of dispute resolution in contracts between domestic companies, although the number of cases in which domestic companies agree to arbitration as the method of dispute resolution for domestic transactions is on the rise. In sharp contrast, arbitration agreements are routinely used in commercial contracts (other than loan agreements) for international transactions as the means of dispute resolution. There are good reasons for selecting arbitration as the method of dispute resolution arising from international transactions including, for example, the ability to conduct the proceedings confidentially, efficiently and without having to subject the dispute to national courts. Indeed, arbitral proceedings are predicated on the principle that they are neutral and fair proceedings. For example, this concept is embodied in Article 18 of the United Nations Commission on International Trade Law ("UNCITRAL") Model Law, which provides: "*The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.*" Equally, if not more important, the existence of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the "New York Convention"), provides a facile method of enforcing an arbitral award in any of the member states[1)], thereby obviating many of the

1) At the time of this writing, there are 170 contracting states to the New York Convention.

challenges and impediments encountered when attempting to enforce a foreign judgment.

Despite the goal of neutrality, the place (or “seat”) of the arbitration is important, as the laws of the seat, like the rules of a particular institution, will impact upon the conduct of the proceedings. Many, but not all, countries have adopted the UNCITRAL Model Law (in whole or in part) as their national arbitration statute. The Arbitration Act of Japan (Law No. 138 of 2003) has been drafted in accordance with the UNCITRAL Model Law.[2)]

Considered as a whole, international arbitrations can vary widely in terms of the legal system at the place of arbitration (*e.g.*, whether it is a pro-arbitration jurisdiction), the structure of that legal system (*i.e.*, civil or common law), the governing law of the contract (and, in some cases, the governing law of the arbitration), and the nationality and experience level of the arbitrators.[3)] This article broadly describes the characteristics of “Japanese” domestic arbitral proceedings and foreign (international) arbitral proceedings[4)] and compares and contrasts their respective practices.

2. A threshold distinction between “Japanese” domestic and international arbitral proceedings is the choice of the language for both the contract and that of the arbitral proceedings. As a practical matter, it is not common for international transactions to be conducted in Japanese. Thus, it is uncommon that an arbitration agreement designates Japanese as either the controlling contractual language or the language used for the arbitral proceeding, even when the place of arbitration is within Japan. On the contrary, in domestic transactions, the controlling contractual language and the language used for the arbitral proceeding is always Japanese and the place of arbitration is always within Japan, with the limited exception that an overseas corporation that is a subsidiary of a Japanese corporation is a party.

Not surprisingly, domestic arbitral proceedings have advantages that are suited to the corporate culture of Japanese companies including being conducted in Japanese. In contrast, it is commonplace that international arbitral proceedings, especially for arbitrators with a common law background, involve active written and oral arguments made in English. It is therefore necessary to have the sufficient experience practicing as a legal professional in the English language. In this regard, Singapore and Hong Kong are often chosen as the place of

2) The decision of the Tokyo High Court on August 1, 2008 (*Hanrei Jihou* No. 2415, p. 24), which referred to various issues regarding the nature of the set aside examination of arbitral awards, also recognized the same. The arbitration case that this decision dealt with is a dispute between a Japanese company and a European company both of which agreed upon the JCAA rules, and the authors were involved in the case as counsel.

3) As a general principle, in the case of a single arbitrator, the arbitrator’s nationality should be different than either party’s nationality, whereas in the case of a three arbitrator panel, each party typically chooses an arbitrator whose nationality it deems favorable and the presiding arbitrator should be of a different nationality than either party.

4) In arbitral proceedings conducted by arbitrators with a common law background under the JCAA Rules, common law litigation practice tends to be strongly reflected in their proceedings. On the other hand, arbitral proceedings conducted by Japanese or other arbitrators with a civil law background under the JCAA Rules, the Japanese and civil litigation practice are reflected in their proceedings and thus we described the latter as "Japanese" or “domestic” arbitral proceedings.

arbitration for arbitration agreements in international transactions, especially in Asian countries[5] because, unlike Japan, there are many English-speaking arbitrators from the UK, the US, Australia, New Zealand, Singapore and Hong Kong.

In order to promote international commercial arbitration in Japan, it is necessary not only to expand the system and facilities and encourage a pro-arbitration legal system, but also to ensure that there are experienced arbitrators and counsel who are qualified to conduct international arbitral proceedings in English and available to serve in arbitrations in Japan.

Ⅱ. Practical Comparisons in the Procedural Timetable and the Collection of Evidence

1. Procedural Timetables in foreign arbitral proceedings such as those administered by the ICC

In any arbitration, the formulation of a procedural timetable is critically important for the fair, expeditious and effective resolution of the dispute. Arbitral tribunals typically issue the procedural timetable in the form of a procedural order, after consultation with the parties and in accordance with the applicable institutional rules. In international arbitral proceedings, the procedural timetable is very detailed and rigorous. In general terms, the procedural timetable will include deadlines for written submissions (*i.e.*, statement of claim, statement of defense), written witness statements, documents exchange/requests, expert reports, and a final evidentiary hearing.

Although the schedule may vary depending on the nature of the case and the issues presented, an overview of the ICC's typical timetable leading up to the finalization of the Terms of Reference[8] is as follows:

First, the Request for Arbitration, the Answer to the Request for Arbitration and Counterclaim (if any) and Reply to Counterclaim are alternately submitted to the Secretariat.

Second, the arbitral tribunal is empaneled.[9] Once empaneled, the Secretariat forwards the record to the arbitral tribunal.

Third, the arbitral tribunal conducts a Case Management Conference ("CMC"), which is

5) Due to the recent political climate, the number of arbitral proceedings in which Hong Kong is the seat of arbitration is reported to be decreasing, with some parties opting instead to seat their arbitrations in Singapore (*e.g.*, SIAC), Malaysia (*e.g.*, AIAC) and Thailand (*e.g.*, THAC). Even so, Hong Kong, especially cases administered by the HKIAC remains a popular seat for international arbitrations and, in light of recent cooperative agreements, the HKIAC remains a preferred choice for arbitrations involving Chinese respondents.

6) As of the time of this writing, the applicable rules are the ICC Rules of Arbitration entered into force on 1 January 2021 (referred to hereinafter as the "ICC Rules"). Care should be taken to recognize that the article numbers of the ICC Rules may be different than those of the earlier issued versions.

7) Article 22 provides generally for procedural measures to be taken by the arbitral tribunal with respect to case management, Article 24 is specifically directed to case management conferences and the procedural timetable, and Article 31 sets the time for the issuance of a final award. Similarly, Article 43 of the JCAA Rules addresses the preparation of the procedural timetable and prescribes the period of time until the issuance of the arbitral award.

equivalent to a preparatory meeting under the JCAA rules. At the CMC, the arbitral tribunal consults with the parties to finalize the Terms of Reference and to hear the parties’ respective positions on the procedures to be followed and the scheduling thereof. The Terms of Reference is then finalized and the procedural timetable for the entire proceeding is set by the arbitral tribunal. Needless to say, the Terms of Reference, which delineates the scope of the proceedings, is an important document that serves as a premise for the arbitral award, and this point is discussed in Section III below.

Next, after the Terms of Reference is finalized and the case moves to parties’ submissions on the disputed issues, there is typically a back-and-forth exchange of arguments and proofs by both parties (alternating between the Claimant's Statement of Claim, the Respondent’s Statement of Defense and Counterclaim, Claimant’s Reply to Defense and Defense to Counterclaim and Respondent’s Reply to Defense to Counterclaim, etc.)[10]. Foreign arbitral proceedings are notably different from domestic proceedings in that the arbitral tribunal expressly orders the submission of "all" factual evidence and legal authorities in support of the parties’ claims.[11]

In cases where there is a dispute over the jurisdiction of the arbitration, such as the scope of the arbitration agreement, a hearing on the tribunal’s jurisdiction may be held, followed by a Partial Award on Jurisdiction (interim award). Such jurisdictional challenges must be identified in Terms of Reference and are typically addressed at the outset of the proceedings, either in advance of or concurrent with the parties’ substantive submissions.

While the ICC Rules do not contemplate discovery, it is common for international arbitral proceedings to include requests for production of documents, whereby a party may request the other party to disclose evidence believed to be within the other party’s possessions, custody and control. Such procedures are commonly guided by the IBA Rules on the Taking of Evidence in International Arbitration. Commonly, each party is permitted to request specific

8) *See* Article 23 of the ICC Rules. Although the ICC Rules require the preparation of the Terms of Reference, this is not provided for in foreign arbitral proceedings conducted under other institutional rules such as those of the SIAC and HKIAC, in which the scope of the proceedings is typically determined by the parties’ pleadings. In either instance, a party seeking to change the allegations in the pleadings (*e.g.*, to add a new claim or defense) must file an application and seek the permission of the arbitral tribunal. Whereas the ICC proceedings limit the addition of new claims beyond the scope of the Terms of Reference (*see* ICC Rule 23(4)), in non-ICC international arbitral proceedings, particularly those conducted under common law procedural law, the scope of the matters to be heard will be strictly determined by the pleadings. *See*, *e.g.*, *PT Prima International Development v Kempinski Hotels SA and other appeals*, [2012] 4 SLR 98.

9) The number of arbitrators and the method of appointment of arbitrators, unless specified by the parties in the arbitration agreement, is set forth in Articles 12 and 13 of the ICC Rules.

10) While the ICC Rules do not provide for the parties’ submissions (*i.e.*, Statement of Claim, Statement of Defense, etc.), such submissions are the normal and all but universal practice in international commercial arbitrations.

11) In foreign arbitral proceedings, the IBA Rules on the Taking of Evidence in International Commercial Arbitration (IBA Rules) provide guidelines on evidentiary methods, and the Chartered Institute of Arbitrators' Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration (CIArb) provides guidelines on the handling of expert witnesses.

documents or narrowly tailored categories of "relevant and material" documents. The arbitral tribunal will review the parties' requests and any objections thereto and issue a procedural order in which it orders the disclosure of evidence it deems relevant and material to the resolution of the issues in dispute, and the party will be required to disclose evidence in accordance with such procedural order.[12)]

In addition to documentary evidence, both parties typically submit written witness statements and, where applicable, expert reports. It is also common to submit rebuttal/responsive witness statements and expert reports, respectively. These statements/reports typically serve in lieu of direct examination at the evidentiary hearing. In particular, if the dispute is related to intellectual property or contract interpretation, it is often necessary to supplement the arbitral tribunal' s knowledge with expert witnesses in the field of the applicable law or the technology field. The authors have frequently submitted the written opinions of experts in various technologies, contract interpretation and case law analysis based on the applicable law, and the calculation of damages.

Prior to the evidentiary hearing, the documents and evidence to be used in the hearing are organized as a Hearing Bundle. At the evidentiary hearing, the witnesses (those who submitted a witness statement or expert report) are subjected to intensive cross-examination.[13)] Often the attorneys are permitted to present opening and/or closing oral submissions. Following the conclusion of the evidentiary hearing, the parties may be required to submit written closing submissions and submissions on the parties' costs.[14)] The arbitral proceedings are thereafter closed, and the arbitration proceeds to the Final Award.

In this way, in international arbitral proceedings, a detailed procedural timetable is formulated, and throughout the proceedings, the parties frequently raise procedural issues by filing applications, and the arbitral tribunal may convene CMCs as necessary to address procedural issues that may arise. This tendency is particularly pronounced in arbitral tribunals that have their sources in common law procedural law, and in the experience of the authors, there have been cases in which as many as 30 procedural orders were issued by the time of the final evidentiary hearing. As will be explained in the next section, in "Japanese" domestic arbitral proceedings, there is not much aggressive motion from counsel regarding procedural matters, and the frequency with which the arbitral tribunal holds CMCs and issues procedural orders is considerably lower.

2. Examination Schedule in" Japanese" Arbitrations

In "Japanese" arbitral proceedings, as there are no notable differences in the governing

12) The failure or refusal to comply with the procedural order to produce documents can result in the arbitral tribunal drawing the adverse inference against the party.

13) In hearings, the differences between Japanese and foreign arbitral proceedings are most pronounced. This issue will be discussed in Section IV below.

14) The Article 38 of the ICC Rules allows the arbitral tribunal to award reasonable costs of the arbitration including attorney fees and expenses of the arbitration (*e.g.*, experts fees, arbitrator fees, administrative costs, etc.).

arbitration rules themselves, the general framework of the examination schedule is the same as in foreign arbitral proceedings. The basic type of examination schedule under the JCAA is that, after the submission of the Request for Arbitration and the Answer, the arbitral tribunal will present a draft procedural order, and the arbitral tribunal will hear the positions of both parties and decide on an examination schedule. Thereafter, in accordance with the schedule of proceedings, both parties shall first present their arguments and evidence, and the arbitral tribunal shall organize the content of the arguments in the terms of reference by adjusting the parties’ positions, and shall afford the parties an opportunity to supplement their arguments and evidence. Depending on the case, methods of proof through witness examination (Article 50(2) of the JCAA Rules), document production orders (Article 54(4) of the JCAA Rules), and expert witnesses (Article 55 of the JCAA Rules) are considered. Necessary hearings will be held to conclude the examination and lead to an arbitral award.

Nevertheless, it cannot be denied that in “Japanese” arbitral proceedings, there is a tendency for claims and proofs, especially the submission of documentary evidence, to be presented in the so-called “on and off” style, as in the first instance in litigation practice. In contrast, in foreign arbitral proceedings, the arbitral tribunal has ordered the submission of "all" facts and methods of proving legal grounds at an early stage of the proceedings, partly because the arbitrators have an underlying belief that all evidence should be disclosed at an early stage in order to search for the truth. In some cases, the arbitral tribunal will take strict measures, such as excluding or limiting evidence if it is submitted too late.

In contrast, in “Japanese” domestic arbitral proceedings, due to the influence of the practical experience of not only the arbitrators but also their counsel in Japanese litigation, there is a tendency to be cautious in the selection and submission of evidence, and the arbitral tribunals do not order submission of all relevant evidence as aggressively as in foreign arbitral proceedings. Although the JCAA provides statutory procedures for the collection of evidence in the form of examination of witnesses (Article 50, Paragraph 2 of the JCAA Rules), order for production of documents (Article 54, Paragraph 4 of the JCAA Rules), and expert witnesses (Article 55 of the JCAA Rules), there is a much lower tendency for Japanese counsel to actively employ these procedures to the same extent as is common in foreign arbitral proceedings. Evidentiary procedures in accordance with the IBA Rules and the CIArb Protocol (see footnote 11 above), which are frequently adopted as guidance with respect to the taking of evidence in foreign arbitral proceedings, are not actively utilized in “Japanese” arbitral proceedings.

It is true that voluminous evidence may lead to delays in the proceedings and increase the burden on the arbitral tribunal, which may have a negative impact on the parties seeking an early resolution in terms of time and costs.[15] In this sense, the hearing policy in “Japanese” arbitral proceedings is influenced in no small part by the national character of not wanting to incur litigation.[16] However, the Arbitration Act of Japan provides that an arbitral award can be

15) Redfern and Hunter on International Arbitration (6th Edition,2015) pp.36-37 points out the problem of high and prolonged arbitration costs in international arbitral proceedings.

set aside only when the grounds for set aside provided in Article 44(1)(i) to (viii) exist.[17] The decision of the Tokyo High Court's on August 1, 2008 stated, as follows:

> *"In a case involving a request for the set-aside of an arbitral award, an examination that would result in a substantive review of the arbitral award is not permissible. Even if the factual findings or legal determinations of an arbitral award appear to be erroneous in the eyes of the national court of the seat of arbitration, the national court of the seat of arbitration may not intervene and set aside the arbitral award on the basis of mere errors in factual findings or legal determinations."*

Because of the strong preference to uphold arbitral awards, the basic premise is that the proceedings should be exhausted under the procedural safeguards of the parties, and in "Japanese" arbitral cases, as in foreign arbitral cases, the parties' counsel should actively exchange positions by e-mail, etc. or make full use of motions/applications, and conduct CMCs to allow the parties the opportunity to be heard, and resolve procedural issues in each instance by procedural order.[18]

Ⅲ. Comparison of Terms of Reference

1. Importance of Terms of Reference

As mentioned in Section II above, in ICC arbitral proceedings, the Terms of Reference is a document prepared by the parties and the arbitral tribunal at the outset of the proceedings in order to clearly identify the claims being raised and the issues the arbitral tribunal must resolve.[19] Once the Terms of Reference has been finalized by the parties and issued by the arbitral tribunal, no new claims may be made by the parties that fall outside the limits of the Terms of Reference unless the party has been authorized to do so by the arbitral tribunal,

16) The aforementioned Tokyo High Court decision of August 1, 2008 stated that "*elaboration of the proceedings will lead to a prolongation of the hearing period of the arbitral proceedings and will increase the costs of the parties required for the arbitral proceedings (unlike court proceedings, the remuneration of the arbitrator is also a procedural cost borne by the parties). It is also contrary to the legislative intent of the Arbitration Law to promote the use of arbitration*." In Japan's litigation practice, there are cases where the losing party is made to bear part of the other party's attorney's fees when there is an agreement to such effect. However, in arbitral proceedings (especially international arbitral proceedings), it is quite common that the losing party is made to bear reasonable attorney's fees incurred by the prevailing party, thereby obviating the Tokyo High Court' s concern.

17) *See* Article 34 of the UNCITRAL Model Law, "*Application for setting aside as exclusive recourse against arbitral award.*"

18) Shintaro Kato, "裁判実務からみた「インタラクティブ仲裁規則」の評価 [Evaluation of the 'Interactive Arbitration Rules' from the Perspective of Court Practice]" (JCA Journal, Vol. 67, No. 3 (2020), p. 8) states that while it is beneficial to require the procedures to be in writing to ensure clarity of such procedures, it should be considered whether the use of oral arguments and procedures can increase the efficiency of this process.

19) *See* Article 23(1) of the ICC Rules.

which shall consider the nature of the new claim, the stage of the arbitration and other relevant circumstances.[20] In this way, the contents of the Terms of Reference define the scope of the arbitral award, and subsequent changes to the claims will not be permitted in principle. If the arbitral tribunal issues an arbitral award that goes beyond the scope of the parties' claims, the award may be deemed as exceeding the jurisdiction of the arbitration, rendering the award subject to set aside.[21]

On the other hand, Article 46(2) of the JCAA Arbitration Rules provides that “*If the arbitral tribunal considers it appropriate for promoting efficient arbitral proceedings, the arbitral tribunal, after giving the Parties an opportunity to comment, may prepare terms of reference setting forth the matters referred to the arbitral tribunal and a list of major issues.*” As such, the preparation of such terms of reference is discretionary. In addition, the text does not limit the filing of new claims that exceed the scope of those identified in the terms of reference. However, if a claim is additionally changed beyond the scope of the terms of reference, the arbitral tribunal is not precluded from rejecting the claim as an untimely claim absent the consent of the opposing party(ies). Although it depends on the complexity of the case, in “Japanese” arbitral proceedings, there are cases in which a terms of reference is not prepared, because the parties give priority to hastening the proceedings without regard to the preparation of terms of reference. However, since the terms of reference defines the scope of the hearing and the arbitral award will be rendered within that scope, it is preferable to prepare the terms of reference to ensure the final award addresses all claims of all parties, and is confined thereto, thereby decreasing the risk the arbitral award will be set aside.

Often in Japanese litigation practice there are parties whose claims at the time of the filing of the lawsuit are vague and who change their claims after receiving a request for clarification from the court, or who change their claims after noticing problems in response to the opposing party's objections. In the authors' experience in “Japanese” arbitral proceedings, there have been cases where changes or additions to claims have been made in the course of the preparation of the terms of reference, but this does not mean that the dispute will immediately become more complicated or protracted. Rather, in light of the dispute resolution function expected of arbitral proceedings, clarifying the content of the parties' claims at an early stage of the proceedings, providing opportunities for explanation, etc., and preparing a terms of reference will often contribute to the efficient resolution of the issues.

2. Effectiveness of Arbitral Awards, Perspectives from Grounds for Set Aside of Arbitral Awards

Article 45(1) of the Arbitration Act of Japan provides that "*an arbitral award shall have the*

20) *See* Article 23(4) of the ICC Rules.

21) Sebastian Perry, Set-aside affirmed after ICC panel upholds “eleventh hour” defence (Global Arbitration Review, 12 Nov. 2021) introduces a case in which a Singapore court vacated an arbitral award to the same effect. *See, CAI v CAJ & CAK* [2021] SGHC 21; *CAI v CAJ & CAK* [2021] SGCA 102. The authors were Claimant’s counsel in the underlying arbitration and instructing counsel in the successful partial set aside of the arbitral award.

same effect as a final and binding judgment." There is no dispute that this "*same effect as a final and binding judgment*" has, at the very least, the res judicata effect. On the other hand, the grounds for set aside of an arbitral award provided for in Article 44(1) of the Act are limited. Arbitral awards are not subject to appeal but, instead, the grounds for set aside exist primarily to address cases in which the procedural safeguards of arbitration are not observed. However, when analyzing the arguments of the parties to a request for set aside of an arbitral award in Japan, the grounds for set aside are most commonly subject to: Article 44(1)(iv) (the party making the application was unable to present its case in the arbitral proceedings); Article 44(1)(v) (the arbitral award contains a judgment on a matter that exceeds the scope of the arbitration agreement or the scope of the request in the arbitral proceedings); and/or Article 44(1)(viii) (the content of the arbitral award is contrary to public policy in Japan). In cases where the terms of reference is not prepared or where the parties' claims are not adequately described in the terms of reference, set aside is most commonly sought on the basis of Articles 44(1)(iv) and (v).

The first case in which an arbitral award was set aside on the grounds of a violation of public policy by a Japanese court seems to be the decision of the Tokyo District Court on June 12, 2011 (*Hanrei Jihou* No. 2128, p. 58). The most significant aspect of the Court's decision is its acceptance that the dispositive holding that disputed facts were undisputed facts constituted a violation of procedural public policy. The Court held that rendering an award without deciding important matters affecting its outcome would be, to parties seeking resolution through decisions by the tribunal on allegations or evidence, tantamount to not making a decision. In contrast, the aforementioned decision of the Tokyo High Court on August 1, 2008 stated that even if there are arbitral proceedings or arbitral awards that violate the old theory on subject of dispute (stretitgegenstand in German) and advisory system (which are premised upon a sharp distinction between the principal facts and indirect facts and a detailed theory of the facts necessary for establishing the element of claims) in Japanese civil litigation practice, the arbitral award cannot be set aside on that basis. It may be argued whether the holding of the aforementioned Tokyo District Court decision should be upheld by the decision of the Tokyo High Court. Leaving this issue aside, what can be said at least is that the parties asserting grounds for set aside have raised doubts about the principle of equal treatment set forth in Article 25 (1) of the Arbitration Act and the principle of procedural safeguards set forth in Article 25(2) of the Arbitration Act as the main principles of arbitral proceedings. In any event, it is important to ensure that procedural steps are taken to avoid any such doubts.

In Japanese litigation practice, unlike that of the U.S., there are some cases in which the parties' claims are simply arranged in the judgment, based on a sharp distinction between the principal facts[22] and indirect facts under the theory of the facts necessary for establishing the

22) The Tokyo High Court's decision of August 1, 2008 held that "*the old theory on subject of dispute and a sharp distinction between the principal facts and indirect facts in Japan cannot be stated to be the international standard of basic principles to be observed in arbitration. It goes without saying that an elaborate theory of the facts necessary for establishing the element of claims in Japan is regarded as an overly elaborate and impractical theory from an international perspective.*"

element of claims. Perhaps due to the influence of this type of litigation practice unique to Japan, in “Japanese” arbitration, even in cases where a terms of reference is prepared, there are cases where the framework of the claim is simply arranged chiefly based upon the principal facts. However, from the perspective of preventing a request for set aside of an arbitral award from triggering on the grounds of a breach of procedural safeguards, steps should be taken to ensure that the terms of reference sufficiently reflects the claims of the parties, and the parties should more actively express their views on the preparation and content of the terms of reference.

Ⅳ. Comparison of Hearing

1. Evidentiary Hearing

The procedural timing of hearings was discussed in Section II above, but it is worth noting the difference in the evidentiary value of such hearings in “Japanese” and foreign arbitral proceedings. As mentioned above, in foreign arbitral proceedings, not only factual witness statements, but also expert reports of expert witnesses in the fields of technology, law, economics, etc. are submitted according to the nature of the case and responsive statements and reports are submitted, respectively, in advance of the evidentiary hearing. The order, schedule, etc. of the examination of factual and expert witnesses in the hearing should be discussed and decided in advance at a CMC, with the witnesses being subjected to cross-examination during the hearing.

In foreign arbitral proceedings, hearings are typically scheduled for one or two consecutive weeks, often irrespective of weekends or holidays depending on the schedule of the arbitral tribunal and counsel.[23] In such hearings, time is usually not allocated for direct examination except for confirming the accuracy of the previously submitted witness statement/expert report and whether or not they have been corrected. Thereafter, the primary focus is on cross-examination. In particular, arbitrators with common law backgrounds tend to place more emphasis on witness examination and oral argument, which tends to prolong hearings, whereas arbitrators with civil law backgrounds emphasize documentary evidence, which tends to make hearings relatively more efficient in their arbitral proceedings.[24] Cross-examination may be conducted for extended periods of hours during a day, or even across multiple days in some cases, and if the witness's native language is different from the language agreed upon in the arbitral proceedings, questioning is conducted through an interpreter, thereby causing the questioning time to be extended. Article 25(2) of the ICC Rules provides that the arbitral tribunal may decide whether they wish to hear the testimony of the parties’ witnesses, or any other person, and are permitted to actively interrogate witnesses on the issues it deems

23) The larger the scale of the hearing, the more effort is required for administrative procedures, such as preparation of the bundle, negotiation with the Arbitration Secretariat for reservation of the hearing room and prepayment of fees, and securing interpreters and check interpreters.

24) Colin Ong, Case Strategy and Preparation for Effective Advocacy (Global Arbitration Review, 1 Oct 2019) analyzes effective procedural strategies and other aspects of international arbitral proceedings.

necessary.

Indeed, the manner in which the evidentiary hearing is conducted in foreign arbitral proceedings is one of the reasons why the cost of international arbitral proceedings is so high. Prior to an evidentiary hearing, a great deal of effort is required to prepare for the hearing, including reorganizing the documents to be used as the hearing bundle and holding repeated meetings for the preparation of witness testimony. The hearing itself focuses primarily on the examination of witnesses, which increases the costs of the arbitrators and the counsel.[25] Nevertheless, in order not to mislead the arbitral tribunal's decision in the one-time resolution method of arbitration, it is necessary to make the arbitral tribunal fully understand the detailed facts and expert knowledge, including the background of the case. As mentioned above, in foreign arbitral proceedings, especially those governed by common law and involving arbitrators with common law backgrounds, the tribunal will not be biased toward fact-finding based on documentary evidence, but rather will place more emphasis on evidence elicited through the cross-examination of witnesses. It should be said that this is the cornerstone for the arbitral tribunal to hear the testimony of witnesses, discover the truth, and reach not only formal conclusions drawn from legal arguments, but also substantively fair arbitral awards. It is necessary for both parties and their counsel to be careful not to neglect the examination of witnesses out of concern for cost.

2. Hearings in "Japanese" Arbitral proceedings

In Japanese litigation practice, except for some types of litigation cases such as domestic relation cases, labor cases, and other cases where documentary evidence is scarce, the evidentiary value of documentary evidence is given more weight than the subjective evidence of human testimony. In civil litigation proceedings, witnesses are never accused of perjury, and under the principle of free evaluation of evidence, the credibility of witnesses' testimony is roughly and briefly excluded based on the facts found by documentary evidence, which practice is often seen in Japanese judgments. In addition, in litigation practice, when there is a wide range of applications for witness examinations by the parties, the time allocated for examination of witnesses is limited, as the court suggests, in order to narrow it down to the necessary number of witnesses and time for examination of each such witness. Article 182 of the Code of Civil Procedure of Japan provides for intensive hearing of witnesses, and although such intensive hearing has become widespread in practice, the time for examination is naturally limited, and it is rare to examine a single witness for an entire day or across days in civil litigation proceedings.

