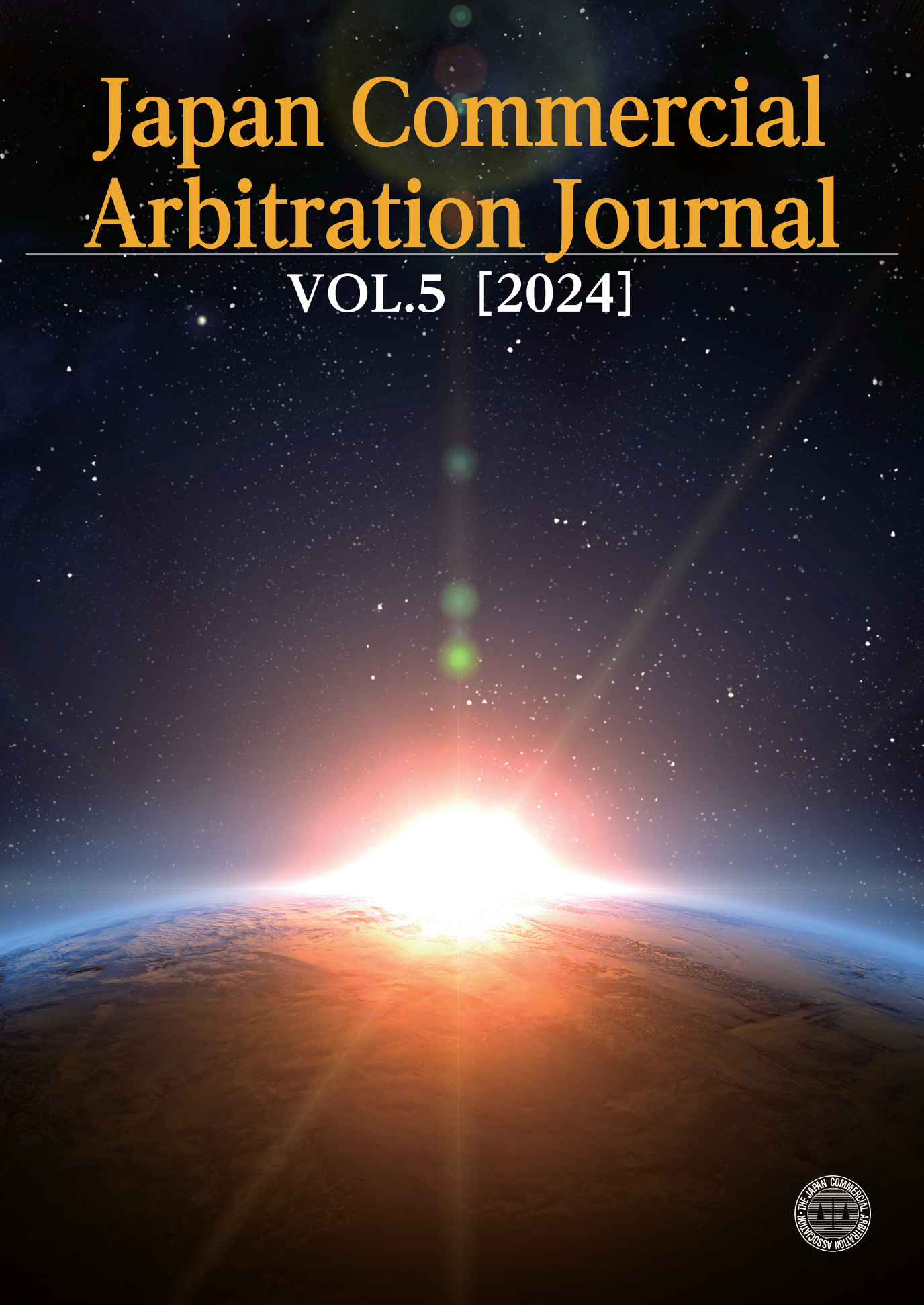
Japan Commercial Arbitration Journal

VOL.5 [2024]



The Japan Commercial Arbitration Association
3F, Hirose Bldg, 3-17, Kanda Nishiki-cho, Chiyoda-ku, Tokyo 101-0054, Japan
www.jcaa.or.jp
planning-consulting@jcaa.or.jp

Japan Commercial Arbitration Journal

VOL. 5 [2024]

Table of Contents

Emergency Arbitration at the JCAA: A Review of the Rules and the Changing Landscape

Counsel, Oh-Ebashi LPC & Partners

Miriam Rose Ivan L. Pereira

Ⅰ. Introduction

Emergency arbitration is a remarkable testament to the innovative use of the power of party autonomy in the field of international arbitration. It grew out of necessity because previously, parties had no choice but to either approach national courts to seek urgent interim reliefs to preserve the status quo, assets or evidence before the constitution of the arbitral tribunal, but with the *"inherent down sides of loss of confidentiality, delays and dependence on the local procedural rules that the parties had sought to avoid in the first place by electing for arbitration,"* or await the constitution of the arbitral tribunal, *"which, in cases requiring urgent reliefs, undermined the very utility of seeking an urgent relief."*[1)]

Today, many arbitral institutions, including the Japan Commercial Arbitration Association ("**JCAA**"), have rules to govern emergency arbitration proceedings and facilitate the grant of emergency relief by an impartial and independent emergency arbitrator before the constitution of the arbitral tribunal.[2)] Thus, by agreeing to arbitration under a set of institutional rules, a party to a dispute can avail itself of this useful arbitration tool as an alternative or in addition to seeking judicial relief.

For a decade now, the JCAA has offered emergency arbitration under its Commercial Arbitration Rules. However, based on its records, only five applications for emergency measures have been filed between 2019 and 2023.[3)] Whatever the reason may be for such

* The author thanks the JCAA for their comments regarding emergency arbitration and the relevant rules.

1) Ranjit Shetty & Rahul Dev, *Recognition and Enforcement of Emergency Arbitration in India: A Comment on the Supreme Court's Ruling in Amazon – Future Dispute*, Indian Arbitration Law Review, Vol. IV, 77 (March 2022).

2) *See*, e.g., Rule 30 and Schedule 1 of the Arbitration Rules of the Singapore International Arbitration Centre ("**SIAC**") (2016) (the "**SIAC 2016 Rules**"), Article 29 and Appendix V of the Arbitration Rules of the International Chamber of Commerce ("**ICC**") (2021) (the "**ICC 2021 Rules**"), and Article 23 and Schedule 4 of the Administered Arbitration Rules of the Hong Kong International Arbitration Centre ("**HKIAC**") (2024) (the "**HKIAC 2024 Rules**").

low user activity, the recent amendments to the arbitration legal framework of Japan, coupled with other developing factors, may turn the tide for emergency arbitration at the JCAA.

Part II of this article reviews the background and application of the emergency arbitration and other rules of the JCAA to emergency arbitration proceedings thereat, with comments on how the rules compare to other selected institutional rules. Practical points are also discussed concerning certain aspects of emergency arbitration proceedings that may be useful to emergency arbitrators, the parties, and their counsel. Part III then discusses the interesting growth prospects of emergency arbitration at the JCAA in view of the recently enhanced legal framework of Japan for the enforcement of interim measures, the possibility of indirect enforcement by courts of orders on emergency measures and the emerging use of emergency arbitration in promoting early settlements.

Ⅱ. Emergency Arbitration at the JCAA: The Rules, the Neutral, and the Proceedings

A. A decade of the emergency arbitration rules based on global standards

The emergency arbitration rules of the JCAA are meant to facilitate emergency relief in an expedient and efficient manner. They are based on global standards and are comparable to the rules of other major institutions (i.e., the SIAC, the ICC and the HKIAC) with some notable differences as will be further discussed in Part II(C) below.

Since the JCAA first introduced emergency arbitration provisions into its Commercial Arbitration Rules in 2014 (the "**JCAA 2014 Rules**"), they have remained constant with no substantial changes, except to (a) soften the obligation of the emergency arbitrator to render a decision on the emergency measures within two weeks from his or her appointment to a "reasonable efforts" obligation (Article 77.4 thereof), and (b) significantly reduce the emergency arbitrator's fixed fees (making the proceedings more affordable) when the said rules were revised in 2019 (the "**JCAA 2019 Rules**"). These rules remain unchanged in the current Commercial Arbitration Rules (2021) (the "**JCAA 2021 Rules**").

B. Default application of the emergency arbitration rules

The JCAA 2021 Rules governing emergency arbitration will automatically apply to any arbitration administered by the JCAA under the said rules, unless the parties agree in writing to modify or opt out of them (Article 5).[4)]

3) According to the JCAA, four of the five applications for emergency measures were made in international arbitration cases.

4) Notably, Article 29(6)(b) of the ICC 2021 Rules expressly allows the parties to exclude the application of the emergency arbitration provisions. To do so, the ICC has suggested stating that *"[T]he Emergency Arbitrator Provisions shall not apply."*

In particular, Articles 75 to 79 of Section 2 of Chapter V of the JCAA 2021 Rules provide for the application for emergency relief, the appointment of the emergency arbitrator and the mandate thereof. Articles 102 and 108 further provide special rules on the emergency arbitrator's fees and the administrative fees for emergency arbitration proceedings. Other provisions of the JCAA 2021 Rules that are consistent with the nature of such proceedings will also apply *mutatis mutandis* thereto (Article 79).

C. A review of the rules governing emergency arbitration proceedings at the JCAA

Below is a discussion of the relevant rules of the JCAA that govern emergency arbitration proceedings thereat.

a. Filing of the application for emergency measures and the request for arbitration. A party may submit a written application for emergency relief to the JCAA (i) if such relief is needed before the constitution of the arbitral tribunal (which is typically the case), or (ii) in case of a vacancy where an arbitrator has ceased to perform his or her duties and must be replaced (Article 75.1). Either situation contemplates the absence of an arbitral tribunal that can order the interim measures urgently needed by the applicant party.

The application may be filed before, concurrent with or after the filing of the request for arbitration, which, if not already filed, must be filed within ten (10) days from the date of the said application, otherwise the mandate of the emergency arbitrator would terminate, and any emergency measures ordered in the meantime would cease to have effect (Articles 75.7, 77.6(3) and 77.7(1)). The rationale for this is that *"[E]mergency arbitration is the prelude to the arbitration on the merits, and is intrinsically linked to the main act."*[5)]

Other institutions have provided similar requirements.[6)] By contrast, paragraph 1 of Schedule 1 of the SIAC 2016 Rules allows the filing of the application only if done concurrently with or after the filing of the notice of arbitration prior to the constitution of the arbitral tribunal. This rule may change, however, when the said rules are amended.

Further, under the JCAA 2021 Rules, the ten (10)-day period to subsequently file the request for arbitration is relatively strict because the parties are prohibited from extending the same by agreement (Article 12.3). The JCAA, however, may change this time limit but only if

5) Cameron Sim, *Emergency Arbitration*, Oxford International Arbitration Series, 249, para. 7.98 (2021).

6) Article 29(1) and Article 1(6) of Appendix V of the ICC 2021 Rules broadly permit the filing of the application, whether or not the request for arbitration has been submitted, but authorize the President to terminate the proceedings if the request for arbitration is not received within ten (10) days from receipt by the Secretariat of the application, unless a longer filing period is determined by the emergency arbitrator to be necessary. Paragraphs 1 and 21 of Schedule 4 of the HKIAC 2024 Rules permit the application to be filed before, concurrent with or after the filing of the notice of arbitration prior to the constitution of the arbitral tribunal, provided that the emergency arbitration procedure shall be terminated if the notice of arbitration is not submitted within seven days of HKIAC's receipt of the application, unless the emergency arbitrator extends this time limit.

necessary (Article 12.5). In contrast thereto, under Article 1(6) of Appendix V of the ICC 2021 Rules and paragraph 21 of Schedule 4 of the HKIAC 2024 Rules, the emergency arbitrator is the one permitted to extend the period to submit the request for arbitration or notice of arbitration, respectively.

The importance of commencing arbitration also relates to the purpose of seeking emergency relief before the constitution of the arbitral tribunal, namely, to secure *"the applicant's underlying claims,"* which would *"justify the emergency measures being granted."*[7)]

b. Preliminary review of the application for emergency measures. The JCAA must first confirm that the application for emergency measures satisfies the formal requirements discussed further below and that it would be appropriate to appoint a sole emergency arbitrator (Articles 76.1 and 7.6.4). Other arbitral institutions have similarly provided for a preliminary review of the application for emergency relief.[8)] Notably, Article 1(5) of Appendix V of the ICC 2021 Rules further permits the President to determine whether the emergency arbitration proceedings should not apply to some or all of the parties.

Under the JCAA 2021 Rules, in terms of content, the application for emergency measures must state that the applicant party is applying for emergency measures, identify the measures being sought, provide the basic information of the parties and the applicant's counsel, refer to the arbitration agreement being invoked (together with a copy thereof), give a summary of the dispute, and state the facts supporting the "necessity" of granting such emergency measures (Articles 75.2–75.3). (As a practical point, it has also been suggested that the application identify the right(s) to be protected.[9)]) A power of attorney must also be attached to the application if the applicant party is represented by counsel (Article 75.4).

Together with the above application, the applicant party must pay the emergency arbitrator's fees (JPY 1,200,000, excluding the consumption tax),[10)] the JCAA's administrative fees (JPY 200,000),[11)] and the deposit (JPY 100,000) needed to cover the emergency arbitrator's reasonable expenses,[12)] otherwise, the application shall not be considered by the

7) Sim, *supra* n. 5, at 31, para. 1.115.

8) *See* paragraph 3 of Schedule 1 of the SIAC 2016 Rules, Article 1(5) of Appendix V of the ICC 2021 Rules and paragraph 4 of Schedule 4 of the HKIAC Rules. *See also* Sim, *supra* n. 5, at 78, para. 3.112 (regarding the preliminary nature of the review).

9) *CIArb Guideline on Applications for Interim Measures*, Chartered Institute of Arbitrators 3 (Nov. 29, 2016).

10) The emergency arbitrator's fees were initially fixed at JPY 2,160,000 (including the 8% consumption tax), however, if the proceedings terminate before a decision on the application is made, the JCAA had the discretion to reduce the amount considering the time spent by the emergency arbitrator for the proceedings (JCAA's Regulations for Arbitrator's Remuneration (2014), Art. 9.2). In the JCAA 2019 Rules, the fees were substantially reduced to JPY 1,200,000, or just JPY 300,000 if the proceedings terminate before a decision is made (Article 102.2 thereof). This fixed amount of the emergency arbitrator's fees stayed the same in Article 102.2 of the JCAA 2021 Rules. The emergency arbitrator's fees may be changed if the parties agree in writing before the appointment thereof (JCAA 2021 Rules, Arts. 97.1, 98 and 102.3).

JCAA to have been made (Articles 75.5, 102.2 and 108.2). Applying Article 16.1 *mutatis mutandis* (Article 79), notice of the application shall be promptly given to the respondent.

In practice, additional deposits may be requested by the JCAA from the applicant to cover further costs of the proceedings, such as transcription service fees if a hearing is held. Other institutions have expressly provided for the payment of additional deposits as well as the consequences of non-payment thereof (i.e., withdrawal or dismissal of the application).[13] With respect to the JCAA, arguably, Article 82.2 may apply *mutatis mutandis* to the emergency arbitration proceedings (Article 79) but only to the extent that it provides that if any additional deposit is not timely paid, the JCAA may request the suspension or termination of the said proceedings.[14] This matter should be further clarified by the JCAA.

c. Appointment of an impartial and independent emergency arbitrator; challenge and replacement thereof. Once the JCAA accepts the application as discussed above, it shall use reasonable efforts to appoint a sole emergency arbitrator within two business days from receipt of the said application (Articles 76.1 and 76.4). Other institutional rules also provide short timelines for the appointment of the emergency arbitrator.[15]

The demand for quick appointments requires arbitral institutions *"to identify and appoint an appropriately qualified emergency arbitrator with immediate availability over the forthcoming 2 to 14 days to conduct the proceedings expeditiously."*[16] Notably, Article 9A.2 of the HKIAC 2024 Rules also requires diversity to be considered in appointing the emergency arbitrator. Although there is no similar provision in its rules, in practice, the JCAA also takes this consideration into account in making arbitrator appointments.

The appointment of the emergency arbitrator by the arbitral institution also highlights one of the known advantages of emergency arbitration, namely, the emergency arbitrator's expertise in dealing with commercial disputes, especially complex cases.[17]

---

11) 90% of the administrative fees will be refunded by the JCAA if the applicant withdraws the application before the appointment of the emergency arbitrator (JCAA 2021 Rules, Art. 108.3).

12) *See* Article 101 of the JCAA 2021 Rules for the conditions for reimbursement of the emergency arbitrator's expenses.

13) *See* paragraph 2 of Schedule 1 of the SIAC 2016 Rules (i.e., the application is considered withdrawn if additional deposits are not timely paid), Article 7(2) of Appendix V of the ICC 2021 Rules (i.e., the application is considered withdrawn for failure to timely pay the increased costs of the emergency arbitration proceedings), and paragraph 5 of Schedule 4 of the HKIAC 2024 Rules (i.e., the application shall be dismissed if the additional deposits are not timely paid).

14) Under Article 75.5 of the JCAA 2021 Rules, the applicant has the obligation to make the subject payments.

15) *See* paragraph 3 of Schedule 1 of the SIAC 2016 Rules (i.e., one day), Article 2(1) of Appendix V of the ICC 2021 Rules (i.e., two days), and paragraph 4 of Schedule 4 of the HKIAC 2024 Rules (i.e., 24 hours).

16) Gordon Smith, *The Emergence of Emergency Arbitrations*, Resolution Institute December 44 (2015).

17) Amy E. Allen, *Emergency Arbitration: The Unsung Hero of International Arbitration*, The Arbitration Brief 2 (Jan. 26, 2021).

Upon making the appointment, the JCAA shall promptly send to the parties and the emergency arbitrator a copy of the notice of appointment, the emergency arbitrator's acceptance of the appointment as well as the declaration thereof of impartiality and independence (Articles 30 and 76.5). The emergency arbitrator must always be impartial and independent (Article 76.2). The appointment thereof may be challenged by a party within two days from the later of the date of its receipt of the notice of appointment or when it becomes aware of any circumstances that give rise to justifiable doubts as to the impartiality or independence of the emergency arbitrator (Articles 76.2 and 76.6). Other institutional rules similarly provide for a challenge procedure.[18)]

Under the JCAA 2021 Rules, if the appointment of the emergency arbitrator is successfully challenged, then applying Article 36.3 in part *mutatis mutandis* (Article 79), the JCAA shall appoint a substitute emergency arbitrator. Although there is no specific timeline for such appointment, given the urgent nature of the proceedings, the JCAA would presumably appoint the substitute emergency arbitrator within the same period of two business days provided in Article 76.4 for the appointment of the original emergency arbitrator. By contrast, paragraph 8 of Schedule 4 of the HKIAC 2024 Rules specifies the timeline for the appointment by the HKIAC of a substitute emergency arbitrator (i.e., within twenty-four (24) hours after the emergency arbitrator dies, has been successfully challenged or removed, or has resigned).

Further, applying Article 38 of the JCAA 2021 Rules *mutatis mutandis* (Article 79), the substitute emergency arbitrator appointed shall decide whether or to what extent the emergency arbitration proceedings already conducted should be repeated after giving the parties an opportunity to comment.

Lastly, for reasons of neutrality, the emergency arbitrator is disqualified from being appointed as an arbitrator for the same dispute, unless otherwise agreed in writing by the parties[19)] (Article 77.8). Other institutional rules similarly provide for such disqualification.[20)] By contrast, Article 2(6) of Appendix V of the ICC 2021 Rules expressly prohibits the emergency arbitrator from acting as an arbitrator in any arbitration relating to the dispute that gave rise to the application for emergency measures, without exception.

d. Prima facie jurisdiction of the emergency arbitrator. A preliminary ruling on jurisdiction is considered a threshold matter before emergency measures can be ordered by the

18) *See* paragraph 5 of Schedule 1 of the SIAC 2016 Rules, Article 3 of Appendix V of the ICC 2021 Rules, and Article 11 and paragraph 7 of Schedule 4 of the HKIAC 2024 Rules.

19) There was reportedly a case where the parties stopped arguing about a specific issue after being persuaded by the reasoning of the emergency arbitrator and agreed to appoint the same emergency arbitrator as the sole arbitrator to save on time and cost. (Kodama, *infra* n. 36, at 15–16.)

20) *See* paragraph 6 of Schedule 1 of the SIAC 2016 Rules and paragraph 19 of Schedule 4 of the HKIAC 2024 Rules.

emergency arbitrator.[21] As a creature of contract, the emergency arbitrator, like the arbitral tribunal, draws his or her power from the arbitration agreement of the parties. In this regard, applying Article 47.1 *mutatis mutandis* (Article 79), the emergency arbitrator has the power to determine any jurisdictional matter that may arise in the emergency arbitration proceedings, including any objection to the existence or validity of an arbitration agreement between the parties.[22] Other arbitral institutions have similarly embodied this principle of Kompetenz-Kompetenz[23] and empowered the emergency arbitrator to determine such issue of jurisdiction.[24] The ICC went a step further by expressly requiring the emergency arbitrator to determine in the order whether the application is admissible and whether he or she has jurisdiction to order the emergency measures (ICC 2021 Rules, Appendix V, Article 6(2)).

In determining jurisdictional matters on a prima facie basis, the emergency arbitrator should examine evidence as to whether there is a valid arbitration agreement and take into account the applicable laws, such as the law governing the arbitration agreement and the law of the place of arbitration.[25] Moreover, if the emergency arbitrator is satisfied that there is a prima facie basis to assert jurisdiction, he or she may order emergency measures (e.g., to preserve the status quo or evidence) even before ruling on a pending jurisdictional challenge since any such determination would not be final[26] (i.e., it would be subject to confirmation by the arbitral tribunal upon its constitution).

e. Place (seat) of the arbitration. The place of the arbitration will generally be the place or seat of the emergency arbitration proceedings as well.[27] In general, its role in the emergency arbitration proceedings includes determining the nationality of the decision of the emergency arbitrator, providing for the application of mandatory provisions of the law, identifying which courts can annul the said decision if it constitutes an award, or supervise and aid the arbitration proceedings (albeit to a limited extent, e.g., determine a challenge to the emergency arbitrator[28]), and identifying the law applicable to the conduct of the proceedings (*lex arbitri*).[29]

---

21) Sim, *supra* n. 5, at 80, para. 3.121.

22) Other typical challenges to jurisdiction include whether the parties to the dispute are the same parties to the arbitration agreement, whether the arbitration agreement was in the required form, whether the subject matter of the dispute is within the scope of the arbitration agreement, and whether the arbitrator has the necessary powers (*CIArb Guideline on Jurisdictional Challenges* 10–11 (Nov. 29, 2016)). Circumstances that can also affect jurisdiction include the effect of multi-tier dispute resolution clauses and claims of forgery (Sim, *supra* n. 5, at 81, para. 3.127).

23) Sim, *supra* n. 5, at 23, para. 1.77.

24) *See* paragraph 7 of Schedule 1 of the SIAC 2016 Rules and paragraph 10 of Schedule 4 of the HKIAC 2024 Rules.

25) *CIArb Guideline on Applications for Interim Measures*, *supra* n. 9, at 2 (regarding Article 1(2) thereof) and 6; and Sim, *supra* n. 5, at 81, paras. 3.128–3.129.