Such practice in Japan is strongly reflected in "Japanese" arbitral proceedings involving arbitrators and counsel who are experienced in Japanese litigation practice, and there is a tendency to scrutinize the necessity of examining evidence, to focus only on important witnesses, and to keep the time for examination relatively short. In "Japanese" arbitral

25) The hourly rates for arbitrators, as well as common law background counsel, can often exceed US$1,000.

proceedings, counsel limit their evidence to the necessary scope as much as possible, and the arbitral tribunal does not endorse the treatment of examining many witnesses over a long period of time. However, in order to concentrate on effectively proving the case, it is beneficial to look to the foreign arbitral practice concerning the conduct of hearings.

Article 54(2) of the Interactive Arbitration Rules provides for the examination of evidence ex officio, and Article 55(1) of the same Rules provides for the appointment of expert witnesses by the arbitral tribunal. Although there is still a scarcity of interactive arbitral proceedings, it is expected that if arbitrators and counsel are involved in litigation practice in Japan, they will be reluctant to use the ex officio principle, and to what extent these provisions will be effectively applied is one of the issues imposed on “Japanese” arbitral proceedings.[26)]

Ⅴ. Revitalization of IP cases and Other International Commercial Arbitration

The authors and their colleagues have experienced an increase in the number of foreign arbitral proceedings involving issues such as infringement of patents and copyrights, misuse of intellectual property, and interpretation of license agreements and plant export agreements.

The ability to conduct arbitral proceedings and maintain the resulting awards in confidence makes arbitration a particularly attractive method of resolving intellectual property disputes.[27)] Additionally, arbitration provides an added advantage of allowing a global resolution (*i.e.*, claims arising in multiple countries) in a single dispute as opposed to having to litigate claims on a country-by-country basis. That said, the unique nature of intellectual property disputes, often involving highly complex and specialized technical expertise increases the need for experienced and technically qualified counsel and arbitrators, particularly those that are fluent in English and having experience in international arbitral proceedings.

Japan has the opportunity to become a preferred seat of arbitration given the judicial respect for arbitral awards. As noted above, the Tokyo High Court decision of August 1, 2008 states, “*If the elaborate interpretation of laws and precedents in the domestic civil court proceedings in the place of arbitration applies to the grounds for the set-aside of arbitral awards, the place of arbitration with such domestic courts will be avoided in international*

26) As one of the features of interactive arbitration (Article 56 of the same Rules), it provides for the presentation of the arbitral tribunal's provisional approach, which while familiar to civil law-type legal practice, may not be suitable for arbitrators with a common law background.

27) *See* Article 22(3) of the ICC Rules and Article 42 of the JCAA Rules. In addition, Article 9 of the Arbitration Act stipulates restrictions on inspection of case records for setting aside an arbitral award. In addition to such confidentiality, in the U.S., in order to avoid the risk of a jury's decision in an intellectual property case, there is also the advantage of choosing arbitration as the dispute resolution method where expertise in intellectual property is warranted. The Amended Hong Kong Arbitration Ordinance of 2017 allows for arbitration of intellectual property disputes and confirms that such arbitral awards are enforceable. Similarly, the United States Patent Statute (35 U.S.C. § 294) specifically provides for the arbitration of patent infringement disputes, whereas the WIPO Arbitration Rules contemplate the arbitration of all intellectual property disputes. The American Intellectual Property Law Association (AIPLA) maintains a list of qualified arbitrators and mediators who are experienced in the resolution of intellectual property disputes.

contracts, to the extent that such interpretation goes beyond the international standard of basic principles to be observed in civil dispute resolution procedures such as arbitration." The court's reasoning is critically important to Japan's standing as a preferred place for international arbitrations. A court system that fails to respect the sanctity of arbitral awards would obstruct development of international commercial arbitration in Japan, which in turn would hinder the development of Japan's national economy. This is also contrary to the legislative intent of the Arbitration Act of Japan. The authors, who were involved in the case as counsel, believe that such holding is not limited to the nature of examination for the set aside of arbitral awards, but also includes expectations for the development of foreign commercial arbitration in which Japan is the seat of arbitration.[28] Steps should be taken to increase the number of qualified arbitrators and arbitration counsel in Japan who are experienced in international commercial arbitration and fluent in English. Doing so will help promote Japan as a preferred arbitral seat in Asia.

28) In February 2018, the Japan International Dispute Resolution Center was established, and the "*Liaison Conference of Relevant Ministries and Agencies for the Revitalization of International Arbitration*" established in the Cabinet Secretariat compiled the "*Possible Measures for the Revitalization of International Arbitration (Interim Summary)*" dated April 25, 2018 and the "*Direction for Further Promotion of Measures for Awareness-raising, Public Relations, and Human Resources Development for the Revitalization of International Arbitration*" dated July 4, 2019. However, in comparison to Japan, Singapore, Hong Kong, and more recently South Korea, Malaysia and Thailand have been more proactive in promoting arbitration institutions in Asian countries.

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The Keys to Success: Unlocking Arbitrator Skills, Experience and Qualification Requirements

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Ⅰ. Introduction

The ability of a party to an international arbitration agreement to select an arbitrator with relevant skills, experience and qualifications is regularly cited as a key advantage of international arbitration as a dispute resolution process.[2)] However, in the field of international commercial arbitration, it is becoming very rare for arbitrator skills, experience or qualifications requirements to be 'hard-coded' into an arbitration agreement.

One of the reasons behind this trend is nervousness around the enforceability of qualification requirements and their potential to give rise to challenges (of arbitrators or arbitral awards). At the same time, parties seem to be growing in confidence that arbitral institutions and experienced counsel will ensure the appointment of a tribunal that has the skills, experience and qualifications required to provide a high quality of justice. Consequently, parties have tended towards arbitration clauses which are as simple as possible, without specifying skills, experience or qualification requirements. This approach is reflected in the simple, standard form wording promoted by arbitral institutions in their model clauses.[3)] But does this trend mean that parties are losing out by not taking advantage of the opportunity to set baseline requirements for their arbitrators?

From the perspective of an arbitration practitioner based in Japan, this article considers the potential risks, rewards and systemic impacts of clauses which require arbitrators to have

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2) *See*, for example, F. Solimene 'Dispute resolution in energy-related agreements: how to choose the right means and draft a proper clause,' *International Energy Law Review* (2015), Vol. 3, 108-122 who notes in a section summarizing the advantages of arbitration that "*the parties can choose from the outset the skills that the arbitrator(s) should be able to demonstrate in order to be appointed.*"

3) For example, the JCAA Model Clause: "*All disputes, controversies or differences arising out of or in connection with this contract shall be finally settled by arbitration in accordance with the Commercial Arbitration Rules of The Japan Commercial Arbitration Association. The place of the arbitration shall be* [city name], [country name]."

certain skills, experience or qualifications. It also examines the contrast between prescriptive arbitrator requirements and attributes frequently required by in expert determination clauses.

Ⅱ. Skills, Experience and Qualification Requirements in Context

In recent years, there has been an increasing focus by the arbitration community on conflicts of interest, availability issues, ethics and diversity in terms of arbitrator appointments. This focus has been driven in part by the frequency of bias challenges as well as concerns by parties and practitioners that the existing pool of arbitrators is too narrow or dominated by a small set of practitioners with similar backgrounds.[4] This trend has been accompanied by a growth in codes of conduct[5] , international guidelines[6] , arbitral rules and national legislation all aimed at managing issues with conflicts of interest or arbitrators whose conduct is questionable.

So skills, experience and qualifications, the focus of this article, must be treated differently because these relate directly to the core competency and quality of arbitrators. However, it is acknowledged that these requirements may overlap with suitability and diversity issues. For example, if parties start to adopt clauses with requirements that arbitrators have over 15 years' experience that will obviously impact the range of eligible arbitrator candidates – but this can go both ways. For example, some requirements may create opportunities for emerging arbitrators who have particular skills, for example, if the parties require an arbitrator that speaks, English, French and Japanese.

Unfortunately, many practitioners have anecdotes to tell of arbitrators whose capability to understand and deal with the issues in dispute – while being of a high enough standard to render their conduct or the award safe from a legal challenge – was, nevertheless, disappointing. Poor quality arbitrators can result in inefficiency as well as potentially erroneous findings of fact or law. On their own, these failures are unlikely to provide sufficient grounds for challenging an award in most jurisdictions.[7] It is only when the competency level is so low, or it is combined with a failure to follow a fair or proper procedure, that we tend to see successful challenges to the award (or the arbitrator).

But whether we are talking about a procedure that is disappointing or legally flawed, the risk of both these outcomes is mitigated by having an arbitrator who has relevant skills,

4) As noted by Dr S Luttrell, "*it was the clients who noticed the problem first: parties to a large international arbitration may well be alarmed to enter the room and find that everybody (including their own lawyers) knows one another except them*" – S. Luttrell, *Bias Challenges in International Commercial Arbitration* (WoltersKluwer, 2009), p. 6.

5) Most recently, ICSID and UNCITRAL have been collaborating towards the production of a 'Code of Conduct for Adjudicators in International Investment Disputes.'

6) For example, the IBA *Guidelines on Conflicts of Interest in International Arbitration.*

7) For example, in the English case of *Schwebel v Schwebel* [2010] EWHC 3280 (TCC) where, dealing with an application to set aside an award for "*serious irregularity*" under s68 of the Arbitration Act 1996, Akenhead J held "[i]*t will be a very rare and exceptional case for the Court to interfere pursuant to Section 68 on the grounds that the arbitrator reached the wrong findings of fact, should have reached different factual conclusions, given greater weight to some evidence or failed to explain why weight or importance was not given to some evidence.*"

experience and qualifications – and these attributes can be included in the arbitration agreement. As other commentators have observed, "[i]*t is a truism of arbitration that the process is only as good as the quality of the arbitrators conducting it.*"[8] While, parties can try and agree on quality criteria once a dispute arises, it is generally easier for parties to agree on such topics at the front end.

Ⅲ. Arbitrator requirements and the arbitration agreement

Given that parties are likely to agree that any tribunal appointed to resolve a dispute between them should have appropriate skills, experience and qualifications, it is perhaps surprising that it is becoming less common to see arbitration agreements that specify these kinds of requirements. In fact, none of the model clauses of the major arbitral institutions include wording or prompts to encourage parties to specify such requirements, and this in itself explains the general absence of such wording.

The most obvious explanation for the general absence of arbitrator requirements in modern arbitration clauses is that arbitral institutions and practitioners are wary of them because of legal challenges that have arisen in relation to such clauses. Crucially, the New York Convention and UNCITRAL Model Law[9] contemplate that arbitral awards may not be enforced or can be set aside if the composition of the Tribunal was not in accordance with the agreement of the parties. So, if an arbitration agreement requires an arbitrator to speak Japanese and Italian, and have engineering as well as legal qualifications, it may create a risk to an award if the arbitrator appointed does not possess those requirements.

Generally, problems tend to arise from a lack of certainty or problematic drafting. For example, in the English case of *Pan Atlantic v Hassneh*[10] , the arbitration agreement required the arbitrator to be a disinterested executive officer of an insurance or reinsurance company. While the arbitrator fulfilled these requirements at the time of his appointment, he ceased to become an officer of the company during the course of the arbitration. One party applied to court to have the arbitrator removed on the basis that he was not qualified. While unsuccessful on appeal, the application caused disruption and delay.[11]

8) D Bishop and L Reed 'Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration,' *Arbitration International* Vol. 14(4) (LCIA, 1998).

9) New York Convention, Article V(1)(d) provides that recognition and enforcement of an award may be refused if "[t]*he composition of the arbitral authority … was not in accordance with the agreement of the parties.*" The UNCITRAL Model Law on International Commercial Arbitration (1985) (with amendments adopted in 2006), provides at Article 34(2)(a)(iv) that an arbitral award may be set aside if "*the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties*" and Article 36(1)(iv) provides the same issue as a ground for a court to refuse enforcement of an award.

10) [1992] 2 Lloyd's Rep. 120.

11) In another English case, *Jivraj v Hashwani* [2011] UKSC 40, an arbitration clause which required the arbitrators to be "*respected members of the Ismaili community and holders of high office within the community*" resulted in a challenge on the basis that it was invalid because it contravened employment laws (which require non-discrimination on the basis of race or religion). While the Supreme Court ultimately upheld the validity of the clause, the challenge prolonged and destabilised the arbitration process.

Similarly, in the case of *Allianz v Tonicstar*[12] , the arbitration agreement (by incorporation of standard insurance industry terms) required the arbitrator to have "*not less than ten years' experience of insurance or reinsurance.*" Tonicstar challenged the appointment of a lawyer as arbitrator on the basis that he only had experience of insurance and reinsurance law, not of the *business* of insurance or reinsurance. While ultimately the Court of Appeal upheld the appointment of the lawyer, this was not without significant disruption to the arbitration process.

It is understandable why, reflecting on the cases above, practitioners and institutions tend to avoid including skills, experience or qualification requirements in arbitration agreements. However, when scrutinised, the number of successful challenges to arbitrators or awards on the basis that arbitrator requirements have not been satisfied or resulted in a pathological arbitration clause, is relatively low. This suggests that if the parties can agree on skills, experience or qualification requirements, courts will support their applicability where possible.

Arguably, for parties involved in complex business sectors where disputes are likely to require the tribunal to deal with complicated technical issues, specification of skills, experience or qualification requirements is particularly important. Language skills and relevant local legal qualifications may also be crucial, particularly for parties who are outside the anglophone/ common law world.

Ⅳ. The role of counsel

Unless arbitration is a regular feature of their business and their legal team is well-experienced in arbitration, most parties will look to their lawyers to provide lists of potential candidate arbitrators. The benefit of this approach is that a party's lawyers will be able to provide suggestions of candidates who they think fit the profile required by the case (which usually takes account of a range of substantive and strategic factors).

Many firms have large arbitration practices including senior lawyers who also sit as arbitrator – so they are well placed to mine their collective experience in making recommendations. However, this does not mean that big firms will get it right every time and they may sometimes be constrained in recommending some arbitrators due to conflict issues.[13] At the same time, where the party's preference is to use a smaller firm, no matter how good the firm, it may not have the collective experience to consider as many possibilities as larger firms. So there are limitations for parties in relying entirely on their external counsel for arbitrator selection purposes. In these circumstances, including some basic arbitrator requirements in the arbitration clause may be advisable, particularly for parties working in sectors where the issues are likely to be technical or challenging for arbitrators who have not experienced them previously.

12) [2018] EWCA Civ 434.

13) For example, the *IBA Guidelines on Conflicts of Interest in International Arbitration* at 3.3.8 state it is an Orange List item if "[t]*he arbitrator has, within the past three years, been appointed on more than three occasions by the same counsel, or the same law firm.*"

Ⅴ. The role of appointing authorities and arbitral institutions

While there is much to recommend agreement by parties on tribunal members, or at least the process for their appointment, it is common that an arbitral institution is required to step in to appoint at least one tribunal member (usually the presiding arbitrator or sole arbitrator). In doing so, institutions or other bodies accepting the role of appointing authority will generally take into account the skills, experience or qualifications of potential arbitrators. Indeed, most arbitral institutions formally commit to doing so. For example, the JCAA's Appointing Authority Rules promise that "[w]*hen appointing the arbitrator, the JCAA shall consider the arbitrator candidate's background, nationality, place of residence, language skill, expertise, experience as arbitrator, availability, and any other relevant factors.*"[14)]

Nevertheless, while many institutions are very knowledgeable and take astonishingly diligent steps to ensure an appropriate appointment, unless there are substantive requirements in the arbitration agreement, or they are notified jointly by the parties to the appointing authority during the appointment process, the appointing authority will have flexibility and discretion to select the arbitrator it considers most appropriate. By contrast, where the parties have specified that the arbitrators must have particular skills, experience or qualifications in the arbitration agreement, the appointing authority is typically bound to take them into account or otherwise risk the stability of the award, given the Model Law and New York Convention provisions set out above. This requirement is reflected in Article 9(1) of JCAA' s Appointing Authority Rules (2021), which confirm that "*the JCAA shall appoint an arbitrator in accordance with the agreement of the Parties.*"[15)]

Consequently, where parties agree that they want their tribunal to have particular skills, experience or qualifications, they can generally be confident that these will be respected by arbitral institutions or other appointing authorities, if they are included in the arbitration agreement.

Ⅵ. Comparison with expert determination

Despite the trend for arbitration clauses to dispense with specific skills, experience or qualification requirements, expert determination clauses frequently stipulate these kinds of requirements. For example, ship sales agreements providing for expert determination frequently require that the expert be a qualified marine surveyor.[16)] More generic expert determination clauses (e.g., for valuation issues) require the expert to be "*a partner in an*

14) JCAA's Appointing Authority Rules (2021), art. 9(3).

15) Other institutions make similar comments, for example, the Singapore International Arbitration Centre (SIAC) Practice Note 01/14 provides that when the President of the SIAC Court makes appointments, "[t]*he criteria for appointment shall follow the provisions specified in legislation or the contract between the parties.*"

16) For example, in the English case of *Schulte & Others v Nile Holdings Limited* [2004] EWHC 977(Comm) the ship sales contract provided that the expert must be "*an independent marine surveyor with experience in the survey of ships similar to the Ships to be nominated by the Chairman for the time being of Bureau Veritas.*"

independent firm of internationally recognised chartered accountants"[17] or, more generally still, an "*independent expert who is qualified by experience and education to determine the matters in issue.*"[18]

This is not surprising given that a key rationale for selecting expert determination is to ensure the dispute is resolved, literally, by an expert. But it is surprising that parties opting for arbitration are not similarly concerned to specify such requirements for arbitrators. This is particularly striking given that the technical and complex subject matter of contracts containing expert arbitration clauses is often the same or substantially similar to those contracts in which we typically find expert determination, e.g., complex cross-border sale and purchase agreements, construction contracts, gas sales agreement or sophisticated technology supply agreements.

It is also notable that Japanese parties (or parties in the Asia-Pacific region more generally), continue to include expert determination clauses despite the relative dearth of bodies and institutions in the region that have experience of acting as appointing authority for expert determiners. For example, while the Chartered Institute of Accountants of England & Wales appoints expert determiners almost every day and has created its own rules for governing the process[19] , the Japanese Institute of Certified Public Accountants does not routinely provide such services. Combined with the difficulties of setting aside a poor expert determination (harder than setting aside an arbitral award in most jurisdictions), it is surprising that Japanese and other parties in Asia do not instead opt for a bespoke arbitration clause which covers decision-maker expertise. A further advantage of adopting this approach would be access to the enforcement mechanism for international arbitral awards – so a party may get the best aspects of expert determination and arbitration in one process.

Regional arbitration institutions could potentially support parties who are weighing up the choice between expert determination and arbitration by providing additional guidance, more specialised appointment services, suggested model clauses and bespoke rules (for parties seeking to gain the perceived benefits of expert determination within the context of an arbitration). In any event, parties should not consider they have to make a binary choice between having their dispute resolved by an expert on the one hand or an arbitral tribunal on the other.

Ⅶ. Conclusion

This paper has considered some of the advantages and risks associated with specifying skills, experience and qualification requirements in arbitration agreements.

Interestingly, the approach in international commercial arbitration may be compared to the

17) This was the clause in the agreement that was the subject of dispute in the English case of *Barclays Bank v Nylon Capital* [2011] EWCA Civ 826.

18) This wording forms part of the standard expert determination clauses found in contract forms issued by the Associated Institute of Petroleum Negotiators (AIPN).

19) Rules for Expert Determination of the Institute of Chartered Accountants in England & Wales.

approach taken in investment treaty arbitration where it is more common to see requirements specified in the treaty. For example, some treaties require tribunals to have expertise or experience in public international law[20] and Article 14(1) of the ICSID Convention requires that: "[p]*ersons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.*" While such requirements are not without controversy, an appropriately worded clause may act as a safety net to ensure the tribunal has the skills, experience and qualifications necessary to resolve the dispute properly, efficiently and to a high-quality standard.

Specifying such arbitrator requirements may also create a viable alternative to expert determination, particularly for parties in jurisdictions where there are limited institutions available to play the role of an appointing authority or supervisor for expert determination processes.

20) See, for example, Article 35(2) of the ASEAN Comprehensive Investment Agreement.

Enforceability of Interim Measures by Arbitral Tribunal

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Ⅰ. Introduction

According to Article 24(1) of the Arbitration Act, an arbitral tribunal "may order any party to take interim measures or provisional measures as the Arbitral Tribunal may consider necessary in respect of the subject matter of the dispute, upon the petition of a party." This provision provides an arbitral tribunal the authority to order a party to take necessary measures prior to the issuance of an arbitration award.

However, the wording of the provision does not make it clear what specific actions fall under the phrase "interim measures or provisional measures" (hereinafter, "interim measures" [1]). Further, since interim measures are not recognized as having the same force as an award made by an arbitral tribunal, they are not necessarily an effective option.

As a result, members of the legal profession and scholars have demanded that the system be reviewed. Consequently, a study and deliberations on the revision of the Arbitration Act began in 2019. New rules are expected to be established on points that have not been clarified by past interpretations and which require a legislative interpretation. This will result in a major turning point for Japanese arbitration law.

In this paper, I will present an examination of the concept of interim measures ordered by arbitral tribunals—with a particular emphasis on the ability to enforce them— with reference to the progress of the efforts to revise the system that are currently underway.

Ⅱ. Discussions on the Enactment of the Arbitration Act

In many civil cases that are subject to an arbitration agreement, there is a need to impose interim measures to maintain the status quo, or prevent or mitigate damages prior to an arbitration award. One measure that can be taken by the parties to such cases is to require

1) Since arbitral tribunals make no distinction between "interim measures" and "provisional measures" in terms of their requirements or effectiveness, there is no practical benefit in distinguishing them. In fact, in the Model Law [as defined later], they are just referred to as "interim measures."

the court to issue a provisional order (as prescribed in the Civil Provisional Remedies Act).

In contrast, opinion has been divided over whether or not an arbitral tribunal can order interim measures. Since there were originally no provisions in the Japanese arbitration law that addressed this point as well as the fact that courts are allowed to impose provisional orders, some thought it would be sufficient to use that method (provisional remedies) when preservation was needed. Hence, they thought an arbitral tribunal did not have the authority to order such type of measures.

However, if one considers the fact that a party may have no choice but to partially utilize a court regardless of it having opted for a resolution of its dispute by an arbitral tribunal and the fact that there are interim measures that are not provisional orders that are available (e.g., for evidence preservation[2]), it is difficult to opine that the parties' needs can be adequately met by the allowance of provisional orders alone. Moreover, Article 17 of the 1985 United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (hereinafter, "the "Model Law") makes clear the purport of recognizing the right of an arbitral tribunal to order interim measures.

Hence, when the Arbitration Act was enacted in 2003, it was clearly indicated therein that the presence of an arbitration agreement would not preclude the issuance of provisional orders by courts (Article 15). The Arbitration Act also established provisions that allowed for the issuance of interim measures by an arbitral tribunal (Article 24). The former is based on Article 9 of the Model Law while the latter is based on Article 17 thereof.

Ⅲ. The Status of Discussions about the Current Arbitration Act

The Arbitration Act went no further than indicating that arbitral tribunals have the authority to order interim measures. Since it did not establish specific provisions, many aspects were left up to interpretation. Below is a presentation of several debates surrounding the application of the Arbitration Act that is currently in force.

1. Terms, requirements and effectiveness

The specific terms of an interim measure are established based on the discretion of the arbitral tribunal on a case-by-case basis. Those who were in charge of drafting the Arbitration Act seem to have expected interim measures such as maintaining the status quo and the value of the dispute subject matter to ensure the effectiveness of the eventual arbitration award or ordering certain payments to be made and actions to be taken to reduce the disadvantages that may occur during the period of time before an arbitration award is made. Further, the Arbitration Act uses the term "any party." Hence, an arbitral tribunal may issue an order not only to the petitioner but also to the respondent. However, it would be difficult to

2) In the Japanese legal system, the term "evidence preservation" refers to a procedure taken in a civil action (not for the purpose of preservation in the literal sense, but rather to accelerate the evidence-gathering process under Article 234 of the Code of Civil Procedure). In this paper, contrary to the above concept, I will assume that "evidence preservation" entails measures that order the parties to preserve items that will be used as evidence.

conceive of an order of an arbitral tribunal that seeks to apply to and bind a third party apart from those who are subject to the arbitration agreement.

As to situations where interim measures are to be ordered, when one considers the cases where a court has issued an order for a provisional remedy, one would see that the probability of success of a claim and the need for preservation are required conditions therefor.

Unlike an award of an arbitral tribunal that has "the same effect as a final and binding judgment" (Arbitration Act, Article 45(1)), there are no provisions that recognize the special force and effect of an interim measure. It seems that there was also a discussion on granting interim measures such enforceability when the Arbitration Act was enacted. However, at the time the Model Law was in the process of being revised and there were many issues that were left unresolved, such as the treatment of cases that did not conform to the Civil Provisional Remedies Act in Japan, and the relationship of such interim measures to the provisional orders issued by courts. Thus, the provision concerning the enforceability of interim measures of arbitral tribunals was postponed. Regarding this point, one view is that the vast majority of parties abide by interim measures regardless of whether or not the arbitral tribunal has the power to enforce such measures. The reason they obey interim measures is to prevent damages from being claimed for breach of the arbitral agreement or losing the arbitral tribunal's credibility and being disadvantaged in subsequent proceedings. In contrast, there are those who argue for the need to examine the grant of the power to enforce such measures as a matter of legislative theory.

2. The relationship of interim measures to provisional orders

As a result of the Arbitration Act allowing arbitral tribunals to issue interim measures, parties who want protection in a civil dispute that is subject to an arbitration agreement are given two options, namely: interim measures and provisional orders. This creates a new problem, that is, what is the relationship between these options?

In terms of theory, there are two stances. One holds that the interim measures of arbitral tribunals should be given preference, while the other states that the two are in competition with each other.[3] However, even those who advocate the former view consider it is not desirable to be unable to provide prompt temporary relief owing to the emphasis on the priority of interim measures. Therefore, it is unlikely that the outcome of the case will differ depending on which view one agree with. The parties may use the two procedures of their choice.

Ⅳ. The Effect of the Revised UNCITRAL Model Law

In 2006, the Model Law was partially revised. The definition of interim measures(types thereof), the requirements for orders granting the same, and provisions regarding issues such

3) In addition to those already mentioned in this paper, there is a view that gives preference to courts. For example, under German law, an interim measure cannot be enforcer in case where an order for a provisional remedy has already been issued (ZPO, Article 1041(2)).

as recognition and enforcement were established. These affected the interpretation of the Arbitration Act. In particular, the terms and requirements for issuance that were presumed for interim measures were explained in accordance with the provisions of the Model Law.

Meanwhile, however, the existing interpretation of the legal enforceability of interim measures remained. Since it is not possible to recognize the existence of a title of obligation that is not stated in the law, there is no room under the current Arbitration Act that recognizes the enforceability of interim measures. Still, it is believed that the revisions made to the Model Law will eventually lead to revisions of the Arbitration Act. As a result, there is increased expectation of a legislative resolution.

In September 2020, the Minister of Justice inquired on the revisions to the Arbitration Act, which led to the establishment of an Arbitration Act Subcommittee in the Ministry of Justice's Legislative Council. The Arbitration Act Subcommittee is working on basic policies to reflect the revisions to the Model Law in the Arbitration Act. At the same time, it is considering the relationship of the Arbitration Act to the Japanese legal system. In October 2021, the subcommittee completed its draft outline, which after being passed by the Legislative Council, was submitted as a report to the Minister of Justice and entitled "Draft Outline regarding Revisions to the Arbitration Act" (hereinafter, the "Outline").[4] Currently, the Ministry of Justice is working to create a draft, and the resulting bill will be submitted to the Japanese Diet.

Ⅴ. Enforceability of Interim Measures by Arbitral Tribunal

Among the revisions made to the Model Law, the provisions related to recognition and enforcement (Article 17(H)) are believed to have a particularly large impact on the Japanese Arbitration Act.[5] The theoretical and legal issues related to adopting the revisions include whether or not interim measures can be granted enforceability (basis), how they would be enforced (method), and how to view their relationship to provisional orders.

1. The basis for granting enforceability

The first basis for granting enforceability is to clarify externally the adoption by the Arbitration Act of the revised Model Law (and the policy judgment designed to increase the resulting activity of international arbitral tribunals). Then, what else can be shown as a more substantive basis?