26) *CIArb Guideline on Applications for Interim Measures*, *supra* n. 9, at 6.

27) Smith, *supra* n. 16, at 46.

28) *See* Article 19(4) of the Amended Arbitration Act.

Under the JCAA 2021 Rules, applying Article 39.1 *mutatis mutandis* (Article 79), the place of the emergency arbitration proceedings shall be as agreed by the parties, and in the absence of such agreement, it shall be the city of the office of the JCAA where the request for arbitration is submitted (or to be submitted).

Other institutional rules have specifically referred to the seat of the arbitration as the seat of the emergency arbitration proceedings or provided a mechanism for the determination thereof. Paragraph 4 of Schedule 1 of the SIAC 2016 Rules provides that *"[I]f the parties have agreed on the seat of the arbitration, such seat shall be the seat of the proceedings for emergency interim relief. Failing such an agreement, the seat of the proceedings for emergency interim relief shall be Singapore, without prejudice to the Tribunal's determination of the seat of the arbitration under Rule 21.1 [i.e., having regard to all the circumstances of the case]."* (underscoring supplied) Similarly, Article 14.1 of the HKIAC 2024 Rules provides that *"[W]here there is no agreement as to the seat, the seat of arbitration shall be Hong Kong, unless the arbitral tribunal determines, having regard to the circumstances of the case, that another seat is more appropriate."* (underscoring supplied)

The ICC took a more administrative approach. Article 4(1) of Appendix V of the ICC 2021 Rules provides that in the absence of an agreed place of the arbitration, the President of the International Court of Arbitration shall fix the place of the emergency arbitration proceedings without prejudice to the said Court's determination of the place of arbitration.

The JCAA may want to consider empowering the arbitral tribunal (emergency arbitrator) to determine the appropriate seat of the arbitration. Such approach would be in line with Article 28(2) of Japan's Arbitration Act (Act No. 138 of August 2003) (the "**Arbitration Act**"), as amended by the Act Partially Amending the Arbitration Act (Act No. 15 of April 2023) (the "**Amended Arbitration Act**"),[30] and better suited for international arbitration. Any preliminary determination by the emergency arbitrator of the seat of the arbitration shall of course be subject to confirmation by the arbitral tribunal.

f. The applicable law. Applying Articles 65.1 and 65.2 *mutatis mutandis* (Article 79), the law applicable to the substance of the dispute shall be the "rules of law" agreed upon by the parties, and in the absence of such agreement, the emergency arbitrator shall apply the substantive law of the country or state to which the dispute being arbitrated is most closely connected.[31] Other institutional rules have provisions concerning the law applicable to the

29) Sim, *supra* n. 5, at 28 and 211–212, paras. 1.102 and 6.39–6.44; and *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration*, United Nations 8 (2012).

30) Article 28(2) of the Amended Arbitration Act states that: *"[I]f an agreement set forth in the preceding paragraph [regarding the place of arbitration] has not been reached, the arbitral tribunal shall provide the place of arbitration by giving regard to the circumstances of the dispute, including the convenience of the parties."* (underscoring supplied)

31) *See also* Article 36 of the Amended Arbitration Act.

substance or merits of the dispute, and in the absence of an agreement of the parties, the arbitral tribunal (emergency arbitrator) shall apply the law determined thereby to be appropriate.[32] Notably, Article 1(3)(g) of Appendix V of the ICC 2021 Rules expressly requires the application for emergency measures to specify the applicable rules of law. In an emergency arbitration, the law applicable to the merits (substantive law) is relevant to, for example, the preliminary assessment by the emergency arbitrator of the likelihood of success on the merits of the claim in deciding on the emergency measures.

The above applicable law may *"not automatically apply to the arbitration clause – although parties may agree upon a choice-of-law clause that expressly applies to both."*[33] Determining the law applicable to the arbitration agreement (and the arbitration proceedings) may entail a complex choice of law analysis, which could lead to the application of the substantive law chosen by the parties or the law of the seat of the arbitration.[34] Ideally, parties should make both the substantive law and procedural law clear in their choice of law clause. Nevertheless, for arbitration cases seated in Japan, the Amended Arbitration Act would mainly apply (Article 1 thereof).

g. Language of the arbitration. By applying Article 11 *mutatis mutandis* (Article 79), the language of the emergency arbitration proceedings shall be based on the parties' agreement, and in the absence thereof, the language(s) must be promptly determined by the emergency arbitrator, taking into account the language of the contract that contains the arbitration agreement, the need for interpretation or translation, the cost thereof, and other relevant circumstances. The emergency arbitrator may also request the parties to attach a translation to any documentary evidence in the language of the proceedings. As to communications between the JCAA and the parties and/or the emergency arbitrator, they can be in English or Japanese. For foreign parties, the fact that emergency relief can be quickly sought in a JCAA-administered case in their preferred language against a Japanese counterparty can be a huge advantage to consider.

Some institutional rules have expressly required that the application specify the language of the emergency arbitration proceedings. For example, Articles 1(3)(g) and 1(4) of Appendix V of the ICC 2021 Rules require the application to state, among others, any agreement as to the language of the arbitration, and for the application to be prepared in such agreed

32) *See* Rule 31.1 of the SIAC 2016 Rules, Article 21.1 of the ICC 2021 Rules and Article 36.1 of the HKIAC 2024 Rules.

33) Amanda Nunes Sampaio, *The law governing the arbitration agreement: Why we need it and how to deal with it, International Bar Association*, https://www.ibanet.org/article/699fd751-0bd4-4a15-bf84-e2542a8219c9 (accessed on July 8, 2024).

34) *See ibid*., for a discussion of the laws that can apply to the arbitration agreement in the absence of an agreement of the parties. The author concluded therein that *"since the lex arbitri ... tends to have the closest connection with the arbitral proceedings, the substantive law of the seat tends to be the best suited to govern the arbitration agreement when parties fail to choose one."*

language, or in the absence of any such agreement, in the language of the arbitration agreement. Paragraph 2(g) of Schedule 4 of the HKIAC 2024 Rules requires the application to include comments on the language of the arbitration. Articles 15.1 and 15.2 of the said rules also state in part that in the absence of any agreement of the parties as to the language of the arbitration, the parties shall communicate in English or Chinese prior to the arbitral tribunal's determination of the language of the arbitration promptly after its constitution.

h. Time-bound proceedings and due process. Immediately after being appointed, the emergency arbitrator must race against the clock to complete the emergency arbitration proceedings and render a decision within two weeks of being appointed (Article 77.4). He or she must make a procedural schedule, and if necessary, hold a hearing (for one day only) by videoconference or other means (Articles 50.3 and 77.2–77.3). In this regard, the emergency arbitrator may also consider whether to allow witness evidence and the examination of witnesses and experts at the hearing.[35)]

Changes to the procedural schedule, such as those prompted by requests for short extensions of time to make submissions or to adjust the date of the hearing, may be permitted only after giving the parties an opportunity to comment (Article 43.3). Anyone who has ever engaged in emergency arbitration proceedings can attest to the intense pace and quick turnaround times of these proceedings, including beyond regular business hours. The tight deadline to resolve the application for emergency relief calls for a proactive emergency arbitrator and flexibility of the parties and the emergency arbitrator with the schedule, while observing the rule on equal treatment of the parties.[36)]

In practice, the emergency arbitrator must bear in mind that *"[T]he urgent nature of the procedure must not result in a suspension of due process norms"* or a waiver of the right to due process.[37)] Thus, despite being time-pressured, the emergency arbitrator must always be mindful of the obligation to treat the parties equally and give each party a sufficient opportunity to state and prove its case and present its defense against the other party (Article 40.1). The emergency arbitrator is also obliged to give each party a reasonable opportunity to comment before granting any emergency measures (Article 71.4). These rules are all consistent with the general observation that *"[I]nterim measures are usually granted on an inter partes basis"* (i.e., after both parties are heard).[38)]

Based on the foregoing, it may be said that from receipt by the other party of the notice of the filing of the application for emergency measures and throughout the emergency

35) Sim, *supra* n. 5 at 195, para. 5.169.

36) Masafumi Kodama, *Emergency Measures – Japanese Law and Practices of the JCAA*, Japan Commercial Arbitration Journal, Vol. 2, 14 (2021).

37) Sim, *supra* n. 5, at 151, para. 5.09.

38) *CIArb Guideline on Applications for Interim Measures*, *supra* n. 9, at 5.

arbitration proceedings at the JCAA, the proceedings are *inter partes*, which may not suit situations where urgent relief *ex parte* is required (e.g., an *"imminent risk of removal of assets or destruction of evidence"*[39]). At present, however, there is a general prohibition on *ex parte* applications for emergency relief[40] (i.e., without notice to the other party or giving the other party an opportunity to be heard).[41]

Relatedly, where the respondent fails to participate in the emergency arbitration proceedings, which, however, has been considered to be rarely the case, the emergency arbitrator should strive to *"ensure that proceedings are conducted and recorded in a manner which continually preserves the respondent's opportunity to be heard and records the opportunities so afforded to the respondent,"* and give notice of all communications and decisions to such respondent throughout the proceedings.[42] Moreover, applying Article 45 of the JCAA 2021 Rules *mutatis mutandis* (Article 79), the emergency arbitrator should continue the emergency arbitration proceedings without treating the failure of the defaulting party to submit written statements as an admission of the other party's statements, and instead render the decision on emergency measures based on the evidence presented.[43]

i. Short period to render a decision on the emergency measures. The emergency arbitrator is required to make "reasonable efforts" to render a decision on the emergency measures within two weeks of his or her appointment (Article 77.4). Unlike Rule 72.4 of the former JCAA 2014 Rules,[44] it is not immediately obvious under the current rules if this time limit can be extended. However, by applying Article 12.5 of the JCAA 2021 Rules *mutatis mutandis* (Article 79), the JCAA, if it considers it necessary, may fix or change the said time limit.

Relatedly, Article 12.4 generally permits the arbitral tribunal to change any time limit under the rules, except for the period to reopen proceedings or to render an award as well as any time limit previously fixed or changed by the JCAA under Article 12.5. However, even with the removal of the previous prohibition on extensions by the emergency arbitrator (Rule 72.4 of the JCAA 2014 Rules), it is unlikely that this provision can apply to allow the emergency arbitrator to extend the period to render a decision. Arguably, such period may have to be treated like the period to render an award, and hence, cannot be extended by the emergency arbitrator.

---

39) Bill Amos, *The Tribunal's power to grant injunctions: The difference between London and Hong Kong arbitration*, CIArb (May 22, 2024).

40) *CIArb Guideline on Applications for Interim Measures*, *supra* n. 9, at 22.

41) Sim, *supra* n. 5, at 171, para. 5.76.

42) *Ibid*., at 169, para. 5.68.

43) *See also* Article 33 of the Amended Arbitration Act.

44) Under Rule 72.4 of the former JCAA 2014 Rules, the emergency arbitrator was prohibited from extending the two-week time limit to render a decision on the emergency measures. Only the JCAA was authorized to extend the said time limit if all the parties agreed, if it found the case sufficiently complex, or if there was any other compelling reason for an extension.

Other institutions have provided stricter time limits to render a decision, with clear provisions on possible extensions by the institution and/or the parties (not the emergency arbitrator). For example, paragraph 9 of Schedule 1 of the SIAC 2016 Rules allows the Registrar to extend the fourteen (14)-day period for the emergency arbitrator to make an interim order or award in exceptional circumstances. Article 6(4) of Appendix V of the ICC 2021 Rules permits the President to extend the fifteen (15)-day limit to render the order based on a reasoned request from the emergency arbitrator or on the President's own initiative if the President decides it is necessary to do so. Lastly, paragraph 12 of Schedule 4 of the HKIAC 2024 Rules allows the fourteen (14)-day period required therein to make a decision, order or award on the application to be extended by an agreement of the parties, or in appropriate circumstances, by the HKIAC.

j. Scope of power of the emergency arbitrator and forms of emergency relief. The emergency arbitrator is said to have substantially the same powers and responsibilities as the regular arbitral tribunal in relation to the grant of interim measures even if he or she is appointed solely for the emergency application.[45] Thus, the power of the emergency arbitrator to order interim measures is limited to those that the arbitral tribunal itself has the power to order (based on, e.g., the *lex arbitri* and the institutional rules) and does not extend to ordering measures against third parties.[46] Such power may be further limited by the agreement of the parties.[47] Other limitations include the lack of power to directly enforce the measures granted, and in general (including Japan), to impose penal sanctions or punitive damages for non-compliance.[48]

Under the JCAA 2021 Rules, the emergency arbitrator can order many types of emergency measures,[49] including to: (i) maintain or restore the status quo, (ii) take action that would prevent, or refrain from taking action that would likely cause, current or imminent harm or prejudice to the arbitral proceedings, (iii) provide a means of preserving assets out of which the arbitral award may be satisfied, or (iv) preserve evidence that may be relevant and material to the resolution of the dispute (Articles 71.1 and 77.1). These emergency measures largely reflect the interim measures enumerated in Article 17(2) of the UNCITRAL Model Law

45) *CIArb Guideline on Applications for Interim Measures, supra* n. 9, at 2.

46) Sim, *supra* n. 5, at 32 and 209, paras. 1.119 and 6.33; and *CIArb Guideline on Applications for Interim Measures, supra* n. 9, at 4. There are certain exceptions to this rule in Japan (e.g., when the corporate veil is pierced to bind an affiliate company). (*Commercial Arbitration: Japan*, Global Arbitration Review (as of Mar. 22, 2024), no. 11 citing Saikō Saibansho [Sup. Ct.] Feb. 27, 1969, Sho 43 (o) No. 877, 551 Hanrei Taimuzu [Hanta] 80 (Japan).)

47) *CIArb Guideline on Applications for Interim Measures, supra* n. 9, at 4.

48) *Ibid*., at 10–11; and *International Arbitration Laws and Regulations Japan 2023-2024*, no. 13.1 (Sept. 18. 2023).

49) Anti-suit injunctions are not permitted in Japan. However, courts are required to dismiss civil cases that are subject to an arbitration agreement unless (a) the arbitration agreement is not valid, (b) it is impossible to carry out the arbitration procedure based on the arbitration agreement, or (c) the petition was filed after the defendant has argued or made statements on the merits in the preparatory proceedings (Amended Arbitration Act, Art. 14(1)). (*Commercial Arbitration: Japan, supra* n. 46, no. 25.)

on International Commercial Arbitration (1985) (as amended, the "**UNCITRAL Model Law**").

In connection with any emergency measure, the applicant party may be required to provide appropriate security (for costs or damages[50]) (Articles 72 and 77.1). This is meant to protect the interests of the adverse party if the subject measure(s) are later determined to have been *"unnecessary or inappropriate."*[51]

Other institutional rules similarly provide for security.[52] Notably, under Article 23.8 of the HKIAC 2024 Rules, the applicant party is also clearly made liable for costs and damages in case it is later determined that the emergency measure should not have been granted.[53]

In deciding the matter of security, it has been suggested that the emergency arbitrator consider the arrangements that must be facilitated, and whether they are necessary to balance the interests between the parties.[54] Caution should also be exercised to avoid *"stifling a meritorious application by an excessive order for security."*[55] The emergency arbitrator may also wish to consider the following factors: (i) the actual costs to comply with the measure, (ii) the potential damage to the adverse party if the subject measure turns out to be unnecessary or inappropriate, and (iii) the applicant's financial capacity to provide the security.[56] In practice, the necessity, amount, form and conditions of such security can be heavily contested between the parties in an emergency arbitration proceeding. Undertakings made in good faith by the adverse party have also been known to be offered as a way to avoid the imposition of emergency relief.[57]

k. Necessity (or urgency) and other standards for review of emergency measures. An emergency arbitrator is empowered to, among others, order emergency measures in accordance with the provisions on interim measures in Articles 71 to 74 (Article 77.1). One of the key conditions for granting emergency measures is that the emergency arbitrator be convinced of the "necessity" of granting the same before the constitution of the arbitral tribunal (or the appointment of the substitute arbitrator) (Article 75.2(6)).

The ICC and the HKIAC have formulated this fundamental requirement in terms of the "urgency" of the subject emergency measures. For example, Article 1(3)(e) of Appendix V of the ICC 2021 Rules requires the application for emergency measures to state, among others,

50) Kodama, *supra* n. 36, at 13; and Sim, *supra* n. 5, at 281, para. 8.78.

51) *CIArb Guideline on Applications for Interim Measures, supra* n. 9, at 9.

52) *See* paragraph 11 of Schedule 1 of the SIAC 2016 Rules, Article 6(7) of the ICC 2021 Rules and Article 23.6 of the HKIAC 2024 Rules.

53) This provision mirrors Article 17G of the UNCITRAL Model Law.

54) Sim, *supra* n. 5, at 283, para. 8.82.

55) *CIArb Guideline on Applications for Interim Measures, supra* n. 9, at 10.

56) *Ibid*.

57) Sim, *supra* n. 5, at 283, para. 8.83; and *CIArb Guideline on Applications for Interim Measures, supra* n. 9, at 12 (regarding Article 4(2) thereof).

"the reasons why the applicant needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal." Paragraph 2 of Schedule 4 of the HKIAC 2024 Rules similarly requires the application for the appointment of an emergency arbitrator to state, among others, *"the reasons why the applicant needs the Emergency Relief on an urgent basis that cannot await the constitution of an arbitral tribunal."*

The question of urgency or whether or not relief can await the constitution of the arbitral tribunal has often been considered *"determinative of the application."*[58] In determining urgency, it has been opined that the key issue is the expected time needed for the formation of the arbitral tribunal and its ability to act upon an application for interim measures, considering, among others, the following factors: (i) the size of the arbitral tribunal, (ii) the nomination process, (iii) any challenges to the nominated arbitrator(s), (iv) conditions for the grant of interim relief (e.g., execution of the terms of reference), (v) period for the arbitral tribunal to determine the application for relief, and (vi) the parties' conduct relative to the formation of the arbitral tribunal (e.g., any dilatory tactics).[59]

Urgency is a high threshold that needs to be overcome for any successful application for emergency measures. The difficulty in meeting it has contributed to the relatively low rate of success that has been observed of applications for emergency measures before the ICC.[60] As has been aptly explained, *"urgent relief is justified only in exceptional circumstances."*[61]

In addition to the requirement of necessity, in ordering emergency measures, the emergency arbitrator must be satisfied that the following standards are met: (i) that harm not adequately reparable by an award of damages is likely to result if the subject measure is not ordered, and such harm substantially outweighs that which is likely to result to the party against whom the measure will be directed if such measure is granted, and (ii) that there is a reasonable possibility that the applicant party will succeed on the merits of the claims (Articles 71.2 and 77.1). Except with respect to evidence preservation, these standards must be met (Articles 71.2, 71.3 and 77.1). For evidence preservation, the emergency arbitrator is only required to "take into account" the above standards in ordering emergency measures *"to the extent it considers appropriate"* (Articles 71.3 and 77.1). These standards mirror the conditions for granting interim measures in Article 17(A) of the UNCITRAL Model Law, except that in connection with the standard described in item (ii) above, Article 17(A)(1)(b) of the UNCITRAL Model Law further provides that *"[T]he determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination."*

58) Sim, *supra* n. 5, at 29, para. 1.104.

59) *Ibid*., at 237, paras. 7.54–7.60.

60) Allen, *supra* n. 17. The author noted that emergency relief was only granted in 28.75% (23 of 80) of the cases reported in the ICC Commission Report on Emergency Arbitrator Proceedings.

61) *Ibid*.

In comparison to the prescriptive approach adopted by the JCAA for granting emergency measures, other institutions have clothed the emergency arbitrator with wider discretion or authority to order emergency measures. For example, Article 23.4 of the HKIAC 2024 Rules, while echoing the conditions for granting interim measures in Article 17(A)(1)(a) and (b) of the UNCITRAL Model Law, including the no prejudgment rule, does not preclude the emergency arbitrator from considering other relevant factors and the circumstances of the case.

The rules of the SIAC and the ICC have equipped the emergency arbitrator with even broader discretion in ordering emergency measures by not providing any specific criteria for the exercise of such discretion. In particular, paragraph 8 of Schedule 1 of the SIAC 2016 Rules broadly empowers the emergency arbitrator to order or award any interim relief that he or she deems necessary as long as summary reasons are given for such decision. As to the ICC, Article 6(3) of Appendix V of the ICC 2021 Rules just requires the subject order to state the reasons therefor. The absence of specific standards, however, may give rise to uncertainty when considering the likelihood of success of an application, and in this regard, it has been remarked that *"[U]ncertainty and unconstrained discretion are an unhelpful combination for a party deciding which is the preferable route to obtain urgent pre-tribunal relief, be it before an emergency arbitrator or a court."*[62)]

Going back to the JCAA 2021 Rules, in regard to the irreparable harm element of the standard described earlier in item (i) above, the prevailing circumstances surrounding the application can affect the determination of the nature of the potential harm that may be suffered if no relief is granted.[63)] The emergency arbitrator should also determine whether the harm that is likely to occur can be sufficiently and adequately compensated by damages (that will likely be honored) on a case-by-case basis.[64)]

As to the balancing exercise aspect of the standard described earlier in item (i) above, the following factors are often considered: (1) the risk of aggravating the dispute (as opposed to preserving the status quo pending the final decision), (2) whether the application is a form of abuse, and (3) the relative position of each party, including its financial position.[65)] The potential financial hardship to both parties should be carefully considered to avoid putting a party at a substantial disadvantage as a result of granting the emergency measure such that it would have to abandon the arbitration.[66)]

62) Sim, *supra* n. 5, at 225, paras. 7.09 and 7.11.

63) *Ibid*., at 247, para. 7.92.

64) *CIArb Guideline on Applications for Interim Measures*, *supra* n. 9, at 7.

65) Sim, *supra* n. 5, at 259–260, paras. 7.136–7.139. Determining whether the subject harm substantially outweighs the harm the defendants are likely to suffer if the interim measure is granted has been considered an assessment of the "balance of convenience." (*UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration*, *supra* n. 29, at 87.)

66) *CIArb Guideline on Applications for Interim Measures*, *supra* n. 9, at 8.

With respect to the standard of having a prima facie case on the merits as described earlier in item (ii) above, it is important to bear in mind the limited mandate of the emergency arbitrator. It has been stressed that *"[T]he power of the emergency arbitrator is limited to decisions on interim measures and does not extend to any decisions on the merits of the case."*[67] Thus, in determining the likelihood of success of the applicant party on its claim on the merits, it has been emphasized that the emergency arbitrator *"must not 'overstep the arbitral tribunal's role of assessing the merits.'"*[68] The approach that has been suggested is for the emergency arbitrator to assess the merits on a provisional basis following the submission of necessarily incomplete arguments and evidence.[69] In this regard, it should also be noted that the submissions and evidence presented by the parties during the emergency arbitration proceedings as well as any hearing transcript may later be considered by the arbitral tribunal in its own determination of the facts and legal issues as part of the record of the arbitration on the merits.[70]

l. Formal requirements of the order on emergency measures. Although the JCAA 2021 Rules do not expressly provide for the form of the decision of the emergency arbitrator on the emergency measures, it can be understood from the reference in Article 71.1 that the decision must be in the form of an order.