The Arbitration Act both recognizes that arbitration awards of arbitral tribunals have "the same effect as a final and binding judgment" and establishes a system to provide for enforceability via execution orders (Articles 45 and 46). The basis for recognizing the enforceability of awards rendered by arbitral tribunals is the fact that, as long as the government (public authority) recognizes the arbitration process as a method for resolving

4) The draft Outline, materials used in the deliberations, and records of the proceedings are all available for viewing at the Ministry of Justice's website: www.moj.go.jp/shingi1/housei02_003006.html.

5) The matter of recognition is not stipulated in the Outline.

disputes, then it is required that the award of the arbitral tribunal be as effective as the judgment of the court and that the compulsory realization of the content is guaranteed.

The next question then is "is it possible to make the same interpretation for interim measures?" If we consider the fact that an interim measure is a temporary measure that is taken as part of the process of arriving at an arbitration award, and as such, is not a final judgment that resolves the dispute, then we can see that the two should not be treated in the same manner. In fact, judgements of foreign courts are distinguished in Japan in terms of their recognition and enforcement based on whether they are final judgments or not (cf. Civil Execution Act, Articles 22(6) and 24(5)).

On the other hand, the idea that the decisions (orders) of arbitral tribunals at all stages of a proceeding should be equally respected by the government is also possible. In domestic Japanese courts, the enforceability of both final judgments (judgments on the merits) and interim judgments (provisional orders) are recognized (Civil Execution Act, Article 22(1), Civil Provisional Remedies Act, Article 43(1)). In addition, it is believed to be illogical to distinguish judgments of foreign courts according to whether they are decisive, final judgments or not. As a result, efforts to allow the compulsory enforcement of non-final decisions of foreign courts are currently underway. Thus, the idea that awards of arbitral tribunals should be distinguished between those that are final and those that are temporary, where only the former carries enforceability, is likely to be considered inappropriate. If we compare this to the purpose of the Arbitration Act, which attempts to guarantee that awards that are rendered by arbitral tribunals will be respected and that their effectiveness will be guaranteed, we can then see that this disproportionate relationship should be rectified. This then implies the necessity and legitimacy of granting interim measures enforceability as well.

2. Methods of enforcement

If one place importance on the fact that interim measures are aimed at maintaining the status quo, then one would assume that the same procedures in the Civil Provisional Remedies Act would be followed. However, since the enforcement of interim measures is based on the judgment of an arbitral tribunal, it seems not appropriate to use the procedure in accordance with the Civil Provisional Remedies Act, which presupposes the existence of a court order, and even if it can be used, there is a limit. For example, under such circumstances, it would be difficult to utilize the registration procedure, the procedures for having the court execution officer retain possession of a real property, and the procedure for issuing orders to third parties who are not parties to the arbitration agreement. Therefore, when this enforcement method is used, the practical benefit of granting interim measures enforceability is almost lost.

If we consider the potential methods of enforcing interim measures, then the following two methods are conceivable. One method is to enforce the property benefits ordered by the arbitral tribunal in the interim measure. The other method is to order to pay a financial penalty when the party who was ordered to take or refrain from taking certain actions does not perform the indicated act or performs the prohibited act. The former can be considered a

case of provisional disposition that determines a provisional status (the enforcement of which "is governed by the rules on [...] compulsory execution;" Civil Provisional Remedies Act, Article 52(1)), while the latter can be considered a case of enforcement of an obligation of action or inaction ("indirect compulsory execution;" Civil Execution Act, Article 172) . Thus, as a method of enforcing interim measures, it seems that the procedures stipulated in the Civil Execution Act can be used.

However, in the context of the Japanese legal system, there is a sense of discomfort in linking interim measures aimed at maintaining the status quo to the procedures stipulated by the Civil Execution Act aimed at the final realization of rights. In addition, particularly in the second case above, performing the procedures for indirect compulsory execution as a way of enforcing an interim measure is a roundabout way to achieve the purpose. If this is so, then instead of simply utilizing the civil execution procedures, there could be a third option of establishing a method of enforcement that is unique to interim measures.

It was initially presumed during the Arbitration Act Subcommittee deliberations that the civil execution procedures would be utilized after an execution order (meaning an order allowing the civil execution based on an interim measure) is issued. However, the implementation of the following systems was subsequently proposed, namely: an interim measure that corresponds to a provisional disposition that determines the provisional status is to be enforced via a civil execution after an execution order, and other interim measures are to be enforced via a civil execution based on a judicial decision (a court order) ordering the payment a certain amount of money due to a violation of the subject interim measure.[6] Finally, a slightly modified version of this content was approved as a draft Outline. Thus, it can be said that the Outline adopts an enforcement method that is in harmony with existing legislation while giving consideration to effectiveness and expediency.

3. The relationship of interim measures to provisional orders of courts

One of the advantages of obtaining provisional orders of courts was the enforceability, but if interim measures are granted the enforceability, the advantage will be diminished. However, this does not mean the significance of court orders is denied. Since court orders are different in content and enforcement method from interim measures, and it may take time to constitute an arbitral tribunal or a petition for an execution order may be dismissed, it makes sense to leave the option to use court orders.

Even if the interim measures and provisional orders of courts are coexisted, it seems that some adjustments are needed. For example, in cases where a party files a petition for an interim measure while also filing a petition for a provisional remedy, or where a petition for a provisional remedy is filed after an interim measure has been issued (or vice-versa), it seems appropriate to think that one procedure will affect the other procedure. In some countries, the

6) Initially, the system envisioned was one where payment of a financial penalty due to a violation of an interim measure would be ordered by the arbitral tribunal (not by the court) and the order to make the payment in question would be enforced. However, since this did not conform with the premise of allowing the enforcement of the interim measure itself, it was revised accordingly as described above.

priority of both of them is determined in the law.[7] However, the Outline does not have any rules for the relationship between interim measures and court orders. Considering that a system that grants enforceability to interim measures will soon be realized, further research on the relationship between the two is urgently needed.

Ⅵ. Conclusion

The provisions on enforceability of interim measures that were temporarily shelved during the deliberations to establish the Arbitration Act will finally be realized. This is a welcome development for the Japanese business and legal communities.

However, the degree to which the effectiveness of interim measures will be improved under the new provisions of the Arbitration Act remains unknown. It is also unclear whether this will lead to the promotion of the use of arbitration procedures. Therefore, it is important to observe the operation status of the new provisions, and furthermore, a continued examination of the relationship of interim measures to provisional orders as well as other theoretical problem is requested.

7) Under German law, when a court procedure has already been implemented first, an interim measure cannot be enforced (Supra note 3), and under the system adopted in Germany, it is possible for a court to revise an order issued by an arbitral tribunal to the extent necessary to enforce an interim measure (ZPO, Article 1041(2)).

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Technology Disputes in Japan: Is Arbitration a Better Option?

David MacArthur[1)]

Ⅰ. Introduction

Japan has long been a global leader in technology in areas as diverse as biomedical/life sciences, vehicles, consumer electronics, robotics, medical devices, space exploration, and photography/film, among others. Although it has seen increasing competition from other regional jurisdictions like Korea, China, and Taiwan in recent years, Japan has remained a key player in the technology arena in part by moving upstream into critical deep-tech inputs and advanced materials and components.[2)] For example, a 2011 study revealed that some 34% of the production value of the iPhone came from Japanese companies supplying high tech parts and components.[3)] Similar statistics reportedly hold true for China's Huawei mobile phones.[4)] The electronics industry is but one example – Japan has strength in a range of technology sectors. Indeed, Japan has repeatedly been in the top 3 countries globally in patent filings, including in patent filings abroad, reflecting Japanese inventors and businesses' ambition to

1) David MacArthur is Co-head of the International Arbitration practice of Anderson Mori & Tomotsune, where he jointly oversees a diverse team that spans the firm's pan-Asian office network. A US national who began his career in US commercial litigation, David has spent nearly two decades practicing in both common law and civil law jurisdictions. Since moving his practice to the Far East in 2006, he has specialized in international arbitration as a member of a globally top-ranked practice. He has represented clients in a variety of industries in disputes that often involve intellectual property and other technology-related issues. In addition to commercial cases, he advises and represents clients in investor-state disputes and is also active as arbitrator. He speaks conversationally proficient Japanese and Korean.

2) Schaede, U., *The Business Reinvention of Japan: How to Make Sense of the New Japan and Why It Matters* (Stanford University Press, 2020). See also Fingleton, E. "It Is Japan, Not The U.S., That Leads In Serious Technology, Says Top Reagan Technology Advisor," *Forbes Magazine* (Nov. 22, 2015) (available at: https://www.forbes.com/sites/eamonnfingleton/2015/11/22/it-is-japan-not-the-u-s-that-leads-in-serious-technology-says-top-reagan-technology-advisor/?sh=56f6cfae4023).

3) Xing, Y., and N. Detert. 2010 (revised May 2011). How the iPhone Widens the United States Trade Deficit with the People's Republic of China. ADBI Working Paper 257. Tokyo: Asian Development Bank Institute (available at: http://www.adbi.org/workingpaper/2010/12/14/4236.iphone.widens.us.trade.deficit.prc/).

4) West, J. "The Japanese Economy Has Reinvented Itself," Brink News, Feb. 15, 2022 (available at: https://www.brinknews.com/the-japanese-economy-has-reinvented-itself/).

operate in overseas markets.[5] Research and development expenditures as a percentage of GDP have hovered well over 3% for many years,[6] placing it consistently in the top five countries in the world by this metric.[7]

Given the ongoing and projected prominence of technology-driven sectors in the Japanese economy, it is a matter of course that legal disputes will arise. And as every business person knows, disputes can consume substantial human (time) and financial resources. In some cases, they can put at risk core assets or business divisions. Dispute strategy therefore should be considered carefully to maximize the company's commercial and legal advantages while minimizing its risks.

For various reasons, national courts have been the forum of choice for many intellectual property and other technology-related disputes.[8] Yet for international commercial disputes generally, arbitration has become the dominant dispute resolution process.[9] While arbitration has become more common in technology-related disputes as well, there is still growth potential for arbitration in this area.

Likewise, data suggests that Japanese parties are less likely to resort to international arbitration than many of their foreign counterparts.[10] However, that, too, seems to be slowly changing.[11]

With these factors in mind, this article considers the question: Should companies in Japan opt for international arbitration over civil litigation for technology-related disputes? The short answer is: yes, more often than now; but not always. The longer answer, which is elaborated below, attempts to respond to the question from the specific perspective of Japan-based parties in the context of intellectual property and other technology-related disputes. Many of the observations in this article can be applied more widely as well.

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5) See World Intellectual Property Organization reports: "World Intellectual Property Indicators 2021" (available at: https://www.wipo.int/edocs/pubdocs/en/wipo_pub_941_2021.pdf) and "World Intellectual Property Indicators Report: Worldwide Trademark Filing Soars in 2020 Despite Global Pandemic" (available at: https://www.wipo.int/pressroom/en/articles/2021/article_0011.html).

6) "Results of the Survey of Research and Development – Summary of Results (2021)" by the Statistics Bureau of Japan (available at: https://www.stat.go.jp/english/data/kagaku/1548.html). See also "Research and development expenditure (% of GDP) – Japan" by the UNESCO Institute for Statistics data, as of September 2021 (available at: https://data.worldbank.org/indicator/GB.XPD.RSDV.GD.ZS?locations=JP). Indeed, the Japanese government has proposed a 100-billion-yen fund to support private-sector companies' research and development activities for advanced technologies, and efforts to prepare a business environment for such technologies. "Japan planning ¥100 billion tech fund for economic security," *The Japan Times*, October 17, 2021 (available at: https://www.japantimes.co.jp/news/2021/10/17/business/economy-business/japanese-technology-economic-security-fund/).

7) See https://www.theglobaleconomy.com/rankings/research_and_development/ (based on data provided by the United Nations).

8) John V. H. Pierce, and Pierre-Yves Gunter, eds., *The Guide to IP Arbitration* (Global Arbitration Review 2020).

9) Gary Born, *International Commercial Arbitration*, 3rd ed., p. 1 (Wolters-Kluwer).

10) https://www.paulhastings.com/ja/publication-items/client-alerts/the-current-international-arbitration-practice-and-challenges-for-japanese .

11) See, "International Arbitration 2021 (Japan): Trends and Developments" (available at: https://practiceguides.chambers.com/practice-guides/international-arbitration-2021/japan/trends-and-developments).

Ⅱ. Why consider arbitration for technology disputes?

Arbitration offers a range of features that distinguish it from civil litigation. Key aspects that should be considered by any company considering arbitration as an alternative to civil litigation for technology disputes include the following.

1. Confidentiality. In disputes involving sensitive technical information, parties may wish to keep details, or even the existence of the dispute, away from the public. By default, however, court procedures are public. Of course, national courts may have procedural devices such as protective orders or court-ordered restrictions on inspection[12] to protect submitted materials as confidential; however, this varies by jurisdiction. And, even where such tools are available, if the matter goes to trial, for instance, sensitive details may be exposed.[13] On the other hand, arbitration is private and can be made strictly confidential. For example, confidentiality obligations may be established in the parties' chosen arbitration rules. The arbitration rules of many prominent international commercial arbitration institutions, such as the Singapore International Arbitration Centre (SIAC)[14] and the Hong Kong International Arbitration Centre (HKIAC)[15] impose confidentiality obligations by default. Likewise, the Arbitration Rules of the World Intellectual Property Organization (WIPO) contain a comprehensive confidentiality regime, including appointment of a confidentiality adviser, protocols for the disclosure of trade secrets and other confidential information, and for the confidential treatment of various aspects of the proceedings.[16] In addition, parties may separately undertake to keep the proceedings confidential by including such obligations in the arbitration agreement, or by separate agreement.
2. Cross-border enforceability. Compared to enforcement of foreign court judgments, arbitration offers relative ease of enforcement of foreign awards in most countries under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the "New York Convention"). The New York Convention requires that courts in signatory countries directly enforce any arbitral award issued in another signatory

12) E.g. Code of Civil Procedure of Japan, art. 92.

13) See, e.g., Jeffrey W. Sheehan, "Confidences Worth Keeping: Rebalancing Legitimate Interests in Litigants' Private Information in an Era of Open-Access Courts," Vand. J. Ent. & Tech. L. (addressing the issue as it concerns litigation in U.S. courts).

14) Article 39.1 of the SIAC Arbitration Rules provides that "Unless otherwise agreed by the parties, a party and any arbitrator, including any Emergency Arbitrator, and any person appointed by the Tribunal, including any administrative secretary and any expert, shall at all times treat all matters relating to the proceedings and the Award as confidential. The discussions and deliberations of the Tribunal shall be confidential."

15) Article 45 of the HKIAC Administered Arbitration Rules provides that "Unless otherwise agreed by the parties, no party or party representative may publish, disclose or communicate any information relating to (a) the arbitration under the arbitration agreement; or (b) an award or Emergency Decision made in the arbitration."

16) Article 54 of the WIPO Arbitration Rules addresses the protection of trade secrets and other confidential information to be disclosed during arbitration. See Ignacio de Castro/Andrzej Gadkowski, "Switzerland Confidentiality and Protection of Trade Secrets in Intellectual Property Mediation and Arbitration" (available at: https://www.wipo.int/export/sites/www/amc/en/docs/confidentialitytradesecrets.pdf)

country, with limited exceptions. This provides a streamlined mechanism of enforcement that in principle is available throughout most of the world.[17] By contrast, enforcement of foreign court awards falls under the more complex, uncertain, and time-consuming Hague Convention on Foreign Judgments in Civil and Commercial Matters (known as the "Hague Convention")[18] and domestic legislations of each jurisdiction.

3. Customization. Arbitration is inherently flexible. Parties may, for example, choose a location that is neutral to both parties rather than the national courts of either. The procedural schedule and format of an arbitration can also be tailored to the needs of the particular case. For example, parties may agree to an expedited timeline or a more robust briefing schedule, depending on the contract or the case. They can also agree to limit or omit discovery procedures, or request an award based on the documents only, without holding a hearing, if they desire. As a result of the COVID-19 pandemic, virtual proceedings have become common and are increasingly accepted as a valid alternative to in-person hearings.[19] The flexibility inherent to arbitration makes these variations, and others, possible. On the other hand, courts generally impose more standard procedures and practices that arise from the local legal system, be it common law or civil law, and tend to be much less flexible or subject to party control. If a court docket fills up, matters may be delayed. By contrast, in arbitration, the solution to an expanding numbers of cases is simply to find an available arbitrator and a suitable venue.

   It is also worth noting that customization also allows parties from different legal systems to find neutral procedural ground. For example, while a Japanese party in US court will be strictly subject to the rules of that forum, including its broad discovery procedures, arbitration permits customized procedures that balance the norms and expectations of the parties involved. Indeed, due to the inherently international nature of the system, international arbitration has developed various practices and protocols (which parties are free to adopt or not), that often fall between the practices typical in common law and civil law courts. One example is the widely used International Bar Association Rules on the Taking of Evidence in International Arbitration (generally referred to as the "IBA Rules"). Among other elements, the IBA Rules provide for a scope of document discovery that is greater than one often finds in most civil law courts, but much more restrained than in many common law systems.

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17) See the United Nations map of signatory countries at https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=4&menu=671&opac_view=-1 .

18) See David H. Herrington et al, "Why Arbitrate International IP Disputes?," p. 14 in *The Guide to IP Arbitration*, (Global Arbitration Review 2020) ("The relative ease of recognition and enforcement of arbitral awards is juxtaposed against the comparative difficulties in seeking to enforce foreign court judgments internationally…. In this context, prevailing parties in complex cross-border IP litigation often face lengthy and costly battles to enforce national court judgments in foreign jurisdictions.").

19) According to a joint report of a survey conducted by KPMG and Baker and McKenzie in late 2020, over 90% of those who had experienced a virtual hearing had "a positive experience" although most would still prefer to have hearings in person or in a hybrid mode (https://www.bakermckenzie.com/-/media/files/insight/publications/2021/02/are-virtual-hearings-here-to-stay--baker-mckenzie-and-kpmg-report_010221.pdf).

4. Curated decision-makers. Another key feature of arbitral flexibility is that arbitrators can be selected for their expertise relevant to the subject matter or other desired qualities, case by case. To aid in arbitrator selection, many arbitration organizations curate lists of vetted arbitrators, though parties are also free to appoint arbitrators who are not on such lists.[20] This ability to influence the appointment of arbitrators on a given case can be especially useful in cases with highly technical subject matter. Indeed, a growing number of institutions, including WIPO, HKIAC and JAMS, maintain a list of arbitrators with substantial expertise in intellectual property or other specialized areas. By contrast, court judges cannot be selected by the parties and are usually generalists that hear and decide all manner of cases. And in the United States, for instance, disputes are often decided by juries, who generally will not possess technical expertise and are not permitted to ask questions of witnesses or experts to clarify their understanding. Of course, technical expertise is only one factor that parties may prioritize in selecting arbitrators, but the option to do so is available. Parties should also be aware that where they fail to agree on arbitrator appointments, the appointments may be made by the arbitral institution or an appointing authority. However, even in such cases, the parties can submit, jointly or separately, requests for certain qualities or background in the arbitrator, which can be taken into account in the selection process.
5. Consolidation. Unlike courts, which can exercise only jurisdiction prescribed by legislation, arbitration is based on parties' agreement. Therefore, it is possible to resolve disputes relating to multiple jurisdictions or parties in a single arbitration procedure rather than undertaking various parallel national court proceedings. In addition to the obvious savings in time and cost, this also has the benefit of reducing the risk of conflicting decisions. (The enforcement scheme for foreign arbitral awards under the New York Convention generally makes them binding in most countries.) Accordingly, in any technology dispute that involves or may involve multiple jurisdictions, this feature may be appealing.
6. Costs recovery. National courts differ on the question of costs recovery. In the U.S., for example, parties typically must bear their own legal costs, while in other jurisdictions the successful party may be entitled to an award of part or all of its costs incurred in the dispute. In international arbitration, the widespread practice and expectation are that a winning party will receive an award of its costs, although this is typically in the discretion of the tribunal in consideration of the overall circumstances of the case. This feature of arbitration should be considered along with other factors in deciding between litigation and arbitration for a particular transaction or dispute.

While the factors above are often viewed as advantages of arbitration, the relative benefits will vary case by case. In addition, there are also areas of potential disadvantages compared with court litigation. For example:

20) Natalia Gulyaeva, "Patent, Copyright and Trademark Disputes," p. 134 in *The Guide to IP Arbitration*, (Global Arbitration Review 2020).

1. Interim measures not always enforceable. Interim measures (also referred to by other terms such as "emergency relief" or "provisional orders") can be a vital tool in some technology disputes. For example, in cases of trade secret misappropriation, a provisional injunction can place a swift, if temporary, halt to any disclosure of the trade secret, which may be essential to preserving its value. However, interim measures issued by arbitral tribunals are not enforceable in many countries, leaving parties to depend on voluntary compliance. That said, in the end, parties often do voluntarily comply, likely because they prefer to avoid upsetting the tribunal that will ultimately decide the case on the merits. And there are cases where an emergency relief order from a tribunal may be preferred, for instance where a party fears bias or local favoritism from domestic courts. It is also worth noting that there is a recent trend of countries amending the domestic law to make interim measures by tribunals in locally seated arbitrations enforceable in the courts.[21] Therefore, parties can make use of this by choosing a seat where interim relief from arbitral tribunals is enforceable in court.
2. Non-arbitrability of certain issues. National laws often exclude certain issues from being subject to arbitration. Most pertinently, some countries do not permit arbitration tribunals to decide patent validity issues. Other countries allow it, but generally the tribunal's decision is binding only on the parties.
3. No appeals. National court systems generally have a built-in system for appealing decisions rendered by first-instance courts. While adding to the potential time and costs involved, such mechanisms provide a significant buffer against bad decisions. This can be a significant benefit in relation to questions of patent validity, for instance. International arbitration generally does not permit appeals in the usual sense. The New York Convention and most modern arbitration laws permit a final arbitration award to be challenged only on very limited and unusual grounds, such as where the arbitration agreement was invalid or inapplicable or procured by fraud, or where the award is against a country's public policy. This finality of arbitration is often viewed as a positive feature, but in some cases, parties will prefer the appeals system of national courts. It should be noted that there are arbitral institutions, such as the International Centre for Dispute Resolution (ICDR) (the international division of the American Arbitration Association), that offer an option for appeals of arbitral awards.[22]

Ⅲ. Is arbitration a better choice for some kinds of technology disputes?

The features of arbitration mentioned above can make it a suitable or even better choice than civil litigation for some technology disputes. But it depends on the nature of the case and

21) See James E. Castello and Rami Chahine, "Enforcement of Interim Measures," in *The Guide to Challenging and Enforcing Arbitration Awards* (Second Edition) (available at: https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/2nd-edition/article/enforcement-of-interim-measures).

22) See "AAA/ICDR Optional Appellate Arbitration: A Step-by-Step Guide" (Practical Law) (available at: https://uk.practicallaw.thomsonreuters.com/w-013-0215).

the objectives and interests of the parties involved. The technology sector includes a wide variety of industries, and includes companies in varies sizes and stages of maturity, operating in various jurisdictions. In addition, a range of different types of technology-related disputes can arise. Understanding when and how arbitration can be a potentially preferable alternative to court litigation is something that savvy in-house counsel of companies dealing in technology business and assets should scrutinize. A brief analysis of a selection of common technology-related disputes follows below.

A. Patent-related disputes

Developing a new, patentable technology can be time-consuming and costly. Additional time and costs are required in actually securing a patent. Commercialization of products that use those patented technologies is yet another phase that can be protracted and costly. For these reasons, patents can be extremely valuable and therefore worth enforcing against potential infringers. While civil litigation tends to be the preferred forum for resolving patent disputes, arbitration is becoming increasingly popular. According to the WIPO, 25 percent of disputes handled by its Arbitration and Mediation Center are patent disputes.[23)]

Broadly, a patent-related dispute can arise in two ways: within a pre-existing contractual arrangement such as a license agreement or a joint R&D agreement, or as an action against accused infringers. The former provides an opportunity for the parties to consider and choose arbitration as the resolution method for any disputes, or for a sub-set of disputes, by including an arbitration clause to the contract. Renewal of such agreements is another opportunity to consider adding such a provision.

When a patent dispute arises outside a contractual relationship, such as when a patent holder brings a claim against an accused infringer, no arbitration agreement exists. However, parties may nevertheless decide to arbitrate such a dispute at the time it arises (known as a "submission agreement"). While it is unusual for parties to do so in the heat of a dispute, sophisticated parties sometimes are able to see mutual benefits in doing so.

One important thing to consider before agreeing to arbitrate patent disputes is the extent to which it is allowed in the jurisdictions where the arbitral award might be enforced. Some jurisdictions require questions of patent validity to be decided in national courts or administrative bodies. Other jurisdictions may permit patent validity determinations to be made in arbitration, but usually only with *inter partes* effect. Thus, arbitrability of patent validity in relevant jurisdictions must be considered before deciding to arbitrate a patent-related dispute.

That said, the procedural flexibility of arbitration may allow for creative and custom-fit solutions. For example, even where the applicable law does not allow arbitration of patent validity, the parties could agree that in the event that the arbitral tribunal concludes that the patent is in fact invalid, the resulting award would simply order the patent holder to grant a royalty-free license in perpetuity to the other party.[24)]

23) WIPO Caseload Summary: WIPO Arbitration, Mediation, Expert Determination Cases and Good Offices Requests (available at: https://www.wipo.int/amc/en/center/caseload.html).

24) Thomas Legler, Arbitration of Intellectual Property Disputes, 37 ASA Bull. 273, 296-97 (2019).

Putting aside arbitrability concerns, parties in a patent dispute may be interested in the confidentiality features of arbitration, the opportunity to resolve multi-jurisdictional issues in a single forum for efficiency, ease of enforceability, and the ability to ensure that arbitrators with relevant technical expertise are appointed, among other qualities. Indeed, it is somewhat surprising that more patent holders do not seek to take advantage of arbitration as a hedging strategy. For example, a patent holder who is successful on claims of infringement could benefit from the cross-border enforcement mechanisms of international arbitration. On the other hand, any finding of invalidity of the patent would be subject to applicable principles of confidentiality and may be binding only as between the parties to the arbitration, thus mitigating against the risk of a public and globally binding decision finding the patent invalid.

In sum, there are potential benefits to arbitrating patent-related disputes that are worth considering.

B. SEP/FRAND royalty disputes

A sub-category of patent-related disputes with unique features is that of FRAND disputes in connection with SEP licensing. "SEP" stands for Standard-Essential Patent. Many high-technology sectors are subject to industry-wide standards set by a designated standards-developing organization (SDO). For example, in cellular wireless technology, "LTE" represents a set of industry standards, as does "5G" . The technologies necessary to comply with such standards, like any technology, are often patented. The SDOs typically require that any company holding such an SEP must make it available to license on "fair, reasonable and non-discriminatory" (FRAND) terms.

Such SEPs will often become the subject of enforcement across various jurisdictions where the applicable standards are required to be followed. In the absence of an agreement to arbitrate, they are typically resolved in national courts. Even where a SEP holder has provided a general declaration regarding FRAND terms to the SDO, it usually does not include an arbitration clause. Therefore, if arbitration is to be employed in such cases, the parties will have to agree to it at the onset of the dispute. There are reasons for parties to consider doing so.

Given the highly technical and industry-specific nature of SEPs, parties may see a particular benefit in being able to appoint arbitrators with that specific technical background. Arbitrators with that background will likely be in a better position to advance efficiently through the process while also providing more reliability on determinations of fact (which are often technical in nature) and on the often central question of what is a fair and reasonable royalty rate. A randomly assigned judge in a national court is unlikely to have such specialized expertise (and a jury perhaps even less so). Even in a specialized court or administrative body set up to address patent-related disputes, adjudicators are likely to be generalists in the field. It is worth noting that WIPO offers arbitration procedures specifically designed for FRAND royalty calculations.[25)]

25) See "WIPO Arbitration for FRAND Disputes" (available at: https://www.wipo.int/amc/en/center/specific-sectors/ict/frand/).

Additionally, where a FRAND dispute involves multiple jurisdictions, arbitration can provide the time and cost efficiencies of single-forum resolution and ease of enforceability under the New York Convention.

Thus, parties in FRAND disputes should give thought to the relative merits of arbitration.

C. Disputes involving trade secrets or other sensitive technical information

Trade secrets are another form of intellectual property that is often the subject of dispute. Contrary to patents, which are by nature the subject of public records, trade secrets must be protected from public disclosure. Indeed, trade secrets acquire legal protection only so long as the rightful holder of the information takes reasonable steps to keep it secret (i.e., known only to a limited number of people). Such measures may include the use of confidentiality agreements for business partners and employees.[26] Given this, the privacy and confidentiality features of arbitration may be especially well-suited to trade secret disputes.

Of course, in cases where trade secrets are illicitly obtained through means of hacking or economic espionage, there is unlikely to be an arbitration agreement in place. However, the reality is that a large percentage of improper trade secret disclosures are made by employees or former employees. Accordingly, by including an arbitration agreement in the employment contract of all employees who may have access to trade secrets, employers can effectively require such disputes to be resolved in arbitration and can include strict requirements of confidentiality for those arbitration proceedings.

Likewise, joint ventures and manufacturing or supply agreements are another common scenario in which trade secrets are shared and may be subject to improper use, misappropriation, or disclosure, giving rise to a dispute. These cases also involve a contract, in which an arbitration clause can be included.

Because parties in a contractual relationship can more readily enter into arbitration agreements for dispute resolution, they can thereby capitalize on the useful features of arbitration such as confidentiality as mentioned above. Depending on the nature of the dispute, the opportunity to resolve multi-jurisdictional disputes in a single forum may also be useful. More generally, parties can customize the proceedings and select arbitrators with relevant technical background and other desired qualities and recover costs in the event of a favorable decision. In addition, they can make use of the effective cross-border enforcement mechanism that is available pursuant to the New York Convention.

Accordingly, there are abundant opportunities in connection with trade secrets to submit disputes to arbitration and to make effective use of its unique features.

Ⅳ. Conclusion

Whether the decision to arbitrate a technology-related dispute takes place at the formation of a contract relationship or the outset of a dispute, such decision should be made in view of

26) See, e.g., the WIPO definition of "trade secrets" at https://www.wipo.int/tradesecrets/en/.

the relative advantages of arbitration and civil litigation. This analysis must compare the features of international arbitration with those of the specific national court systems that may be used to resolve disputes. Civil litigation in the United States, for instance, has a different set of advantages and disadvantages to litigation in, say, China, Vietnam, or Japan. Of course, the experience of international arbitration can vary according to jurisdiction and institution as well, but due to its inherent flexibility, parties have more control over the contours of proceedings in arbitration than they do in civil litigation.

The nature and circumstances of a given transaction or dispute setting, and the objectives and preferences of the parties involved, should dictate the choice between litigation and arbitration. As noted, where an enforceable provisional injunction, an appealable final decision or a public decision on a patent validity or similar issue is considered essential or paramount, then civil litigation may be the right choice. However, where confidentiality, a specialist adjudicator or the relative ease of enforceability of arbitral awards across jurisdictions is viewed as especially important, parties should give serious consideration to use of international arbitration in connection with technology-related disputes.

As mentioned, Japanese parties have been relatively reluctant to make full use of international arbitration and this may be especially true in the area of technology disputes. Although this is changing, there may be significant commercial benefits being missed, which could have been remedied simply by giving greater consideration to the option of arbitration.

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Do Mediation Parties Owe Confidentiality in Japan?

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Ⅰ. The Issues

While the privacy of institutional mediation and ad-hoc private mediation proceedings are well honored by mediators and mediation institutions, sometimes, during the mediation proceedings or after the proceedings, in various circumstances and out of various motives, a party to the mediation discloses the contents or results of the mediation process to third parties such as friends, relatives, supporters, consultants, or to the wider public through mass-media or the internet.

Between the parties, such disclosures may cause a new dispute or aggravate the existing dispute. For the mediator and/or the mediation institution, such disclosures may lead to a separate complaint or grievance whether the mediator takes action to rectify the disclosure or fails to take action to rectify the disclosure.

The first issue to consider in this context is whether parties to mediation owe an obligation not to disclose the contents of the mediation proceedings to third parties, including the public. The second issue is whether mediators can or should take measures to control party's conduct with respect to confidentiality. This article presents basic guidance in the Japanese context by identifying the legal framework in Japan for these issues. This article also tries to respond with some practical considerations and suggested measures for mediators carrying out mediation proceedings.

Ⅱ. Legal Framework in Japan for Confidentiality in Mediation

Unlike arbitration[1)] , there is no legislation generally applicable to mediation proceedings in Japan[2)] . Mediations are conducted as voluntary proceedings, which means almost everything is up to the agreements among the parties, and mediators and/or mediation institutions.

For a general legal framework, one needs to look into the rules of the mediation institutions

1) The Arbitration Act of 2003 governs arbitration proceedings.

in Japan[3] and, based on almost all those rules, one can confidently say that privacy for the parties is secured in mediation proceedings. To be more specific, (a) non-parties are excluded from proceedings, unless all parties consent to their participation, and (b) mediators, mediation institutions, and their officers and employees are prohibited from making the contents of the proceedings public or otherwise disclosing to third parties. This is, so to speak, "privacy for the parties" , and not "privacy by the parties" .

Speaking of privacy by the parties, the rules with respect to confidentiality obligations owed by the parties, as opposed to that owed by the mediator and the institution, need to be analyzed separately from the general legal framework above. They are, unfortunately, sometimes unclear. While some mediation institutions adopt rules providing for the parties' confidentiality obligations[4] , others are silent on this issue[5] .

From a mediation practitioner's standpoint, it is safest to take a strict interpretation approach, *i.e.*, the parties are not under an obligation of confidentiality absent a confidentiality agreement or provisions in the rules on the parties' confidentiality obligations. While confidentiality obligations could arguably be implied between parties based on the mediation proceeding's confidential and private nature[6] , in light of the fact that mediations are conducted based on voluntary agreement of the parties, we should be cautious in finding that the parties are under an obligation without an express undertaking or agreement to that effect.

Several additional points need to be mentioned. First, even if the rules are silent, the parties can agree to confidentiality obligations and, such an explicit agreement makes the obligation beyond dispute. Such agreements to confidentiality beyond the rules of the mediation institution can be: (a) in a mediation agreement, (b) agreed separately before or (c) during

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2) The ADR Promotion Act of 2004 provides for certain conditions for the certification of mediation proceedings and privacy of the proceedings is one of those conditions. However, mediation can be conducted without certification under that Act, provided that, without the certification, mediation in exchange for fees can only be conducted by attorneys (Article 72 of the Attorneys Act).

3) It is difficult to examine under what rules ad-hoc private mediations, as opposed to institutional mediations, are conducted. However, the author does not believe that the rules for ad-hoc private mediations in Japan are very different from the rules under the institutional mediations.

4) For example, the Commercial Mediation Rules of the Japan Commercial Arbitration Association provide that "The Mediator, the Parties, their counsels and assistants, the JCAA's officers and other staff, and other persons involved in the mediation proceedings shall not disclose facts related to or learned through the mediation proceedings." (Article 23 of the Commercial Mediation Rules).

5) For example, the Daini Tokyo Bar Association Arbitration and Mediation Center's Procedural Rules are silent on the parties' confidentiality obligations while privacy of the proceedings and the confidentiality obligations of mediators and staffs are provided for (Article 4 of the Procedural Rules). Most of ADRs operated by bar associations in Japan adopt the similar rules regarding the privacy of the proceedings and confidentiality.

6) As for arbitration, many national laws based on the UNCITRAL Model Law are silent on the confidentiality obligations of the parties (they are silent on the privacy of the proceedings as well), but there are arguments as to whether or not confidentiality obligations on the parties are implied. Some institutional rules explicitly provide for an obligation of confidentiality on the parties (*e.g.*, the Commercial Arbitration Rules of the Japan Commercial Arbitration Association). The International Chamber of Commerce Arbitration Rules do not. See G. Born "International Arbitration Law and Practice" (2nd Edition) pages 202~206.

the mediation proceedings, or (d) in any resulting settlement agreement.

Second, while the parties are not under the mediation rules prohibited from third party disclosure, sometimes such disclosure or other improper use of the information exchanged in the mediation proceedings will constitute a tort, such as invasion of privacy, or infringement of the other party's right under the unfair competition law, such as misappropriation of trade secrets. This will of course depend on the nature of the disclosed information and the manner of disclosure.

Third, even where the parties are found to be under explicit or implied confidentiality obligations, there may be occasions where the party has, or arguably has, legitimate reasons for resorting to a third-party disclosure, such as to share it with their friends and close supporters[7] , consultants[8] , or government authorities.

Ⅲ. Practical Considerations & Suggestions

(1) *The Desirability of Confidentiality*

It is generally desirable that the parties refrain from making the contents of mediation proceedings public or otherwise disclose those contents to third parties. Because mediation proceedings are considered private and confidential, such a disclosure often surprises, and sometimes offends or does harm to, the other party. Moreover, such events also jeopardize candid discussion between the parties (and the mediator) and may lead to a breakdown of the mediation, in extreme cases.

With such basic considerations, it may be wise for a mediator to remind the parties of the desirability of confidentiality and encourage them to explicitly agree to confidentiality obligations[9] . Further, even if the rules of the mediation institution provide for the parties' confidentiality, it may be useful for the mediator to explicitly remind the parties of such obligation, depending on the nature of the information exchanged in the mediation.

As set out above, there is at least an argument about whether or not the parties' confidentiality obligations are implied, it may be worthwhile for mediation institutions to consider adopting the provisions in the mediation rules specifically providing for the parties' confidentiality obligations.

(2) *How Should the Mediator Cope with Undue Disclosure that May Occur?*

Without explicit confidentiality obligations, when one of the parties intends to make the contents of the mediation proceedings public through mass media or the internet, and the

7) Sharing information with a party's family members or close relatives is usually tolerated.

8) There is no doubt that sharing information with one's legal advisors should be permitted; although there may be arguments over whether parties may share information with other non-legal consultants or advisors.

9) For mediation proceedings on the Hague Convention on the Civil Aspects of International Child Abduction held at the Daini Tokyo Bar Association Arbitration and Mediation Center, it is the practice (though not a rule) that, at the outset of the proceedings, the mediator recommends that the parties enter into a confidentiality undertaking. Most parties adhere to such recommendation.

other party protests, how should the mediator cope with the situation? The mediator faces a difficult situation, given the lack of explicit obligations.

The mediator may remind the party intending such disclosure: (a) of the importance of candid discussion in the mediation proceedings and (b) that such undue disclosure is not usually constructive and tends to become an obstacle to a smooth and meaningful mediation process.

(3) *Parties' Recordings of the Proceedings*

Related to the issues of privacy and the parties' confidentiality is the issue of recording of the mediation sessions by a party (sometimes by both parties) and the subsequent use of such records. While long a matter of less urgent debate, the development of recording technology has recently made recordings (often hidden recordings) easier and, under the Covid-19 situation, the spread of remote hearings using video conferencing systems seems to have made it physically and psychologically easier still.

Conducting mediation with one of the parties recording the proceedings may, in many occasions, make candid and natural conversation psychologically difficult for the other party (and sometimes for the mediator) and, if it is afterwards revealed that hidden recording was conducted by one of the parties, the other party may feel that the fairness of the process has been offended. Further, once recorded, the contents of the proceedings can easily be shared with third parties or in extreme cases be made public through the internet. At the least, such recordings lack an affinity with the private nature of mediation proceedings.

The issue is less clear than it seems. The problem in many circumstances is the use of the recording, and not the recording itself. A party, particularly a party not represented by counsel, may need a recording of the proceedings in order to accurately understand what was discussed/proposed. Further, as discussed above, sharing the contents of the proceedings with non-parties may, in some cases, be legitimate and should be tolerated. A party may need to consult with family, friends, supporters, or consultants based on accurate records of the hearings.

So, should the parties be prohibited from recording the mediation proceedings or is recording to be permitted/tolerated under certain circumstances and conditions? The prevailing general view, the author observes, is that due to the private nature of the mediation proceedings, parties ought to be prohibited from recording, whether hidden or not. When the mediator is asked by one of the parties if such party can make recording of the proceedings, most mediators ask the party to refrain from doing so. When a mediator becomes aware of a party's hidden recording, most mediators request that it be stopped.

That said, mediation is a voluntary process where not only the result but also the procedure is constructed by the parties' agreement. It may be desirable for the mediator to address this issue and try to seek agreement, at the outset of the proceedings, to make it clearly understood by the parties that recording is not allowed and both parties must comply. And, if it is allowed, the mediator should seek to specify under what conditions[10)] .

(4) *Voluntary Use of Mediation Information in Litigation and Arbitration*

Whether or not the parties are restricted from using the contents of the mediation proceedings in other legal proceedings such as litigation or arbitration needs further consideration. For illustration, the contents of a mediation relevant to a litigation or arbitration may include: (a) information and materials provided by the other party in the proceedings; (b) a settlement proposal from the other party; (c) the other party's reaction to a settlement proposal; (d) mediator's comments and opinions on the parties' positions; and (e) the mediator's recommended settlement.

The general rule is that, in the absence of the provisions in the mediation rules providing for confidentiality and/or "without prejudice" obligations, or the parties' agreements/undertakings the parties are free to use such information in arbitration and litigation[11] . Even if the mediation rules provide for such restrictions, or "without prejudice" obligations, or the parties separately enter into these arrangements, it is ultimately up to the court or arbitral tribunal whether such arrangements are honored, and courts and tribunals may take a different approach from the parties' agreements or the rules of mediation institutions.

(5) *Compelled Disclosure & Lack of "Mediation Privilege"*

Whether or not the parties, mediators, and mediation institutions may be compelled to share the contents of a mediation when ordered by the court or the arbitral tribunal is a separate issue.

For the parties to a mediation, if subsequently required to testify in litigation about what was discussed/proposed in a mediation, a party cannot refuse to testify[12] . Articles 196[13] and 197[14] of the Japanese Code of Civil Procedure providing for legitimate grounds for refusing to testify do not cover information exchanged in a mediation. Even if confidentiality was agreed between the parties or the rules of the mediation provided for the parties' confidentiality, the

10) At the ODR Promotion Review Committee established in the Ministry of Justice in 2020 (and the discussion at the Committee still going on as of the writing of this article), the rules regarding recordings were discussed. However, setting forth any rules or even recommended rules were avoided in that Committee's products.

11) The Commercial Mediation Rules of the Japan Commercial Arbitration Association effective February 1, 2020 provide for articulated rules which are somewhat equivalent to "without prejudice" arrangements (Article 24 of the Commercial Mediation Rules). Under these provisions, the parties are generally prohibited from giving or seeking testimony in judicial, arbitral, or similar proceedings between the parties relating to: (1) the fact that the other party proposed to conduct mediation proceedings or accepted the proposal to mediate; (2) the fact that the other party made admissions or any other statements as to specific matters during the mediation proceedings; (3) any proposals for settlement made by the other party or the mediator; (4) views expressed or suggestions made by the other party in respect of the proposal for settlement; and (5) the fact that the other party indicated its willingness to accept a proposal for settlement (Article 24.2). The parties are also generally prohibited from introducing as evidence or making a request for disclosure regarding: (1) a document or any other materials provided for in Article 24.2; and (2) a document or any other materials prepared solely for purposes of the mediation proceedings (Article 24.3).

12) This is about litigation in national courts and not about arbitral proceedings conducted in Japan (which is governed by the Japanese Arbitration Act). In the arbitration, it is generally up to the tribunal.

13) It provides for self-incrimination privilege.

14) It provides for (i) public officer's right to refuse to testify, (ii) doctors, attorneys, and clergymen's right to refuse to testify, and (iii) refusal to testify to avoid disclosing trade secrets and other occupational secrets.

obligation to testify under the national law overrides a confidentiality agreement[15] . Although the relevance and necessity of such testimony may need to be scrutinized, nothing like mediation privilege has been established by law or litigation practice.

For mediators, as there is no mediation privilege, the mediator cannot refuse to testify about the contents of the mediation. However, if the mediator is an attorney, they can (and must) invoke a lawyer's right to refuse to testify under Article 197, Paragraph 1, Item 2 of the Japanese Code of Civil Procedure.

Given that, as described, mediation rules and the parties' agreement cannot create a right to refuse to testify in litigation or arbitration, it would require legislation for something equivalent to mediation privilege to be introduced in Japan. Examination of the feasibility of such legislation should be promoted in order to create a legal framework more favorable to mediation in Japan.

15) When a party testifies about the contents of a mediation, that party is absolved from liability for breaching their confidentiality whether under the mediation rules or under a separate agreement.

Online Practice and Activation of ADR - Further Progress of Arb. Med. Arb.

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Ⅰ. Acceleration of Online Practice Under COVID-19

As many arbitration practitioners and users recognize, the last few years under the COVID-19 pandemic saw an acceleration of the use of online ADR facilitated by developments in both the technological/hard aspects and operational/soft aspects of delivering online ADR.

For example, following extensive studies of the Web Hearing Committee set up by the Japan International Dispute Resolution Centre (JIDRC)[1] and in consideration of proposals made by the Web Hearing Committee on the hard and soft aspects, JIDRC has developed equipment for high-quality online/virtual hearings and is making available and operating facilities for these purposes.[2] Due to these institutional efforts to facilitate online operation of international arbitration and mediation, online ADR continues to be active especially on cross-border platforms, including examination of witnesses who are located overseas, even though such remote witness examinations do not tend to be accepted in the courts of many jurisdictions.

The practice of online ADR appears to be getting more common and more broadly utilized than expected before the COVID-19 pandemic. Some positive factors or elements of online ADR can be listed as follows:

1) Flexible and easy to schedule hearings and various meetings, such as procedural/pre-hearings, internal meetings of the parties, as well as meetings of the tribunal or mediators to internally discuss or deliberate, among busy arbitrators, mediators, legal counsel and users.
2) For a party who does not prefer to attend in person at the same location as an adverse party, it may be more preferrable to meet online rather than in person at the same location, for example, in cases where there is an emotional aspect, such as those involving family matters or disputes involving serious damages caused by malicious torts.

1) JIDRC English web-site at https://idrc.jp/en/ The author is the chair of the Web Hearing Committee of JIDRC.
2) JIDRC has published the committee's report and proposals at its web-site "https://idrc.jp/wp-content/uploads/2020/11/reportandrecommendation_webhearing.pdf"

3) Also, although subject to debate, some mediators are of the view that online ADR is actually more effective for observing behavioral reactions compared to in-person meetings, thanking to the ability to zoom in/out of screen views and other features of online/virtual meeting technology. Depending upon further advancements in technology and practice, such observations might become more broadly accepted, even though the in-person hearing may continue to be the default practice.

Especially for cross-border ADR, which may involve multiple jurisdictions and players overseas, the practice of online ADR is expected to be accepted as main stream in the dispute resolution market, based upon various advantages or merits, as mentioned above.

Ⅱ. Advantages/Merits of Combination of Arbitration and Mediation -Arb. Med. Arb.

The combination of arbitration and mediation, especially which is known as Arb.Med.Arb., is becoming increasingly popular and more broadly utilized by various ADR institutions such as the Japan Commercial Arbitration Association（JCAA）and the Singapore International Arbitration Centre（SIAC）/Singapore International Mediation Centre（SIMC）, as flexible ADR methods. Although Med.Arb., which takes the approach of mediation first before filing arbitration, is also broadly utilized, some practitioners or arbitrators/mediators have concerns on this combination order in terms of cost and timing, and some legal issues which may trigger pre-requirement issues to be satisfied before filing arbitration. Compared to this, the procedural order of Arb.Med.Arb. may not raise such concerns or issues, and, depending upon the progress of the arbitration proceeding and nature of the dispute, may work efficiently and flexibly to resolve a case faster, taking into account business factors and the interests of the parties/users involved.

The following can be considered some advantages and merits of Arb.Med.Arb.:

1) Saving cost and time through early settlement/resolution
   If a settlement can be reached faster by moving the case into mediation from an ongoing arbitration, this can save potentially significant costs, not only with respect to arbitration expenses, including arbitrators' fees, but also, more substantially with respect to attorney fees, which may accumulate as long as the dispute continues on.
2) Maximization of advantages of seeking common interests of both parties as win-win resolution not only for legal interests but also for business interests.
   While arbitration can resolve and determine only legal issues which are caused by past incidents or certain facts, by combining arbitration with mediation, related issues can be resolved, including business issues which may include future possible business and a continuing relationship between the parties.
3) Where a dispute is settled through mediation combined with arbitration, the settlement can be enforced by implementing the settlement through the format known as the "consent award" if the consent award is recognized as an enforceable award in the jurisdiction in which the targets of enforcement are located. The consent award has been

utilized broadly, by Arb. Med. Arb. resolution to secure enforceability, by various institutions and tribunals such as JCAA and SIAC/SIMC. However, if the state in which the target assets are located is a signatory who ratified The Singapore Convention on Mediation (the "Singapore Convention")[3], the settlement agreement can be enforced in such state/jurisdiction smoothly without taking the form of a consent award.

While mediation style is said to differ depending upon legal culture; i.e., common law culture tends to proceed with facilitative methods, and civil law culture tends to proceed with evaluative methods, the recent trends of international mediation appear to be moving more toward a hybrid style featuring both facilitative aspects and evaluative aspects to maximize the advantages of each, depending upon the nature of the case and the respective legal backgrounds of the parties and the legal counsel involved. For example, if the concerned dispute pertains to a sophisticated high-tech transaction and the lifetime of the relevant technology is very short in the relevant market, unless the dispute is resolved or settled speedily, i.e., at least within a few months, the possible resolution or settlement may be meaningless in the market by the time that it is reached because of the lifetime limitation of the technology. To avoid this, a technology expert or other neutral party should be involved in the ADR process so that resolution can be reached swiftly and in time for the result to be regarded as useful/valuable in the market[4].

Ⅲ. First Case under Joint-Protocol by SIMC and JIMC-Kyoto

As one of the great honors of my career, I was appointed as a co-mediator for the very first mediation case under the joint-protocol of the Singapore International Mediation Centre (SIMC) and the Japan International Mediation Centre-Kyoto (JIMC—Kyoto)[5], which was uniquely implemented to handle cross-border cases online under the COVID-19 pandemic situation[6], for time and cost saving. This protocol mediation is to be handled or facilitated, unless otherwise agreed by parties, by two co-mediators, one of whom is to be appointed by JIMC and the other by SIMC. Such co-mediation can provide various advantages or merits including the following:

1) Especially for cross-border dispute resolution, this co-mediation may be able to respond to the different legal cultures of the parties, such as differences between common law and civil law culture.
2) Co-mediators, whose native language might be the same as that of one of the parties, can

3) The Singapore Convention is a uniform and efficient framework for international settlement agreements resulting from mediation. It applies to international settlement agreements resulting from mediation, concluded by parties to resolve a commercial dispute. Cited from https://www.singaporeconvention.org/

4) For disputes relating to high-tech transactions, in the course of the 2019 UNCITRAL Commission, Japan and Israel submitted a proposal entitled: "Possible future work in the field of dispute resolution in international high-tech related transactions" (https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/a-cn9-liii-inf-3.pdf)

5) JIMC's home page is at https://www.jimc-kyoto.jp/

6) The joint protocol is introduced at https://www.jimc-kyoto.jp/serviceandfees/index.php

work as bridge for language differences, provided that the co-arbitrators do not function as mere translators or messengers for the parties, but instead function as a single unit of "co-mediators" to facilitate settlement negotiations.

3) Having two experienced professionals from different backgrounds is helpful to maintain the appearance of fairness and credibility on which the parties rely. As a result of this diversity, even if one or both of the parties might not agree with the thinking of one of the co-mediators , the parties may be more accepting of the process for having a combination of two professionals from differing backgrounds.

For this type of co-mediation, the following should be the key turning points to facilitate settlement:

1) The pre-mediation meeting is a helpful step that can be utilized to persuade parties to shift from a dispute or arbitration mode to collaboration or mediation mode so that they can make efforts to identify common interests rather than remain entrenched in their own legal assertions.
2) An efficient and speedily operating online platform, by which the hearings and meetings can be easily scheduled, can facilitate the availability of the mediators and parties involved, as the online format obviates the need to physically travel between countries.
3) An efficient combination of joint sessions and private/caucus sessions, is very helpful not only for sorting through legal arguments but also for identifying common business interests between the parties, including the business objectives of each of the parties to facilitate a win-win resolution.

For this first co-mediation case, we co-mediators utilized what is to be known as the "Greg/Yoshi Schedule[7)]" to facilitate the settlement negotiation. This is a chart/schedule by which the co-mediators organize and compose the following topics: ① commercial objectives, ② common interests, and ③ agreed/yet to be agreed points.

①Commercial Objectives: Having the parties identify their respective commercial objectives establishes a starting point whereby a clear understanding can be gained of each party's fundamental direction, including future business and/or separation of the parties. This can be a common goal for the parties to discuss how to reach or achieve, depending upon the nature of their mutual relationship and their business plans for the future based on a possible settlement.

②Common Interests: Common interests identified not only by the parties but also by the mediators should be the key factors and basis for the parties to understand settlement conditions and how to develop them.

While the cost and time savings of a swift resolution can be identified as a common interest, looking beyond can also be meaningful. If the parties look to the future they may gain a

7) While the Redfern Schedule is broadly used for discovery practice of arbitration, we co-mediators developed our schedule, for our convenience and efficient facilitation.

clear understanding that their common interests might also include maintaining a profitable business, preserving reputation/credibility in the market, as well as conditions under which each party can focus on its respective business during or post COVID-19.

③Agreed/Yet to be Agreed Points: Visualization of already agreed items, steps for possible further collaboration between the parties, and yet to be agreed items with reasons why they cannot agree on the differences they assert, in the form of schedule is very effective for working out points to be resolved.

Utilizing this schedule, co-mediators can facilitate the progress of settlement negotiation, and depending upon the yet to be agreed points and the reasons, a mediator may propose or suggest his or her own idea, including his or her evaluation of certain subjects. Such combination of evaluation and facilitation can function as a hybrid of common law and civil law styles for mediation proceedings[8].

The reasons for the success of this seminal co-mediation proceeding can be described as follows and these points can be regarded as possible know-how for settlement negotiation practice.

1) Efficient and smooth combination of and communication by co-mediators with a mutual understanding of their roles
2) The Greg/Yoshi Schedule was efficiently utilized to track progress and each milestone achieved, as well as points to be resolved and the gaps to be closed, thereby allowing the parties to be aware of their progress towards reaching a possible settlement goal.
3) Reasonable and amicable communication between the parties involved, including experienced and capable legal counsel of the parties, despite of some hurdles including different legal backgrounds on each side. This shows how important the role of counsel for each party is, in addition to the function of the mediators.
4) The appearance of reliability and credibility of two co-mediators from different legal backgrounds, helps the parties to be persuaded and feel comfortable with the work of the mediators, as compared to a case in which there is only one mediator whose thinking might not be compatible with the thinking or mindset of the parties.
5) Efficient logistical and technical support and operational support from SIMC and JIMC-Kyoto, including facilities for the online proceedings, such as break-out rooms for private sessions, parties' rooms, and a room for the mediators to discuss matters confidentially between themselves.

Utilizing such know-how based upon my experience as a co-mediator, I would like to promote further international mediation and educate/train more mediators, not only for Japanese users but also for cross-border ADR practice, including online ADR practice.

8) A recording and transcript of an interview of the co-mediators can be found on the SIMC Home Page (https://simc.com.sg/blog/2021/09/22/meet-the-co-mediators-who-overcame-cultural-odds-under-the-jimc-simc-covid-19-protocol/) You Tube (https://m.youtube.com/watch?v=kQPKomjwE6g)

Ⅳ. Outlook for the Post COVID-19 Era

While it is unclear when the world can fully emerge from the COVID-19 pandemic, it is now actively discussed whether and how online ADR practice, as above, will continue to be utilized by users in the market. Considering the many advantages and merits of online ADR as mentioned above, I believe this should still be a strong option going forward, especially for cross-border cases, particularly those involving jurisdictions of differing legal systems and traditions.

Before online ADR, it was very difficult to schedule hearings or meetings with highly sought after arbitrators/mediators with strong experience and reputations in the legal or business industries, who were called upon frequently to travel across Europe, U.S. and/or Asia countries to sit down for various hearings and meetings. Due to the great advances made in online ADR, such availability issues have been minimized, thereby making it much easier to flexibly schedule hearings and meetings with busy arbitrators and mediators as well as busy businesspeople and their respective legal counsel, across borders. However, even if travel issues can be resolved by holding proceedings online, attention should also be given to time zone differences in order to avoid unreasonableness or unfairness in scheduling. For example, a remote witness examination scheduled at a time that would be in the middle of the night for one of the parties or other players may be regarded as an unfair or unreasonable lack of accommodation for time zone differences, which in turn may trigger a future challenge against any decisions made through such proceeding.