Other arbitral institutions have either specified the form of the decision on the emergency measures or provided more flexibility as to its form. On the one hand, Article 29(2) and Article 6(1) of Appendix V of the ICC 2021 Rules provide that the decision of the emergency arbitrator shall take the form of an order, which is not considered an award.[71] On the other hand, paragraphs 8 and 9 of Schedule 1 of the SIAC 2016 Rules provide more flexibility and refer to an "order or Award" of any interim relief, provided that the form thereof is first approved by the Registrar. Further, under Rule 1.3 of the said rules, an "Award" includes an award of an emergency arbitrator.

Somewhere in between the above two approaches is paragraph 12 of Schedule 4 of the HKIAC 2024 Rules, which defines an "Emergency Decision" as any decision, order or award of the emergency arbitrator on the application, but, under Article 2.13 thereof, references to an "award" exclude any award made by an emergency arbitrator.

It has been explained that the labeling of a decision of an emergency arbitrator (i.e., whether as an arbitral award or an order) can affect the manner of its enforcement in courts, which favor the enforcement of arbitral awards over simple orders.[72] However, there is still

67) *Ibid*., at 22.
68) *ICC Emergency Arbitration*, Aceris Law LLC 6 (Dec. 13, 2023).
69) Sim, *supra* n. 5, at 251, para. 7.105.
70) *Ibid*., at 32–33 and 199, paras. 1.123 and 5.187.
71) *ICC Emergency Arbitration, supra* n. 68, at 2.

uncertainty about the enforcement of such decision under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the "**New York Convention**") even if it is named an "award" because the said Convention does not directly address the enforceability of interim measures.[73)]

Under the JCAA 2021 Rules, the decision or order on emergency measures must meet the formal requirements for awards provided in Articles 66.2, 67 and 68 (Articles 71.5 and 77.1). In terms of content, the decision must state, among others, the determination on the relief and remedy sought, the procedural history, the reasons for the decision, the date thereof, and the place of the arbitration (Article 66.2). Moreover, by applying Article 80 *mutatis mutandis* (Article 79), the decision of the emergency arbitrator may include the costs of the emergency arbitration proceedings. This has also been recognized as the practice at the JCAA on the basis of a request made by any of the parties.[74)]

Further, in practice, the decision of the emergency arbitrator must first be submitted to the JCAA for its review to ensure that the same is in order before it is finalized and issued by the emergency arbitrator. The SIAC has a review process as well that is described in its rules. Paragraph 9 of Schedule 1 of the SIAC 2016 Rules expressly requires approval by the Registrar of every interim order or award of the emergency arbitrator as to its form. Thus, emergency arbitrators and arbitral institutions are recommended to consider the time needed for the review process to meet the schedule for issuing the decision to the parties.[75)]

Contrary to the above institutional review practice, the HKIAC does not review or scrutinize its awards *"[C]onsistent with its light touch approach,"* and in view of the duty of the arbitral tribunal *"to make reasonable efforts to ensure that an award is valid."*[76)] This policy presumably extends to decisions on emergency measures.

As to the ICC, it does not provide for scrutiny of orders of emergency arbitrators,[77)] which are not considered awards.[78)]

m. Interim nature of order on emergency measures and its binding effect on the parties. Due to its interim nature, the order on emergency measures will not be binding on the arbitral tribunal (Article 78.1). The emergency arbitrator may also modify, suspend or

72) *How will an emergency arbitrator evaluate my application?* MoloLamken LLP 3 (2021).
73) *Ibid*.
74) Kodama, *supra* n. 36, at 14.
75) Smith, *supra* n. 16, at 48.
76) *HKIAC Administered Arbitration 50 Questions & Answers*, no. 42, https://www.hkiac.org/arbitration/why-choose-hkiac/hkiac-administered-arbitration-faqs (accessed on July 8, 2024).
77) *Emergency Arbitrator Proceedings*, Report of the ICC Commission on Arbitration and ADR Task Force on Emergency Arbitrator Proceedings 9 (2019).
78) Smith, *supra* n. 16, at 48.

terminate such emergency measures (Article 77.1) before the constitution of the arbitral tribunal or the appointment of the substitute arbitrator. Thus, the emergency measures shall remain in effect until the arbitral tribunal modifies, suspends or terminates them upon the written application of either party or on its own motion in exceptional circumstances,[79] and after giving the parties an opportunity to comment (Articles 74 and 78.2). Further, the emergency measures would be considered "interim measures" granted by the arbitral tribunal when it is constituted or when the substitute arbitrator is confirmed or appointed by the JCAA in the case of a vacancy (Article 77.5). The purpose and intended application of this last rule may need further clarification by the JCAA, but in any event, once confirmed by the arbitral tribunal, the emergency measures will become enforceable in Japan as interim measures.[80]

Moreover, to keep the emergency arbitrator or the arbitral tribunal informed, under the JCAA 2021 Rules, each party has an obligation to disclose to the emergency arbitrator or the arbitral tribunal any material changes in the circumstances which formed the basis for the application or the determination on the emergency measures (Articles 73 and 77.1). In contrast thereto, under Article 23.7 of the HKIAC 2024 Rules, such duty of disclosure would only arise if the emergency arbitrator or the arbitral tribunal imposes it on a party.

Although interim in nature, as between the parties, an order on emergency measures will bind them in view of their agreement under the JCAA 2021 Rules to be bound by and to carry out such emergency measures (Article 77.5).

Other arbitral institutions have similarly provided for the non-binding effect of orders of the emergency arbitrator on the arbitral tribunal,[81] including provisions for the modification, suspension or termination of such orders by the emergency arbitrator or the arbitral tribunal, once constituted,[82] as well as the binding effect of such orders as between the parties and/or the parties' contractual undertaking to comply with the same.[83] Notably, Article 29(5) of the ICC 2021 Rules also limits the undertaking of compliance to the signatories of the underlying arbitration agreement or their successors.

The agreement of the parties in the relevant institutional rules to be bound by the order on emergency measures and/or their undertaking to comply therewith can mitigate the effects of the lack of enforceability of orders on emergency measures in jurisdictions like Japan. Such agreements and undertakings may also account for the high compliance rate that has been

79) The arbitral tribunal can exercise this power *motu proprio* when the subject measure was granted based on an erroneous or fraudulent basis. (*CIArb Guideline on Applications for Interim Measures*, *supra* n. 9, at 19.)

80) Kodama, *supra* n. 36, at 16.

81) *See* paragraph 10 of Schedule 1 of the SIAC 2016 Rules and Article 29(3) of the ICC 2021 Rules.

82) *See* paragraphs 8 and 10 of Schedule 1 of the SIAC 2016 Rules, Article 29(3) and Article 6(8) of Appendix V of the ICC 2021 Rules, and Article 23.5 and paragraph 11 of Schedule 4 of the HKIAC 2024 Rules.

83) *See* paragraph 12 of Schedule 1 of the SIAC 2016 Rules, Article 29(2) of the ICC 2021 Rules, and Article 35.3 and paragraph 17 of Schedule 4 of the HKIAC 2024 Rules.

observed with respect to emergency measures.[84] Reasons for such compliance include the desire to prevent the arbitral tribunal from looking unfavorably on a breach, with respect to both the party's claim or defense in the main arbitration proceeding as well as any award on costs,[85] or in the case of evidence production or preservation, the drawing of an adverse reference, if appropriate under the circumstances.[86] On the flip side, in cases involving non-compliance, it has been cautioned that the corresponding contractual remedy for breach of an order of an emergency arbitrator *"may be a pyrrhic victory if assets or important evidence has been dissipated in breach of an order."*[87] Arbitral tribunals also generally lack the power to issue monetary penalties for non-compliance.[88]

n. Expiration of the emergency measures granted. The emergency measures ordered by the emergency arbitrator will cease to have effect for any of the following reasons: (i) the arbitral tribunal is not constituted or the substitute arbitrator is not confirmed or appointed by the JCAA within three months from the grant of the emergency measures, (ii) the arbitral proceedings are terminated upon the rendering of an arbitral award, withdrawal by the parties of all the claims before the constitution of the arbitral tribunal, or in the event of a decision to terminate the arbitral proceedings, (iii) the request for arbitration is not received by the JCAA within ten (10) days from the date of the application for emergency measures, if such request was not submitted before or at the time of the filing of the said application, or (iv) the emergency measures are terminated by the emergency arbitrator, or the arbitral tribunal, once constituted (Articles 61.1, 74, 77.1 and 77.6). Other institutions have their own provisions on when an order or award on emergency measures would cease to be binding on the parties.[89]

o. Termination of the mandate of the emergency arbitrator. The mandate of the emergency arbitrator shall terminate for any of the following reasons: (i) if no request for arbitration is received by the JCAA within ten (10) days from the date of the application for emergency measures, where such request was not filed before or at the time of the said application, (ii) upon the constitution of the arbitral tribunal on the date all the arbitrators are confirmed or appointed by the JCAA, or (iii) upon the confirmation or appointment of the substitute arbitrator by the JCAA. Nevertheless, the JCAA may extend the mandate of the emergency arbitrator, if necessary (Article 77.7).

---

84) Allen, *supra* n. 17. The author noted therein that the nearly 87% compliance rate of emergency arbitration decisions made enforcement an unlikely consideration in a typical emergency arbitration case.

85) Practical Law Arbitration, *Emergency arbitrators in international arbitration*, Thomson Reuters Practical Law 9 (2022).

86) Sim, *supra* n. 5, at 326–327, paras. 10.29 and 10.32–10.33.

87) Smith, *supra* n. 16, at 51.

88) Sim, *supra* n. 5, at 325, para. 10.24.

89) *See* paragraphs 8 and 10 of Schedule 1 of the SIAC 2016 Rules, Articles 6(6) and 6(8) of Appendix V of the ICC 2021 Rules, and Article 23.5 and paragraphs 11 and 18 of Schedule 4 of the HKIAC 2024 Rules.

The SIAC has also provided for the termination of the power of the emergency arbitrator to act once the arbitral tribunal is constituted.[90] By contrast, Article 2(2) of Appendix V of the ICC 2021 Rules allows the emergency arbitrator *"to retain the power to make an order"* even after the file has been transmitted to the arbitral tribunal when it is constituted but within the required time limit.[91] Similarly, based on paragraphs 13 and 14 of Schedule 4 of the HKIAC 2024 Rules, as an exception to the emergency arbitrator losing the power to act once the arbitral tribunal is constituted, *"[T]he emergency arbitrator may proceed with the Emergency Relief proceedings and the Emergency Decision may be made within the period referred to in paragraph 12 of this Schedule, even if in the meantime the case file has been transmitted to the arbitral tribunal."*[92] Under these provisions, the emergency arbitrator is given enough time during the transition period to complete his or her mandate even after the arbitral tribunal has been constituted.

p. Allocation of costs of the emergency arbitration proceedings. Applying Article 80.2 *mutatis mutandis* (Article 79), the emergency arbitrator may apportion the costs of the emergency arbitration proceedings between the parties, considering their conduct throughout the proceedings, the determination on the merits (which, in the context of the application for emergency measures, pertains to the decision thereon) and the relevant circumstances.[93] Other institutions have expressly authorized such allocation of costs by the emergency arbitrator,[94] including where the proceedings are terminated without an emergency decision.[95] Applying Article 61.4 of the JCAA 2021 Rules *mutatis mutandis* (Article 79), the emergency arbitrator may similarly act accordingly when terminating the proceedings.

q. Appointment of a tribunal secretary. Depending on the nature, size and complexity of the case, the emergency arbitrator may need the assistance of a tribunal secretary to ensure that the emergency arbitration proceedings are conducted expediently and efficiently. If, so, then applying Article 33 *mutatis mutandis* (Article 79), the emergency arbitrator may, with the consent of the parties, appoint a tribunal secretary. The obligations of impartiality and independence as well as confidentiality shall apply to the tribunal secretary (Article 33.3). The remuneration and expenses thereof would be considered expenses of the emergency arbitrator (Articles 33.4, 101.1(3) and 102.3).

---

90) *See* paragraph 10 of Schedule 1 of the SIAC 2016 Rules.

91) *See also* Article 6(8) of Appendix V of the ICC 2021 Rules.

92) Under Article 5.4 of the HKIAC 2024 Rules, the case file shall be sent to the arbitral tribunal as soon as it is constituted.

93) For purposes of allocating costs, Article 34.4 of the HKIAC 2024 Rules lists the following factors that can be considered: *"(a) the relative success of the parties; (b) the scale and complexity of the dispute; (c) the conduct of the parties in relation to the proceedings; (d) any third party funding arrangement; (e) any outcome related fee structure agreement; and/or (f) any adverse environmental impact arising out of the parties' conduct in the arbitration."*

94) *See* paragraph 13 of Schedule 1 of the SIAC 2016 Rules, Article 7(3) of Appendix V of the ICC 2021 Rules and paragraph 16 of Schedule 4 of the HKIAC 2024 Rules.

95) *See* paragraph 22 of Schedule 4 of the HKIAC 2024 Rules.

Other institutions have practice notes or rules concerning the appointment and remuneration of tribunal or administrative secretaries.[96)]

r. Confidentiality. In this age of internet and digital media, confidentiality is becoming an increasingly more valuable feature of arbitration. Applying Article 42 *mutatis mutandis* (Article 79), the confidential nature of the arbitration proceedings extends early on to the emergency arbitration proceedings. Thus, such proceedings shall be held in private and the records thereof will be closed to the public. All the persons involved in the emergency arbitration proceedings, including the emergency arbitrator, the parties, their counsel and assistants, and the JCAA's officers and staff, are prohibited from disclosing the facts related to or learned through such proceedings, or expressing any views as to such facts, except where disclosure is required by law or in court proceedings, or for other justifiable grounds.

D. Court relief not precluded

Concurrent jurisdiction by the arbitral tribunal and the courts is considered one of the fundamental principles of emergency arbitration.[97)] At the outset, a party must weigh the pros and cons and other considerations of applying for emergency measures or seeking court relief before the constitution of the arbitral tribunal. In view of the inherent inapplicability of emergency measures to third parties, their lack of enforceability in jurisdictions like Japan, or the unavailability of *ex parte* relief,[98)] a party may want to seek court relief instead.

The JCAA 2021 Rules are silent on the matter of court relief for interim measures. Nevertheless, regardless of the seat of the arbitration,[99)] Article 15 of the Amended Arbitration Act clearly provides that an arbitration agreement does not preclude the filing with the court of a petition for a provisional order before the commencement or during the arbitration proceedings in respect of a civil dispute that is the subject of the arbitration agreement.

In contrast, other institutional rules have expressly allowed resort to judicial relief for interim measures to varying degrees. Rule 30.3 of the SIAC Rules 2016, which is relatively broad, states that *"[A] request for interim relief made by a party to a judicial authority prior to the constitution of the Tribunal, or in exceptional circumstances thereafter, is not incompatible with these Rules."* (underscoring supplied) Slightly restrictive is Article 29(7) of the ICC 2021 Rules, which states in part that *"[T]he Emergency Arbitrator Provisions are not intended to prevent any party from seeking urgent interim or conservatory measures from a competent judicial authority at any time prior to making an application for such measures,*

96) *See* the SIAC's Practice Note (PN – 01/15, Feb. 2, 2015), the ICC's Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (Jan. 1, 2021), and Article 13.4 and paragraph 6 of Schedule 2, among others, of the HKIAC 2024 Rules.

97) Sim, *supra* n. 5, at 79, para. 3.119.

98) *Ibid*., at 23, para. 1.76.

99) *See* Article 3(2) of the Amended Arbitration Act.

and in appropriate circumstances even thereafter, pursuant to the Rules." (underscoring supplied) Lastly, being the most liberal one, paragraph 20 of Schedule 4 of the HKIAC 2024 Rules broadly provides that *"[T]he Emergency Arbitrator Procedure is not intended to prevent any party from seeking urgent interim or conservatory measures from a competent authority at any time."* (underscoring supplied)

As a practical matter, for Japanese court proceedings, foreign parties may find the requirement to translate English documents into Japanese costly and challenging. In general, other considerations for not seeking relief from a national court include the desire to preserve the confidentiality of the arbitration, concern for the length of time or costs of filing an application therewith, or concern about such court's impartiality or competence.[100)]

Ⅲ. Prospects of Emergency Arbitration at the JCAA: Looking at the Next Decade and Beyond

A. Potential impact of the Amended Arbitration Act on emergency measures

The recent amendments to the arbitration law of Japan have been very positive. Although orders for emergency measures remain unenforceable thereunder, they can still benefit from the substantial changes to the legal landscape to enforce orders for interim measures.

The Arbitration Act of Japan was fashioned after the UNCITRAL Model Law prior to its amendments in 2006. It was then recently amended to harmonize the law with the UNCITRAL Model Law, as amended, and enhance the legal system of arbitration in Japan. The amendments took effect on April 1, 2024. In particular, under Article 47 of the Amended Arbitration Act, interim measures ordered by an arbitral tribunal, irrespective of the place (seat) of the arbitration, are now enforceable by the competent courts of Japan.[101)] This rule does not, however, extend to orders for emergency measures, which are interim in nature and non-binding on the arbitral tribunal. However, once confirmed by the arbitral tribunal, the emergency measures ordered can be enforced as interim measures in Japan as well as other countries that have adopted the UNCITRAL Model Law, which recognizes and enforces interim measures of the arbitral tribunal.[102)]

100) Practical Law Arbitration, *supra* n. 85, at 5.

101) The following courts have exclusive jurisdiction over petitions to enforce orders for interim measures: (a) the district court determined by the parties' agreement, (b) the district court with jurisdiction over the place of the arbitration but only where the designated place of arbitration falls within the jurisdiction of a single district court, (c) the district court with jurisdiction over the location of the general venue of the respondent in the case, the subject matter of the claim or the property of the respondent to be seized, and (d) the Tokyo District Court and the Osaka District Court if the place of arbitration, the location of the general venue of the respondent, or the location of the subject matter of the claim or the property of the respondent to be seized is in Japan (Amended Arbitration Act, Arts. 5(1) and 47(4)).

102) Practical Law Arbitration, *supra* n. 85, at 4.

Exceptionally, in some jurisdictions like Hong Kong and Singapore, their national laws have been amended to make orders or awards for emergency measures enforceable.[103] In general, however, there is uncertainty about the enforceability of orders for emergency measures under Article V(1)(e) of the New York Convention,[104] which *"permits–but does not mandate"*[105] the denial by a court of the recognition and enforcement of an arbitral award if, among other grounds, *"[T]he award has not yet become binding on the parties."* The use of the word "binding" therein has been interpreted to mean that *"a party was entitled to apply for recognition and enforcement of an award once it was issued by the arbitral tribunal."*[106] It has been noted, however, that courts have varying views about the moment when an award is "binding," including by referring to the binding nature of the award under the *lex arbitri* or independent thereof, the agreement of the parties (which may include a clause about the binding effect of the award), or the availability of recourse on the merits by the arbitral tribunal.[107] In any event, the New York Convention is said to only apply if the subject emergency arbitrator decision is considered an arbitral award.[108]

B. Possible indirect enforcement by courts of orders for emergency measures

Even if an order for emergency measures is not enforceable in Japan, there is a possibility that it may be enforced indirectly by pro-arbitration courts. It has been suggested that *"courts may also be willing to indirectly enforce an emergency arbitrator's decision by ordering interim relief identical in effect to the decision of the emergency arbitrator."*[109]

This trend was observed in India. In *HSBC PI Holdings (Mauritius) Limited v. Avitel Post Studioz Limited (2014)*, the Bombay High Court ordered interim relief "equivalent" to that ordered by the emergency arbitrator under the SIAC rules to restrain the respondents from withdrawing money from specified bank accounts.[110] More recently, the Supreme Court of India in *Amazon.com NV Investment Holdings LLC v. Future Retail Ltd. (2022)* recognized and allowed the enforcement of an award of an emergency arbitrator under the SIAC rules even if the concept of emergency arbitration (or emergency arbitrator proceedings) was not expressly

103) Smith, *supra* n. 16, at 54. As described therein, Singapore amended its International Arbitration Act (Cap 143A) in 2012 to include in the definition of "arbitral tribunal" *"an emergency arbitrator appointed pursuant to the rules of arbitration agreed to or adopted by the parties including the rules of arbitration of an institution or organization."* This gave the emergency arbitrator the status of an "arbitral tribunal" and made the decision thereof on interim relief enforceable in Singapore. Hong Kong revised its Arbitration Ordinance (Cap 609) in 2013 to make the emergency relief granted by an emergency arbitrator, within or outside Hong Kong, enforceable like a court order or direction, subject to leave of the court.

104) Practical Law Arbitration, *supra* n. 85, at 8.

105) Sim, *supra* n. 5, at 343, para. 10.99.

106) *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges (Second Edition)*, International Council for Commercial Arbitration (2024), at 101.

107) *Ibid*., at 101–102.

108) Sim, *supra* n. 5, at 343, para. 10.98.

109) Smith, *supra* n. 16, at 52.

110) *Ibid*.

recognized under the Arbitration and Conciliation Act (1996) of India.[111)]

This pro-arbitration judicial attitude of Indian courts extended to an order of an emergency arbitrator denying emergency measures. In *Ashwani Minda & Anr v. U-Shin Ltd. (2020)*, the emergency arbitrator appointed under the JCAA's rules declined to grant interim reliefs. In the said case, the Delhi High Court dismissed the applicants' petition under Section 9 of the Arbitration and Conciliation Act (1996) for similar interim reliefs ruling in part that, *"having invoked the mechanism of the Emergency Arbitrator and invited a detailed and reasoned order, it is not open for the Applicants to take a second bite at the cherry."*[112)]

If this trend of indirectly enforcing orders on emergency measures becomes widespread, then such orders can become effective even in jurisdictions where they are not directly enforceable.

C. Emergency arbitration as an early settlement tool

Discussions around emergency arbitration are frequently accompanied by observations concerning early settlements, whether before, during or even after the emergency arbitration proceedings.

Prior to commencement of emergency arbitration proceedings, it has been observed that *"parties frequently contact arbitral institutions, and in particular the ICDR and ICC, with an expressed intent to file an arbitration and simultaneously invoke emergency arbitrator procedures, but then never file either. ... because the mere ability to do so functions as an effective early settlement tool."*[113)] The "mere availability" of such proceedings can promote the amicable resolution of a dispute.[114)]

During the emergency arbitration proceedings, the parties can test the merits of their case, which can also lead to settlement.[115)] In this regard, it has been explained that *"the emergency arbitrator's preliminary assessment of the particular strengths and weaknesses of the parties' respective cases can lead to an early settlement."*[116)] However, it has been cautioned that using emergency arbitration to "test the waters" may work against an applicant who, after failing to demonstrate a prima facie case, would then have to settle *"albeit from a significantly weakened bargaining position against an emboldened respondent."*[117)]

111) Ranjit Shetty & Rahul Dev, *supra* n. 1, at 75.

112) *Ibid*., at 81–82; and *Ashwani Minda & Anr v. U-Shin Ltd. & Anr* (May 12, 2020), AIR 2020 (NOC) 953 (DEL.), para. 55.

113) Sarah Zagata Vasani, *The Emergency Arbitrator: Doubling as an Effective Option for Urgent Relief and an Early Settlement Tool*, King & Spalding 2 (May 8, 2015).

114) Allen, *supra* n. 17.

115) *Ibid*.

116) Lars Markert & Raesa Rawal, *Emergency Arbitration in Investment and Construction Disputes: An Uneasy Fit?* Journal of International Arbitration 37, no. 1, 133 (2020).