Further, for online arbitration proceedings, some due process issues have been actively discussed as follows, for example:

1) Coaching risk in witness examinations conducted online/remotely
   It has been actively discussed how to avoid witness coaching during examination by an adverse party/opposing counsel. Some protocols or agreement[9] by parties on preventative measures, including the use of 360 degree cameras and/or multiple cameras so as to detect and deter coaching, have been discussed and implemented.
2) Opportunity to object
   Even when a party (either directly or through legal counsel) raises an objection to a question during a witness examination or other important proceeding, if such interjection is not promptly acknowledged in real time due to the online environment, this may result in a party being treated unequally or unfairly, which in turn can be a possible basis for challenge of an award rendered under such circumstances.
3) Translation/Interpretation issues
   For remote communication, including witness examination, where the speaker must communicate in the proceedings through a translator, it is critical to establish the conditions for accurate, uninterrupted and timely translation. This requires not only

9) JIDRC has published its form of protocol for the online protocol/agreement to be provided by the parties. The form was drafted by JIDRC's Web Hearing Study Committee, chaired by the author. (https://idrc.jp/images/link/JIDRC_sample_agreement_for_a_virtual_hearing_ENG.pdf)

logistical support such a translator's booth, quality audio equipment, and transcription services, but also consideration of soft aspects including a decision on whether consecutive or simultaneous translation should be utilized as well as special instructions to the speakers, such as keeping questions and answers concise. The above aspects are essential to ensure timely and accurate translation and to ensure that each party has the opportunity to raise any concerns regarding the timeliness or accuracy of the translation.

In contrast to the above due process or soft aspects of arbitration, mediation can be more flexible and the above issues may not be substantial concerns for mediation, because mediation hearings do not usually involve witness examinations and therefore the need to raise objections during testimony is obviated. Also, detailed transcripts are not necessary for mediation, and translation or interpretation can be taken care of by the party counsels and/or mediators flexibly, if practitioners having an international background are so appointed. Considering the nature and flexibility of mediation, at least online mediation proceedings can continue to be a very realistic option for users in the market, and if legal concerns surrounding cyber-security are addressed, arbitration combined with flexible mediation and online ADR may become main stream especially for cross-border dispute resolution and grow with the progress of Arb. Med. Arb. practice.

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ODR (Online Dispute Resolution)

—Outline of the Action Plan of the Ministry of Justice and Domestic Trends

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Ⅰ. Introduction

On March 31, 2022, the Ministry of Justice announced the "Basic Policy on the Promotion of ODR - Action Plan for making ODR familiar to citizens" (hereinafter referred to as the "Action Plan")[1] . We introduce what ODR is, and then outline the Action Plan and trends of ODR in Japan.

Ⅱ. What is ODR?

ODR is an abbreviation for Online Dispute Resolution. It is not defined by law, however, ODR generally refers to on-line dispute resolution procedures using advanced technologies such as IT and AI. The term "dispute resolution procedures" generally refers to procedures in courts such as civil litigation, and dispute resolution procedures such as ADR (alternative dispute resolution). However, in the context of ODR, it is commonly used to include the previous stages.

Based on the Growth Strategy Follow-up (approved by the Cabinet on June 21, 2019), the ODR Revitalization Panel, which was established in the Cabinet Secretariat, published a report on March 16, 2020, which classified the general flow of resolution, from the occurrence of legal disputes to the resolution itself, into the following five phases.[2]

1) https://www.moj.go.jp/housei/adr/housei10_00187.html

2) The Growth Strategy Follow-up states: "As part of the development of our country's business environment in response to the diversification of disputes, we will examine the expansion of the use and enhancement of functions of civil dispute resolution, such as alternative dispute resolution using IT and AI including online dispute resolution (ODR), and we will reach a conclusion on the basic policy in fiscal 2019."

The above report also covers legal services and dispute resolution procedures that utilize IT and AI in phases (1) to (3) above. In this way, ODR should be recognized to include not only "(4) ADR Phase" and "(5) Civil litigation Phase (5)" , but also legal services and dispute resolution procedures utilizing IT and AI in each phase of the review, consultation, and negotiation, which are the preliminary stages of phases (4) and (5). The specific image for each phase is summarized as follows according to the stage of development of ODR.

Images of Phase of ODR

	(1) Examination and information collection	(2) Consultation	(3) Negotiation	(4) ADR	(5) Civil Litigation
First step (introduction)	Random searches of law information and solutions (on the Internet)	- Counsel and submission of materials by e-mail - Use of video and web meeting	Use of email and SNS tools	- Petition and submission of materials by e-mail - Use of video and web meeting	
Second step (development)	More effective searches (of the above information) and the creation of a portal site with a collection of reliable information	- Use of no-face-to-face chat methods (e.g., messenger applications) - Use in consultations by searching for precedents, etc. ⇒To speed up and improve the quality of counselling	Development and provision of dedicated apps and web tools (specializing in dispute resolution) (customized web meetings, chat methods, etc.)	- Use of no-face-to-face chat methods (e.g., messenger applications) - Preparation of dedicated platform (common to ADR organizations) with record submission, management, storage, and sorting functions	
Third step (advanced)	Provided information by AI ⇒Provision of information on options for resolution, level of resolution, solvability, etc. through precedent analysis	Automatic response and consultation support by AI ⇒Arrangement of the content of consultations and support for counselors	support for negotiations by AI ⇒To establish a forum for negotiations, guide agreements, present guidelines for resolution, and assist in the examination and preparation of draft agreements	Support in the Resolution of Agreements by AI ⇒Support to the mediator and support to the parties	

(As excerpted from the above report)

Ⅲ. Significance of ODR

The above report states that advantages of the penetration of ODR include the following.

- Online consultation and dispute resolution can significantly reduce the time and economic costs of visiting consulting and ADR organizations.
- ODR can provide diverse support to a wide range of users, including those with mental or physical disabilities and foreign nationals, in response to their needs, thereby easy to access to the dispute resolution.
- Dispute resolution can be promoted even when it is difficult to carry out in-person activities, such as when a pandemic occurs or when travel is difficult due to a large-scale disaster, etc.

The first and second bullet points are also attracting attention from the perspective of efforts in respect of SDGs efforts. In the area of dispute resolution, SDGs indicates the target that of "Promote the rule of law at the national and international levels and ensure equal

access to justice for all." [3] ODR is expected to be a tool towards this target. For companies, providing ODR for their own services can lead to SDGs initiatives.

The third bullet point will attract attention from the perspective of online development due to the impact of COVID-19 infections. It can be said that ODR efforts in each country are accelerating worldwide.

In addition, the implementation of ODR, which entails low time and economic costs to resolve problems, can be said to lead to increased customer satisfaction and loyalty towards a company's services, and ultimately to the securing of trust for the company. In this way, it is said that there is significance from a variety of perspective in respect of introduction of ODR by companies.

Ⅳ. Outline of the Action Plan of the Ministry of Justice

In order to promote ODR as described above, the Ministry of Justice has compiled the Actin Plan. Among the phases (1) to (5) above, "(4) ADR Phase" is positioned as ODR on a non-consolidated basis, and the Action Plan draws up promotional measures with a broad perspective in conjunction with other phases. The goals for promoting ODR are divided into short-term targets (while supporting the participation of private sector businesses in ODR, establishing the basis for promoting ODR by causing as many citizens as possible to know of and use ODR and gain a feel for its convenience, etc.), and medium-term targets (by implementing the world's highest-quality ODR in terms of function, design, etc., in the social sphere, and realizing a society in which people can receive effective support for the resolution of disputes anytime, anywhere, if they have a smartphone or the like), and the Action Plan puts together measures to promote the realization of these respective short-term and medium-term target.

The table below outlines the measures to be taken to achieve each goal.

<Promotion measures to achieve short-term targets>

①Penetration of ODR into the daily lives of citizens (making ODR a lifestyle infrastructure)	Proactive and effective information dissemination to increase ODR awareness	・Dissemination and publicity of ADR ・Intensive and integrated public relations activities by setting ODR (ADR) weeks, etc. ・Promotion of understanding of ODR by company complaints officers, counselors, etc. ・Promotion of efforts with public recognition of ODR as KPI
	Development of information infrastructure to facilitate access to ODR information	・Visualization of dispute resolution cases and enhancement of convenience of ODR search ・Provision of ODR introduction videos

3) SDGs 16.3 https://www.mofa.go.jp/mofaj/gaiko/oda/sdgs/statistics/goal16.html

②Improving access to ODR and quality of ODR	Securing of leads from consultation to ODR	・Establishment of referral routes from counsel organizations to ODR organizations ・Information coordination from counseling organizations to ODR organizations
	Improvement of ODR usability	・Improvement of usability through evaluation by users and counseling organizations, etc. ・Promotion of horizontal collaboration among ODR organizations ・Support for entry into ODR with pre-ADR phase ・Response to cost burden for ODR use
③Support for entry into ODR business	Technical support, etc., to businesses wishing to enter into ODR	・Provision of technology and design-related information necessary for chat ODR ・Provision of training programs for the training of dispute resolution providers
	Enhancement of ODR for handling digital platform-related disputes	・Approach to digital platform operators
	Acceleration of Certification Procedures, etc.	・Formulation of rules of model procedure ・Simplification of certification procedures when certified ADR Operators engage in ODR[4)] ・Acceleration of certification procedures

<Promotional measures mainly aimed at achieving medium-term targets>

①One-stop consultation, negotiation, and mediation	Creation of an environment for providing one-stop services	・Review of data and formats, etc.
②To facilitate an environment where world-class ODR can be provided	Supporting ODR demonstration experiments that incorporate cutting-edge technologies	・Research on the world's most advanced ODR technology ・ODR demonstration experiment through public-private partnership
	Participation in a global network of ODR	・Construction of networks with foreign stakeholders ・Participation in discussions on standardization of ODR standards

4) "ADR Operator(s)" means private ADR business operators who can implement private dispute resolution procedures certified by the Minister of Justice under the Act on Promotion of Use of Alternative Dispute Resolution (Article 2, sub-para.4 of the said Act).

③Infrastructure Development for Use of AI Technology in ODR	Development of a database	・Verification of databases that contribute to the use of AI technology ・Creation of database of civil judgment information
	Examination of issues related to use of AI technology and ethics, etc.	・Examination of ideal ethics and systems for the use of AI technologies

In addition, as a promotion and follow-up framework, an organizational structure is expected to be formed in which the public, private and academic sectors work together to continuously carry out measures to promote ODR and deliberations on normative, ethical, and technical issues.

Ⅴ. Trends in Japan

ODR can be classified into three categories from the viewpoint of the provider: (1) the judicial type, (2) the administrative type, and (3) the private type. In Japan, the introduction of judicial and administrative ODR is in the stages of further study and progress. The electronic submission of civil court documents (so-called "mints"), which was launched in courts, is an example of ODR.

In Japan, as in Europe and the United States, the private sector is ahead of the judicial and administrative sectors, and there are a variety of private-sector ODR initiatives. For example, there are companies that provide ODR services, such as Middleman Corporation, which provides *Teuchi*, a service for mediating disputes online; Civitas Inc, which provides dispute resolution services arising from online transactions; and Deloitte Tohmatsu Financial Advisory LLC, which provides *Smart Judgment*, a service enabling them to negotiate, mediate, and settle disputes online. In addition, Dai-Ichi Tokyo Bar Association has introduced "Simple settlement procedures" using an online chat system for some types of disputes.

Further, Japan Association for Online Dispute Resolution (JODR) was established in September 2020 with the aim of ensuring the sound and fair development of ODR in Japan. This organization has also been adopted as organization with which the Ministry of Justice collaborates in the Action Plan, and their activities are expected to support the promotion of ODR.[5)]

Ⅵ. Concluding remarks

It can be said that the formulation of the Action Plan indicated the direction of the national government's efforts toward the promotion of ODR. The promotion of ODR is a noteworthy

5) MORI Oki, one of the authors of this article, is the Chairman of the Operation Committee of the Arbitration Centre of Dai-Ichi Tokyo Bar Association and servs as a director of the Japan ODR Association at the time of writing.

trend in corporate activities, and we believe that the likelihood of occasions for discussion of the services offered by the company will increase. Therefore, it is necessary to keep a close watch on ODR trends in the future.

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The Possibility of Utilizing Special Conciliation Proceedings as Insolvency ADR—Focusing on its Use as a Business Revitalization Procedure

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Ⅰ. Introduction

Alternative dispute resolution (ADR) is defined as, according to Art. 1 of the Act on Promotion of Use of Alternative Dispute Resolution [*Saiban Gai Funsōkaiketsu Tetsuzuki no Riyō no Sokushin ni kansuru Hōritsu*], "procedures for resolution of a civil dispute between parties who seek, with the involvement of a fair third party, a resolution without using litigation." "Insolvency ADR [*Tōsan ADR*]" comprehensively refers to a dispute resolution procedure related to adjustments of debts for individuals and corporations that are likely to become unable to pay debts.[1)] When combined with the definition of ADR, insolvency ADR can be defined as a procedure that arranges the debtor's debts, liquidates its assets or revitalizes its business (or rebuilds his or her life) in a flexible and swift manner with the involvement of a neutral third party without the resort to "formal" insolvency proceedings (i.e., Bankruptcy, Special Liquidation, Civil Rehabilitation, and Corporate Reorganization).[2)]

Insolvency ADR is classified into the following three types according to the nature of the establisher or operator of each procedure: (1) judicial (e.g., Special Conciliation), (2) administrative (e.g., rehabilitation support procedures by the "SME Revitalization Support Council"[reorganized into "SME Vitalization Council" from April 1, 2022]) and (3) private (e.g.,

*This is an English version of my Japanese article published in *Chūsai to ADR* [Journal of Japanese Arbitration and ADR], No.16, pp 1-9 (June 2021). The original article has been summarized and updated in this version.

1) *See* Kazuhiko Yamamoto and Aya Yamada, *ADR Chūsai Hō* [ADR Arbitration Law](2nd ed., 2015) at 392-93. For English translations of Japanese laws, *see* http://www.japaneselawtranslation.go.jp/?re=02 (last visited Feb. 22, 2022).

2) Of course, it is possible to process insolvency cases through negotiations and agreements on the basis of private autonomy. This is called a "pure private arrangement [*Junsui Shitekiseiri*]." Because insolvency ADR is based on certain rules including the involvement of a neutral third party, it overlaps with the procedure which is called the "rule-based [*Junsoku Gata*] private arrangement" to a considerable degree (Special Conciliation is usually categorized into this type too). However, the rule-based private arrangements can also be done without a fair third party. For example, a private arrangement led by the "Regional Economy Vitalization Corporation of Japan (REVIC)" is not an ADR because REVIC invests in or finances the debtor companies. As a result, insolvency ADR and the rule-based private arrangements are not exactly the same.

Business Revitalization ADR). Although the nature of the procedure is not determined only by its type, each has its own characteristics. For example, in the judicial procedure, the enforceability of the agreement and clear taxation rules for inclusion in deductible expenses are recognized based on the credibility of the court's proceeding.

In this article, I focus on Special Conciliation [*Tokutei Chōtei*], which is classified as a judicial insolvency ADR. This procedure is, on the one hand, a judicial process because judicial powers are available for measures like the stay of civil execution proceedings (Art. 7 of the Act on Special Conciliation for Promotion of Adjustment of Specified Debts, etc. (hereinafter referred to as the "Special Conciliation Act") and "an order in lieu of conciliation" (hereinafter referred to as the "Art. 17 Order") (Art. 22 of the Special Conciliation Act, Art. 17 of the Civil Conciliation Act). On the other hand, it has an element of private arrangement in that the proceedings are carried out privately and through flexible negotiation forms such as limiting the extent of creditors affected. Thus, Special Conciliation has a hybrid nature that encompasses various kinds of usability depending on how it is designed and operated. In recent years, as several rule-based private arrangements have been established for the purpose of debt adjustments and revitalizations of businesses and as the experiences of their operations accumulate, there has been a movement that tries to integrate a rule-based private negotiation (before the final agreement) with judicial elements of Special Conciliation.

In this article, I briefly trace the outline of the Special Conciliation procedure (Ⅱ.) and describe the development of various ways of utilizing it (Ⅲ.). I then discuss future possibilities for Special Conciliation, with the focus on it as a business revitalization type of procedure (IV.).

Ⅱ. Outline of Special Conciliation procedure

1. Purpose of Establishment

In accordance with the Special Conciliation Act, Special Conciliation aims to expedite the arrangement of interests pertaining to monetary debts of the "Specified Debtor [*Tokutei Saimusha*]" in order to contribute to their economic rehabilitation (Art. 1 of the Special Conciliation Act; for definitions of "Specified Debtor," *see* Art. 2 Para.1 of the Act.). Special Conciliation is regarded as an exception to Civil Conciliation under the Civil Conciliation Act, and is commenced by the request, at the time of filing of conciliation, of the Specified Debtor (Art. 3 Paras. 1 and 2 of the Special Conciliation Act). Since there are no particular restrictions on the attributes of Specific Debtors, Special Conciliation can be widely used by individuals and corporations facing economic difficulty.[3)]

3) Research Group on Special Conciliation (ed.), *Ichimon Ittō Tokutei Chōtei Hō* [Q&A the Special Conciliation Act] (2000) at 5-6, 12 -13. Right after the enforcement of the Special Conciliation Act, it was reported that a little more than 10% of the cases in the Tokyo Summary Court were filed by business entities (*see* Wataru Kobayashi, *Tokyo Kansai ni okeru Tokutei Chōtei no Dōkō to Jisshi Jōkyō no Kenshō* [Trends and Analyses of Implementation of Special Conciliation in the Tokyo Summary Court], 594 Ginkō Hōmu 21 (2001) at 28.

2. Key features of the Special Conciliation procedure

(1) Petition of Special Conciliation

A petitioner who requests conciliation to be implemented in accordance with Special Conciliation shall submit a detailed statement indicating financial conditions, any other materials clarifying that the petitioner is a Specified Debtor, and a list of the "Entitled Persons Concerned [*Kankei Kenrisha*]" (those who have the rights to property claims against the Specified Debtor and who possess a security interest on the property of the debtor [Art. 2, Para. 4 of the Special Conciliation Act]) (Art. 3, Para. 3 of the Special Conciliation Act). In addition, when the petitioner is a business entity, the pre-petition progress of negotiations with the Entitled Persons Concerned and the outline of the conciliation clauses desired by the petitioner must be clarified at the same time as the petition (Art. 1, Para. 1 of the Special Conciliation Rule). Thus, it is basically assumed (recommended) that negotiations between the business debtor and creditors, etc. have begun before the time of filing.

The filing fee is determined according to the value of the matter for which a conciliation is sought (Art. 3, Para. 1 of the Act on the Costs of Civil Proceedings, Row 14 of Appended Table 1). In general practices of Special Conciliation in Summary Court, the fee is deemed to be 500 yen in the case of a petition by an individual (value of matter: 100,000 yen), and 5,000 yen in the case of a petition by a business entity (value of matter: 1,000,000 yen), for the reason that the remaining debt cannot be calculated unless the conciliation proceeds.[4] However, a determination of the value of the matters for conciliation shall be determined also by the way to count the number of petitions for conciliation (whether or not a debtor's petition involving multiple creditors can be treated as one), the court having jurisdiction (Summary Court or District Court) and the content of the conciliation (whether or not it includes debt forgiveness). Therefore, there are some differences among courts as to calculation standards for filing fees. [5]

(2) Conciliation Agencies

In the case of conducting Special Conciliation by the Conciliation Committee, the court shall designate two or more (normally two) persons as the conciliation committee members who have the necessary expert knowledge and experience pertaining to laws, taxation, finance, corporate finance, asset evaluation, etc., according to the nature of the case (Art. 8 of the Special Conciliation Act).

Conciliations, when the court finds it appropriate, may be carried out by a judge only(Art. 22 of Special Conciliation, Art. 5, para. 1, proviso of the Civil Conciliation Act). In practice, if the rationality verification of the business revitalization plan by the Commission of Examination [*Chōsa Shokutaku*] (see below) is the main purpose of Special Conciliation, it is often conducted by the judge only (especially in the case of Conciliation by a District Court[6]).

(3) Various Measures for Special Conciliation

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4) Iwata Kazutoshi, *Kiso kara Manabu Kan'i Saibansho no Sho Tetsuzuki* [Learning from the Basics: Proceedings of a Summary Court] (2017) at 160.

5) For example, the amount of filing fee is differently decided as to petitions under "Guidelines for Managers' Guarantees" discussed later. *See generally* Nobuaki Kobayashi and Yasuyuki Nakai, *Keieisha Hoshō Gaidorain no Jitsumu to Kadai* [Practices and Issues of Guidelines for Managers' Guarantees] (2nd ed. 2020) at 268-270.

In principle, Special Conciliation is a procedure between the petitioner and the other party (a creditor). However, heavily indebted debtors, whether individuals or corporations, assume debts from multiple creditors, and debt adjustments with those creditors should be carried out interrelatedly and collectively. Therefore, Art. 6 of the Special Conciliation Act stipulates that "if multiple cases of Special Conciliations pertaining to the same petitioners are pending in the same court separately, conciliation proceedings pertaining to these cases must be consolidated and processed to the extent possible." When, as a prerequisite for consolidation, a transfer of a case to a proper court is necessary, it can be done under looser requirements ("when it is deemed appropriate to handle the case") (Art. 4 of the Special Conciliation Act; cf. proviso of Art. 4, Para. 1 of the Civil Conciliation Act).

As a means to promote Special Conciliation, the conciliation committee or a judge (hereinafter referred to as the "Conciliation Committee, etc.") has the authority to request the disclosure or submission of information, documents or property from the parties, etc. (Arts. 10, 12 and 19 of the Special Conciliation Act; *see also* Arts. 4 and 6 of the Special Conciliation Rule). When the Conciliation Committee, etc. finds it particularly necessary for conciliation, it, upon the petition by a party, may issue an order to prohibit the respondent or any other person concerned with the case from changing the present state of any property, or order them to cease and desist from any act that would make it impossible or extremely difficult to achieve the conciliation ("Measures prior to Conciliation [*Chōteimae no Sochi*]," Art. 22 of the Special Conciliation Act, Art. 12, Para. 1 of the Civil Conciliation Act). There is a fine for violation of the orders (Art. 35 of the Civil Conciliation Act).

In addition, the Special Conciliation Court, under certain requirements, may, upon petition, order the stay of civil execution proceedings pertaining to the right that is the subject of Special Conciliation (main text of Art. 7, Para. 1 of the Special Conciliation Act). The order is typically issued to stay compulsory execution against the debtor's important property commenced by a creditor in order to obtain an unreasonably favorable conciliation.[7)]

In some cases of Special Conciliation involving business revitalization, the main purpose of the procedures is to confirm the rationality of the business revitalization plans through examination by lawyers and other experts on the basis of the Commission of Examination (Art. 9 of the Special Conciliation Rule and Art. 16 of the Civil Conciliation Rule). Such method of Special Conciliation proceedings is different from the normal conciliation process in which conflicts between the parties are mediated through the above-stated authorities of the Conciliation Committee, etc. Instead, it seems that this kind of proceeding aims at securing the fairness and rationality of the revitalization plan by intensive examination and verification by neutral experts.[8)] When such business revitalization Special Conciliations are linked to the conclusion of proceedings by the Art. 17 Order described earlier, it appears to be a simplified

6) As described below, in a judge-conciliation case in the District Court, an examiner, usually an attorney, attends the conciliation dates and substantially mediates between the parties. For the practice in the Osaka District Court, *see* Masafumi Kawabata et al., *Hai Rokumin desu, Okotae shimasu* [Yes, Civil Affairs, Division 6, We Will Respond] (2nd ed. 2018) at 644.

7) Iwata, *supra* note 4 at 176.

judicial insolvency (revitalization-type) proceeding which consists of an examination of a revitalization plan by qualified experts and a court's confirmation of the legality and rationality of the plan.

(4) Successful conciliation and its effects

When the Conciliation Committee, etc. present the proposed terms of conciliation to the parties, those terms shall be fair, appropriate, and economically reasonable from the perspective of contributing to the economic rehabilitation of the specified debtor (Art. 15 of the Special Conciliation Act). Here, "fair" means that it is fair among persons with an interest, and that it does not violate laws and regulations. "Reasonable" means that the content is appropriate for the economic revitalization of a debtor. Further, "economic reasonableness" means that the terms of conciliation are economically reasonable to both parties, and, in particular for creditors, that the debtor's rehabilitation can provide them with an economically more advantageous solution than bankruptcy [*Hasan*] proceedings.[9)]

When an agreement is reached between the parties and it is entered into a court record, the conciliation is deemed successful, and this entry into the record shall have the same effect as a judicial settlement (Art. 22 of the Special Conciliation Act and Art. 16 of the Civil Conciliation Act; *see also* Art. 22, item (vii) of the Civil Execution Act). If the parties do not reach an agreement, the court may, by its authority and to an extent that does not contradict the objectives of the parties' petitions, issue the Art. 17 Order to resolve the case. The court may do so only after hearing the opinions of the conciliation committee members, giving consideration to the equitable treatment of the interests of both parties, and taking into account all relevant circumstances (Art. 22 of the Special Conciliation Act and Art. 16 of the Civil Conciliation Act). The content thereof, as is the case of terms of conciliation, shall be "fair, reasonable, and economically rational" (Arts. 20 and 17, para. 2 of the Special Conciliation Act). The Art. 17 Order shall have the same effect as the judicial settlement unless the parties file an objection within two weeks from the day on which the party receives notice of the order (Art. 22 of the Special Conciliation Act, Art. 18, paras. 1 and 3 of the Civil Conciliation Act). Thus, the Art. 17 Order, in spite of a limit that it expires due to an objection by the parties, is regarded as a merit of the use of the Special Conciliation proceeding for reasons that it sometimes makes it easy for creditors (financial institutions, etc.) to obtain internal approvals, and that there are cases where creditors who were against the conciliation switch in favor of it due to credibility of the court order.[10)]

Ⅲ. Function of special conciliation as an insolvency ADR

As mentioned above, the original dispute resolution process of a Special Conciliation is to

8) Akimitsu Takai and Akihiko Inuzuka, *Tokuteichōtei* [Special Conciliation], Junichi Matsushita and Mitsue Aizawa (ed.), *Jigyōsaisei Tōsanjitsumu Zensho* [Complete Guides on Business Revitalization and Insolvency Practices] (2020) at 61.

9) *See* Research Group on Special Conciliation Law (ed.), *supra* note 3 at 99-101.

10) *See* Takai and Inuzuka, *supra* note 8 at 60-61.

reach a rational agreement for a revitalization and a debt adjustment of an individual or a corporate debtor on the verge of economic collapse through special measures for collective resolution and through the involvement of conciliation committee members. Recently, however, along with the development of various rule-based private arrangements in the field of business revitalization, there seem to be changes in the way of using the Special Conciliation proceeding. Let us take a closer look.

1." Parallel" and "continuous" use with other rule-based private arrangements

Special Conciliation has been operated not only as a self-contained insolvency ADR, but also as part of unique scheme particularly for business revitalization purposes in conjunction with other rule-based private arrangements. Here I take up two rule-based private arrangements: (1) private arrangements pursuant to the Guidelines for Private Arrangement [*Shiteki Seiri ni kansuru Gaidorain*] (and Q&A) (2001), and (2) Business Revitalization ADR [*Jigyō Saisei ADR*] (introduced in 2007 and now revised by the Act on Strengthening Industrial Competitiveness [*Sangyō Kyōsōryoku Kyōka Hō*] (hereinafter referred to as the "Industrial Competitiveness Act")).