In regard to emergency arbitration aiding the settlement of disputes, it has also been theorized that *"this may be due to the consequences of the emergency arbitrator's decision on the parties' relationship and performance of their obligations, including that the applicant may lose appetite to pursue its claims on the merits in the event that it has been unsuccessful,"* or *"faced with an emergency arbitration decision against it, the respondent might change its position and start cooperating with the claimant to avoid a full-blown arbitration on the merits."*[118)]

In respect of post-emergency arbitration proceedings, it has been opined that the chances for early settlement will be higher if the emergency measures sought are closely related with the substantive claims in the main arbitration.[119)] The reasoned order of the emergency arbitrator may also persuade the parties to settle after having a better understanding of their dispute.

In sum, it has been observed that *"emergency arbitration cases settle within or just outside the 15-day window, solidifying emergency arbitration's reputation as an efficient negotiation tool."*[120)] In light of this evolving user trend, emergency arbitration may become a way for parties to arrive at an early settlement.

Ⅳ. Conclusion

The emergency arbitration provisions of the JCAA are clearly at par with global standards with all the bells and whistles needed to obtain emergency relief that would be binding between the parties and which can be transformed into interim measures that can be enforced in Japan and other UNCITRAL Model Law jurisdictions. This ensures predictability for parties choosing arbitration under the JCAA's rules.

Moreover, recent legislative changes as well as developments in user trends and judicial attitude can turn the tide and shape the future of emergency arbitration at the JCAA. In particular, the enhanced legal framework governing the enforcement of interim measures in Japan will give parties more reason to consider emergency arbitration knowing that the emergency measures can be transformed into enforceable interim measures of the arbitral tribunal. The possibility of indirect enforcement of reasoned emergency arbitrator decisions by pro-arbitration courts can also mitigate the general lack of enforceability of such decisions. Lastly, emergency arbitration may serve in some cases as an early settlement tool, which can prove beneficial to parties who may be reluctant to spend their precious time and resources in a full-blown arbitration. In sum, emergency arbitration at the JCAA will have much to offer in the next decade and beyond.

117) Sim, *supra* n. 5, at 67, para. 3.63.
118) *Ibid*., at 66–67, para. 3.61.
119) *Ibid*., at 67, para. 3.62.
120) Allen, *supra* n. 17, at 1.

Overview of the amendment to Japan's Arbitration Act

Attorney, International Affairs Division, Minister's Secretariat, Ministry of Justice

Fumiyasu Miyazaki[1)]

Ⅰ. Introduction

On April 21, 2023, the 211th session of the Diet adopted the Act Partially Amending the Arbitration Act (Act No.15 of 2023), which came into force on April 1, 2024. The Act is part of the government's initiatives for invigoration of arbitration by providing global standard procedures through : (1) renewed provisions for interim measures, (2) relaxed requirements for arbitration agreements and submission of translations, and (3) expanded jurisdiction of courts in Tokyo and Osaka for arbitration-related applications. This article provides a background of the legislative work and an overview of the amended Act.

Ⅱ. Background

1. Invigoration of international arbitration

The Arbitration Act was enacted in 2003, based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (Model Law), which was originally created in 1985. The Model Law was amended in 2006 to introduce new articles regarding interim measures. Until recently, however, the Arbitration Act had not been equipped with those provisions. On the other hand, it has been pointed out that the use of Alternative Dispute Resolution mechanisms, especially to resolve international disputes, is stagnant among Japanese corporations, and the government has been encouraged

1) The views expressed in this article reflect the personal opinions of the author and do not necessarily represent those of the Ministry of Justice (MOJ) of Japan. To facilitate the understanding of international readers, some of the English phrases used in this article may not necessarily reflect the ones in the Japanese Law Translation provided by the MOJ (https://www.japaneselawtranslation.go.jp/en/laws/view/4440).

I am grateful to Mr. Atsushi Fukuda, the former Councilor of the Civil Affairs Bureau of MOJ responsible for the arbitration legislation and the author of the original article (in Japanese) upon which I largely relied, for suggesting this opportunity to write this English article to promote the amended Act overseas. Additionally, I appreciate the valuable advice from Mr. Tom Schmid, my friend and Legal Editor for the International Affairs Division of the MOJ and UNAFEI.

to promote the efficient use of these legal systems, such as arbitration among businesses.

In a policy brief dated April 25, 2018, the Inter-Ministerial Committee for the Invigoration of International Arbitration suggested that, in order to encourage the efficient use of international arbitration, it is necessary to develop a domestic legal system in line with the latest international standards, exemplified by the UNCITRAL Model Law. In addition, another governmental report compiled on March 10, 2020 suggested that the Ministry of Justice should consider the amendment to the current Arbitration Act such as introducing the global standard mechanisms referring to the Model Law, reducing the procedural burden for parties by reviewing translation requirements as well as the establishment of additional jurisdiction for arbitration cases before the judiciary. Consequently, the legal reform of arbitration was integrated into the primary agenda for the Ministry of Justice to spur the use of international arbitration.

2. Legislative process

The following is a summary of the legislative process that led to the amendment to the Arbitration Act:

(a) On September 17, 2020, the Justice Minister consulted the Legislative Council on the review of the Arbitration Act, which resulted in the establishment of the Arbitration Legislation Subcommittee chaired by Professor Kazuhiko Yamamoto, Hitotsubashi University Graduate School of Law.

(b) In October 2021, the Arbitration Legislation Subcommittee compiled a Draft Outline for amending the Arbitration Act. After the Legislative Council approved the outline, it was submitted to the Justice Minister.

(c) On February 28, 2023, the bill to partially amend the Arbitration Act was submitted to the 211th session of the Diet.

(d) The bill was deliberated in the Committee on Legal Affairs of the House of Representatives and the Committee on Legal Affairs of the House of Councilors. It was subsequently passed by the plenary session of the House of Councilors on April 21, 2023, thereby becoming law, and was promulgated on April 28, 2023. There was no supplementary resolution to the bill.

Ⅲ. Overview of the amended Arbitration Act

The amended Arbitration Act has aimed to align the domestic law with international standards, thereby promoting the use of arbitration. Key provisions in the new legal regime are new interim measures, form requirements for arbitration agreements, the submission of Japanese translations, and jurisdiction.

1. Interim measures

An interim measure is any temporary measure by which the arbitral tribunal orders a party to take or refrain from taking certain actions, as provided for in Article 17(2) of the UNCITRAL

Model Law. Although the original Arbitration Act in 2003 involved the generic provisions regarding the interim measures, it was considered that, if the provisions were amended to introduce the enforceability for interim measures, the relevant provisions should be sufficiently clarified to ensure predictability for the users. As a result, the amended Article 24 of the Arbitration Act specifies the requirements and legal effects of the interim measures by creating five categories.

1.1 Five categories

The amended Arbitration Act provides five categories as follows:

i) prohibiting the disposal or alteration of assets for a subsequent monetary award,
ii) prohibiting the disposal or alteration of a property that is the subject of a non-monetary claim,
iii) taking measures necessary to prevent current or imminent harm, or to restore the status quo,
iv) prohibiting certain behaviors in order to prevent hindrance to the arbitral process itself, and
v) preserving evidence.

These are, while not corresponding in order, substantially equivalent to the items that are enumerated in Article 17(2) of the UNCITRAL Model Law. Article 17(2)(a) of the Model Law corresponds to the second and third categories, and Article 17(2)(b) corresponds to the third and fourth categories. Article 17(2)(c) and (d) correspond to the first and the fifth categories, respectively.

In requesting an interim measure, the party must satisfy the arbitral tribunal that the case has merit and that the underlying facts sufficiently support the application, except for the application for the fifth category.

The first category is a measure for prohibiting the disposal or alteration of assets so that they will be preserved in the event that the requesting party becomes entitled to enforce an arbitration award against the other party. For example, this might apply in a case in which a creditor who made a monetary claim makes an application against the debtor to prohibit the debtor from withdrawing funds from his deposit account.

The second category is a measure for prohibiting the disposal or alteration of a property that is the subject of a non-monetary claim. This could be used in cases where the requesting party is at risk of becoming unable to enforce the subsequent non-monetary award or would otherwise be placed in a comparable situation. An example of this category is when the claimant is seeking an arbitral award over the possession of a piece of land, asserting that he is the new owner of the land but the previous owner has refused to relinquish possession thereof by arguing the contract is invalid. In this case, the claimant may be able to make an application to prohibit the respondent (alleged previous owner) from transferring the

possession to any third party.

The third category is for taking measures necessary to prevent current or imminent harm, or to restore the status quo. Under this category, the arbitral tribunal is capable of ordering a party to take necessary actions to prevent significant loss to the requesting party concerning the property or rights that are matters of dispute. Also, the arbitral tribunal is able to order a party to restore the status quo. For example, suppose that there is a transaction in which a supplier has to continuously supply products to the buyer for a certain period of time, but the supplier suddenly stopped supplying the products because of the buyer's breach of the contract. The buyer initiated the arbitration arguing that there was no breach of the contract and therefore the contract is still valid. Under the third category, the buyer may be able to apply for the interim measure to resume the supply in order to maintain his business.

The fourth category is for prohibiting certain conduct in order to prevent hindrance to the arbitral process itself. For example, in a case where one of the parties initiates civil litigation regardless of the arbitration agreement under which arbitration has already commenced, the aggrieved party can seek this remedy, commonly referred to as an anti-suit injunction in this case, by arguing that the opposing party's conduct obstructs the arbitration proceedings.

Finally, the fifth category pertains to preserving evidence. This item covers a broad range of actions such as disposing of, erasing or altering evidence necessary for arbitration. For example, if a respondent would attempt to erase e-mails that would be disadvantageous if submitted as evidence, prohibiting the respondent from erasing relevant e-mails may fall into this category.

1.2 Dual mechanisms for enforcement

The amended Arbitration Act introduces new judicial mechanisms for enforcing interim measures. The specific ways to enforce interim measures diverge into two different routes, depending on the aforementioned category, as follows: enforcement of an interim measure or enforcement of a payment order. As explained above, third-category interim measures are issued to prevent current or imminent harm, or to restore the status quo, and consequently they will involve orders for specific performance, which lends itself to direct enforcement. In contrast, interim measures outside of the third category are typically issued to prohibit certain actions, making them more suitable for indirect enforcement through the payment of kind of penalty under Japan's legal system. Based upon those considerations, these dual enforcement mechanisms were established.

1.3 Enforcement of interim measures

For the party that has obtained a third-category interim measure, Articles 47 and 48 of the amended Arbitration Act establish a judicial enforcement mechanism, allowing the party to make an application to the court for approval of the enforcement of the interim measure. The

court shall approve the enforcement of the interim measure unless there are grounds for refusal, which are broadly parallel to the grounds for refusing the enforcement of arbitral awards. These grounds include the invalidity of the arbitration agreement, lack of proper notice to the party against whom the interim measure is invoked, or the occasion where the interim measure is contrary to the public policy of Japan.

After approval by the court, enforcement of the third-category interim measure may be carried out by submitting an authenticated copy of the approved order to the enforcement agency. For example, when a third-category interim measure ordering a party to deliver the product is issued, the requesting party may be able to receive the product by following the necessary process set forth in the Civil Execution Act, such as submitting the authenticated copy thereof to the court enforcement officer.

1.4 Enforcement of payment orders

For the party that obtained an order for an interim measure in accordance with the first, second, fourth or fifth category, Articles 47 and 49 of the amended Arbitration Act allow the party to make an application to the court for approval and issuance of an order for payment. The court shall approve and issue a payment order when it finds a violation of the interim measure or the likelihood thereof, unless there are grounds for refusal that are the same as those for third-category interim measures. The amount of the payment shall be determined by the court, taking into consideration various factors, including the interest that would be harmed by the violation of the interim measure. After approval and issuance by the court, the payment order may be carried out by submitting an authenticated copy of the payment order to the enforcement agency. For example, when a party destroys evidence in spite of a fourth-category interim measure ordering the preservation of evidence, the requesting party may be able to receive the due amount of payment by following the process above.

2. Form requirements for arbitration agreements

In principle, the arbitration agreement should be made in writing (including electronically). The amended Arbitration Act relaxed the form requirements for arbitration agreements by aligning with Option 1 of Article 7(3) of the UNCITRAL Model Law. Under Article 13(6) of the amended Act, if an oral contract is made with reference to an arbitration clause in a written paper or electronic record in order to make that clause part of the contract, the arbitration agreement is valid. This provision addresses the practical need for oral contracts in urgent circumstances, such as international salvage agreements.

3. Submission of Japanese translations

The original Arbitration Act obligated the parties to submit a Japanese translation of arbitral awards when they file an application for the enforcement of arbitral awards made in a language other than Japanese, which was pointed out to be too burdensome for the parties. The amended Arbitration Act allows the court to proceed without requiring submissions of translations of arbitral awards when the court finds it appropriate after hearing opinions from

the parties.

4. Jurisdiction

To respond to the specific need for professional knowledge and skills including language proficiency required to handle arbitration cases adequately and smoothly, the amended Arbitration Act extends jurisdiction over arbitration cases, such as enforcement or annulment of arbitral awards, to the Tokyo District Court and the Osaka District Court. In other words, the District Courts in Tokyo and Osaka have become universal venues for arbitration cases brought across the country. Furthermore, the amended Arbitration Act incorporated a new provision for the transfer of cases, which enables the court to transfer individual arbitration cases more flexibly.

Ⅳ. Conclusion

Before concluding, I would like to briefly touch upon the recent progress. To advance the governmental initiatives regarding the invigoration of international arbitration, in summer 2023, a practical Task Force was set up within the government chaired by Professor Kazuhiko Yamamoto and including members from the private sector. The Task Force engaged in a number of interviews with those including the German Arbitration Institute (DIS), the International Chamber of Commerce (ICC), the International Dispute Resolution Centre (IDRC), the Japan Arbitrator Association (JAA), the Japan Commercial Arbitration Association (JCAA), the Japan In-House Lawyers Association (JILA), the Japan International Dispute Resolution Center (JIDRC), the Korean Commercial Arbitration Board (KCAB), and the Swiss Arbitration Association (ASA).

With great contributions made by all the participants, the Task Force had a meaningful discussion over the future policy to further encourage the efficient use of arbitration. In the end, the Task Force developed a report containing a number of recommendations, which will guide us in taking the next steps.[2)] The report highlighted the significance of the recent progress including not only the entry into force of the amended Arbitration Act but also improvements in judicial operation, especially the establishment of the Business Court in Tokyo in which judges specialized in commercial matters deal with international arbitration cases, as well as the importance of awareness raising of Japan as a seat of arbitration among practitioners and business sectors.

Together with Japan's respected and highly qualified judiciary and experienced legal professionals, it is expected that this legislative reform will further contribute to making Japan a more arbitration-friendly jurisdiction, which guarantees impartial, just and expedited dispute resolution and enforcement.

I hope this article will be one of the contributions to increasing global awareness of these developments of the arbitration environment in Japan.

2) Due to space constraints, I am unable to include the detailed contents of the Task Force report in this article. The Task Force report is available via the link below (Japanese only).
https://www.cas.go.jp/jp/seisaku/kokusai_chusai/pdf/r6_kenkyukai_houkoku.pdf

NAGASHIMA OHNO & TSUNEMATSU
長島·大野·常松 法律事務所

Nagashima Ohno & Tsunematsu, based in Tokyo, Japan, is widely recognized as a leading law firm and one of the foremost providers of international and commercial legal services. The approximately 600 lawyers of the firm work together in customized teams to provide clients with the expertise and experience specifically required for each client matter.

TOKYO / NEW YORK / SINGAPORE / BANGKOK /
HO CHI MINH CITY / HANOI / JAKARTA* / SHANGHAI
*Associate office

Contact

Tokyo Office:
JP Tower, 2-7-2, Marunouchi,
Chiyoda-ku, Tokyo 100-7036, Japan
Tel: +81-3-6889-7000
Email: info@noandt.com

Kaori Sugimoto
(Daini Tokyo Bar Association)

https://www.noandt.com

Your Most Trusted Partner

Overview of the Development of International Mediation Legislation in Japan with the Singapore Convention on Mediation

Counselor, Civil Affairs Bureau, Ministry of Justice※

Atsushi FUKUDA

Attorney, Civil Affairs Bureau, Ministry of Justice, and International Legal Affairs Division, International Legal Affairs Bureau, Ministry of Foreign Affairs

Takahito KAWAHARA

Ⅰ. Introduction

On October 1, 2023, Japan deposited the instrument of accession to the United Nations Convention on International Settlement Agreements Resulting from Mediation (hereinafter the "Singapore Convention on Mediation" or simply the "Convention") with the Secretary-General of the United Nations at the UN headquarters in New York.[1)] The Convention enters into force in respect of a State six months after the date of the deposit of its instrument of accession. As a result, on April 1, 2024, the Singapore Convention on Mediation entered into force for Japan.[2)]

In advance of this accession, on April 21, 2023, the 211th session of the Diet passed the Act for Implementation of the United Nations Convention on International Settlement Agreements Resulting from Mediation (Act No.16 of 2023. Hereinafter the "new Act"), which was promulgated on April 28, 2023.[3)4)]

The new Act establishes rules that conform with the contents of the "United Nations Convention on International Settlement Agreements on Mediation", which provides a framework for the enforcement of international settlement agreements through mediation, among other matters in order to promote the use of mediation as a means of resolving international commercial disputes.

This Article introduces the background of the enactment of the new Act and provides an overview of the new Act. Any opinions expressed in this Article are those of the authors and do not reflect the official views of the institution with which the authors are affiliated.

※ As of April 30, 2024.

1) Conclusion of the "Singapore Convention on Mediation" by Japan (https://www.mofa.go.jp/press/release/press6e_000501.html) (last visited April 30, 2024).

2) Entry into force of the "Singapore Convention on Mediation" for Japan (https://www.mofa.go.jp/press/release/pressite_000001_00258.html) (last visited April 30, 2024).

3) The website of the Ministry of Justice contains the text of the new Act as well as an overview of the new Act in English(https://www.moj.go.jp/EN/MINJI/m_minji07_00006.html) (last visited April 30, 2024).

4) In addition, English translation of the new Act is available on the website of the Japanese Law Translation System (https://www.japaneselawtranslation.go.jp/ja/laws/view/4441) (last visited April 30, 2024).

Ⅱ. Background leading to the enactment of the new Act

1. Singapore Convention on Mediation

The Singapore Convention on Mediation was adopted by the United Nations General Assembly on December 20, 2018. It establishes a harmonized legal framework for the right to invoke settlement agreements as well as for their enforcement.

Over the years, arbitration has established its position as a globally accepted mechanism for the resolution of international commercial disputes. Nevertheless, in recent years, the usefulness of international commercial mediation has also become recognized for the following reasons: (i) it is simpler, faster, and less expensive than arbitration; (ii) it is based on the parties' agreement and does not force the parties to accept outcomes that could be at times unpredictable; (iii) the nature of the proceedings is generally not confrontational, which may enable the business relationship between the parties to be preserved; (iv) unlike in arbitration where an arbitration agreement is a prerequisite for its conduct, mediation may be easily commenced and conducted as there are no formal requirements as such; and (v) it may form a part of tiered dispute resolution clauses, which may be administered with flexibility in combination with arbitration.

With a view to promoting the use of mediation as much as arbitration was used, there was a growing momentum to develop a framework that would give enforceability to settlement agreements resulting from mediation.

Against this backdrop, the United Nations Commission on International Trade Law (UNCITRAL) mandated Working Group II to work on developing uniform rules on the enforcement of settlement agreements resulting from mediation in 2014. Following the deliberation by the Working Group which started in 2015, a draft of the Convention was approved by the Commission in June 2018, and the General Assembly of the United Nations subsequently adopted the Convention in December 2018.

On August 7, 2019, a signing ceremony was held in Singapore, and 46 States including Singapore, the U.S., China, and others (not including Japan) signed the Convention. The Convention then entered into force on September 12, 2019. As of April 30, 2024, the Convention has 57 signatories and 14 parties.

2. Study and deliberation at the Legislative Council

During the same period of time, in Japan, the revitalization of international arbitration was considered to be one of the priority objectives within the Japanese government. As a measure to achieve this, it was pointed out that a review of the Arbitration Law based on the 2006 version of the UNCITRAL Model Law on International Commercial Arbitration was necessary for the legal system in Japan to be in compliance with the latest global standard.

In response, on September 17, 2020, the Minister of Justice referred the review of arbitration legislation to consultation (Consultation No. 112) by the Legislative Council, which was followed by the establishment of the Arbitration Legislation Subcommittee of the Legislative Council (hereinafter the "Subcommittee"). Kazuhiko Yamamoto, Professor of

Graduate School of Law, Hitotsubashi University was appointed Chair of the Subcommittee.

The Subcommittee considered that promoting international mediation would contribute to the revitalization of international arbitration, and therefore, in addition to the review of the Arbitration Law, acknowledged that it would be relevant to study and deliberate on rules to provide for the enforceability of settlement agreements resulting from mediation. The study addressed not only the question as to whether making international settlement agreements resulting from mediation enforceable was necessary and appropriate, but also the consistency of a possible rule in this regard with domestic legislation. In the study and deliberation, it was considered necessary to develop domestic legislation in Japan with a view to seeking consistency with the rules of the Convention and ensuring the prospects of acceding to the Convention.

On March 5, 2021, the Subcommittee put together the "Interim Proposal Concerning the Revision of the Arbitration Act, etc." (hereinafter the "Interim Proposal"), which included relevant provisions setting forth rules such as on enforcement decisions of international settlement agreements resulting from mediation. Until May 7, 2021, a procedure to seek comments from the public on the Interim Proposal was conducted. On February 4, 2022, the Subcommittee compiled the "Draft Outline for the Establishment of a System in which Settlement Agreements resulting from mediation may be Enforceable." On February 14, 2022, the Legislative Council adopted the "Outline for the Establishment of a System in which Settlement Agreements resulting from mediation may be Enforceable" based on this draft outline made by the Subcommittee and reported back to the Minister of Justice.

3. Deliberations in the Diet

Based on the report to the Minister of Justice mentioned above, drafting work was further carried out, and on February 28, 2023, a bill entitled "Draft Act for Implementation of United Nations Convention on International Settlement Agreements Resulting from Mediation" was submitted to the 211th session of the Diet (ordinary session).

The House of Representatives Committee on Legal Affairs commenced its consideration of the bill on March 29, 2023, and passed it unanimously on April 4, 2023. The House of Representatives plenary session also passed the bill unanimously on April 6, 2023, and sent it to the House of Councilors for its consideration. Subsequently, the House of Councilors Committee on Legal Affairs commenced its consideration of the bill on April 17, 2023, and passed it unanimously on April 20, 2023. The House of Councilors plenary session also passed the bill unanimously on April 21, 2023, whereby the bill formed the new Act, which was then promulgated on April 28.

In the 211th session of Diet session, a proposal seeking approval for the conclusion of the Singapore Convention on Mediation was also submitted to the Diet, which was unanimously approved by the plenary session of the House of Representatives on May 12, 2023, and also unanimously approved by the plenary session of the House of Councilors on June 9, 2023.

Ⅲ. Outline of the new Act

The new Act was enacted in conjunction with the conclusion of the Singapore Convention

on Mediation in order to ensure its proper implementation by establishing a system that enables civil enforcement based on international settlement agreements resulting from mediation, thereby establishing an up-to-date standard for alternative dispute resolution (ADR) procedures. The purpose of the Singapore Convention on Mediation is to strengthen mediation as an ADR in line with the latest international standards and to further promote its use by establishing such system in order to ensure its proper implementation.