According to the Guidelines for Private Arrangement, which were the first instance of guidelines for a rule-based private arrangement, when target creditors (usually financial institutions) confirm the suspension of debt collection acts at the first creditors' meeting (and before the second one), the Special Conciliation proceeding can be used in parallel with the private arrangements. More specifically, the Guidelines state that, where it is more likely that an agreement will be reached by using Special Conciliation due to various reasons, the debtor may file for Special Conciliation in addition to the preceding private arrangement. Then, when approaching an agreement through measures provided for by the Special Conciliation Act, the debtor can withdraw the conciliation and reach a final agreement as a result of the private arrangement.[11)]

Next, the relationship between the Business Revitalization ADR (intended for considerably large debtor corporations) and Special Conciliation can be described as follows. According to Art. 50 of the Industrial Competitiveness Act, if Business Revitalization ADR was undertaken with respect to the same case prior to the application for Special Conciliation, the court is to make a judgment as to whether it is appropriate for the conciliation to be undertaken only by a judge "in consideration of the fact that" Business Revitalization ADR was undertaken. Typically, if Business Revitalization ADR turns out to be unsuccessful due to the disagreement of a small number of creditors, a Special Conciliation by a judge only can be used in order to obtain their agreement. Moreover, according to the rules of the Business Revitalization Practitioners Association [*Jigyō Saisei Jitsumuka Kyōkai*], currently the only Specified Certified Dispute Resolution Business [*Tokutei Ninshō Funsō Kaiketsu Jigyōsha*] (Art. 2, Para. 15 of the Industrial Competitiveness Act), a petition for Special Conciliation can be filed in parallel with the Business Revitalization ADR proceeding.[12)] In that case, Special Conciliation may be

11) *See* Appendix 2 of Guidelines for Private Arrangement: "On the Use of Special Conciliation Procedures."

commenced only against the opposing creditors while maintaining the Business Revitalization ADR procedure.[13] Therefore, Special Conciliation (judge-only) is, under the Industrial Competitiveness Act, designed to take over from unsuccessful Business Revitalization ADR (which is a "continuity" or "bridging" type of relationship), while the ADR agency's rules of implementation assume that both procedures proceed concurrently ("parallel" type of relationship). In either type of relationship, it is very hard to persuade opposing creditors to change their minds in Special Conciliation. The case is more likely to go to formal insolvency proceedings with majority rule. There have not been many cases where the two procedures worked well together.[14]

2. Procedures that integrate the results of rule-based private negotiations with Special Conciliation

Recently, Special Conciliation has been used at the final stage of rule-based private arrangements after business revitalization plans are agreed by almost all financial creditors through negotiations with close involvement of lawyers and other experts. In this kind of procedure, the Special Conciliation procedure itself is supposed to end within a short period of time by a successful conciliation or the Art. 17 Order. The characteristic of such procedure is that the revitalization plan itself is substantially completed by way of a private agreement in order to avoid damage to the value of the debtor's business, and that, by going through Special Conciliation as a judicial ADR, both the debtor and the creditors enjoy benefits like favorable tax treatments. This procedural framework is, unlike the "continuity" type, designed as an integral combination of private negotiation and Special Conciliation from the beginning.

In such a procedural framework, the negotiation process before filing a petition for Special Conciliation is important. The Japan Federation of Bar Associations (JFBA), therefore, has established a number of manuals, including the "Manual for the Use of the Special Conciliation Scheme as a Method to Support Business Revitalization [*Jigyōsha no Jigyō Saisei wo Shien suru Shuhō toshiteno Tokutei Chōtei Sukiimu Riyō no Tebiki*]" (originally released in 2013 and revised in 2020). The scheme implemented pursuant to the Manual[15] has the following features: (1) the basic targets are relatively small business entities (corporations or sole proprietors), (2) the terms of conciliation or revitalization plan are most likely to be agreed to by all financial creditors before filing a petition of Special Conciliation (hence pre-conciliation measures pursuant to Art. 12 of the Special Conciliation Act are not expected to use), (3) the jurisdiction shall be given to the Summary Courts (handled by the Conciliation Committee) located in the same place as the main offices of the District Courts, (4) the Art. 17 Order is

12) Art. 25, Para. 8 of Rules concerning Business Revitalization Procedures through Specified Certified ADR [*Tokutei Ninshō ADR Tetsuzuki ni motozuku Jigyō Saisei Tetsuzuki Kisoku*]. For the text of the Article *see* Business Revitalization Practitioners Association (ed.), *Jigyō Saisei ADR no Subete* [Everything about Business Revitalization ADR] (2nd ed. 2021) at 619.

13) Business Revitalization Practitioners Association (ed.), *supra* note 12 at 155.

14) Of 81 business revitalization ADR applications (253 debtor corporations) from 2008 to 2020, there were 20 cases of transition to other procedures, and only two of them were transferred to Special Conciliation. *See* Business Revitalization Practitioners Association (ed.), *supra* note 12 at 426.

supposed to be actively utilized, and (5) tax treatments are clarified regarding debt forgiveness for both debtors and financial institutions.[16] Since the Commission of Examination is not scheduled in this procedure, the cost of Special Conciliation is limited to a filing fee (6,500 yen per case no matter how many creditors are involved or 500 yen per creditor) and postal stamp cost, and the conciliation is deemed to end, in principle, after only two conciliation dates. Thus, emphasis is given to the simplicity, speed, and inexpensiveness of the conciliation process.[17]

3. Development of Special Conciliation procedures in district courts

The district courts (prominently the Tokyo District Court and the Osaka District Court) have developed their own methods of the Special Conciliation proceeding for revitalization of considerably large corporations.[18] It is a procedure handled by judges of the insolvency division of large-scale district courts that is closer to a formal rehabilitation procedure than the Summery Court Special Conciliation. As such it is appropriate to characterize it as a unique type of Special Conciliation.

The Civil Affairs, Division 8 (Commercial Division) of the Tokyo District Court, originally in response to the enactment of the "Guidelines on Private Arrangement" in 2001, introduced a new model of Special Conciliation in cooperation with the Civil Affairs, Division 22 (Conciliation, etc. Division). This procedure attempted to assume cases in which private arrangements were not successful due to opposition by minority creditors, and as the result of conciliation, based on the examiner's report on rationality of the rehabilitation plan, voluntary approval to the plan or the Art. 17 Order is encouraged.[19] Lately, since April 2020, the Civil Affairs, Divisions 8 and 20 (Bankruptcy and Rehabilitation Division) of the Tokyo District Court have collaboratively started new operations of Special Conciliation. Even in the new operation, the main targets are cases where a business revitalization plan was not successful through rule-based private arrangements (Business Revitalization ADR and the like), and the Art. 17 Order

15) In addition to this guideline, the JFBA prepared and published two more guidelines: (1) "Manual for the Use of Special Conciliation Scheme as a Method of Guarantee Debt Arrangement pursuant to the Guidelines for Managers' Guarantees" (2014) and (2) "Manual of the Use of Special Conciliation Scheme as a Method of Supporting the Closure and Liquidation of Business Entities" (2017). Both were also revised in 2020. Apart from these manuals, the "Organization for the Operation of the Debt Arrangement Guidelines for Victims of the Great East Japan Earthquake and Natural Disasters" established a guideline for debt adjustment of individuals or sole proprietors affected by natural disasters including special provisions for those affected by Covid-19 infection, where Special Conciliation is an important part of the procedural scheme. *See* http://www.dgl.or.jp/guideline/ (last visited Feb. 22, 2022).

16) For the tax treatment relating to JFBA's Special Conciliation Schemes *see* https://www.nichibenren.or.jp/activity/resolution/chusho/tokutei_chotei.html (last visited Feb. 22, 2022).

17) Takai and Inuzuka, *supra* note 8 at 63, 69.

18) The average number of the debtor filings is just 1 to 3 cases a year (Akimitsu Takai, Revitalization and Liquidation through Special Conciliation, Matsushita and Aizawa, *supra* note 8 at 632.

19) Yasushi Kanokogi, *Tōkyō Chisai Dai 8 Bu niokeru Tokutei Chōtei no Unyō Jōkyō* [Operation of Special Conciliation in the Civil Affairs, Division 8 of the Tokyo District Court], *Jigyō Saisei to Saiken Kanri* No. 119 (2008) at 65ff. Then the amount of advance payment was, considering the costs for full-scale investigation activities of lawyers and certified public accountants, set at a higher level, around 12 million yen.

is encouraged to be used. Additionally, some features have been newly introduced: (1) a smaller amount of an advance payment at the time of petition to make Special Conciliation easy to use,[20] (2) the standard number of conciliation dates is just three and the conciliation is supposed to end within seven weeks or so, and (3) Special Conciliation for a debtor corporation can be operated jointly with that of the debtor's guarantor(s) in accordance with the Guidelines for Managers' Guarantees. In the new operation, while emphasizing the importance of the examiner's report, an efficient and low-cost Special Conciliation is aimed at by limiting and simplifying the items of the report.[21]

The Osaka District Court, the second largest district court in Japan, has also established a system in which the Insolvency Division (Civil Affairs, Division 6) and the Conciliation etc. Division (Civil Affairs, Division 10) cooperate to handle some cases of the business revitalization type of Special Conciliation.[22] This procedure is also premised on the pre-petition existence of a proposed revitalization plan for a business corporation. The case is distributed formally to the Civil Affairs, Division 10, although a judge of the Civil Affairs, Division 6 handles the case as a judge of the Civil Affairs, Division 10.

With regard to the new operation of the Tokyo District Court, we must wait for future developments. But, apparently, the Special Conciliation procedures in two district courts have a number of points in common. For example, the main targets in both procedures are cases which were not successful through the preceding rule-based private arrangements. Further, both procedures try to reduce the amount of the advance payment by streamlining the examination process, etc. and reach a successful conciliation within a shorter period of time.

Ⅳ. Conclusion—Present and future of Special Conciliation

As we have seen in this article, Special Conciliation, in addition to its original function as an independent insolvency ADR, has progressed “in parallel” with other pure or rule-based private arrangements, or has been utilized as a successor to these processes. In addition, recently, there is an increasing number of procedures that use Special Conciliation as a completion stage following the rule-based negotiation process. That kind of procedure could be called the “integration” type in order to distinguish it from the idea of Special Conciliation focused on “continuity” after other rule-based private arrangements fail.

I have argued that relationships between private arrangements and formal insolvency proceedings can be reduced basically into three perspectives: (1) “strengthening continuity,” (2) “mutual entry” and (3) “integration.” [23] This analysis seems to offer a clue for

20) The maximum amount of the prepayment is set as much as that of a Civil Rehabilitation proceeding (one of the formal revitalization insolvency proceedings) and 60% of that amount as a standard. On the other hand, the filing fee was clearly set at 6,500 yen per the other party (based on the idea that economic benefits cannot be calculated). *See* Takeshi Ebara et al., *Tokyo Chihō Saibansho ni okeru Kigyō no Shitekiseiri ni kansuru Tokutei Chōtei no Arata na Unyō no Gaiyō* [Outline of New Operation of Special Conciliation regarding Private Arrangements of Businesses in the Tokyo District Court], *Kinyū Hōmu Jijō* No. 2133 (2020) at 24.

21) Ebara et al., *supra* note 20, at 25-26.

22) Kawabata et al., *supra* note 6, at 643-45.

understanding the relationship between Special Conciliation and other rule-based private arrangements too.

First, if there are a small number of opposing creditors in the business revitalization ADR and no agreement is reached, the company will, under "strengthening continuity" policy, smoothly proceed to Special Conciliation (especially in the district courts) and come to a successful conciliation through mediation by conciliation committees or the use of the Article 17 Order, etc. based on an examiner's report. Second, "mutual entry" is an idea that even during a private arrangement the statutory measures like the stay of civil executions should be available under certain conditions[24] (*see* "parallel use" of Special Conciliation with the private arrangements under the Guidelines for Private Arrangement and with Business Revitalization ADR).

Finally, there are procedures which aim to conclude an agreement by Special Conciliation of the court (or conclusion by the Art. 17 Order) based on the existence of a business revitalization plan compiled with the assistance of lawyers according to the various "manuals" established by the JFBA, etc. This type of procedure can, unlike the "strengthening continuity" and "mutual entry" types of procedures, be described as "integration" of the rule-based private *negotiation* and *completion* of the reconstruction plan through the Special Conciliation.

Given the diversified functions of Special Conciliation mentioned above, though, there still is a need for Special Conciliation to return to its original function as an independent insolvency ADR and strengthen such function. It is important to expand the possibility of the rehabilitation of business debtors even without a sufficient prior preparation through Special Conciliation by making the most of various measures stipulated by the Special Conciliation Act. This is an independent judicial insolvency ADR which is simpler and more flexible than a formal insolvency proceeding and more reliable than a rule-based private arrangement.

While the number of Civil Conciliations per year has been decreasing recently, the number of new cases assumed as Special Conciliation has decreased much more sharply (according to the Annual Report of Judicial Statistics, the numbers of new cases of the Special Conciliations in the Summary Courts was 55,904 in 2009, and 2,959 in 2019). With regard to business revaitalization Special Conciliation, even though various attempts have been made in practice, there seems to be more pessimism about the active use of it.[25] However, Special Conciliation as a judicial-type ADR that can be connected in various ways not only with other rule-based

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23) Shoichi Tagashira, *Saiken Gata Shitekiseiri Tetsuzuki to Hōteki Seiri Tetsuzuki no "Tōgō" Shiron* ["Integration"of Out-of-Court and In-Court Corporate Restructuring Processes: A Proposal], *Jōchi Hōgaku Ronshū* Vol. 60, Nos. 3 and 4 (2017) at 165-69.

24) *See* Tomonori Miyakawa, *Saimusha Kōsei Hō Kōsō: Sōron* [The Concept of Debtor Rehabilitation Law: General Theories] (1994) at 370-72.

25) *See e.g.*, Hiromasa Nakajima, *Jigyō Saisei Shuhō toshite no Tokutei Chōtei ni tsuite: Shihō Gata Tōsan ADR no Genjō to Kadai* [On Special Conciliation as a Business Revitalization Method: Current Status and Prospects of Judicial Insolvency ADR], Hiroshige Takata et al. (eds.), *Minji Soshō Hō no Riron* [Theory of Law of Civil Procedure] (2018) at 1279, Tōru Masuichi, *Shihou Gata Tousan ADR to shite no Tokutei Choutei: sono Igi to Mondai Ten* [Special conciliation as Judicial Insolvency ADR: Its Significance and Problems], Ginkō Hōmu 21 No. 821 (2017) at 35-36.

private arrangements but also with formal insolvency proceedings has the potential to be the mother body that produces new operations or statutory schemes. In the immediate future, I would like to pay close attention to the direction of the JFBA schemes introduced above.

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How Are Disputes Settled in Japan's Financial ADR?

Statistical Analysis of the Determinative Factors in the Facilitation and Conclusion of Settlements in FINMAC Mediation

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Ⅰ. Introduction

This paper presents findings from a statistical analysis of mediation cases at FINMAC (Financial Instruments Mediation Assistance Center), a leading certified financial ADR organization in Japan. I analyzed cases mediated using the FINMAC mediation process from Fiscal Year 2011 and 2016 to answer three main research questions: (1) what kind of cases are more easily settled; (2) what kind of cases settled involving higher settlement figures; (3) what kind of changes the process has seen, if any.

To that end, Part 1 will provide the background to the analysis, namely, the success story of financial ADRs and recent shadows of doubt over it. Part 2 will explain the working hypotheses and methods for the analysis, and Part 3 will present the findings from it. Finally, in Part 4, I provide explanatory hypotheses elucidating the findings.

Ⅱ. Background to the research

1. ADR, civil justice capacity, and judicial system reform

During the latter half of the 20th Century, ADR processes served as instruments of “Small Sized Justice” of Japan, at least in some sense. In the context of Japan's low litigation rate for traffic accidents, Ramseyer and Nakazato, and Tanase concurred in their analysis that ADR processes specialized in traffic accidents provided efficient and meaningful alternatives to lawsuits in Japan.[1)] More generally, Frank Upham pointed out that the creation of institutional mediation is one consistent response to social conflict in any form in Japan. According to Upham, a Japanese response to social changes, characterized as bureaucratic informalism and institutionalized mediation, is a vehicle to regain control over the specifics and pace of a social change endorsed by court decisions.[2)] These scholars differed in their nuances but concurred

1) Ramseyer, J. M.、& Nakazato, M. “ The rational litigant: settlement amounts and verdict rates in Japan,” The Journal of Legal Studies, 18(2), 263-290 (1989). Tanase, T., “The management of disputes: automobile accident compensation in Japan,” Law and Society Review, 651-691 (1990).

that institutionalized mediation has facilitated Small Sized Justice in Japan, reducing the civil litigation caseload and settling conflicts out of court.

While justice system reforms in 2000s aimed at breaking-away from the traditional Small Sized Justice and the expansion of the rule of law, the Justice System Reform Council nevertheless recommended the promotion and institutionalization of ADR.[3] The Council seemed to have assumed that ADR can serve as venues for negotiation "in the shadow of law" and can expand the scope of available dispute resolution guided by rules and standards developed in courts.[4]

Based on the recommendations, Japan legislated wholesale revision of theh Arbitration Act (Act No. 138 of 2003) and the Act on Promotion of Use of Alternative Dispute Resolution (Act No. 151 of 2004), for example, the latter of which introduced Certified ADR Institutions. These recommendations and legislation prompted a remarkable number of start-ups of ADR institutions in the 2000s. However, many of these start-ups (and especially those qualifying as Certified ADR Institutions) saw only small number of cases.[5] It is quite doubtful that the promotion of ADR expanded the rule of law in a meaningful manner.

2. Codification of Financial ADR

In order to promote ADR in Japan's financial markets, the Financial Service Agency set up the Financial Service Dispute Resolution Liaison Group, where lawyers, academics, and representatives from financial businesses held discussions to develop and promote models for ADR processes hosted by industry organizations. However, with the notable exception of the mediation process provided by the Japan Securities Dealers Association (hereinafter JSDA), and its successor FINMAC, ADR mechanisms attached to industry organizations saw few cases.[6]

While justice system reforms and the liberalization of financial markets ignited discussions over so-called financial ADR (i.e. an ADR system specifically designed to resolve disputes over financial instruments), the financial crisis of 2007–2008 brought the final momentum necessary to the revision of the Financial Instruments and Exchange Act and other statutes (Act No. 58 of 2009), which institutionalized financial ADR through Designated Dispute Resolution Organizations (hereinafter abbreviated as DDRO). Below the term "financial ADR"

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2) Upham, F. K., Law and Social Change in Postwar Japan, Harvard Univ. Press (1987), pp. 15-22.

3) *Shiho-Seido-Kaikaku-Shingikai* (Justice System Reform Council), "*Shiho-Seido-Kaikaku-Shingikai Ikensho: 21 Seiki-no Nihon-wo Sasaeru Shiho-Seido* (Recommendations from Justice System Reform Council: Justice System to Support 21th Century's Japan)" https://lawcenter.ls.kagoshima-u.ac.jp/sihouseido/report-dex.html (2001) (archived by Kumamoto University Judicial Policy Research Education Center; retrieved on Aug. 25, 2022) pp. 35-38.

4) For the concept of negotiation "in the shadow of the law," please refer Mnookin, Robert H, and Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce." The Yale Law Journal88, no. 5, 950-97 (1979).

5) Ministry of Justice, "*ADR-Ho Kentokai Ikensho* (The Report from the Study Group on ADR Act)," https://www.moj.go.jp/content/000121361.pdf (2014) (retrieved on Mar. 18, 2022) p. 55.

6) Financial Service Agency, "*Un'yo-Men-no Jokyo-ni tsuite* (About the Operations of the ADR Programs)," https://www.fsa.go.jp/singi/singi_trouble/siryou/20050603_sir/03.pdf (2005) (retrieved on Mar. 18, 2022) .

refers specifically to these DDROs.

The statutory framework for these DDROs contemplates that they provide both complaint processing and mediation services, which FINMAC calls "*kujo-shori*" and "*assen*" respectively. In complaint processing, a DDRO secretariat relays the complaint to the respondent dealer/trader and monitors the progress made. In mediation, a DDRO will select one (or a panel of) mediator(s) from its register. It needs to be mentioned that the "Basic Contract" , which is mandatory for businesses operating in the said market to enter into with a DDRO, gives the respondent businesses the duty to cooperate with the mediation process, including the duty to agree to be subject to mediation and the duty to accept a special settlement offer from the mediator(s) (in effect creating a unilateral arbitration clause).

In addition to these mandated processes, most DDROs, including FINMAC, also provide free (or cheap) consultation services for customers, which usually precedes complaint processing and any mediation.[7)]

3. Quantitative and Qualitative Success of Financial ADR

Financial ADR, upon undergoing the institutionalization explained above, saw a considerable numbers of cases, in strong contrast to the low uptake of other private ADR processes. (Fig. 1 and 2)[8)] As for FINMAC, though the spike in 2018 was attributed to the invoking of a call provision in a particular financial instrument, (which provoked more than 600 mediation filings at FINMAC) there have been more than a hundred mediation filings in each year other than 2018. The case counts are comparable to those arising in civil litigation disputes concerning financial instruments. As for mediation filings with the Japan Bankers Association (abbreviated as JBA hereinafter) over securities disputes, its first three years of operation saw distinctively high numbers of filings, which was attributed to customers' losses incurred from currency derivatives products sold by banks in circumstances where there were drastic currency fluctuations during the global financial crisis in 2007-08. Even after that boom, the number of filings of securities disputes with JBA mediation surpasses that of civil litigation every year, according to the mandatory reports from member banks to the JSDA.

The case numbers shown above illustrate the exceptional success of financial ADR among private ADR mechanisms in a quantitative sense.

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7) FINMAC, "*Sodan-to-no Nagare* (The flow of Processes at FINMAC) https://www.finmac.or.jp/flow/ (publication date unknown) (retrieved on Nov.20, 2017).

8) The figures are compiled using the data from the following business reports from FY 2010 to FY 2018. JSDA, *Gyomu-Hokokusho* (Annual Business Report), https://www.jsda.or.jp/about/gaiyou/houkokusho.html (2010-) (retrieved on Mar. 15, 2022), *Zenginkyo-Sodanshitsu* (JBA Counseling Bureau), *Gyomu-no Jisshi-Jokyo* (Annual and Quarterly Business Report) https://www.zenginkyo.or.jp/adr/conditions/year/ (2010-) (retrieved on Mar. 15, 2022) Japanese banks are not only members of JBA, but also special members (*tokubetsu-kaiin*) of JSDA in their capacity of securities business. Based on that capacity, the banks reports their litigation and conciliation cases to JSDA. The numbers for "JBA Mediation Cases (Securities)" are the sums of the mediation filings in "derivatives cases" and "securities cases (over-the-counter-sales)" categories which correspond to litigation and conciliation cases appeared in JSDA reports. (The categories representing banking business, such as deposits and savings, money transfer, and foreign exchanges, are excluded from the figures.

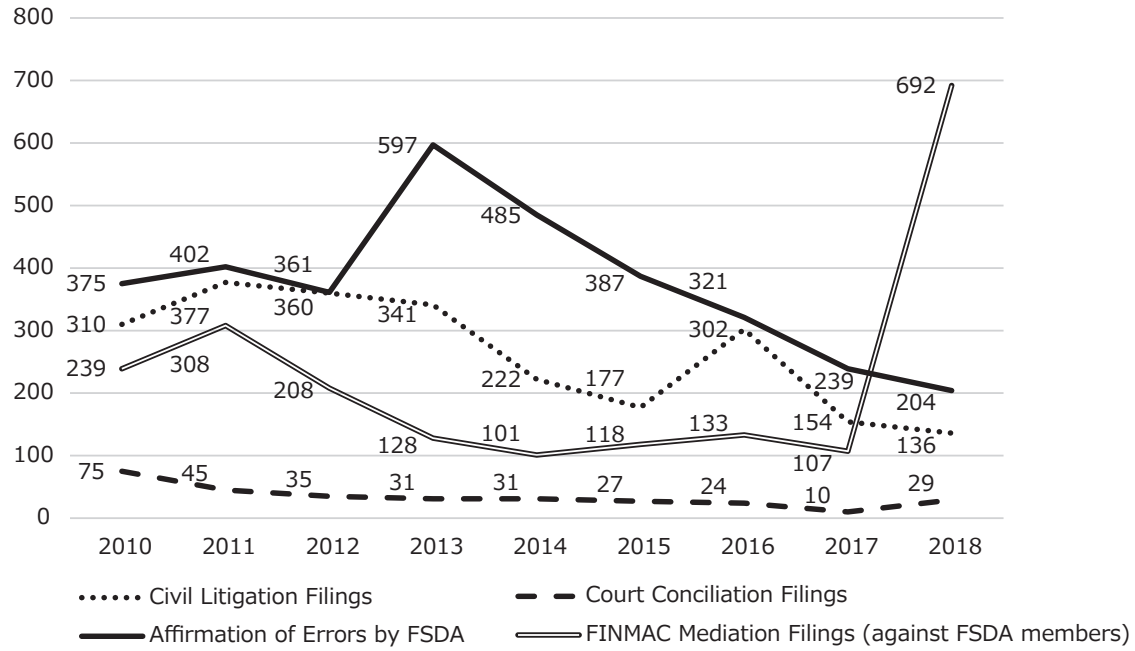

Fig.1 Numbers of filings initiating dispute resolution processes against securities businesses

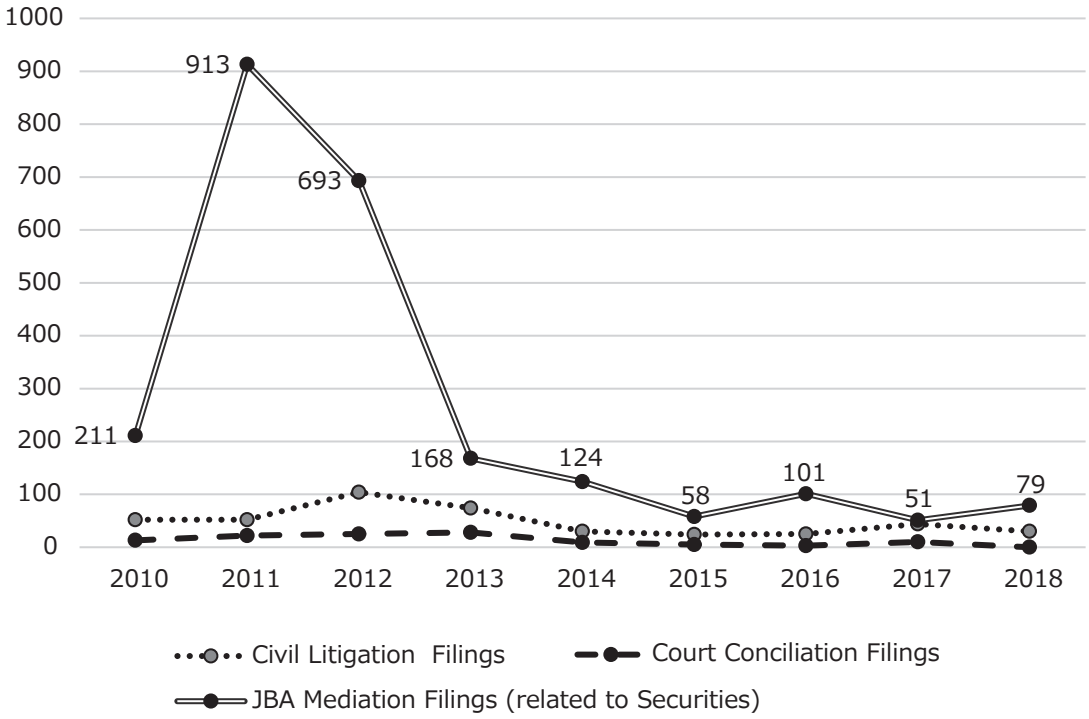

Fig.2 Numbers of filings initiating dispute resolution processes against banks (securities related)

Now, we turn to the question of whether the financial ADR mechanisms serve to expand the Rule of Law, as expected by the Justice System Reform Council, in a qualitative sense.