The Convention does not provide specific provisions on what procedures should be established within the Contracting Parties for its implementation and leaves it up to each Contracting Party. Therefore, in concluding the Convention, Japan has decided to enact a new law to give enforceability to the settlement agreements covered by the Convention (*See* the Appendix for the correspondence between the Convention and the new Act).

1. Definitions

(a) Mediation

The term "mediation" means a process, irrespective of its name or grounds for commencement, for parties who seek to resolve a civil or commercial dispute in respect of a certain legal relationship (irrespective of whether contractual or not), whereby a third person lacking the authority to impose a solution upon the parties mediates a settlement and attempts to resolve the dispute (paragraph 1 of Article 2).

(b) Mediator

A "mediator" means "a third person lacking the authority to impose a solution upon the parties" and "a person who mediates settlement through mediation" (paragraphs 1 and 2 of Article 2).

In order to avoid conflict with the Convention, there are no specific provisions in the new Act regarding the qualifications of the mediator or the measure of involvement with the proceedings.

(c) International Settlement Agreements

An "International Settlement Agreement" means an agreement resulting from mediation that has been reached between the parties and that falls under any of the following items at the time of the conclusion of the agreement (paragraph 3 of Article 2).

(i) Some or all of the parties have an address, a main office or a place of business outside Japan

A requirement of internationality is filled when some or all of the parties have an address, a main office or a place of business outside Japan (including cases in the parent's company of the parties has an address, main office or a place of business outside of Japan) (item (i) of paragraph 3 of Article 2).

For example, this requirement applies not only when one of the parties has its main office outside Japan, but also when the parent company of one of the parties has its main office outside Japan, even if the two Japanese companies have their main offices in Japan.

This requirement is not required by the Convention, but it was established based on the definition of "international mediation case" in Act on the Handling of Legal Services by Foreign Lawyers (item (xv) (a) of Article 2 of this Act), in response to a practical need that was pointed out in the Legislative Council.

(ii) Some or all parties have their addresses, offices or places of business in different States

The requirement of internationality is also filled when some or all parties have their addresses, offices or places of business (if a party has two or more offices or place of businesses, the office or place of business which has the closest relationship to the dispute resolved by the agreement, in regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the agreement; hereinafter the same applies in the following item) in different States (item (ii) of paragraph 3 of Article 2).

For example, this is the case where both parties have their main offices in Japan, but one of them has an office outside Japan that is the closest relationship to the dispute resolved by the agreement.

(iii) the State in which some or all of the parties have their addresses, etc. is different from the State in which either the place where a substantial part of the obligations under the agreement is performed or the place with the closest connection to the subject matter of the agreement belongs.

The requirement of internationality is also filled when the State in which some or all of the parties have their addresses, offices or places of business is different from the State in which either the place where a substantial part of the obligations under the agreement is performed or the place with the closest connection to the subject matter of the agreement belongs (item (iii) of paragraph 3 of Article 2).

For example, this is the case where both parties have offices only in Japan, but one of them is supposed to deliver the subject matter to the other party outside Japan based on such agreement.

2. Scope of Application

Article 3 of the new Act provides only when parties to the international settlement agreement have agreed that it could be enforced through civil enforcement based on the Convention or laws and regulations regarding the implementation of the Convention (agreement of civil enforcement). They may file a petition with the court seeking an Enforceability Order (meaning an order allowing the civil enforcement based on an international settlement agreement; the same applies hereinafter).[5)]

This is because it was considered necessary, from the perspective of ensuring due process for the parties, that the parties should decide whether or not to accept civil enforcement based on the said settlement agreement grounded on their own will in order to be enforceable based on a settlement agreement resulting from mediation.

In order to avoid conflict with the Convention, the new Act does not provide any particular limitation on the timing, manner, or form of the agreement of civil enforcement.

---

5) The Convention provides that a Party may declare that the Convention shall apply only to the extent that the parties to the Settlement Agreement have agreed to its application (Article 8, paragraph 1(b) of the Convention), and the Government of Japan, in accordance with this provision, has declared that the Convention shall apply only to the extent that the parties to the Settlement Agreement have agreed to its application. *See* the webpage of United Nations Treaty Collection (https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en) (last visited April 30, 2024).

3. Exclusions from Application

Article 4 provides for exemptions from the provisions of the new Act for international settlement agreements in accordance with the rules of the Convention (Exclusions from Application).

(a) Disputes to which individuals are parties

In view of the fact that the Convention covers settlement agreements relating to international commercial disputes, the new Act is excluded from application of the new Act when international settlement agreements on disputes relating to civil contracts or transactions for which some or all of the parties to the agreement are individuals (excluding those who have become parties to a contract or transaction as a business or for business purposes) (item (i) of Article 4).

(b) Individual labor-related disputes

International settlement agreements on individual labor-related disputes (meaning individual labor-related disputes as prescribed in article 1 of the Act on Promoting the Resolution of Individual Labor-Related Disputes (Act No. 112 of 2001)) are excluded from application of the new Act (item (ii) of Article 4).

This is because it is generally assumed that there is an imbalance in bargaining power, information, etc. between employees and employers, and that the likelihood of reaching a settlement agreement that is not based on the true intention of the parties is typologically high, and it is considered inappropriate to grant enforcement powers on the basis of an agreement between the parties.

(c) Disputes regarding personal status and other disputes regarding family affairs

International settlement agreements on disputes regarding personal status and other disputes regarding family affairs are excluded from application of the new Act (item (iii) of Article 4).

This is because personal and family disputes are types of disputes that are particularly likely to conflict with the unique legal culture and public order of each State in the enforcement situation, as they are of public interest and guardianship in that they create or change status relationships and these results affect third parties other than the parties. In particular, it is considered inappropriate to grant enforcement powers on the basis of an agreement between the parties, as this is likely to conflict with the unique legal culture and public policy of each country in enforcement situations.

(d) Others

International settlement agreements that have been approved by courts of a foreign country or concluded in the course of proceedings before the Japanese courts or courts of a foreign country and that are enforceable in the State of that court (item (iv) of Article 4) and international settlement agreements that have the effect of an arbitral award and are enforceable (item (v) of Article 4) are excluded from application of the new Act, respectively.

4. Enforceability Order of International Settlement Agreement

(a) A petition for an enforceability order

A party that intends to process a civil enforcement based on an international settlement

agreement must file a petition with the court[6] for an enforceability order, indicating the obligor as the respondent (paragraph 1 of Article 5). The court must make an enforceability order, except when it dismisses the petition referred to finding grounds for refusing after the examination of the grounds (paragraph 11 of Article 5).

The reason for requiring enforceability order by the court is that it is considered appropriate to leave the question of whether or not there are grounds for refusing to the court in light of the contents of the settlement and the procedures leading to its conclusion, considering that the compulsory realization of the contents of the settlement is based on the action of the State authority.

Civil execution based on an international settlement agreement shall be carried out by an international settlement agreement for which an execution order has become final and binding (item (vi)-(iv) of Article 22 of the Civil Execution Act after amendment by the new Act) as a title of obligation.

(b) Procedural requirements for a petition

A petitioner must submit (i) a document prepared by the parties containing the content of the international settlement agreement (item (i) of paragraph 2 of Article 5) and (ii) a document prepared by the mediator or another person who prepares or preserves records or performs any other administrative work that certifies that the international settlement agreement resulted from mediation (item (ii) of paragraph 2 of Article 5).

If the documents containing the contents of the international settlement agreement is prepared in a foreign language, a Japanese translation shall be submitted, but if the court finds it appropriate, the submission of the translation may be omitted after hearing the opinion of the respondent (paragraph 4 of Article 5).

(c) Grounds for refusal of execution

Paragraph 12 of Article 5 provides the grounds on which the court may dismiss a petition for an execution order (grounds for refusal of execution) in accordance with the rules of the Convention. These grounds are a limitative list.

(i) Invalidation or annulment of international settlement agreements under substantive law

Item (i) of paragraph 12 of Article 5 provides that "the international settlement agreement is not valid due to the limitation on the legal capacity of a party" is a ground for refusal of execution. Also, item (ii) of paragraph 12 of Article 5 provides that "the international settlement agreement is not valid on grounds other than the limitation on the legal capacity of a party pursuant to the laws and regulations designated by the agreement of the parties as those which should be applied to the international settlement agreement (or if their designation has not

6) The district court determined by an agreement between the parties, the district court which has jurisdiction over the locality of the general venue of the respondent in the case, or the district court which has jurisdiction over the locality of the subject matter of the claim or the seizable property of the respondent have the exclusive jurisdiction. In addition, if the case related to petition for an enforceability order based on international settlement agreement in which the location of the general venue of the respondent or the location of the subject matter of the claim or the seizable property of the respondent is in Japan, the Tokyo District Court and the Osaka District Court also have the exclusive jurisdictions (paragraph 6 of Article 5).

been made, pursuant to the laws and regulations determined to be applicable to the international settlement agreement by the court)" is a ground for refusal of execution.

For example, a case in which an international settlement agreement made by a representative of a juridical person is declared invalid on the ground that the representative has no authority of representation falls under ground of the first item, and a case in which the declaration of intention of an international settlement agreement is rescinded on the ground of miscomprehension or fraud falls under ground of the second item.

(ii) Unspecified content of obligations under an international settlement agreement

Under item (iii) of paragraph 12 of Article 5, "the content of the obligations in the international settlement agreement cannot be specified" is listed as a ground for refusal of execution.

For example, the case where is a clause that one party shall compensate the other party for damages in an international settlement agreement, but the specific amount of compensation cannot be specified in light of the provisions of other clauses falls under this item.

(iii) Extinction of all obligations under an international settlement agreement

Under item (iv) of paragraph 12 of Article 5, "the obligations in the international settlement agreement have been extinguished in their entirety due to performance or any other reasons" is listed as a ground for refusal of execution.

For example, the case where the entire obligation based on an international settlement agreement has been paid, set off, or discharged falls under this item.

As is clear from the item, only partial performance of an obligation does not constitute grounds for refusal of execution.

(iv) Violation of laws, regulations, or rules by the mediator

Item (v) of paragraph 12 of Article 5, "the mediator has breached laws, regulations or any other rules applicable to the mediator or to the mediation implemented by the mediator pursuant to an agreement between the parties (limited to those unrelated to public order), and the fact constituting the breach is serious and affects the conclusion of the international settlement agreement" is listed as a ground for refusal of execution.

For example, the case where there has been a material breach by the mediator of the equal treatment or confidentiality obligations stipulated in the mediation implementation agreement, and it is found that there is a causal relationship that the parties would not have reached a settlement agreement but for such breach falls under this item.

(v) Breach of duty of disclosure by the mediator

Under item (vi) of paragraph 12 of Article 5, "the mediator failed to disclose to the parties a fact that may raise doubts as to the mediator's impartiality or independence, and the fact is serious and affects the conclusion of the international settlement agreement" is listed as a ground for refusal of execution.

For example, the case where the mediator has a personal or professional relationship with one of parties but fails to disclose these facts to others, and where the facts are material and there is a causal relationship that would have prevented the parties from reaching a settlement agreement had the facts been disclosed falls under this item.

(vi) Deficiency of settlement possibility

Under item (vii) of paragraph 12 of Article 5, "the subject matter of the international settlement agreement concerns a dispute which may not be subject to a settlement agreement pursuant to the provisions of Japanese laws and regulations" is listed as a ground for refusal of execution.

For example, a settlement that provides for the revocation of a resolution at a general meeting of shareholders or a settlement that provides that a patent right has no binding legal effectiveness as to third parties falls under this item.

(vii) Violation of public policy

Under item (viii) of paragraph 12 of Article 5, "a civil enforcement based on the international settlement agreement would be contrary to public policy in Japan" is listed as a ground for refusal of enforcement.

For example, the case where the international settlement agreement includes the payment of wagers for gambling, or where the mediator has concluded an international settlement agreement after accepting a bribe from a party falls under this item.

(d) Mandatory hearing and appeal

In order to ensure that the parties have sufficient opportunity to present their arguments, the court may not make a decision on the petition of the enforceability order without holding an oral argument or a hearing that both parties can attend (paragraph 13 of Article 5).

An immediate appeal may be filed against the petition of the enforceability order, within an unextendible period of two weeks from the day on which a notice of the decision was received (paragraph 14 of Article 5).

Ⅳ. Conclusion

We focused on the background of the enactment of the new Act and provide an overview of the new Act. The Singapore Convention on Mediation is the latest treaty and there are only 14 parties including Japan at this moment.[7] On the other hand, there are 172 parties to the New York Convention on Arbitration,[8] which is expected to be mutually utilized with international mediation. Therefore, it is hoped that the Convention will contribute to attracting foreign investment and the overseas expansion of Japanese companies by revitalizing international arbitration in Japan and enabling appropriate resolution of disputes.

At the same time, since Japan's the new Act published in English and it can be referred by foreign governments, we hope that Japan's legislation will serve as a model to assist in the formulation of domestic legislation in future contracting States with the Singapore Convention on Mediation.

7) Status: United Nations Convention on International Settlement Agreements Resulting from Mediation (https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status) (last visited April 30, 2024).

8) Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention") (https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2) (last visited April 30, 2024).

[Appendix]

Comparison chart regarding Article 1 to 8 of the Singapore Convention on Mediation

The Singapore Convention on Mediation	The new Act
Article 1. Scope of application	
1	Paragraph (3), Article 2
(a)	Item (ii), paragraph (3), Article 2
(b) (i), (ii)	Item (iii), paragraph (3), Article 2
2 (a)	Item (i), Article 4
(b)	Item (ii) and (iii), Article 4
3 (a)	Item (iv), Article 4
(b)	Item (v), Article 4
Article 2. Definitions	
1 (a)	Parentheses in items (ii), paragraph (3), Article 2
(b)	"address" in each item, paragraph (3), Article 2
2	Paragraph (3), Article 5
3	Paragraph (1) and (2), Article 2
Article 3. General principles	
1	Article 1
2	–
Article 4. Requirements for reliance on settlement agreements	
1	Paragraph (1) and (2), Article 5
(a)	Item (i), paragraph (2), Article 5
(b) (i)～(iv)	Item (ii), paragraph (2), Article 5
2 (a), (b) (i), (b) (ii)	Paragraph (3), Article 5
3	Paragraph (4), Article 5
4, 5	–
Article 5. Grounds for refusing to grant relief	
1	Paragraph (11) and (12), Article 5
(a)	Item (i), paragraph (12), Article 5
(b) (i)	Item (ii), paragraph (12), Article 5

The Singapore Convention on Mediation	The new Act
Article 5. (continued)	
(ii)	(Item (iii), paragraph (12), Article 5)
(iii)	(Item (iv), paragraph (12), Article 5)
(c) (i)	Item (iv), paragraph (12), Article 5
(ii)	Item (iii), paragraph (12), Article 5
(d)	–
(e)	Item (v), paragraph (12), Article 5
(f)	Item (vi), paragraph (12), Article 5
2	Paragraph (12), Article 5
(a)	Item (viii), paragraph (12), Article 5
(b)	Item (vii), paragraph (12), Article 5
Article 6. Parallel applications or claims	Paragraph (5), Article 5
Article 7. Other laws or treaties	–
Article 8. Reservations	
1 (a)	–
(b)	Article 3
2～5	–

ANDERSON MŌRI & TOMOTSUNE

Anderson Mori &Tomotsune is a full-service law firm formed by the merger and consolidation of the practices of three leading Japanese law firms: Anderson Mori, which established its reputation as one of the largest and most established international law firms in Japan since its inception in the early 1950s; Tomotsune & Kimura, particularly known for its expertise in international finance transactions; and Bingham Sakai Mimura Aizawa, a premier international insolvency/restructuring and crisis-management firm.

Anderson Mori & Tomotsune

Anderson Mori & Tomotsune

ANDERSON MŌRI & TOMOTSUNE

Tokyo / Osaka / Nagoya / Beijing / Shanghai / Hong Kong / Singapore
Hanoi / Ho Chi Minh City / Bangkok / Jakarta / London / Brussels
www.amt-law.com

Multi-Tiered Dispute Resolution Clauses: Effects of Non-Compliance with Pre-Action/Pre-Arbitration ADR Clauses*

Professor of Law, Keio University

Takanori Kawashima

Ⅰ. Introduction

The purpose of this article is to describe the current situation and future prospects of the enforceability of multi-tiered dispute resolution clauses, especially those of pre-action/pre-arbitration alternative dispute resolution ("ADR") clauses. In Japan, as shown below, this topic is one of the current issues that has come under discussion in recent years, and it has not been fully elucidated theoretically.

The term "pre-action/pre-arbitration ADR clauses" used in this article can be defined as an agreement that stipulates the optional or mandatory use of specified ADR (such as mediation or expert determination) prior to the use of litigation/arbitration as a means of dispute resolution when a dispute arises between parties. Although multi-tiered dispute resolution clauses often include the so-called good faith negotiation clause, its enforceability is outside of the scope of this short article.

Firstly, this article explains the current situation in Japan as to the enforceability of pre-action ADR clauses in litigation (refer to Section II.) and that of pre-arbitration ADR clauses in arbitration (refer to Section III.), and, secondly, it shows some perspectives for consideration with reference to domestic and foreign discussions that have been made (refer to Section IV.), and, finally, it describes future prospects on this topic (refer to Section V.). Although ADR clauses as dispute resolution clauses can be used in transnational trading as well as in domestic trading, to simplify the discussion here, this article does not deal with issues (such as choice-of-law issues) that are specific to the transnational context.

* This article is based on earlier studies that appeared in Takanori Kawashima, "A Study on the Enforceability of Pre-action ADR Clauses" (ADR前置合意の効力に関する一考察), Challenges of Modern Civil Procedure Law (Commemoration of Prof. Ichiro Kasuga's 70 Years of Age) (現代民事手続法の課題(春日偉知郎先生古稀祝賀)) (Shinzansha 2019) (in Japanese), pp. 719-748; Takanori Kawashima, "Enforceability of Pre-arbitral ADR Clauses in Arbitration", Keio Law Journal, No. 50 (2023) (in Japanese), pp. 81-110.

Ⅱ. Enforceability of Pre-action ADR Clauses

1. Current Situation in Japan

In Japan, it was only around 2010' that the enforceability of pre-action ADR clauses became a controversial issue. In a high court case[1] in which this issue was challenged, the high court reversed the first instance decision that held to dismiss the plaintiff's complaint filed without complying with the pre-action ADR clauses (the clauses could have been read that the parties stipulated the use of ADR as optional). In the judgment, the court describes the effect of the pre-action ADR clauses in the case as follows:

> "...regarding the effect of this provision [the pre-action ADR clauses in the case] in litigation, it is only an effort provision or an advisory provision, and it can only be seen as having a gentlemen's agreement meaning. (In passing, even if the provision were to have some procedural effect...the court in charge of the case should only be granted the power to stay court proceedings applying Article 26 of the ADR Act [Act on Promotion of Use of Alternative Dispute Resolution[2]] by analogy only when the prescribed requirements are met.)"

As you can see from the above, the position of the judgment seems to be somewhat ambivalent. The judgment describes that the pre-action ADR clauses has only the meaning of a gentlemen's agreement, while it also suggests that there is room for the court to enforce the clauses in litigation.

2. Some Discussion

Looking at some discussion on the judgment above, not a few commentators are against the said judgment in that it generally denied legal effects in court proceedings. Although there are various remarks, some of them are as follows: (1) it is contrary not only to the intention of the parties who agreed on such clauses, but also to the social demands to promote alternative dispute resolution; (2) it goes against the recent global trends of giving the clauses some legal effects; (3) it is inconsistent with the conventional understanding that even an agreement in which completely excluding the use of the court (e.g., an arbitration agreement, an agreement not to sue) has some effect in court proceedings; and (4) the suggestion by the said judgment that the court would have the power to stay court proceedings applying Article

1) The judgment of the Tokyo High Court (June 22, 2011), 2116 *Hanrei Jiho* 64.

2) Act No. 151 of December 1, 2004. An English translation is available on the website [https://www.japaneselawtranslation.go.jp/ja/laws/view/3774]. Article 26 (1) of the Act provides as follows:

> "Where a lawsuit is pending between the parties to a civil dispute which may be settled, the court in charge of the case may, upon the joint request of the parties to the dispute, make a decision that the litigation proceedings may be suspended for a period of not more than four months, in any of the following cases: (i) a certified dispute resolution procedure [it refers to private dispute resolution procedures to be carried out as the services certified by the Minister of Justice under Article 5 of the Act] is being carried out for the dispute between the parties to the dispute; or (ii) in addition to the case prescribed in the preceding item, the parties to the dispute have reached an agreement to achieve a resolution of the dispute through certified dispute resolution."

26 of the ADR Act by analogy would be impractical in that it requires the joint request of the very persons in conflict over the use of the court proceedings[3].

Ⅲ. Enforceability of Pre-arbitration ADR Clauses

1. Current Situation in Japan

In Japan, in contrast to pre-action ADR clauses, the enforceability of pre-arbitration ADR clauses has not been thoroughly discussed in Japan yet. It can be said that discussion on pre-action ADR clauses and those on pre-arbitration ADR clauses have not been distinguished consciously in Japan, and that the latter seems to have been considered as nothing more than an analogy of the former. As far as court cases that appeared in law reports are concerned, no precedents on this issue can be found.

2. Some Discussion

Looking overseas, we can see that there are some rulings and related discussion on this issue[4]. The case often quoted is *Vekoma v. Maran*[5]. One of the issues in the case was whether or not the petitioner (Maran) filed its request for arbitration in breach of the pre-arbitration clause setting a time limit for arbitration. The clause provided, "The said difference or dispute shall [be] so referred by either party within thirty days after it was agreed that the difference or dispute cannot be resolved by negotiation". The petitioner alleged that in the case the trigger date was to be April 13, 1992, and therefore the request for arbitration of May 11, 1992, was within the contractual limitation period, while the respondent (Vekoma) alleged that the trigger date was to be January 17, 1992, and therefore the request was past the date. In an award dated August 22, 1994, the arbitral tribunal (the ICC Tribunal) found in favour of the petitioner, and required the respondent to pay some USD 650,000. After the petition for setting aside the award was filed by Vekoma, the Federal Supreme Court of

3) For details, refer to Takanori Kawashima, "A Study on the Enforceability of Pre-action ADR Clauses" (ADR前置合意の効力に関する一考察), Challenges of Modern Civil Procedure Law (Commemoration of Prof. Ichiro Kasuga's 70 Years of Age) (現代民事手続法の課題(春日偉知郎先生古稀祝賀)) (Shinzansha 2019) (in Japanese), pp. 727-730.

4) For example, refer to Jan Paulsson, "Jurisdiction and Admissibility" in Gerald Aksen et al. (eds), Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner (ICC Publishing 2005), p. 601, (reprinted in University of Miami Legal Studies Research Paper No. 2010-30); Gary Born and Marija Šćekić, "Pre-Arbitration Procedural Requirements: 'A Dismal Swamp'", in David D. Caron et al. (eds), Practising Virtue: Inside International Arbitration (OUP 2015), Ch. 14; Ewelina Kajkowska, Enforceability of Multi-Tiered Dispute Resolution Clauses (Hart Publishing 2017), Ch. 4; and Hamish Lal, Brendan Casey, Josephine Kaiding, and Léa Defranchi, "Multi-Tiered Dispute Resolution Clauses in International Arbitration – The Need for Coherence", 38 ASA Bulletin 4 (2020) 796.