In this respect, the follow-up committee gave a positive evaluation of financial ADR mechanisms in that they had been playing a certain role in troubleshooting matters for customers and therefore had been serving to protect customers in financial markets. It cited the facts that (1) the system captured potential demands for dispute resolution and that (2) the organizations boasted a relatively high rate of successful settlements.[9)]

I also contended in my article, co-authored by Andrew Pardieck, that Japan's financial ADR mechanisms have functioned to expand the domain of the Rule of Law, based on the following arguments. Unlike securities arbitrations in the United States, filings for mediation at a financial ADR institution does not prevent customers from bringing their cases also to court. And the financial ADR mechanisms employ lawyers specialized in securities law as their mediators and also allow attorneys to represent customers. In short, financial ADR mechanisms do not exclude but necessitate the involvement of attorneys. During the mediation process, the attorneys (either mediating or representing clients) analyze and argue the disputes within the frameworks developed through lawsuits and precedents relevant to securities and other financial instruments. Further, a large part of the cases submitted to financial ADR mediations in the past were disputes over smaller stakes and/or brought by elderly investors. The financial ADR mechanisms provide cheaper and faster dispute resolution based on the laws, regulations, and precedents relevant to such cases where the use of attorneys and the courts would not pay off. In the manner explained above, financial ADR mechanisms have served to expand the domain of influence of the courts and lawyers into a wider range of disputes over financial instruments.[10)]

4. Recent Worries

However, there have been a few disturbing developments concerning financial ADR mechanisms in recent times. In the late 2010s, some of the organizations began to report that the situation of their handled cases worsened with respect to the numbers of filings and the settlement rates. The organizations themselves attributed this trend to the increase in cases unsuitable to mediation, such as those disputed already for years, and the fact that the easier cases, as typified by those over currency derivative products, had been cleared away and the remnant cases are relatively harder to settle.[11)]

From another point of view, it can be speculated that the recent situation is in fact a return to normalcy and the favorable conditions at the birth of Japanese financial ADR mechanisms

9) Financial Service Agency, "*Kin'yu-ADR-Seido-no Foroappu-ni Kansuru Yushikisha-Kaigi-ni-okeru Giron-no Torimatome* (Report of Discussions at Follow-Up Committee for Financial ADR system)," https://www.fsa.go.jp/singi/adr-followup/20130308/02.pdf (2013) (Retrieved on Mar. 18, 2022).

10) Maeda, Tomohiko, and Andrew M. Pardieck. "ADR in Japan's Financial Markets & the Rule of Law." NEULJ 10, p, 400 (2018).

11) Financial Service Agency, "*Dai-48-kai Kin'yu Toraburu Renraku-Chosei-Kyogikai Gijiroku* (The Minute for the 48th Financial Dispute Resolution Liaison Group Meeting), https://www.fsa.go.jp/singi/singi_trouble/gijiyoroku/20141204.html (2014) (Retrieved on Mar. 18, 2022).

were an exception, which fortunately bestowed a successful beginning on the system. As for the cases over currency derivative products, it is reported that the administrative guidance (*gyosei-shidou*) made the banks inclined to accept customer bailouts through privately negotiated settlements or through the financial ADR mechanisms.[12)]

Ⅲ. Subject and Methods of the Analysis

With these situations in mind, I conducted statistical analysis, more specifically regressions, of the data from mediations at a financial ADR, to verify the following two hypothesis. The first hypothesis (HA) is that dispute resolution in the financial ADR mechanisms have changed because of the loss of the favorable conditions present at the time of their startup. The second hypothesis (HB) is that court precedents have guided dispute resolution in financial ADR processes.

1. Subject of the Analysis

I chose the mediation process at FINMAC as the subject of statistical analysis for the following three reasons.

First, FINMAC has distinctive capabilities given by securities regulations. FINMAC deals with disputes over financial instruments such as securities, where the dealers are prohibited from compensating customers for their losses, with several exceptions (Financial Instruments and Exchange Act, Art. 39). FINMAC and other DDROs have the legal capability to legitimize settlements compensating customers' losses (Order for Enforcement of the Financial Instruments and Exchange Act Art. 16-5).[13)] This legal framework pushes securities dealers to prefer mediation at financial ADR institutions over one-on-one negotiations, even when they are otherwise inclined to negotiation and settlement. If the banks were willing to settle the disputes over the currency derivatives products, they should have brought considerable number of “easy” cases to the financial ADR institutions dealing with financial instruments (i.e. FINMAC and JBA) at the start of the system. This in turn should have led to a decline in the rate of “easy” cases and thus a decline in settlements as the currency derivatives dispute boom waned.

The second reason for choosing to examine the mediation process at FINMAC is the detailed statistics available from the Japan Securities Dealers Association, one of the parent organizations of FINMAC. It has broad and strong regulative authority over its member dealers and publishes detailed annual and quarterly reports, which include the numbers of disputes between the member dealers and their customers and their disposition, filings, and terminations of civil litigations and conciliations (*Minji Chotei*). Therefore, we can compare the number of cases amongst civil litigation, conciliation, and the financial ADR mechanisms

12) For the news coverage about the said administrative guidance, please refer to Asahi-Shinbun, “*Deribatibu-Keiyaku-no Chusho-Kigyo, Cho-Endaka-de Sonsitsu-Uttae Yonbai: Sakunendo Funso-Kikan-ni* (Small-to-Medium Businesses who Bought Currency Derivatives Products Report Files Quadruple Cases to Dispute Resolution Organizations under Super-Strong Yen, Compared to the Last Year),” Jun. 7, 2012 (Morning Ed.) p. 1, for example

13) See, Maeda & Pardieck, *supra* n. 10 for the details.

(being mediations at FINMAC and JBA) involving the member dealers (including the banks brokering financial instruments).

The third and last reason is that FINMAC discloses its information more thoroughly than other DDROs and discloses even the approximate amount of awards for each case settled through its mediation process. This allows us to analyze not only the probability of successful settlements, but also the probable or expected amounts of such awards.

2. FINMAC Mediation Cases Seen Through Numbers

When we compare the composition of mediation cases submitted to FINMAC by the amounts of the claims and the awards, it is apparent that high stake cases involving ten million yen or more has decreased both in numbers and rates (Fig. 3).

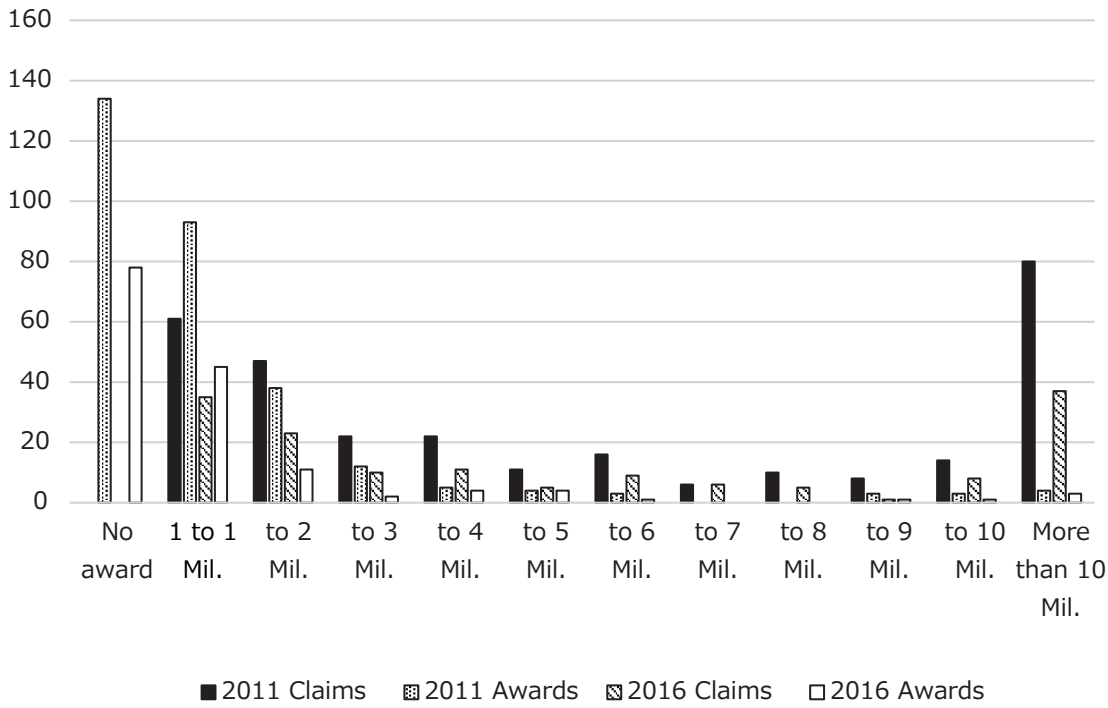

Fig.3 Distribution of Amounts of Claims and Awards of FINMAC Mediation Cases (in JPY) (Filed by Non-Corporate Customers) Terminated in 2011 and 2016.

3. Working Hypotheses

Based on the data available for analysis, the author verified three working hypotheses deduced from the two hypotheses above (HA and HB). The first working hypothesis (WHA) is that when we compare the cases from 2011 and 2016, the settlement rate and the award rate (being the amount of the award divided by the amount of the claim for each settled case) is lower in 2016. The second working hypothesis (WHB) is that in cases where the dealers admitted that they were at fault or showed a willingness to settle, the parties are more likely

to settle and the award rate is higher with an absence of discount from comparative fault (WHB1). Another element of the hypothesis is that claimants older than 75 and/or female claimants would be more likely to reach settlements and they would settle at higher award rates, for such attributes are associated with having less experience with investments and/or having insufficient knowledge necessary to appropriately judging investments, and therefore this enhances the dealers' level of accountability (WHB2). The third working hypothesis is that disputes over currency derivatives products has a higher likelihood of settlement and shows higher award rates for settled cases, when we compared cases filed both by individual customers and corporate customers (WHC).

The data for the analysis is those of all cases terminated in fiscal years 2011 and 2016. I coded all of the cases according to the criteria set to represent such attributes discussed in the working hypotheses, based on the description in the FINMAC quarterly reports.[14)]

Ⅳ. Analysis

1. Factors Contributing to the Success of Settlements and Award Rates in Settled Cases

First, I conducted a logistic regression analysis using the data only from the cases filed by individual claimants with odds of successful settlements set as the explained variable. The

Tab.1 Logistic Regression for Successful Settlement in Mediation Cases Filed by Individual Claimants.

Variables in Equation

	B	S.E.	Wald	df	Sig	Exp(B)	95% Confidence Interval of Exp(B) Min	Max
Early Cases	.362	.227	2.550	1	.110	1.437	.921	2.241
Admission / Willingness	2.564	.343	55.895	1	**.000**	**12.988**	6.631	25.436
Solicitation	-.248	.271	.838	1	.360	.781	.459	1.327
Older	-.186	.237	.618	1	.432	.830	.522	1.321
Female	.737	.216	11.678	1	**.001**	**2.090**	1.369	3.189
Constant	-.700	.307	5.216	1	.022	.496		

14) For the detailed criteria for the coding, see Maeda, Tomohiko, "*Kin'yu ADR ni-okeru Funso-Shori Jokyo-no Tokei-teki Bunseki: FINMAC no Assen-Tetuduki-ni Miru Wakai-Seiritsu-Yo'in to Sousouki-karano Henka* (A Statistical Analysis of Dispute Resolutions at Financial ADRs: Factors Contributing to Successful Settlements and Changes Thereof Observed from Mediation Cases at FINMAC)," Ho-to Shakai-Kenkyu, vol. 3, p. 71.

explaining variables set for the regression model are “case from 2011 (Early Cases),” “admission of liability and/or respondent(s)' willingness to settle (hereinafter Admission/ Willingness),” “disputes over solicitation of deals (hereinafter Solicitation),” and “female (hereinafter Female) and/or older (75 years old or older, hereinafter Older) claimant(s).” Among these hypothetical explaining variables, Admission/ Willingness and Female had significant effects on the odds of successful settlements (Tab. 1; χ^2 = 99.440、df = 5、p= .000 ; Cox-Snell R^2=.199）.

Second, we conducted multiple regression analysis using the data from the cases filed by individual claimants and settled, with award rates set as the explained variable (Tab. 2; F = 10.205、df = 5、p =.000; Adjusted R^2 = .163). The hypothetical explaining variables in the regression model are the same as in the first analysis above. Among those, three variables turned out to be significant. Early Cases and Admission/ Willingness have positive beta values, which means they add to the award rate; Solicitation has a negative beta value, which means it reduces the award rate.

Tab.2 Linear Regression for Awarding Rates in Settled Cases Filed by Individual Claimants

Coefficients

	Unstandardized Coefficients		Standardized Coefficients			95% Confidence Interval of B		Collinearity Statistics	
	B	S.E.	Beta	t	Sig	Min	Max	Tolerance	VIF
(Constant)	.367	.054		6.786	**.000**	.260	.473		
Early Cases	.109	.041	.163	2.681	**.008**	.029	.189	.957	1.045
Admission/ Willingness	.198	.038	.316	5.250	**.000**	.124	.273	.976	1.025
Solicitation	-.122	.045	-.166	-2.737	**.007**	-.210	-.034	.955	1.047
Women	-.061	.038	-.098	-1.611	.108	-.135	.014	.959	1.043
Older	-.004	.042	-.005	-.085	.933	-.086	.079	.968	1.033

As for the WHA, a regression analysis of cases filed by individual claimants showed that cases from 2011 and 2016 were not different in settlement rates, but award rates dropped during the five years interval between them.

As for the WHB, when the dealer admitted fault or were willing to settle (as written in the case reports), it increased both the odds of a successful settlement and the award rates when settled. Female claimants had higher odds of settling their cases: although no significant difference was found in the award rates between them and their male counterparts. Being Older had no significant effect on the odds of settlement or award rates.

2. Effects of Currency Derivatives Products Disputes

We now investigate cases to verify the WHC about the effects of the booming and waning of disputes over currency derivatives. Because all of the cases over currency derivatives were filed by corporate customers, I used all cases for the analysis and added a dummy variable to indicate disputes over currency derivatives (Derivatives hereinafter) to the explaining variables, while excluding the variables concerning the attributes of individuals (i.e., Female and Older). The logistic regression analysis showed that only the Admission/ Willingness had significant effects on the odds of successful settlements. (Tab. 3; χ^2 = 87.922、df = d、p = .000; Co-Snell R^2 = .141) Contrary to the self-analysis reported by the JBA to the Liaison Group, disputes over the currency derivatives were not so easy to settle, at least at FINMAC.

Tab.3　Logistic Regression for Successful Settlements in All Mediation Cases.

Variables in Equation

	B	S.E.	Wald	df	Sig	Exp(B)	95% Confidence Interval of Exp(B) Min	Max
Derivatives	.172	.247	.484	1	.487	1.188	.732	1.928
Admission/ Willingness	2.073	.261	63.004	1	**.000**	7.947	4.763	13.258
Solicitation	-.307	.249	1.525	1	.217	.735	.451	1.198
Constant	-.102	.228	.201	1	.654	.903		

Multiple regression with the same variables set as the explaining variables and the award rates set as the explained variable showed significant effects of all the variables in the model (Tab. 4; F = 16.383、df = 3、p = .000; Adjusted R^2 = .136). Derivatives and Admission/ Willingness raised the awarding rates, while Solicitation lowered them.

Tab.4　Linear Regression for Award Rates in All Settled Cases

Coeefficients

	Unstandardized Coefficients		Standardized Coefficients			95% Confidence Interval of B		Collinearity Statistics	
	B	S.E.	Beta	t	Sig	Min	B	S.E.	Beta
(Constant)	.383	.040		9.598	.000	.304	.461		
Derivatives	.185	.048	.219	3.896	**.000**	.092	.279	.948	1.055
Admission/ Willingness	.199	.034	.321	5.832	**.000**	.132	.266	.983	1.018
Solicitation	-.090	.042	-.121	-2.159	**.032**	-.173	-.008	.950	1.052

Therefore, cases brought over currency derivatives were not easier to settle, but customers received higher awards when they settled their cases. It seems that the currency derivatives disputes set a rather generous “market price” for settlements through the financial ADR mechanisms.

Ⅴ. Arguments and Implications

Based on the statistical analysis presented above, I examine in this section if the financial ADRs have served to expand the rule of law.

As for the guidance available from the legal principles established in securities law precedents, the analysis illustrated that comparative fault applies to the cases mediated at FINMAC. Admission of fault by the dealers minimizes the application of the principle and thus raises the value of awards. In the cases over solicitation of deals, the dealers appear not so clearly erroneous or negligent as they do in cases like those over technical errors, such as placing orders for the wrong number of shares, forgetting to place an order for a customer in time, and similar matters. The troubles over solicitation often involved the customers' carelessness and/or a lack of their own research, which led to sharp discounts arising due to comparative faults reasoning being applied.

As for the factors considered in jurisprudence concerning the enhanced accountability of the dealers, there is no result supporting the hypothesis. It is not verified that securities law precedents have guided not only the words but also the results of mediation cases, from this point of view. The adjusted R squares were small throughout the analysis, indicating that the models explain no more than 20 percent of the distributions. It is quite possible that the simple classifications (age or gender) used in the statistical models in this paper do not represent the experiences and capabilities of the customers observed by the mediators.

The most important finding from the analysis is the fact that the award rates dropped over the years. The waning of the disputes over the currency derivatives partially explains the decrease for corporate cases. However, it does not apply to the drop in the awards for individual customers, for all the currency derivatives cases were filed by corporate customers.

Considering a hypothetical factor to explain the drop, it came to my attention that references to the internal records of the dealers appeared to work differently in considerations of comparative fault in 2011 and 2016. So, I conducted another set of multiple regressions of cases from each year, adding a dummy variable for “reference to internal records (Internal Records hereinafter)” to the explaining variables (and excluding Early Case from them.)

First, for the cases from 2011, Internal Records was significant on a 10% significance level; its B value was .256, which means that if the report referred to internal records, the customer was awarded 25% more (Tab. 5; $F = 9.067$、$df = 5$、$p = .000$; Adjusted $R^2 = .196$）.

In contrast, in 2016, no hypothetical explaining factor was significant other than Internal Records, which has negative B value and lowered the awards by 20% if applicable（Tab. 6; $F = 1.987$、$df = 5$、$p = .092$; Adjusted $R^2 = .065$）.

Tab.5 Linear Regression for Award Rates in Cases (Filed by Individual Claimants) Settled in FY 2011

Coeeficients

	Unstandardized Coefficients		Standardized Coefficients			95% Confidence Interval of B		Collinearity Statistics	
	B	S.E.	Beta	t	Sig	Min	B	S.E.	Beta
(Constant)	.492	.057		8.632	.000	.379	.605		
Admission/ Willingness	.234	.045	.365	5.163	**.000**	.145	.324	.973	1.028
Solicitation	-.157	.056	-.197	-2.784	**.006**	-.268	-.046	.976	1.025
Women	-.073	.046	-.115	-1.601	.111	-.163	.017	.938	1.066
Older	-.014	.053	-.018	-.260	.796	-.119	.091	.963	1.039
Internal Records	.256	.144	.125	1.781	*.077*	-.028	.540	.988	1.013

Tab.6 Linear Regression for Award Rates in Cases (Filed by Individual Claimants) Settled in FY 2016

Coeeficients

	Unstandardized Coefficients		Standardized Coefficients			95% Confidence Interval of B		Collinearity Statistics	
	B	S.E.	Beta	t	Sig	Min	B	S.E.	Beta
(Constant)	.373	.086		4.328	.000	.201	.546		
Admission/ Willingness	.104	.070	.182	1.483	.143	-.036	.244	.876	1.141
Solicitation	-.100	.075	-.165	-1.341	.185	-.250	.049	.873	1.146
Women	-.002	.068	-.003	-.023	.981	-.137	.134	.950	1.053
Older	-.011	.068	-.019	-.163	.871	-.146	.124	.970	1.031
Internal Records	-.208	.120	-.205	-1.735	*.087*	-.448	.031	.944	1.059

Therefore, the effects of the references to the internal records on the award rate reversed in the two periods. The records of phone calls and conversations between the customers and dealers came to prove due diligence by the dealers in the forms of disclosure of risks, explanations of the deals understandable to the said customer, and like recently, although such records tended to evidence in the early days of FINMAC mediations the negligence of the

dealers in form of guaranteeing profits from the deals, pushing the deals too strongly, and the like.

One of the possible explanations for this reversal is that the dealers have improved their legal compliance by setting guidelines and internal codes of practice for the deals with consumer customers and the elderly; they have also become well prepared for disputes brough through ADR mechanisms. In the early days of FINMAC, the dealers were not aware of litigation/mediation risks and their representatives tended to act negligently. As the disputes at financial ADR institutions took root, the dealers and their representatives became more aware of such risks, and the new guidelines and codes were set to offer stronger defenses in case of a dispute by recording the reasonable explanations they had offered and the valid confirmation of the will of the customers (and their family in the case of elderly customers or inexperienced investors.)

Remaining Issues for Further Research

The analysis presented above is “external” in the sense that the author, an external and independent scholar, analyzed open data published and available on the Internet as quarterly reports. The analysis, especially regarding the cause or background of the drop in award rates, needs more support through quantitative and qualitative data. As for quantitative follow-up, more sequential analysis based on all the cases from a several year period should be conducted. And as for qualitative follow-up, the internal views of market participants on the phenomena are necessary to supplement the external analysis.

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Civil Litigation in Japan: Too Long from Start to Finish? A Primer on Recent Timelines and Law Reforms

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Ⅰ. Introduction

Litigation in Japan is often viewed by companies and attorneys outside Japan as lengthy and inefficient, as well as lacking transparency. In our experience, it is not uncommon for foreign companies to express hesitation in using Japan's litigation system to resolve a dispute.

This article intends to provide more transparency on the procedural aspects of Japanese litigation, including what to expect in terms of duration. We present Japanese civil procedure from our viewpoint as Japanese attorneys along with statistics provided by the Supreme Court of Japan.

Section II. provides an overview of the Japanese civil procedure and also describes the characteristics of the Japanese court and judges, including their sanctioned and active role in facilitating settlement, which can be different from that in common law countries such as the United States.

In Section III., we present and analyze the timeline of the civil procedure in Japan based on the latest statistics of Japanese district courts, comparing it to the statistics of the federal district courts in the U.S. Specifically, the analysis based on the statistics in the last five years illustrates that the litigation timelines from filing of complaints to disposition in the civil procedure in Japan are within a reasonable period.

Section IV. introduces the latest reforms of the civil procedure in Japan, aiming to promote and accelerate the process. We touch on the topic of digitalization in the civil procedure and the newly-introduced expedited procedure.

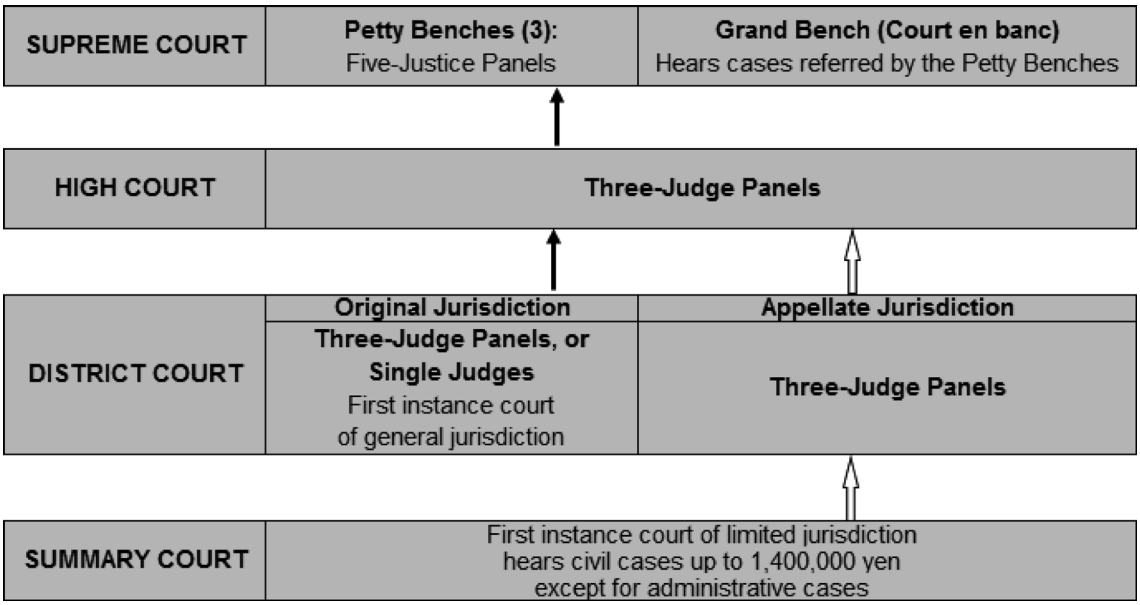
Ⅱ. Outline of the Civil Procedure in Japan

Three-Tiered System

Figure 1 shows the jurisdiction and procedure of civil cases under the Japanese civil litigation system. All courts are national courts, and there is no difference between a state court and a federal court. Japan adopts a three-tiered system, under which a party has the

right to appeal to a higher court up to twice.[1] One element is that questions of fact are reconsidered and re-determined in the appellate court, i.e., during the first appeal, both the appellant and appellee may alter or add allegations and defenses, including submission of further evidence.[2]

Figure 1: Jurisdiction and Procedure of Civil Cases in Japan



(The Supreme Court of Japan, Outline of Civil Procedure in Japan, 6 (2022)[3])

Brief Overview of Civil Procedure in First Instance

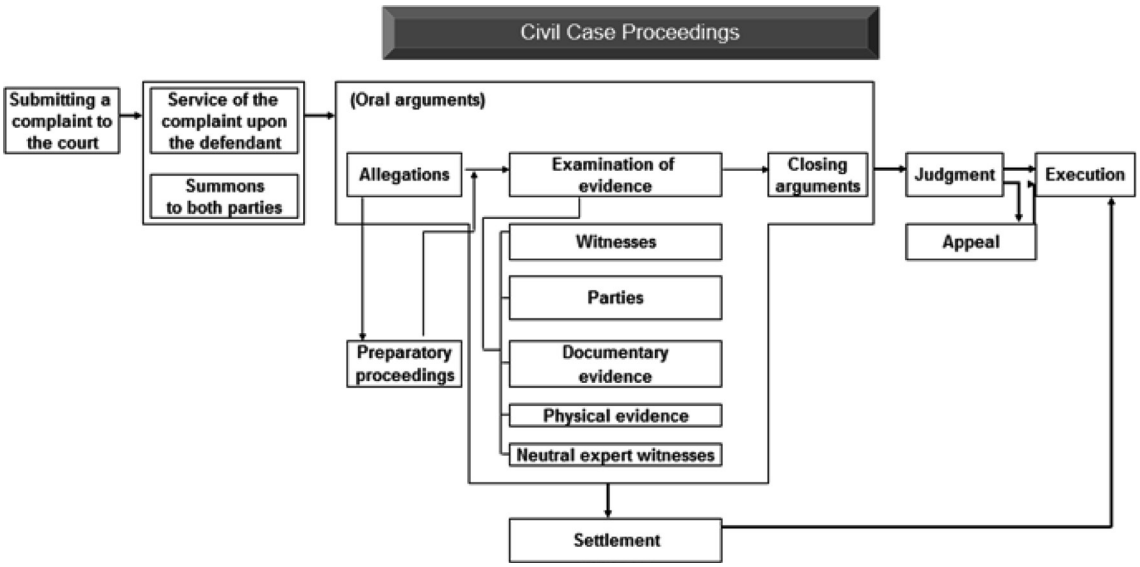
Figure 2 shows the flow of civil proceedings in first instance courts, which roughly consists of the three phases—the beginning phase: submission and examination of a complaint, service, and default judgment; the middle phase: "issue-evidence management procedure"; and the final phase: an intensive examination of witnesses and parties. The court then issues a judgment (or solicits settlement).

1) Although either a summary court or a district court has the jurisdiction of the first instance based on the amount of claim as stated in Figure 1, the summary court may decide to transfer the case to a district court by a petition of a party or at the discretion of the summary court. Saibansho-hô [Court Act], Art. 33 (Japan); Minji Soshô-hô [Minsohô] [Code of Civil Procedure ("COCP")], Art. 18 (Japan).

2) *See* Minsohô [COCP], Art. 298, Para. 1; *see also* Minsohô [COCP], Art. 321, Para. 1 ("[f]acts legitimately found in the original judgment shall be binding upon the court of last resort."). *See* the translation of Minsohô [COCP], Henderson, D. F. et al., *Civil Procedure in Japan*, 977 (3d ed. 2018).

3) https://www.courts.go.jp/english/vc-files/courts-en/Material/Outline_of_Civil_Procedure_in_JAPAN_2022.pdf

Figure 2: Flow of Court Proceedings in the First Instance



(The Supreme Court of Japan (2022), at 7[4])

Beginning Phase: Submission and Examination of a Complaint, Service, and Default Judgment

Civil proceedings are commenced by submitting a complaint to a court. After examining the complaint as to whether it satisfies the statutory requirements, the court sets a date for the first oral session, and a court clerk conducts service with a counterpart of the complaint. If a defendant fails to appear at the first session and to submit an answer, the court may, at its discretion, conclude the proceedings and render a default judgment with prejudice.