5) *Transport- en Handelsmaatschappij "Vekoma" B.V., Rotterdam (NL) v. Maran Coal Corporation, New York (USA)*, Switzerland, Bundesgericht, I. Zivilabteilung, 17 August 1995, 14 ASA Bulletin (1996) 673. For the outline of the case and some remarks, for example, refer to Paul D. Friedland, "The Swiss Supreme Court Set Aside an ICC Award", 13 Journal of International Arbitration (1996) 111; and Pierre A. Karrer and Claudia Kälin-Nauer, "Is there a Favor Iurisdictions Arbitri?, Standards of Reviews of Arbitral Jurisdiction Decisions in Switzerland", 13 Journal of International Arbitration (1996) 31.

Switzerland examined whether or not the jurisdiction of the court of arbitration can be confirmed on the facts established by the arbitral tribunal, and set aside the ICC award because of the lack of the jurisdiction of the arbitral tribunal.

Against the ruling by the Supreme Court above, there has been some criticisms as follows[6] : (1) it is re-deciding factual issues established by the arbitral tribunal, and it is contrary to the legislation designed to render arbitration independent of judicial courts; (2) it could lead to different decisions about closely related facts: the facts for the purposes of the question of arbitral jurisdiction and the facts for the purposes of the decision on the merits; and (3) the challenged arbitral decision in the case was as to admissibility of the claim, not as to the jurisdiction of the arbitral tribunal, and therefore judicial courts were not entitled to review in this regard, nevertheless, the Supreme Court misunderstood the nature of the challenged arbitral decision.

Ⅳ. Consideration

1. Perspective for Consideration

As we have seen, in Japan, the issue of enforceability of pre-action/pre-arbitration ADR clauses remains an ongoing issue. Although it can be said that there is no unified view either nationally or internationally, an overview of some theoretical frameworks seen in domestic and foreign discussions would be helpful for further discussion.

2. Substantive Agreement and Procedural Agreement

One perspective in discussing the enforceability of dispute resolution clauses is whether or not the agreement is substantive or procedural. In Japan, this perspective has long played an important role especially in considering the legal effects of an agreement not to sue (pactum de non petendo). There has been a conflict between two different views.

The first, the so-called "substantive contract theory", is the view that an agreement not to sue imposes a substantive obligation not to sue on both parties. According to this theory, although it does not give rise to any procedural effects directly, the pending lawsuit brought for breach of the agreement not to sue comes to lack legal interest (*rechtsschutzinteresse*) or the need for legal relief (*rechtsschutzbedürfnis*) when the existence of the agreement is asserted and established by the respondent in the lawsuit. As a result, the pending case is dismissed. The precedent in Japan appears to take this view. In a Supreme Court case[7], where the enforceability of the agreement of withdrawing the complaint was at issue, the Supreme Court ruled that the pending lawsuit filed without complying with the agreement should be dismissed for the reason of lacking legal interest.

The second, the so-called "procedural contract theory", is the view that an agreement not to sue has directly a procedural effect of excluding the jurisdiction of the judicial courts (in

6) For example, refer to Friedland, *supra* note (5), p. 115, Karrer and Kälin-Nauer, *supra* note (5), p. 36, and Paulsson, *supra* note (4), p. 602.

7) The judgment of the Supreme Court of Japan (October 17, 1969), 23 *Minshu* (10) 1825.

addition, some argue for an effect imposing a procedural duty not to sue on both parties). According to this theory, a lawsuit filed without complying with an agreement not to sue is dismissed by the court for lack of the jurisdiction of judicial courts when the existence of the agreement is asserted and established by the respondent. In contrast to the precedent above, not a few procedural jurists have taken this view.

If taking the pre-action ADR clauses as a type of an agreement not to sue (until the pre-action ADR process has been exhausted in accordance with the agreement), one possible approach would be to consider the legal effects of the ADR clauses by analogy of the discussions of the agreement not to sue. However, it should be noted that dismissing a lawsuit as a result of non-compliance with pre-action ADR clauses could impose an excessive burden on a plaintiff to file a lawsuit again when an ADR process fails despite attempts to settle a dispute. Therefore, if this approach is adopted, it would be necessary to consider reasonable means in place of dismissal of a lawsuit, such as stay of court proceedings.

3. Jurisdiction and Admissibility

Another perspective in discussing the enforceability of dispute resolution clauses is whether or not the agreement is as to the jurisdiction or as to admissibility. Although this perspective may not be very well known in Japan, it can often be seen in the context of international investment arbitration as well as commercial arbitration. In general, the term "jurisdiction theory" can be defined as the view that the pre-arbitration ADR clauses are as to the jurisdiction of the arbitral tribunal, and the term "admissibility theory" can be defined as the view that the pre-arbitration ADR clauses are as to the admissibility of the claim.

According to the jurisdiction theory, non-compliance with pre-arbitration ADR clauses excludes the jurisdiction of the arbitral tribunal. Under this theory, when an award was rendered despite failure to exhaust contractual ADR process, the award can be set aside by judicial courts for lack of the jurisdiction of the arbitral tribunal. In the case of *Vekoma v. Maran* quoted above, it appears that the Federal Supreme Court of Switzerland took this view.

On the other hand, according to the admissibility theory, non-compliance with the pre-arbitration clauses does not affect the jurisdiction of the arbitral tribunal, but affects the admissibility of the claim. Under this theory, when a case is brought for breach of the pre-arbitration ADR, the arbitral tribunal can dismiss the claim (or stay the proceedings) for lack of the admissibility. In other words, a decision by an arbitral tribunal on whether or not to comply with the pre-arbitration ADR is final, and in principle it cannot be re-examined by judicial courts in challenge or enforcement proceedings (except where there are other grounds for it being void or unenforceable).

According to one recent study with comparative analysis between the two theories, it was observed that the admissibility theory is superior to the jurisdiction theory in the following respects[8]: (1) the jurisdiction theory creates the potential for negative jurisdiction conflict because both adjudicative bodies (an arbitral tribunal and a judicial court) may legitimately

8) Refer to Kajkowska, *supra* note (4), p. 161, pp. 174ff.

refuse to hear the case under the theory; (2) the jurisdiction theory unbalances the position of both parties in that it allows the claimant to render the whole arbitration clause inoperative by the failure to adhere to the ADR process agreed in the contract; and (3) under the jurisdiction theory, the court would be entitled to revise the arbitrators' findings on whether or not the ADR process was performed in compliance with the contract and declare the award void and unenforceable, but this unnecessarily widens the scope of the court supervision of arbitration and undermines the notion of the finality of an arbitration award.

Recently, the admissibility theory appears to be gaining ground in several jurisdictions, such as France, Germany, and Hong Kong[9]. The position of the courts in Japan on this issue has been unclear.

It can be said that whether pre-arbitration ADR clauses are as to jurisdiction or as to admissibility is, in principle, determined by the intention of the contract parties in individual cases. Given this, the question here would be which should be the "default" (in a case where there is no explicit provision in the clauses). In terms of the superiority of the admissibility theory to the jurisdiction theory and the recent global trends as mentioned above, it would be reasonable to presume that pre-arbitration ADR clauses are as to admissibility, unless otherwise provided[10].

Ⅴ. Closing Remarks

This article is only a rough sketch of the current situation in Japan on this topic. At this stage, it is not easy to describe future prospects specifically. However, as a rough perspective, the following can be stated.

Firstly, the issue of enforceability of pre-action/pre-arbitration ADR clauses remains an ongoing issue, and there has been no well-established theory. Discussions on this topic are expected to continue.

Secondly, regarding pre-action ADR clauses, there have been only a small number of cases in which the effect of "optional" pre-action ADR clauses was at issue, and there have been no reported cases in which the effect of "mandatory" pre-action ADR clauses was at issue. The fact that courts in Japan have relied on "substantive contract theory" with regard to an agreement not to sue makes it likely that they will rely on the same theory with regard to "mandatory" pre-action ADR clauses as well, taking the clauses as a type of an agreement not to sue (until the pre-action ADR process has been exhausted in accordance with the

9) Regarding some cases in France and Germany, refer to Kajkowska, *supra* note (4), p. 170. Regarding a case in Hongkong, refer to Yan SUN, "Multi-tier Dispute Resolution Clauses", JCA Journal, vol. 70, No. 2 (2023) (in Japanese), pp. 28-29.

10) In this regard, it is suggestive that Born and Šćekić, *supra* note (4), at p. 259 state as follows: "Ultimately, the proper analysis is one of interpreting the parties' intentions, with the presumptive rule being that parties intend compliance with pre-arbitration procedures to be for arbitral, not judicial, determination: absent very clear and unequivocal language requiring a contrary result, questions of compliance with contractual procedural requirements should be submitted to the arbitrators, subject to only the generally deferential standard of judicial review applicable to other decisions by the arbitral tribunal."

agreement). However, unlike an agreement not to sue, there would be room to consider that the clauses have the effect of staying the proceedings rather than dismissing the plaintiff's complaint.

Thirdly, regarding pre-arbitration ADR clauses, there appears to have been no reported cases in Japan in which the effect of pre-arbitration ADR clauses in the arbitration procedure commenced in breach of the agreement was at issue. Although it remains unclear how the courts in Japan deal with a decision by an arbitral tribunal on whether or not to comply with the clauses, if drawing an analogy from the precedent on an agreement not to sue or the discussion on pre-action ADR clauses, one possible approach would be that when a case is submitted to arbitration without complying with the clauses, an arbitral tribunal can dismiss the claim (or stay the proceedings) due to a lack of maturity of dispute, that is, a type of admissibility. As a consequence of considering the clauses as to a type of admissibility (not as to jurisdiction), a decision by an arbitral tribunal on whether or not to comply with the clauses would be considered final, and in general it cannot be re-examined by judicial courts in challenge or enforcement proceedings (except where there are other grounds for it being void or unenforceable).

At this stage where there is no unified view on what we call multi-tiered dispute resolution clauses including pre-action/pre-arbitration ADR clauses, it would be desirable for contracting parties to clearly stipulate their intention and the effect of these clauses in a contract. Moreover, it is hoped that international standard rules will be established and shared both domestically and internationally[11].

11) Lal et al., *supra* note (4), at p. 819 suggest, as an example of the amendment of an international rule on arbitration, that Rule 28 [Jurisdiction of the Tribunal] of SIAC Rules 2016 could be amended as follows:

"28.2 The Tribunal shall have the power to rule on its own jurisdiction, including any objections or procedural issues with respect to the existence, validity or scope of the arbitration agreement and pre-arbitral steps (if any) and shall have the power to stay the arbitration pending compliance or completion with pre-arbitral steps (if any) or allow the arbitration to proceed concurrently with compliance or completion with pre-arbitral steps (if any). An arbitration agreement which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the Tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration agreement, and the Tribunal shall not cease to have jurisdiction by reason of any allegation that the contract is non-existent or null and void. [Possible amendments shown in underline]"

SHIMADA HAMBA & OSAJIMA

Building on a foundation of trust.
We deliver the highest quality legal services.

In this rapidly changing business and social environment, the field of corporate legal services is constantly evolving.
We stand with our clients at the forefront, leveraging our extensive litigation experience and deep knowledge of corporate law to deliver flexible legal solutions tailored to the needs of clients across a diverse range of industries.

Representative Attorney
Kunio Shimada
(DAI-ICHI TOKYO BAR ASSOCIATION)

West 18th Floor, Otemachi 1st Square 1-5-1 Otemachi, Chiyoda-ku, Tokyo 100-0004, Japan
TEL: +81-3-3217-5100 FAX: +81-3-3217-5101
E-mail:info@shimada-law.jp http://www.shimada-law.jp

Due Process in Arbitration - How to Mitigate Due Process Paranoia?

Professor of law, Nagoya University

Miyuki Watanabe*

Ⅰ. Introduction

Due process in arbitration is a concept that encompasses a basic guarantee of a wide variety of procedural fairness and is the basis for the legitimacy of a final and binding effect of an arbitral award. This is suggested by the fact that a failure of observing due process requirements is a ground for the setting aside of an arbitral award. However, the said concept is abstract. Therefore, it may be used strategically or abusively as a tool to attack an arbitral award by a complaining party.

Due process paranoia, which has become a buzz phrase in recent years,[1] means that arbitral tribunals are anxious or paranoid that they will be criticized later on by the courts for breach of due process,[2] thereby leading to their defensive procedural decision-making. This suggests that the understanding of arbitral tribunals and the courts of what constitutes due process (natural justice / procedural guarantees) in arbitration is not necessarily the same. To make arbitration an effective dispute resolution procedure, it is necessary to mitigate paranoia and ensure that arbitral tribunals and courts share a common understanding of how due process in arbitration should be appreciated and how arbitral awards should be reviewed in light thereof. In this regard, the judicial review of arbitral awards from the same perspective as civil litigation in the courts is particularly problematic.

This article will (1) examine how due process in arbitration is viewed from the perspective of arbitration law, (2) discuss procedural management by the arbitral tribunal of the arbitration process and the guarantee of the parties' opportunity to present their case, (3)

＊ This article is based on my presentation at the Symposium "Due Process in Arbitration" at the 19th Annual Conference of the Japan Association of the Law of Arbitration and ADR held on July 9, 2023. *See Symposium "Due Process in Arbitration"*, Journal of Japanese Arbitration and ADR, Vol.19 (2024), 68-73.

1) *See* Queen Mary University of London, White & Case, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, 10, Franco Ferrari, Friedrich Rosenfeld, Dietmar Czernich, *Due Process as a Limit to Discretion in International Commercial Arbitration*, Kluwer, 2020, 2 and 259 (Koji Takahashi).

2) Koji Takahashi, 日本法から見た「適正手続パラノイア（due process paranoia）」—判例の検討と処方箋— (*"Due process paranoia" from the viewpoint of Japanese law: a review and prescription of precedents*), JCA Journal, Vol. 66, No. 8 (2019), 13.

discuss the role of the courts with respect to due process in arbitration, and (4) attempt to provide a perspective on due process in arbitration. Although due process involves all phases of the proceedings,[3] this article will mainly focus on the guarantee of the parties' opportunity to present their case, which is discussed in relation to due process paranoia.

Ⅱ. Due Process in Arbitration

1. Why Due Process is Required in Arbitration

Let us consider why due process is required for arbitration in the first place. Arbitration is a private dispute resolution system based on the parties' agreement to arbitrate. The authority of the arbitral tribunal is based on the parties' agreement to arbitrate, not the state's power of the place of arbitration. On the other hand, the concept of due process originally developed as a defensive right against the exercise of state authority, guarantees a fair and proper proceeding to a private person,[4] and is part of the constitutional protections afforded to individuals. It might then seem at first glance that due process is not relevant to arbitration because arbitration is not an exercise of state authority and thus parties do not need protection against it. However, arbitration is recognized as one of the legal systems of the state and has an aspect that limits or replaces the jurisdiction of the state. This can be seen in the fact that an arbitration agreement can be an obstructive legal defense (Article 14(1) of the Japanese Arbitration Act[5] [hereinafter, the "Arbitration Act"]) and hence, an obstacle to access to the courts, and an arbitral award has the same final and binding effect on the rights and obligations of the parties as a final judgment.[6] It can be said that the power of the state courts is delegated to arbitral tribunals as an alternative to the procedure in the courts of realizing substantive rights through the agreement of the parties, which is a type of trade-off with the quality of the arbitration.[7]

As a means of dispute resolution equivalent to litigation, an arbitral tribunal should issue an enforceable arbitral award. For that reason, arbitral proceedings must meet certain qualitative standards. Such minimum qualitative standards are the due process requirements. They are the basic procedural safeguards that ensure the fairness of the proceedings by which the parties' substantive rights are determined. Therefore, due process is also an essential requirement for arbitration proceedings based on the parties' agreement. In other words, each party being given adequate notice and a fair opportunity to present its case before a

3) Matti S. Kurkela and Santtu Turunen, *Due Process in International Arbitration* 2nd, Oxford University Press, 2020, 1-2.

4) The source of the "due process of law" concept is said to be the Magna Carta (1215) in England, which subsequently became an important constitutional constraint on the legislative power in the United States as respect for fundamental human rights (Fifth and Fourteenth Amendments to the United States Constitution). The concept has undergone historical transition; *see* John V. Ohth, *Due Process of Law*, University Press of Kansas, 2003, 5-14; Hideo Tanaka, デュー・プロセス (*Due Process*) (University of Tokyo Press, 1987), 8 et seq, 284 et seq.

5) Act No. 138 of 2003.

6) *See* Article 45(1)1 of the Arbitration Act.

7) Kurkela/Turunen, *supra* n. 3, 1-2.

neutral and impartial arbitral tribunal is the minimum basic condition necessary to recognize arbitration as a legal system that is at par with the courts and to justify the binding effect of arbitral awards on the treatment of the substantive rights of the parties; procedural guarantees are also essential to the parties' acceptance of the outcome of the arbitration.[8)]

2. Characteristics of Arbitration Procedures Compared to Civil Litigation

In arbitration, the parties' agreement governs many aspects thereof, including the selection of arbitrators, the arbitration agreement, procedural rules, and substantive dispute resolution standards. It differs from civil litigation in that arbitral tribunals are set up for each case and the procedure is only for the first instance, although the arbitral award has the same final and binding effect as a final judgment. In addition, the parties bear the costs of the proceedings, including the arbitrators' fees. Therefore, the parties will have an interest in a reasonably expeditious process.

Furthermore, arbitration is characterized by its borderless and international nature. Since arbitration is based on the agreement of the parties, it does not definitively rely on specific national laws. The arbitration laws of each country also have certain commonalities by virtue of the New York Convention[9)] and the UNCITRAL Model Law on International Commercial Arbitration (hereinafter, the "Model Law.").[10)] As is well known, the Arbitration Act is also based on the Model Law. One of the reasons why arbitration is used as a means of resolving international business disputes is that it is easy to enforce arbitral awards across borders by using the New York Convention. International arbitration is especially unique in that it targets disputes that arise in a world where different cultures and values are bound together solely through contracts, and the parties, attorneys and arbitrators can have diverse backgrounds, so it is not based on the laws or legal culture of a particular country.

With respect to procedural rules (Article 26 of the Arbitration Act), they are determined by agreement of the parties unless they are contrary to mandatory provisions of law, in which case they would be determined at the discretion of the arbitral tribunal. They can also be subject to the rules of an arbitral institution specified by the agreement of the parties, as it has been expressed that, "unlike litigation, which prohibits the parties from establishing a procedure for convenience, arbitration has its uniqueness and advantage in that the procedure can be designed and administered by the agreement of the parties."[11)] The Arbitration Act does not generally have detailed procedural provisions like the Code of Civil Procedure, but instead it has only very simple provisions.[12)] The formality of the arbitration procedure is relaxed, and the procedure is more flexible.

---

8) Yasuhei Taniguchi, 手続的正義 (*Procedural Justice*), in *ibid*., 民事訴訟法の基礎理論 I (*Basic Theory of Civil Procedural Law I*) (Shinzansha, 2013 [first published in 1983]), 228.

9) Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). The purpose of the New York Convention is to unify the standards for the recognition and enforcement of arbitral awards among member countries. Japan ratified it in 1961.

10) Adopted in 1985, amended in 2006. The purpose is to assist countries in revising and modernizing their national arbitration laws, taking into account the characteristics and needs of international commercial arbitration.

11) Yasuhei Taniguchi and Isomi Suzuki (eds.), 国際商事仲裁の法と実務 (*Law and Practice of International Commercial Arbitration*) (Maruzen Yushodo, 2016), 191 [Naoki Idei].

Considering the above features, it can be said that in arbitration, the parties are expected to take action to influence the arbitrator's decision, and the arbitral tribunal dynamically shapes the proceedings on the basis of the grunts of assent and the cries of protestation from the parties during the course of the proceedings.[13)]

3. Is there a Clear Definition of Due Process in Arbitration?

In view of the unique characteristics of arbitration, due process in arbitration should also be understood without limiting it to specific state laws. So, is it possible to define due process in arbitration concretely?

There are no provisions that clearly define due process in arbitration internationally. National arbitration laws also do not provide a clear basis of the definition, and as each law can be interpreted in a variety of ways, there is a great deal of room for parties to decide this matter by agreement. Arbitrators also have much procedural discretion. Indirectly, the minimum standards of due process required for arbitral proceedings are suggested by the limited number of grounds on which an arbitral award may be set aside or refused enforcement. However, such standards also vary from country to country and are not clear-cut. It is thus difficult to say that due process in arbitration is specifically defined by citing a specific legal basis.[14)] In addition, in dynamically formed arbitration proceedings, procedural guarantees must also be determined according to the context of each case, thus a formal definition seems inappropriate.

Even though it is difficult to specifically define what constitutes due process in arbitration,[15)] it is possible to confirm how the parties are systematically ensured the opportunity to present their case in the arbitration proceedings and to provide a perspective for courts to determine whether due process requirements have been complied with in their review of an arbitral award.

Ⅲ. Management of Arbitral Tribunal Proceedings and Guarantee of Opportunity for Parties to Present Their Case

1. Management of Arbitral Tribunal Proceedings

In arbitration, it is possible for an arbitral tribunal to decide the case *ex aequo et bono* depending on the agreement of the parties. However, basically, as in litigation, legal disputes in arbitration are to be resolved based on the facts and the law, and not sociological or psychological bases. Since parties enter into an arbitration agreement seeking an effective dispute resolution based on the characteristics of arbitration as described above, arbitrators

12) *See*, e.g., Articles 25 (Equal Treatment of Parties), 26 (Rules of Arbitration Procedure), 27 (Waiver of Right of Objection), 31 (Time Limit of Statements by the Parties), and 32 (Proceedings) of the Arbitration Act.

13) *See* the Singapole court decision mentioned below.

14) Kurkera/Turunen, *supra* n. 3, 3 et seq.

15) Takeshi Kojima and Takashi Inomata, 仲裁法 (*Arbitration Law*) (Nihon Hyoronsha, 2014), 506 et seq, argue that it is best to avoid imposing uniform formal restrictions on procedural guarantees in arbitration, and the institutional framework of arbitration is such that arbitrators can make an arbitral award in a flexible manner as long as the basic issues are clear between the parties in the form of a request for arbitration and a response thereto.

are required to prepare an arbitral award that is enforceable or that cannot be refused recognition and enforcement. This means that an arbitral award must meet the procedural requirements of the law of the place of arbitration and/or the New York Convention.[16] The core elements of the procedural requirements are the equal treatment of the parties and the granting to them of a fair opportunity to prepare and present their case.

Arbitrators should conduct the arbitral proceedings with a view of making an enforceable arbitral award. In addition, with the aim of administering the proceedings in a reasonable, efficient, and fair manner, arbitrators will exercise discretion as to whether to allow additional time, such as setting a time limit or restricting the making of untimely statements, while taking into consideration the request for the observation of due process requirements by the parties (Articles 26(2) and 31 of the Arbitration Act). If a party becomes aware of a violation by the arbitral tribunal of the procedural rules, then it shall be deemed to have waived its right to object if it does not object in a timely manner (Article 27 of the Arbitration Act).