Middle Phase: Issue-Evidence Management Procedure

When the defendant rebuts the plaintiff's allegation before the court in factual and/or legal aspects, the court usually initiates the "issue-evidence management procedure" (*sôten seiri tetsuzuki*).[5] This is a procedure where the court narrows down the issues to be determined by examination of witnesses and parties with exchanging allegations and evidence of both parties. It is important to note that these sessions are not held consecutively. Rather, the sessions are non-consecutive and generally held at monthly intervals.

4) *Id*.

5) The COCP stipulates three proceedings: (i) a preparatory oral proceeding (*junbiteki kôtô benron*); (ii) a preparatory proceeding (*benron junbi tetsuzuki*); and (iii) a preparatory proceeding based on documents (*shomen ni yoru junbi tetsuzuki*). A preparatory proceeding, (ii), where only both parties and the court can attend for discussion, is the most frequently used of the three types. Under the Covid-19 situation, a full-remote web conference (via Microsoft Teams, usually) under a preparatory proceeding based on documents, (iii), has also been widely held.

Final Phase: Intensive Examination of Witnesses and Parties

After the issues are narrowed down, an intensive examination of witnesses and parties is held. In practice, both parties request the examination of witnesses and parties to the court with submission of a statement of each witness or party. The court then decides to examine witnesses and parties to the extent necessary to resolve the issues. After examination, in most cases, the parties submit a final brief that summarizes their allegations and highlights the results of the examinations. Finally, the court closes the oral arguments and renders a final judgment.

Settlement Before the Judge

In addition to the right of parties to terminate the instant case by settlement, the Code of Civil Procedure in Japan (*Minsohô*) provides a judge with the authority to attempt, at any stage of the procedure, to induce the parties to enter into a settlement.[6] In our experience, a judge oftentimes asks the parties about the possibility of settlement or suggests settlement, especially before the intensive examination (i.e., after the issues are narrowed down) or thereafter (i.e., when the judge is ready to decide the case). The judge's positive attitude and its role as mediator are prominent characteristics of civil litigation in Japan.[7]

Japanese Court and Judge: Institutions Ensuring Capability of Rendering a Reasonable Decision in an International Dispute

Although it is admittedly difficult to objectively evaluate decisions rendered by Japanese courts, from a business viewpoint, the Japanese judiciary system, generally speaking, has several systems that ensure reasonable decisions on a dispute. The first one is the career system of Japanese judges and the uniformity of training of judges stemming from this system. A dispute will be assigned to judges who have been trained from their twenties in the judiciary career system. Judges build their careers as a judge after being appointed by the Supreme Court after graduation from the Legal Training and Research Institute.[8] [9]

Second, Japanese courts, especially some large courts such as the Tokyo District Court or the Osaka District Court, assign a dispute to a particular civil division with the relevant experience

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6) Minsohô [COCP], Art. 89. The statutory effect of a settlement within the procedure is the same as a final binding judgment. *See* Minsohô [COCP], Art. 267.

7) *See* Henderson, at 489; *see also* Yoshiro Kusano, A Discussion of Compromise Techniques, 24 LAW JAPAN 138 (1991); Yoshiro Kusano, *Shin Wakai Gijutsu Ron* [A New Discussion of Compromise Techniques] 10-17 (Tokyo: Shinzansha 2020) (stating that most judges positively think of settlement as a dispute resolution mechanism and explaining five merits of settlement: a final and binding resolution; the flexibility of agreement-based settlement; probability of voluntary enforcement; swift resolution; and the cost-efficiency of the court).

8) To be accurate, they are appointed and serve as an assistant judge (*hanjiho*) for the first ten years, and an assistant judge becomes a judge (*hanji*) after ten years' experience. Before promotion to a judge, an assistant judge with over five years' experience will be promoted to the status of an assistant judge with special status (*tokurei-hanjiho*), who basically has the same power as a judge (*hanji*). Saibansho-hô [Court Act], Art. 27; *Hanjiho no shokken no tokurei tô ni kansuru hôritsu* [Law Concerning Special Treatment of the Authority of Assistant Judges], Law No. 146 of 1948, Art. 1, Para. 1 (Japan).

9) No jury system in Japanese civil procedure may also serve the uniformity and stability of court decisions.

and expertise depending on the type of the dispute. For example, when filed to the Tokyo District Court, disputes regarding corporate laws are allocated to the 8th Civil Division, which specializes in such disputes. The Tokyo District Court also has Divisions specializing in disputes concerning intellectual property, bankruptcy, labor/employment, construction, medical, etc. In practice, additionally, the district courts in Japan have come to assign more cases not to a single judge but to a panel bench (*gôgitai*), which consists of three judges.[10)]

The Active Role of the Court in Japan to Resolve the Dispute

In some cases, the Japanese judge plays a more active role in resolving the case compared to a common-law judge, whose role is, oftentimes, limited to deciding on the issues (of law, if in a jury trial) and rendering a judgment.[11)] More specifically, judges in Japan, at the beginning stage, usually question the parties to obtain a better understanding of the allegations,[12)] and, at a later stage, partially disclose their inclinations or impressions on the case (*zantei teki shinshô kaiji*) to the parties and discuss the issues and evidence.[13)] The extent of such judicial activism, needless to say, depends on the nature of each case[14)] and the individual characteristics of each judge.

The court often plays an active role in settlement during litigation. Some, in particular lawyers with a common-law background, may think it unfair that a judge having authority to decide the case also attempts to settle (mediate) as if they were a mediator. However, it is also noteworthy that the inducement of settlement by a judge is based on their thoughts about the merits of the case, i.e., a possible judgment. This serves as an incentive for the parties to consider settlement seriously.[15)]

Ⅲ. Timeline of the Civil Procedure in the First Instance in Japan

Introductory Remarks

This part III. describes the timeline of the civil procedure in the first instance in Japan with the latest statistical data based on the annual judicial statistics and detailed analysis reports published every two years by the Supreme Court of Japan.[16)] [17)] The Law for Acceleration of Judicial Proceedings mandates this report.[18)] This statute also stipulates the non-binding

10) Saibansho-hô [Court Act], Art. 26.

11) Legal professionals in common law jurisdictions traditionally have assumed that a separate neutral should be necessary as a mediator, and a judge or an arbitrator should avoid wearing two hats. *See, e.g.,* Rule 3.9 of the Model Code of Judicial Conduct of the U.S.

12) *See* Minsohô [COCP], Art. 149, Para. 1 (authorizing a judge to ask for an explanation to the parties).

13) *See* The Supreme Court of Japan, *Dai 8 kai Saiban no Jinsokuka ni kakaru Kenshô ni kansuru Hôkokusho* [The Eighth Report for the Verification of Judicial Acceleration] ("Eighth Report") 72 (2018) (explaining the practice in the text as the usual practice of Japanese courts). https://www.courts.go.jp/toukei_siryou/siryo/hokoku_08/index.html (only available in Japanese).

14) *Id*.

15) *See supra* note 7. This is the rationale of the ordinary timing of a judge's inducement of settlement (before or after the intensive examination). *See also* Kusano (2020), *supra* note 7, at 28 and 34 (introducing the majority's practice).

target of a litigation timeline in the first instance as "the shortest period within two years,"[19] which we will verify in this part.

Statistical Data and Analysis on the Civil Procedure in the First Instance in Japan: Average Timeline is Not Much Different from the United States, Tends to be Prolonged, and Approximately Two Years in Actuality

Figure 3-1 shows the trend in the number of civil cases filed to the district court in Japan as the first instance and the average timeline from filing to disposition, from 2016 to 2020. The number of civil filings tends to be slightly decreasing (from 148,307 in 2016 to 133,427 in 2020) while the average timeline tends to be prolonged (from 8.6 months in 2016 to 9.9 months in 2020).[20]

Figure 3-3 shows the comparison with the U.S. There is no significant difference between the average timeline of the Japanese district courts and that of the U.S. federal district courts, whose data in the five years from 2016 to 2020 is within the range from 8.9 months to 10.4 months (Figure 3-2 shows this).[21] The major factors directly causing this trend of lengthening of the proceedings in Japan are lengthening of the issue-evidence management procedure and increase in number and proportion of the cases that have not reached disposition after more than two years.[22] The background factor, to the authors' view, is the fact that civil cases are becoming more complex, especially the increasing complexity of specialized cases that take more time than other types of civil cases.[23]

Figure 3-1: District Courts in Japan—Number of Civil Cases Filed and Average Timelines from Filing to Disposition

	Year of 2016	2017	2018	2019	2020
Number of Cases Filed	148,307	146,681	138,444	134,935	133,427
Average Timelines from Filing to Disposition (months)	8.6	8.7	9.0	9.5	9.9

(*) This number does not include the cases filed to the summary courts.

16) This Article is essentially based on the data available in March 2022.

17) As for the judicial statistics, *see* https://www.courts.go.jp/app/sihotokei_jp/search (only available in Japanese, and the data in English is limited. *See* https://www.courts.go.jp/english/publications/index.html). As for the report, *see* https://www.courts.go.jp/toukei_siryou/siryo/index.html (only available in Japanese).

18) *Saiban no jinsokuka ni kansuru hôritsu* [Law for Acceleration of Judicial Proceedings], Law No. 107 of 2003, Art. 8, Para. 1 (Japan). This statute is one of the reforms of the Japanese judiciary system since the 1980s.

19) *Id*, Art. 2, Para. 1.

20) The data in 2020 is affected by the Covid-19 pandemic and the suspension or reduction of judicial business due to the pandemic, which led to a decrease in cases filed and lengthening of the proceedings. However, the trend can be still observed even if we set aside the data in 2020.

21) The median timelines of the civil cases filed to the federal district courts are described in Table C-5. *See* https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables.

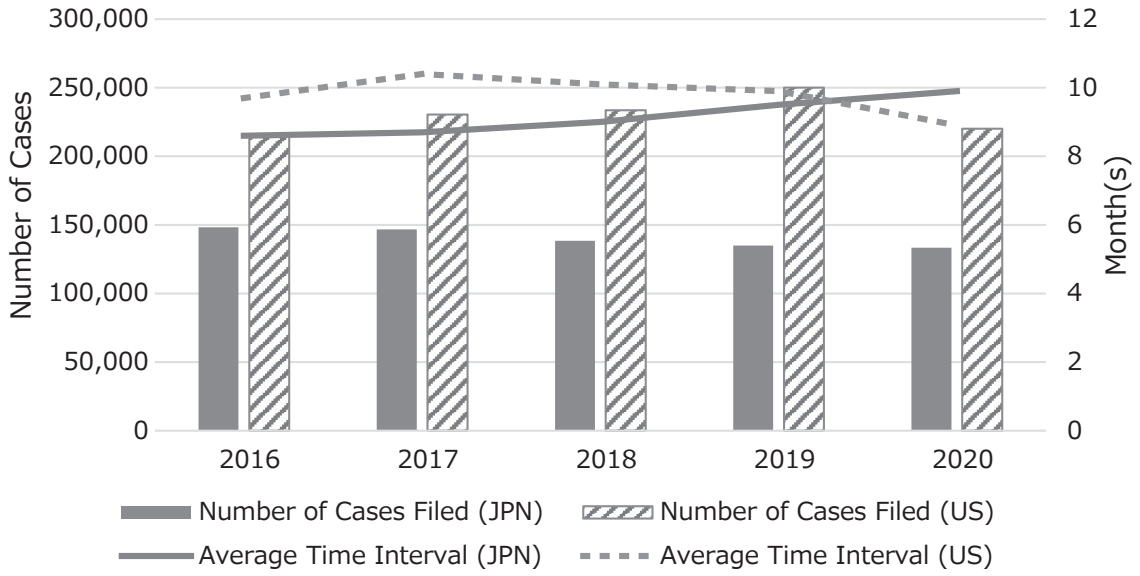
22) *See* The Supreme Court of Japan, *Dai 9 kai Saiban no Jinsokuka ni kakaru Kenshô ni kansuru Hôkokusho* [The Ninth Report for the Verification of Judicial Acceleration] ("Ninth Report") 11, 55 (2021); the Eighth Report, *supra* note 13, at 7, 17. https://www.courts.go.jp/toukei_siryou/siryo/hokoku_09_hokokusyo/index.html (the Ninth Report: only available in Japanese).

Figure 3-2: Federal District Courts in the U.S.—Number of Civil Cases Filed and Median Timelines from Filing to Disposition

	Year of 2016	2017	2018	2019	2020
Number of Cases Filed	215,273	230,412	233,595	250,058	220,097
Median Timelines (months)	9.7	10.4	10.1	9.9	8.9

(*) This number consists only of the cases filed to the federal district courts (i.e., it does not include cases filed to the state courts).

Figure 3-3: District Courts in Japan and the U.S.—Number of Civil Cases Filed and Average Timelines from Filing to Disposition



For a more precise description, the average timelines in Japan in 2018 and 2020 by the actions taken by the courts or parties that caused the termination of the litigation are as follows in Figures 4-1, 4-2, and 4-3.[24] The timelines of the cases resolved by final judgment

23) The specialized cases described in the Ninth Report are medical-related cases, construction-related cases, intellectual property-related cases, labor/employment-related cases, and administrative cases. The Ninth Report, *supra* note 22, at 73-114. Most of these specialized cases have the same tendency of becoming lengthened. *See id*, at 11 and 55, and the table below.

	Year of 2018 (months)	2019	2020
Medical-Related Cases	24.4	26.1	26.7
Construction-Related Cases	18.4	18.9	19.7
Intellectual Property-related Cases	12.9	15.2	15.4
Labor/Employment-related Cases	14.5	15.5	15.9
Administrative Cases	14.5	16.2	15.9

24) The Eighth Report, *supra* note 13, at 25; and the Ninth Report, *supra* note 22, at 64.

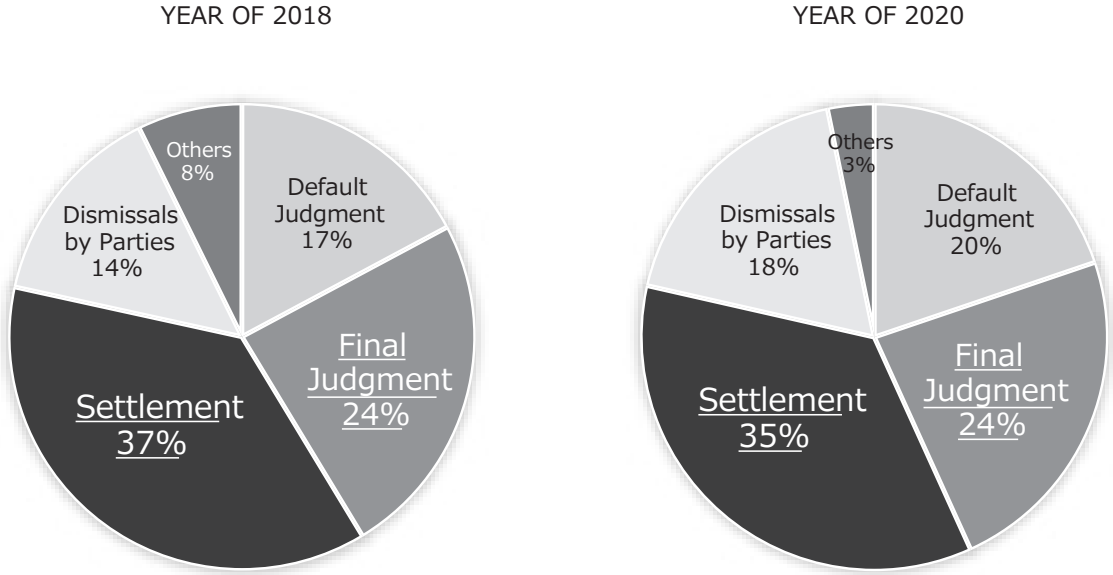
and settlement are: 13.2 months (2018) and 13.9 months (2020) by final judgment, and 11.5 months (2018) and 13.0 months (2020) by settlement, respectively. Based on that, it is reasonable to say that ordinary cases in Japan take approximately two years on average, consistent with the target required in the statute[25] and our experience.

Figure 4-1: District Courts in Japan—Civil Case Resolutions and Average Timelines, by Action Taken

	Year of 2018	Year of 2020
Disposition by Number of Cases	138,683	122,749
Judgment(*)	57,370 (41.4%) / 9.0 months	53,084 (43.2%) / 9.4 months
Default Judgment	23,840 / 3.1 months	24,306 / 4.1 months
Final Judgment	33,486 / 13.2 months	28,747 13.9 months
Settlement	51,445 (37.1%) / 11.5 months	43,364 (35.3%) / 13.0 months
Dismissals by Parties	19,800 (14.3%) / 5.9 months	22,372 (18.2%) 6.3 months
Others	10,061 (7.3%) / 2.1 months	3,929 (3.2%) 4.5 months

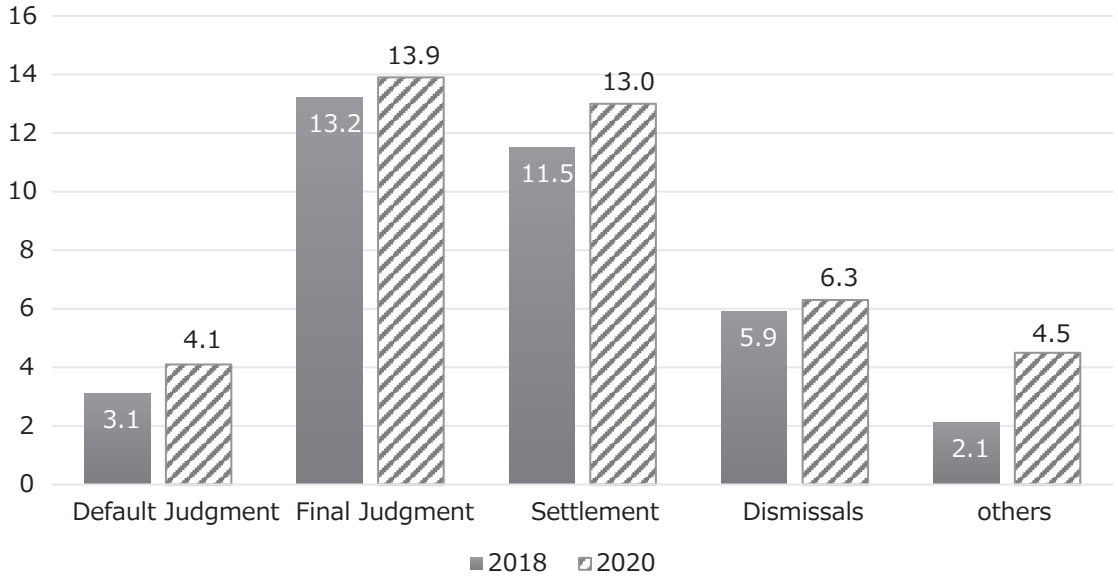
(*) "Judgment" in the original data consists of "Default Judgment," "Final Judgment," and "Others"; therefore, the sum of the two former categories is not identical to the total amount of "Judgment."

Figure 4-2: Proportion of Action Taken in Resolved Civil Cases in Japan



25) *Supra* note 19. The statistics also show certain types of complicated and specialized cases do not necessarily satisfy the target (within two years). *See supra* note 23.

Figure 4-3: Average Timeline by Action Taken in Japan (months)



Ⅳ. Recent Reform for Improvement of Accessibility to Judiciary – Digitalization and Newly-Introduced Expedited Procedure

A draft of a significant amendment to the Code of Civil Procedure (*Minsohô*) was published on January 28, 2022. This amendment aims to digitalize the current civil proceedings that are primarily paper-based and in-person.[26] This is one of the attempts at legal reforms triggered by the negative evaluation on the automation and digitalization of the Japanese judiciary system in the World Bank's *Doing Business 2017*.[27] The Draft of Amendment (or updated one) has been reportedly submitted to the 208th Ordinary Diet session. This Section IV. will present a brief introduction of the Draft of Amendment focusing on digitalization, with an additional description of the expedited procedure to be completed within seven months ("Special Procedure"), a newly-introduced litigation procedure.

26) *Minji soshô hô (IT-ka kankei) tô no kaisei ni kansuru yôkô-an* ("*Yôkô-an*") [The Draft of the Amendment to the Code of Civil Procedure concerning the Digitalization with IT, etc. ("Draft of Amendment")], https://www.moj.go.jp/shingi1/shingi04900001_00119.html (only available in Japanese).

27) *See* World Bank Group, *Doing Business 2017: Equal Opportunity for All*. 215 (Washington, DC: World Bank, 2016) https://openknowledge.worldbank.org/handle/10986/25191. The Japanese judiciary system has been highly evaluated in respects of "Resolving insolvency" (the second-highest score in the world) and "ADR" in the "Enforcing contracts" area (the score was 2.5 out of 3.0). However, it has ranked relatively low in the fields of "Case management" (1.0 out of 6.0) and "Court automation" (1.0 out of 4.0) both in the "Enforcing contracts" area. *See* https://databank.worldbank.org/source/doing-business (more specific scores of Japan).

Digitalization of the Civil Procedure—Three "e"s

The ultimate goal set by the Japanese government is the computerization of the entire civil procedure—termed the three "e"s. The three "e"s refer to (i) "e-filing," which enables electronic submission of all documents including a complaint ; (ii) "e-court," meaning enabling the court to hold an oral argument, an issue-evidence management procedure, and an examination, all in a virtual manner via the web-conference system; and (iii) "e-case management," which is an electronic case-management system. Here, we introduce the first two "e"s that are important for global companies and lawyers overseas: "e-filing" and "e-court."

"E-filing" means that each party will be able to take actions that currently require submission to the court *in writing*, i.e., on a paper basis, by means of an electronic-filing system, including filing a complaint and submission of evidence.[28] The service will also be completed by the party's access to the document uploaded by the court in the filing system.[29] It is noteworthy that a lawyer must use the system under the Draft of Amendment.[30] Therefore, every case a global company will be involved with will proceed under the "e-filing" system.

As for the "e-court," a party who desires oral examination virtually must obtain approval of the court with satisfying each statutory requirement.[31] The requirement of the place where a witness is examined virtually has yet to be determined. It will be specified by amending the Rules of the Civil Procedure (*Minji soshô kisoku*, Sup. Ct. Rule No. 5 of 1996).[32] An interpreter may also participate in an examination session using a web-conference system (or via the voice-call system when there is trouble with a web-conference system).[33]

An Expedited Procedure to Be Completed Within Six Months

The Draft of Amendment newly introduces the Special Procedure, a statutory shortened civil procedure as an alternative to a normal litigation process.[34] This is a procedure where, from

28) *Yôkô-an* [Draft of Amendment], *supra* note 26, Sec. 1-1 and 1-6, at 4-7, 13-14.

29) *Id*, Sec. 1-2, at 7-9.

30) *Id*, Sec. 1-1-3(1), at 6.

31) The court may let the parties examine a witness virtually in each of the following cases in which: (i) it is difficult for a witness to appear at the court due to the reasons including a residence in a remote place, its age, or its physical or mental status; (ii) a witness is likely to feel pressure and whose peace of mind would be seriously harmed while testifying at the place where a judge and a party are present; or (iii) both parties raise no objection. *Id*, Sec. 1-7-1, at 14.

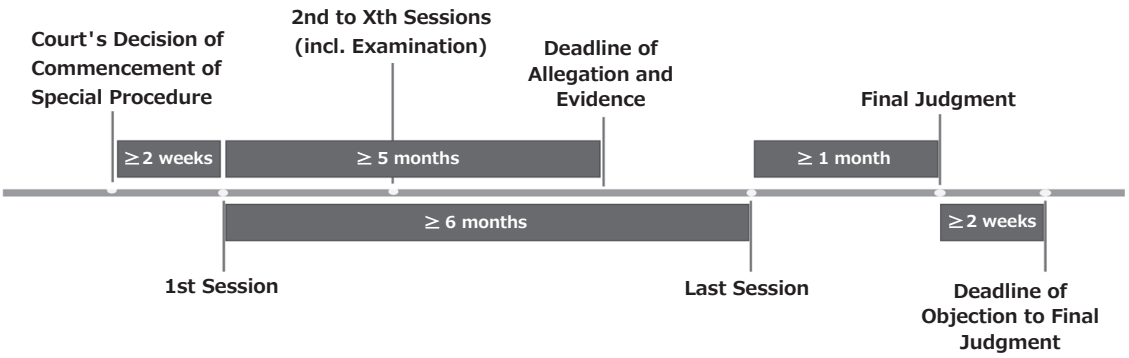
32) *Yôkô-an* [Draft of Amendment], Sec. 1-7-1, n., at 14-15. Although the requirement has not been clarified yet, it would be the place with an appropriate communications environment and without unfair influence on the witness according to the discussion at the Ministry of Justice Legislative Council COCP (Digitalization with IT) Subcommittee. *See* the minutes of the 4th, 15th, and 20th meetings of the council (all only available in Japanese). https://www.moj.go.jp/content/001335049.pdf (4th); https://www.moj.go.jp/content/001357241.pdf (15th); https://www.moj.go.jp/content/001368344.pdf (20th).

33) *Yôkô-an* [Draft of Amendment], *supra* note 26, Sec. 1-7-2, at 15.

34) The Draft of Amendment describes this Special Procedure as "*Tôjisha no môshide ni yoru kikan ga hôtei sareteiru shinri no tetsuzuki no tokusoku*" [Special Provisions on a Procedure with Statutory Fixed Period Based Upon Parties' Request]. *Id*, Sec. 1-4, at 10-11.

the date of the first session (oral argument), parties have to complete their submission of allegations and evidence within five months and the court has to complete the last session (oral argument) within six months, and the court has to render a final judgment within one month after its completion of the last session. Figure 5 shows an overview of the timeline:

Figure 5: Overview of the Timeline of the Special Procedure



The Special Procedure is entirely agreement-based. It may only be commenced by the court's decision subject to both parties' request, and each party may request to transfer the instant case to an ordinary procedure at any time during the Special Procedure.[35] It is also designed as an alternative to ordinary litigation. A final judgment rendered in the procedure has the same effect as an ordinary final judgment (i.e., no right to appeal) unless either party objects within two weeks after a final judgment is rendered.[36]

The introduction of the Special Procedure is controversial, and whether it will be enacted remains unseen. From the viewpoint of business litigation, however, there should be a particular need for the Special Procedure considering the trend toward expedited proceedings in other areas, including international arbitration.

V. Conclusion

In this article, we have attempted to describe litigation in Japan and its timeline, mainly for the benefit of corporations and lawyers outside Japan. Our goal is for readers to understand the outline of Japanese civil procedure, the active role of Japanese judges, and the timeline of actual litigation. Although the amendment of the Code of Civil Procedure has yet to be enacted, we are of the belief that it will improve the accessibility of the judiciary system in Japan and have a positive influence on litigation timelines.[37]

35) *Id*, Sec. 1-4-1, 2, and 11, at 10-11.
36) *Id*, Sec. 1-4-15 and 16, at 11.

37) The authors of this article relied on information available as of March 2022. *Supra* note 16. Following submission of this article to the publisher, the amendment to the COCP passed the Diet on May 18, 2022 and was promulgated on May 25, 2022. The enacted amendment is essentially identical to the Draft of Amendment described here, and the explanation in this section is applicable to the enacted amendment. The majority of the amendment will come into effect within four years from the promulgation date of May 25, 2022, but the section on the "e-court" (which allows the court to hold oral argument sessions and issue-evidence management procedures via a web-conference system) will be effective within one or two years from the date of promulgation.

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A Message from JCAA

President

Kazuhiko Bando

It is our pleasure to publish the third volume of the Japan Commercial Arbitration Journal this September. We would like to extend our thanks to all contributors to this journal.

This journal features articles on the JCAA's arbitration rules, Online Dispute Resolution, ADR and litigation with special focus on Japan. It aims to introduce the latest trends in arbitration, mediation and litigation in Japan. It would be our great delight if you find this journal helpful.

In 2022, Chinese translation of the Commercial Arbitration Rules and Interactive Arbitration Rules came out. It is available at JCAA's website. Chinese parties are the most frequent non-Japanese users of the JCAA Arbitration. The long-awaited official translation would invite more Chinese corporates to choose the JCAA Arbitration.

We will continue to do our utmost to take our services to the next level, and your continued support will be vital to our success.

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