In exercising the arbitral tribunal's procedural discretion, certain constraints are imposed by due process requirements on the parties.[17] For example, the question often arises whether strict time limits can be said to have guaranteed a reasonable opportunity for the parties to present their case. In addition, soft law, such as the IBA Guidelines on the Administration of Arbitral Tribunal Proceedings, may serve as a reference for the exercise by the arbitral tribunal of its discretionary powers.

2. Guarantee of Opportunity to Present One's Case

Regarding the extent to which parties are guaranteed the opportunity to prove their claims, Article 18 of the Model Law[18] uses the word "full." This, however, is not intended to give the parties unlimited opportunities as they wish. It is understood that due process should be balanced with efficiency and expediency and does not give parties the right to obstruct or delay the process.[19] Article 25 of the Arbitration Act, which follows Article 18 of the Model Law, used the word "sufficient"[20] to make it clear that it is not intended to allow parties to freely file their submissions without any limit. This is likewise considered to mean "reasonable." The reason why parties should be given a sufficient opportunity to present their case is to allow them to provide the information necessary for the arbitrators to make a proper arbitral award and thereby control the outcome of the arbitral award, and that if more

16) Martin Platte, *An Arbitrator's Duty to Render Enforceable Awards*, Journal of International Arbitration 20 (3), 312-313.

17) *See* Ferrari/Rosenfeld/ Czernich, *supra* n. 1, 2 et seq.

18) Article 18 of the Model Law states that: "*The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.*" This provision is called the Magna Carta of arbitration proceedings and is interpreted as a mandatory provision. Even in countries that do not conform to the Model Law, equal treatment and the guarantee of the right to a fair opportunity to prepare and present one's case are often provided for.

19) Gilles Cuniberti, *The UNCITRAL Model Law on International Commercial Arbitration*, 2022, 301-302.

20) The Japanese Law Translation DB system provided by the Ministry of Justice translates Article 25 of the Arbitration Act into English using the word 'full' as in the Model Law, instead of providing a direct translation of the Japanese text. *See* https://www.japaneselawtranslation.go.jp/ja/laws/view/2784/je#je_ch5at1.

information is to be provided that would not affect the arbitrators' decision, then the speed of the proceedings should instead be given priority. It has also been opined that priority should be given to the expeditiousness of the proceedings if no further information is to be provided that will affect the arbitrator's decision.[21)]

In 2020, a Singapore court decision (*China Machine New Energy Corporation v. Jaguar Energy Guatemala LLC, et al.*[22)]) made a suggestive determination on the issue of due process paranoia. It indicated that the "full" opportunity of presenting one's case in Article 18 of the Model Law was not intended to entitle a party to obstruct or delay the proceedings, and concerns of due process must be balanced against concerns for efficiency and expediency.[23)] Therefore, the party's right to be heard is *impliedly* limited by considerations of reasonableness and fairness.[24)]

To reasonably guarantee to the parties the opportunity to present their case, it is important that the arbitral tribunal and the parties have a common understanding of the issues in dispute and the progress of the proceedings. Parties are also expected to be actively involved in the exercise of such opportunity.

Ⅳ. The Setting Aside of an Arbitral Award and Due Process

1. Interpretation of a Breach of Due Process

Should the Arbitration Act be interpreted from the same perspective as the Code of Civil Procedure? No, it should not be interpreted from the same perspective as the Code of Civil Procedure because the Arbitration Act did not take over the provisions of Article 1 of the former arbitration law,[25)] which allowed the provisions of the Code of Civil Procedure to apply *mutatis mutandis*. Also, the law applicable to arbitration proceedings is the Arbitration Act and not the Code of Civil Procedure (see Article 4 of the Arbitration Act). The parties have also chosen arbitration instead of litigation in light of the characteristics of arbitration.

The decision of the Tokyo High Court on August 1, 2018[26)] (hereinafter, the "2018 Decision")

21) Kojima/Inomata, *supra* n. 15, 307.

22) [2020] 1 SLR 695/ [2020] SGCA 12. In a dispute concerning the construction of a power plant in Guatemala, the claimant (CMNC) requested the set aside of the arbitral award, claiming that it was not given a reasonable opportunity to present its case and that the arbitral tribunal did not treat the parties equally. In the arbitration proceedings, there was an agreement to end the complex dispute in a short period of time and an agreement on a specific timeline, but the claimant showed an attitude of trying to stall the proceedings and did not challenge the arbitral tribunal during the arbitration proceedings on the grounds asserted in the set aside proceedings.

23) [2020] 1 SLR 695, [95].

24) *Ibid*., [98].

25) Article 1 of the Act on Public Notice and Demand Procedure and Arbitration Procedure (Act No. 29 of 1890): *"Except as otherwise provided, the provisions of the laws and regulations concerning civil litigation shall apply mutatis mutandis to arbitration proceedings to the extent that they are not inconsistent with the nature thereof."*

26) 判例時報 (Hanrei Jiho) Vol. 2415, 24. In this case, one party to a patent cross-license agreement (the agreement in question) filed a petition for arbitration with the Japan Commercial Arbitration Association against the other party, claiming that the other party had not performed a part of the agreement and demanded the return of royalties already paid.

clearly denies the application directly or *mutatis mutandis* of the Code of Civil Procedure. The original decision of the Tokyo District Court set aside most of the arbitral award on the ground that the failure to make a ruling on some of the wording of the contract at issue in the case constituted grounds for review as prescribed in Article 338(1)(ix) of the Code of Civil Procedure as an omission of the decision on a material matter that should affect the award as well as a breach of public order as set forth in Article 44(1)(viii) of the Arbitration Act. However, the Tokyo High Court set aside the original decision and ruled as follows:

- The standard for determining whether there has been a breach of the law governing the arbitration proceedings is not the Code of Civil Procedure, but the Arbitration Act and the procedural rules established by the agreement of the parties under Article 26 of the Arbitration Act (in this case, the JCAA Rules). The fact that the arbitral proceedings violated the Code of Civil Procedure of the place of arbitration does not by itself constitute a violation of the Arbitration Act (Article 44(1)(vi) thereof). This is because the Code of Civil Procedure is neither applicable directly nor *mutatis mutandis* to arbitral proceedings conducted by an arbitral tribunal.
- Even if there is an arbitral proceeding or an arbitral award that violates the traditional *Streitgegenstand* (subject matter of the litigation) theory (旧訴訟物理論) or *Verhandlungsmaxime* (party presentation principle) (弁論主義) in Japanese civil litigation practice, the arbitral award cannot be set aside on that ground.
- The standard of interpretation of these provisions of the Arbitration Act [Articles 25, 44, and 45] is not the precise interpretative theory of the Code of Civil Procedure, but the international standard of basic principles to be observed in civil dispute settlement procedures, such as arbitration. The international standard for these basic principles ultimately boils down to whether the provisions of Article 25 of the Arbitration Act have been substantially guaranteed. The determination of whether there was such substantial guarantee is left to the wisdom and good sense of jurists and not to the elaborate interpretation of domestic civil procedural law in the seat of arbitration.

2. Court Review at the Hearing for the Setting Aside of an Arbitral Award

In the decision of the court in setting aside an arbitral award, the legitimacy of the arbitration lies in the procedure itself, which must be fairly conducted by the parties and the arbitrators, and the aspect of self-responsibility of the parties in appointing the arbitrators and proactively shaping the arbitral procedure should be emphasized.[27)]

In this regard, the aforementioned Singapore decision is suggestive and ruled as follows:

- In determining whether a party had been denied his right to a fair hearing by the arbitral tribunal's conduct of the proceedings, the proper approach that a court should take is to ask itself if what the arbitral tribunal did (or decided not to do) falls within the range of what a

27) *See* Taniguchi/Suzuki (ed.), *supra* n.10, 27-28 [Taniguchi].

reasonable and fair-minded arbitral tribunal in those circumstances might have done. This inquiry will necessarily be a fact-sensitive one, and much will depend on the precise circumstances of each case.[28] The arbitral tribunal's conduct and decision should only be assessed *by reference to what was known to the arbitral tribunal at the material time*.[29]

- The nature of the arbitral process is inevitably a dynamic one. Timelines may be short; arrangements may need to be made well ahead of time to accommodate multiple schedules; and each party has an interest in a reasonably expeditious process. In these circumstances, the contours of what constitutes a fair and proper procedure cannot be found in any one rulebook, but will be shaped by the grunts of assent and the cries of protestation from the parties during the course of the proceedings. The fairness of that procedure can only be judged against what the parties themselves may be taken as having agreed to and expected, and *by what they contemporaneously communicated to the arbitral tribunal*.[30]
- In practical terms, what this means is that the alleged unfairness upon which the complaining party seeks to base its claim of breach of natural justice must have been brought to the attention of the arbitral tribunal.[31]
- The court should accord a margin of deference to the arbitral tribunal in its exercise of procedural discretion. Deference is accorded in recognition of the fact that (i) the arbitral tribunal possesses a wide discretion to determine the arbitral procedure, and (ii) that such discretion is exercised within a highly specific and fact-intensive contextual milieu, the finer points of which the court may not be privy to. It has therefore been said that the court ought not to micromanage the arbitral tribunal's procedural decision-making, and instead give "substantial deference" to the procedural decisions of the arbitral tribunal. This means that the court will not intervene simply because it might have done things differently. The threshold for intervention is a relatively high one.

In principle, the procedural discretion of the arbitral tribunal should be respected. Of course, this is not to say that we should blindly follow the decisions of arbitral tribunals, since the system of setting aside arbitral awards is a mechanism to ensure the credibility of the arbitration process. The court should be aware that the arbitral tribunal has broad discretion to manage the arbitral proceedings and that such discretion was exercised in a specific context outside the court's knowledge and control.

Even in Japanese court cases, for example, regarding the inability to defend oneself (Article 44(1)(iv) of the Arbitration Act), the number of cases in which an arbitral award is set aside is quite limited. For example, the 2018 Decision held that an arbitral award may be set aside in cases where there was clearly unfair procedural conduct, such as where the arbitral tribunal or arbitrators intentionally obstructed a party's opportunity to present its case but may not set

28) [2020] 1 SLR 695, [98].
29) Ibid., [99].
30) Ibid., [101].
31) Ibid., [102]

aside merely because a party is dissatisfied with the timelines or other conditions set by the arbitral tribunal. It is also noteworthy in relation to the issue of paranoia that the 2018 Decision states that to avoid the protraction of arbitral proceedings and the escalation of costs due to the lengthening of the hearing period, it is not necessary to provide parties with unlimited opportunities for presenting their case.

The decision of the Tokyo District Court on July 28, 2009[32] also held that an arbitral award can be set aside only when there is a serious violation of procedural guarantees where the parties were not given an opportunity to defend themselves, such as when the proceedings were conducted without the parties being present or when the arbitral award was made based on materials that the parties were unaware of.

These court decisions have been evaluated as having the effect of mitigating paranoia. Moreover, even when there are grounds for setting aside an arbitral award, the court may not set it aside (Article 44(6) of the Arbitration Act), and regarding complaints concerning the procedural discretion of the arbitral tribunal, the arbitral award should not be set aside unless it is a serious defect that would affect its outcome.

Ⅴ. Conclusion

To mitigate any due process paranoia of the arbitral tribunal and to make arbitration an effective means of dispute resolution, it would be ideal for the arbitral tribunal to manage the proceedings efficiently with the involvement of the parties and with the awareness that the courts will respect its procedural discretion. For this purpose, it is necessary for courts to understand the characteristics of arbitration and respect the decisions of the arbitral tribunal, and for the parties and the arbitral tribunal to share an awareness of the issues in dispute and the progress of the proceedings.

From this perspective, the JCAA's Interactive Arbitration Rules,[33] which make a dialogue between the parties and the arbitral tribunal mandatory and which aim to enable a prompt dispute resolution after the parties know the arbitral tribunal's thoughts and can appropriately

32) 判例タイムズ (Hanrei Times) Vol. 1304, 292. The case is as follows: A was operating a semiconductor manufacturing plant in Taiwan using semiconductor manufacturing equipment, etc., manufactured, sold and installed by X. The plant was completely destroyed in a fire accident, and A received payment from the insurance company and subrogated the right to claim damages held by Y, the reinsurer, against the person responsible for the accident. X and Y entered into an arbitration agreement to the effect that they would request the International Centre for Dispute Resolution (ICDR) of the American Arbitration Association (AAA) to render an arbitral award with respect to the dispute in question, designating Tokyo as the place of arbitration. The arbitral tribunal found a reasonable causal relationship between the accident and X's breach of its duty to warn regarding the use of semiconductor manufacturing equipment, etc., and ordered X to pay damages. In response, X filed a motion to annul the arbitral award, arguing on the ground that X could not defend itself because it had not alleged a breach of the duty to warn in the arbitration proceedings.

33) Entered into force on January 1, 2019, and amended and effective on July 1, 2021. https://www.jcaa.or.jp/arbitration/rules.html *See* Shusuke Kakiuchi, 大陸法的仲裁－JCAAインタラクティヴ仲裁規則とプラハ規則の比較－(*Continental Legal Arbitration: Comparison of the JCAA Interactive Arbitration Rules and the Prague Rules*), JCA Journal, Vol. 67, No. 1 (2020), 8 et seq.

grasp the direction of the dispute resolution, as well as recent legal reforms,[34] which allow the Tokyo District Court and Osaka District Court to have concurrent jurisdiction over arbitration cases, can be appreciated as attempts to achieve a common understanding among the courts.

※This article was supported by JSPS KAKENHI Grant Number JP23K01191.

34) Act No. 15 of 2023. Article 5(2) thereof provides that *"Notwithstanding the provisions of the preceding paragraph, a petition on a proceeding carried out by a court pursuant to the provisions of this Act may be filed with the Tokyo District Court and the Osaka District Court if the place of arbitration is in Japan."*

Tokyo・Osaka・Nagoya・Fukuoka・Takamatsu
Sapporo・Yokohama (Scheduled to open the summer of 2024)

Beijing・Shanghai

Singapore

Ho Chi Minh City・Hanoi

Bangkok
(Chandler MHM Limited)

Yangon
(Myanmar Legal MHM Limited)

Jakarta
(ATD Law in association with Mori Hamada & Matsumoto)

Manila
(Tayag Ngochua & Chu, a member firm of Mori Hamada & Matsumoto)

New York

MORI HAMADA & MATSUMOTO

Mori Hamada & Matsumoto is a full service international law firm that provides exemplary service to clients and continuously aims to achieve the best results for its clients in every matter. The firm has its headquarters in Tokyo with offices in Osaka, Nagoya, Fukuoka, Takamatsu and Sapporo and nine overseas offices. Our team contributes significantly to the constant evolution and development of the Japanese legal system, and to the creation of a legal infrastructure that enables our local and international clients to excel.

Mergers and Acquisitions
Corporate Governance
Regulatory/Regulated Transactions
Finance
Infrastructure/Energy
Disputes/Dispute Resolution
Bankruptcy/Restructuring
Crisis Management
Competition/Antitrust
Information Technology, Life Sciences
and Intellectual Property
Health Care, Pharmaceuticals and Medical Sciences
Tax
Wealth Management
Labor Law
International Practice
International Trade
Fintech

Marunouchi Park Building 2-6-1 Marunouchi,
Chiyoda-ku, Tokyo 100-8222, Japan
E-mail:mhm_info@ mhm-global.com
www.mhmjapan.com

Patent royalty claim dismissed due to a demurrer, admitting the reach of an arbitration agreement

—Defendants' measures and plaintiffs' risk reduction —

ABE & PARTNERS Attorney-at-Law (Japan and New York)
Guest Professor, Graduate School of Medicine, Osaka University
Takanori Abe

Ⅰ. Summary of the case

The plaintiff (X) developed, manufactured, and sold printing inks for printing wiring boards, paints, adhesives and applied products thereof. The defendant (Y) researched, developed, manufactured, and sold electronic industry materials. X and Y reached a non-exclusive patent licence agreement on October 1, 2002 (the licence agreement). X sought payment from Y of a total of 328.19 million yen (approximately US$2.92 million in 2005) from Y, on the grounds that Y had underreported the sales volume in 2004 and underpaid running royalties based on this underreporting.

As a claim before the merits, Y alleged that X's claim should be dismissed under Article 14 of the Arbitration Act (the Act) because an arbitration agreement had been reached between X and Y under Article 15 of the licence agreement.

In response to this, X alleged that Y's claim before the merits was unfounded premised on the continuation of the licence agreement according to the facts that X notified Y on March 25, 2005 that the licence agreement was terminated on the grounds of non-payment of running royalties Y owed (the termination notice); Y did not pay the mentioned unpaid running royalties in the 40 days following X's termination notice; Y only notified X on March 29, 2005 that the termination notice was invalid, and did not file a request for arbitration as stipulated in Article 12(2) of the licence agreement; and the licence agreement was terminated on April 9, 2005 by the termination. X further alleged that Y's claim before the merits was groundless because Y had requested invalidation trials against two of the patents listed in Annex 1 of the Tokyo District Court judgment (the patents) without following the arbitral proceedings, in violation of Article 15 of the licence agreement.

Ⅱ. Judgment of October 21 2005, Tokyo District Court, 1216 Hanrei Times 309 (2006).

The Tokyo District Court (Presiding judge Takabe) dismissed the claims, holding as follows.

Article 15 of the licence agreement contains the following clauses regarding arbitration and applicable law (the agreement): 'Any dispute, controversy or difference of opinion which may arise between the parties hereto out of or in respect of or in connection with this licence agreement shall be settled amicably through negotiations between the parties. However, if each such matter cannot be settled within a reasonable period of time, the matter shall be referred to arbitration in accordance with the International Chamber of Commerce (ICC) rules. The arbitration shall consist of three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator, who shall be the presiding arbitrator. Each party may initiate arbitral proceedings by notifying the other party in writing and providing the name of the arbitrator it appoints. In this case, the other party shall appoint another arbitrator within two months of receipt of such notice. This licence agreement shall be governed by and construed in accordance with Japanese laws and the place of arbitration shall be Tokyo, Japan'.

The ICC Arbitration Rules, administered by the ICC Japan, which entered into force on January 1, 1998, stipulates that it provides the settlement by arbitration of disputes not of an international character, i.e. domestic disputes (Article 1) and that the arbitration shall proceed if it is prima facie satisfied that an arbitration agreement under the Rules may exist (Article 6).

According to the above, the agreement is an agreement to refer the resolution of all or certain civil disputes which have already arisen or which may arise in the future in respect of a certain legal relationship to one or more arbitrators, and to accept any award made, and constitutes an arbitration agreement under Article 2(1) of the Act. And since it is found that the subject of the agreement is a civil dispute which can be settled between the parties, the agreement is valid pursuant to Article 13(1) of the Act.

Since it is clear that the action was filed for a civil dispute which is subject to the agreement, and the grounds stipulated in each item of Article 14(1) of the Act are also not found, the claim shall be dismissed under that article.

In this regard, X alleged that because it gave the termination notice on the grounds of non-payment of running royalties, the licence agreement was terminated by the termination and that the agreement, which was premised on the existence of the licence agreement, has also become invalid. However, Y does not dispute the reach of the agreement itself, and the validity of X's termination for Y's default is not clear at this stage. Even if, as X alleges, the license agreement was terminated by X's manifestation of intention to terminate it due to non-payment of running royalties, pursuant to Article 13(6) of the Act, 'in regard to a single contract containing an arbitration agreement, even if the clauses of the contract other than that of the arbitration agreement are not valid due to nullity, rescission or for any other reasons, the validity of the arbitration agreement shall not be impaired automatically', the termination of the licence agreement does not retroactively invalidate the validity of the agreement. Thus, X's claim on this is unfounded.

In addition, although X points to the fact that Y has requested invalidation trials against two of the patents, because Article 6(2) of the licence agreement stipulates that any provision in the licence agreement shall not prevent Y from disputing the validity of each patent, Y's

disputing the validity of each patent is not contrary to the licence agreement. In addition, because a patent invalidation trial is a trial to invalidate a patent decision as an administrative disposition when there are grounds for invalidation of the patent, and is not a 'civil dispute which can be settled between the parties', Y's request for invalidation trials should not be in violation of Article 15 of the licence agreement. Even if it were an act in violation of Article 15 of the licence agreement, that would merely render the request for an invalidation trial unlawful, and there is no reason to conclude that it would cause the arbitration agreement itself to lose its validation and prevent the application of Article 14(1) of the Act to this claim. Therefore, X's claim on this point is also unfounded.

Ⅲ. Judgment of February 28 2006, IP High Court, No. 2005 (ne) 10120, Japanese Court website

Upon X's appeal, the IP High Court (presiding Judge Sato) also found the claim to be unlawful and dismissed the appeal, holding as follows in response to X's claim at the IP High Court.

X alleges that because Y did not file a request for arbitration within 40 days of receipt of the termination notice under Article 12(2) of the licence agreement, the request for performance in respect of the default that is the cause of the termination of the licence agreement, which X claims in this case, can no longer be subject to the arbitration clauses under Article 15 of the licence agreement. Article 12(2) of the licence agreement contains the following clauses (the termination clause).

'The licence agreement may be terminated by either party by giving written notice to the other party in the event of default of any of the obligations stipulated in the licence agreement, on the condition that such default is not rectified within 40 days after written notice of such default. However, if a doubt as to whether such default exists or not is referred to arbitration within such 40-day period, the 40-day period shall suspend proceedings for the duration of such arbitration'.

According to the above, the termination clause stipulates that if the default is rectified within 40 days after one party gives written notice to the other party of the other party's default (the rectification period), the termination of the licence agreement on the grounds of the default shall not be valid. It is clear that the termination clause requires the effect of the termination of the licence agreement on the grounds of default to be effective upon the expiry of the rectification period. And the proviso in the termination clause stipulates that if a request for arbitration is filed during the rectification period, the rectification period will not proceed as long as those arbitration proceedings are in progress, which merely suspends the progress of the rectification period and limits the effect of the termination during the arbitration proceedings. It is clear that it does not oblige the other party to file a request for arbitration, nor does it stipulate that a request for arbitration may only be filed within the rectification period for disputes in respect of the default that is the cause of termination of the licence agreement.

Thus, the fact that Y did not file a request for arbitration within 40 days of receipt of the termination notice merely means that the rectification period has expired. This only means that if Y's default objectively exists as X alleged, the lapse of the rectification period will be effective to terminate the licence agreement on the grounds of such default, which does not mean that the agreement will naturally be effective to be terminated, nor does it mean that the existence of a default as a cause of termination or disputes concerning the request for performance in respect of the default can no longer be subject to arbitration under the agreement.

Whether or not Y's default, as X alleges, objectively exists, and thus whether or not the effect of the termination of the licence agreement on the grounds of default has become effective, is a matter to be determined by arbitration in accordance with the agreement. Further, irrespective of whether or not the effect of the termination of the licence agreement has become effective, it is clear that the running royalties that X sought payment from Y in this case are a claim under the licence agreement, and their existence or non-existence is a matter to be determined by arbitration in accordance with the agreement.

Therefore, X's claim that Y's failure to file a request for arbitration caused X's claim to be not subject to arbitration under the agreement is a misinterpretation of the termination clause and is therefore unfounded.

X alleges that Y's failure to file a request for arbitration on its behalf is a violation of the agreement and that Y's filing to dismiss the claim in this case is contrary to the clean-hands doctrine, fairness, equity and other doctrines.

However, the agreement only stipulates that if 'any dispute, controversy or difference of opinion' 'cannot be settled within a reasonable period of time, the matter shall be referred to arbitration in accordance with the rules of the ICC', which cannot be construed as obliging either party to proactively file a request for arbitration. X's claim lacks that premise and cannot be accepted.

Ⅳ. Practical guidelines

1. Background

This case is a part of global litigation in Japan, China and Taiwan between the plaintiff and the defendant concerning solder resist for printed circuit boards. Other litigations between the plaintiff and defendant in Japan include the Solder Resist case on disclaimers, judgment of May 30, 2008, IP High Court, 1290 Hanrei Times 224 (2009). Attorney Satoshi Nakajima and I represented the defendant in Japanese litigations including this case, and supported the defendants in overseas litigations.

2. Filing a demurrer?: Measures in the defendant's position

If, as in this instance, a case is filed in court despite the existence of an arbitration clause, how should the sued defendant respond? The defendant has the option of filing a demurrer (Article 14(1) of the Act) to seek a judgment of dismissal on the ground that a proceeding in

court is unacceptable because of the existence of an arbitration clause, or accepting the proceeding in court as requested despite the existence of an arbitration clause. Which option is more advantageous to the defendant is to be carefully determined by strictly comparing the respective interests and gains and losses.

It is important to note that there is a time limit for filing a demurrer, and once an approval or disapproval or rebuttal has been made on the merits, it is no longer possible to file a demurrer (Article 14(1)(iii) of the Act). In other words, as a defendant, it is not possible to argue tentatively about the content and then file a demurrer considering the situation of the litigation[1] ; it must decide whether or not to file a demurrer at the beginning of the litigation. Failure to file a demurrer within the time limit will lose the right of demurrer and render it impossible to file a request for arbitration under the arbitration agreement[2] .

How, then, should a defendant compare the interests and gains and losses in this extremely short period of time? This would involve examining the advantages and disadvantages of arbitration (and, on the flip side, the advantages and disadvantages of litigation)[3] in light of the differences between arbitration and litigation. Specifically, the factors to be considered include whether or not an appeal is possible, duration, language used, level of understanding of the technology (specialisation), expertise, whether it is open or closed to the public, costs, whether it is possible to determine infringement and validity of foreign patent rights, and why the plaintiff has dared to file the lawsuit despite the existence of an arbitration clause[4] . These factors are, excluding the last point, equivalent to those considered when deciding whether or not to include an arbitration clause in a contract drafting situation. However, in the situation of whether or not to file a demurrer, there is a particularity in the addition of the last point, and it is crucial how accurately this point can be analysed. In this case, under the guidance of Attorney Nakajima, I considered the above factors strictly in line with the case and carefully determined which would maximise the interests of the defendant: arbitration at the ICC or a litigation at the Tokyo District Court. The final decision was to file a demurrer, and this consideration in such an extremely short period was the pivot point in the win/loss of the case.

3. Arbitration agreement, Validity, Grounds stipulated in each item of Article 14(1) of the Arbitration Act

The existence of an arbitration agreement is not a subject of the court's sua sponte

1) Naoki Idei & Takayuki Miyaoka, Q&A Shin Chusaiho Kaisetsu [New Arbitration Law Q&A] 67 (2004).

2) *Id.*

3) *Id.* at 32; Tatsuya Nakamura, Chusaiho Gaisetsu [An Overview of arbitration law] 10-17 (2022); Hideyuki Kobayashi, Kokusaitorihiki funso [International transaction dispute] 219-222 (3d ed. 2003).

4) Although the contracting parties in this case are both Japanese companies, the existence of discrimination against foreigners is a factor when the contracting parties are a Japanese company and a foreign company. For a discussion of how juries in the US patent litigation may discriminate against foreign people or corporations, see, Takanori Abe, *Gaikoku tokkyokenshingaijiken no kokusaisaibankankatsu, junkyoho, mongonshingai, kintoshingai, fuseikyosoboshiho ihan* [*Judicial Jurisdiction, Applicable Law, Literal Infringement, DOE, and Unfair Competition Regarding a Foreign Patent Infringement Case (Declaratory Judgment Against US Patentee in Japan) Where the Japanese Court Applied the US Supreme Court's Festo Decis*] 54(10) CHIZAIKANRI 1485, 1501, Note 7 (2004).

investigation[5] , and the claim can only be dismissed if the defendant files a demurrer and the court admits the existence of an arbitration agreement[6] (Article 14(1) of the Act).

If the defendant files a demurrer, the court will judge the existence of an arbitration agreement, validity, and grounds stipulated in each item of Article 14(1) of the Act. That is, with regard to the arbitration agreement, the court will determine whether there is 'an agreement to refer the resolution of all or certain civil disputes which have already arisen or which may arise in the future in respect of a certain legal relationship to one or more arbitrators, and to accept the award made therefor' (Article 2(1) of the Act). The validity of the arbitration agreement is determined by whether 'the subject of the agreement is a civil dispute which can be settled between the parties' (Article 13(1) of the Act). With regard to the grounds stipulated in each item of Article 14(1) of the Act, it is determined whether it shall apply in the following cases: '(i) if the arbitration agreement is not valid due to nullity, rescission or for any other reasons; (ii) if it is impossible to carry out an arbitral proceedings based on an arbitration agreement; and (iii) if said petition was filed after the defendant presented oral arguments on the merits or made statements on the merits in preparatory proceedings' (Article 14(1) provisos (i) to (iii)).

Some judgments have held that since an arbitration agreement is a contract involving the waiver of the right of action, it is necessary to carefully examine the validity of the agreement[7] . However, in this case, partly because the plaintiff did not dispute the existence of the arbitration agreement, the Tokyo District Court admitted the agreement and its validity without difficulty, and the grounds stipulated in each item of Article 14(1) of the Act were not found to apply.

With regard to the effect of the demurrer, in the US, orders compelling arbitration are issued, and Article 8 of the Model Law stated that 'A court … shall … refer the parties to arbitration'. However, if an order of referral to arbitration is issued, as in the Model Law, it is difficult to take measures to directly enforce it. In addition, it may not conform to the traditional conception of the court's authority, which is why the Arbitration Act stipulates that the court 'shall dismiss the action[8] '.

4. Whether the arbitration agreement becomes invalid due to termination of the contract: the principle of severability of the arbitration agreement

The plaintiff alleged that because it gave the termination notice on the grounds of non-payment of running royalties, the licence agreement was terminated by the termination and that the agreement, which was premised on the existence of the licence agreement, has also become invalid.

5) Takeshi Kojima & Akira Takakuwa, Chukai Chusaiho [Commentary on the Arbitration Law] 69 (1988); Nakamura, *supra* note 3, at 70.

6) Idei & Miyaoka, *supra* note 1, at 66-67.

7) Judgment of July 10, 2013, Tokyo High Court, 1394 Hanrei Times 200 (2013); Nakamura, *supra* note 3, at 56.

8) Koichi Miki & Kazuhiko Yamamoto eds., *Shin chusaiho no riron to jitsumu* [*Theory and practice of the new Arbitration Act*] Jurist 76-78 (2006).

Even if the principal contract is not valid due to termination, nullity or rescission, the arbitration agreement shall not be impaired automatically (Article 13(6) of the Act). This is referred to as the principle of severability of the arbitration agreement. If the arbitration clause shared the same fate as the principal contract when the plaintiff disputes the validity of the principal contract against the defendant's demurrer, the court would have to hear and determine the validity of the termination, which should be heard and determined in arbitration, in order to judge whether the arbitration agreement is invalid or not. This would make the arbitration system ineffective[9] . Therefore, if the parties agree to arbitrate disputes relating to the validity of the principal contract, the agreement will be valid[10] .

The severability of the arbitration agreement was supported by the judicial precedent (Judgment of July 15, 1975, Supreme Court, 29(6) Minshu 1061 (1976)) even before the enactment of the Arbitration Act, and was clearly stipulated in Article 13(6) of the Act. According to the drafter, the severability of the arbitration agreement is proper[11] , however, the provision was made to avoid causing unnecessary disputes by clearly stipulating it[12] .

In this case, the judgment of the Tokyo District Court applied Article 13(6) of the Act and held that 'the termination of the licence agreement does not retroactively invalidate the validity of the agreement', and this case appears to have been a typical example of the application of Article 13(6) of the Act. The IP High Court held that 'whether or not the effect of the termination of the licence agreement has become effective is a matter to be determined by arbitration in accordance with the agreement', though this is in the context of the interpretation of the termination clause, which is to the same intent as the Tokyo District Court judgment. The analysis shows that, as of 2019, this judgment is the only case in which Article 13(6) of the Act has been applied since the Arbitration Act was enacted in 2004[13] .

It is stipulated that the parties may exclude by agreement the severability of the principal contract and the arbitration agreement[14] . Even if theoretically conceivable, such an agreement is a nullity of the arbitration clause, and it is unlikely that the one party who intends to include an arbitration clause would comply with the proposal of such an agreement from the other party.

5. Whether there was a breach of contract in requesting invalidation trials without arbitral proceedings

The plaintiff alleged that the defendant's request for invalidation trials without arbitral proceedings was a breach of contract.

(a) Provisions allowing licensees to dispute the validity of licensor's patents

9) Idei & Miyaoka, *supra* note 1, at 52; Nakamura, *supra* note 3, at 101.

10) Miki & Yamamoto, *supra* note 8, at 66.

11) Masaaki Kondo et al., ARBITRATION LAW OF JAPAN, 52 (1st ed. 2004).

12) Miki & Yamamoto, *supra* note 8, at 66.

13) Tatsuya Nakamura, *Bosokoben to chusai goi no sonpi* [*Arbitration Defense before the State Court and Existence of Arbitration Agreement*] 52 KOKUSHIKAN LAW REVIEW 59, 81 (2019).

14) Yasuyuki Shibata, *Hankai* [*Commentary of Judgment*] 1975 COMMENTARIES ON SUPREME COURT CASES. CIVIL 347 (1979).

In response, the Tokyo District Court first held that there was no breach of contract because the licence agreement contains a provision to the effect that 'nothing in the licence agreement shall prevent Y from disputing the validity of each patent'. The above provision allows the licensee to dispute the validity of licensor's patents.

With regard to whether a licensor can impose an obligation on the licensee not to dispute the validity of licensor's patent, i.e. a no-contest obligation, in a licence agreement, the Japan Fair Trade Commission's 'Guidelines for the Use of Intellectual Property under the Antimonopoly Act' state that imposing an obligation not to contest is recognised as pro-competitive by facilitating technology transactions and is unlikely to reduce competition directly. However, it may constitute an unfair trade practice when it is found to tend to impede fair competition by continuing rights that should be invalidated and by restricting the use of the technology associated with the said rights. In principle, stipulating termination right of the agreement for the technology with any licensee that challenges the validity of rights may not constitute an unfair trade practice (Article 4(4)(vii) of the said Guidelines).

The above provision in the licence agreement allows the licensee to dispute the validity of the licensor's patents without imposing a no-contest obligation, which risks being held to be a violation of the Antitrust Act. Since it would be a paradox to be held to be in breach of contract after having complied with clauses to avoid a violation of the Antimonopoly Act, the judgment of the Tokyo District court is therefore appropriate.

(b) Arbitrability of patent validity

The Tokyo District Court then held that the defendant's request for invalidation trials should not be found as contrary to Article 15 of the licence agreement, because a patent invalidation trial is a trial to invalidate a patent decision as an administrative disposition when there are grounds for invalidation of the patent, and is not a 'civil dispute which can be settled between the parties'.

With regard to whether the validity of a patent can be determined in arbitral proceedings relating to patent infringement disputes, the majority view in academic theory is to affirm the arbitrability of patent validity when it is a premise for an arbitral award[15] . On the other hand, with regard to whether the validity of a patent itself can be the subject of an arbitral award, the view is divided between the view that arbitrability is denied on the ground that the validity of a patent is subject exclusively to invalidation trials in the Japan Patent Office (JPO)[16] , and the view that arbitrability is affirmed as confirming the validity of a patent on the relative effect between the parties only does not conflict with the action allowed by the JPO, who determines the validity of a patent erga omnes[17) 18)] .

The Tokyo District court took the view to deny arbitrability. It appears to have judged that the request for invalidation trials was not in violation of the arbitration agreement (Article 15

15) Nakamura, supra note 3, at 43.

16) Yasuo Ueno, Chusai kanosei [Arbitrability], in Gendai chusaiho no ronten [Issues in modern arbitration law] 99, 113 (Kaoru Matsuura & Yoshimitsu Aoyama eds., 1998); Yoshimitsu Aoyama, Chusai keiyaku [Arbitral agreement], in Shin saiban jitumu taikei (3) Kokusai minjisoshoho (zaisanho kankei) [New litigation practice series (3) Law of International Civil Procedure (Property law)] 420, 429-430 (Akira Takakuwa & Masato Dogauchi eds., 2002).

of the licence agreement) as the defendant could not seek an award on the validity of the patents through arbitral proceedings.

(c) Legality of a request for invalidation trials for violation of an arbitration agreement

The Tokyo District Court held finally that even if it were a breach of contract, it would merely render the request for invalidation trials unlawful and would not render the arbitration agreement invalid.

There is little discussion and no established view on the consequences if a request for invalidation is found to be in violation of an arbitration agreement. There is a view that even if the licensor alleges before the JPO that an arbitration agreement exists, the request for invalidation trials may not be dismissed[19] .

6. Interpretation of the termination clause

The plaintiff (the appellant) alleged that the dispute could not be subject to arbitration under the arbitration agreement because the defendant (the appellee) had not filed a request for arbitration within 40 days of receipt of the termination notice (the rectification period), because the Article 12(2) of the licence agreement (the termination clause) stipulates that a request for arbitration must be filed within 40 days of receipt of the termination notice (rectification period).

In response, the IP High Court held that the proviso in the termination clause merely suspends the progress of the rectification period and limits the effect of the termination during the arbitration proceedings, and it is clear that it does not oblige the other party to file a request for arbitration, nor does it stipulate that a request for arbitration may only be filed within the rectification period for disputes in respect of the default that are the cause of termination of the licence agreement.

The IP High Court's interpretation of the termination clause is reasonable, as it is not only logical but practical because it is difficult to conceive of a drafting contract with a time limit to file a request for arbitration within only 40 days of receipt of the termination notice.

7. Lessons learned from the case: Plaintiff's risk reduction measures

One lesson learned from this case is the importance of dispute resolution clauses in contract drafting[20] . It has been pointed out that 'dispute resolution clauses are referred to as "midnight clauses," because they are often discussed late at night in the final stages of contract negotiations[21] ' and that 'when negotiating licence agreements in international

17) Hiroko Nihei, *Tokkyo no yukosei wo meguru funso no chusaitekikaku (ge)* [*Arbitrability of Patent Validity Disputes (Part 2)*] 66(6) Journal of the Japan Commercial Arbitration Association 17, 22 (2019); Yoichi Okada, *Tokkyo no yukosei ni kansuru chusaitekikaku* [*Arbitrability on patent validity*] 89(1) Horitsu ronso 111, 130-131, 134-137 (2016).

18) Nakamura, *supra* note 3, at 43-44.

19) Yasufumi Shiroyama, *Chitekizaisanken chusai kasseika no tameno hokosei* [*Arbitration of IP Disputes*] 757 NBL 49, 53-54 (2003).

20) Takanori Abe, *Amerikakigyo kara no fubyodo eibunkeiyakusho heno taishoho* [*How to cope with unfair license agreements*] 68(7) Chizaikanri [Intellectual Property Management] 860, 865-866 (2018).

transactions, it is not unusual for dispute resolution clauses to be decided carelessly in the final stages of contract negotiations under pressure of time[22] '. In my experience, companies seem to be more interested in business clauses than dispute resolution clauses.

However, the choice between arbitration and litigation must be carefully determined at the contract drafting stage, not only because it directly affects the outcome of a dispute, but also because it is extremely difficult to change the policy once it has been decided. If the party feels unfamiliar with arbitration, it is better to opt for litigation.

Even if arbitration is the option, in a case of a licence agreement between Japanese companies, such as in this case, it would be a smaller burden for a Japanese company to use the JCAA (Japan Commercial Arbitration Association)[23] as the arbitral institution, rather than an overseas arbitral institution such as the ICC in this case. This choice would make it more likely that the Japanese company would try to proceed with arbitration as stipulated in the contract when disputes do arise. In other words, this would lower the risk of daring to file a lawsuit and having a demurrer filed.

21) Katsuki Ishikawa, *Ajia kakkoku ni okeru chusaiseido no hatten to kigyohomu ni ataeru eikyo* [*The Development of Arbitration Systems in Asian Countries and its Effect on Corporate Legal Practices*] 65(1) Journal of the Japan Commercial Arbitration Association 22, 27 (2018).

22) Katsumi Shinohara, *Chizaifunsoshori ni okeru kokusaichusai no yakuwari* [*The role of international arbitration in IP dispute resolution*] 1535 Monthly Jurist 35, 39 (2019).

23) My experience with the JCAA has been very satisfactory and the secretariat was very helpful in informing me about the procedures.

Practical Issues in Enforcing International Settlement Agreements Resulting from Mediation

Oh-Ebashi LPC & Partners Attorney at Law in Japan and New York

Kazuhiro Kobayashi

Ⅰ. Introduction

Arbitration is generally said to be a means to resolve a dispute between the parties by obtaining the judgment of a third party, an arbitral tribunal, but that some parties are dissatisfied with such judgment and do not perform them voluntarily. The enforcement of arbitral awards has thus become an important issue. On the other hand, since a settlement agreement resulting from mediation is only concluded when the parties agree to it, unlike an arbitral award, it is highly likely that the parties will voluntarily perform it. However, as time passes from the time the agreement is made, some parties may change their minds. In particular, if the terms of the settlement agreement do not need to be performed soon and require a long period of time for their performance, parties may change their minds during that long period of time and refuse to perform it voluntarily.

More than 170 countries are parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the **"New York Convention"**) as of May 22, 2024. This has ensured a certain degree of stability in the international enforcement of arbitral awards. To similarly provide a uniform and efficient framework for the enforcement of settlement agreements resulting from mediation, the United Nations Convention on International Settlement Agreements Resulting from Mediation, (the **"Singapore Convention"**) was adopted by the United Nations General Assembly on December 20, 2020. It was signed by 46 countries in Singapore on August 7, 2019 and, with the third instrument of ratification deposited on March 12, 2020, it entered into force on September 12, 2020.

The Singapore Convention had only 57 signatories and 14 parties as of May 22, 2024. To promote ADR and with the hope that the Singapore Convention will be acceded to by as many countries as the New York Convention, the Diet of Japan enacted the Act for Implementation of the United Nations Convention on International Settlement Agreements Resulting from Mediation (Act No. 16 of 2023) (the **"Singapore Convention Implementation Act"**) on April 21, 2023, and approved the conclusion of the Singapore Convention on June 9 of the same year. On October 1 of the same year, Japan deposited its instrument of accession to the

Singapore Convention as the twelfth party thereto. The Singapore Convention entered into force in Japan on April 1 of this year and the Singapore Convention Implementation Act took effect on the same day.

This article will discuss some possible practical issues regarding the enforcement of international settlement agreements resulting from mediation under the Singapore Convention and the Singapore Convention Implementation Act.

Ⅱ. Enforcement under the Singapore Convention

1. Enforcement in the Territories of the Parties to the Singapore Convention

Unlike the New York Convention, which clearly states that a *"State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State"* (Article I (3)), the Singapore Convention does not have a provision allowing such declaration. Therefore, a settlement agreement under the Singapore Convention (Article 1) made in a state which is not a Party to the said Convention may be enforced in a state where the Singapore Convention has already entered into force. Therefore, when a party enters into an international settlement agreement resulting from mediation, regardless of the place of the mediation, the party should consider whether the location of the other party or its property (hereinafter simply referred to as the **"Subject Location"**) is in the territory of a Party to the Singapore Convention. However, please note that the laws of each country must also be checked for specific details because the Singapore Convention is not considered self-executable (Article 3).

Therefore, even though a foreign party is not located in the territory of a Party to the Singapore Convention, the party may still enforce in Japan an international settlement agreement reached on or after April 1, 2024 (Article 2 of the Supplementary Provisions of the Singapore Convention Implementation Act). Enforcement under Japan's Singapore Convention Implementation Act is discussed in detail in Part III below.

Furthermore, as mentioned in Part I above, as of May 22, 2024, the Singapore Convention has only 14 Parties, but 57 countries have already signed it. Moreover, it is still open for future signature and accession (Article 11). Therefore, a state may become a Party to the said Convention in the future. In addition, it is possible that the Subject Location of the other party may transfer to a state that is a Party to the said Convention. Therefore, even if the Subject Location of the other party is not currently in the territory of a Party to the Singapore Convention, the possibility of enforcement under the said Convention in the future should be taken into consideration.

2. Reservations

A Party to the Singapore Convention may make a reservation by declaring that (i) it shall not apply the said Convention to any settlement agreement to which it or any governmental agency, or any person acting on behalf of such agency is a party, and that (ii) it shall apply the said Convention only to the extent that the parties to the settlement agreement agree to

its application (the **"Opt-in Reservation"**) (Article 8, paragraph 1). Therefore, if the Subject Location of the other party is in the territory of a Party to the Singapore Convention, it is necessary to consider whether or not such reservation has been made.

When considering enforcement under the Singapore Convention (to be precise, as stated in Part II 1 above, enforcement under the laws of each Party implementing the Singapore Convention, but hereafter referred to as **"enforcement under the Singapore Convention"** for brevity), it is difficult to deal with the sovereignty-related reservation described in item (i) above, as it would depend on the attributes of the other party to the settlement agreement. However, if such other party is not currently a state-owned enterprise or any other type of government entity, then it may be possible to stipulate that the settlement agreement shall be terminated or the benefit of time shall be forfeited in the event that such other party is nationalized in the future so that the party may demand immediate performance therefrom. As for the Opt-in Reservation in item (ii) above, the parties may consider adding a stipulation therefor in the settlement agreement, which is discussed in detail in Part III below.

3. Arb-Med, Med-Arb

International arbitration is said to be expensive and time-consuming, and international mediation is gaining use as a means to resolve disputes. The number of cases where arbitration has been commenced but an attempt to settle through mediation is made, so-called Arb-Med, is also increasing. In cases where an attempt to settle through mediation is first made but an agreement cannot be reached and arbitration is then commenced (a kind of Med-Arb), it is unlikely that the parties will appoint the mediator as the arbitrator. However, in the case of Arb-Med, especially among companies in Asian countries, it is not uncommon to try evaluative mediation rather than facilitative mediation by appointing an arbitrator who understands the substance of the case as the mediator, partly to save on the mediator's fees and other costs. The Commercial Arbitration Rules of the Japan Commercial Arbitration Association (the **"JCAA"**) also provide for Arb-Med in "Article 59 Special Rules for the CMR (Commercial Mediation Rules) if an Arbitrator serves as Mediator."

However, under the Singapore Convention, the "mediator" is described as *"a third person or persons ... lacking the authority to impose a solution upon the parties to the dispute"* (Article 2, paragraph 3). Therefore, if the arbitrator continues to serve as the mediator, the settlement agreement resulting from the mediation would not be recognized as a "settlement agreement" under the Singapore Convention. The only way to give international enforceability to a settlement agreement where the arbitrator continues to serve as the mediator is to record the settlement in the form of an arbitral award on agreed terms (Article 30 of the UNCITRAL Model Law on International Commercial Arbitration). It will be interesting to see whether, as the number of Parties to the Singapore Convention increases, the practice of not appointing an arbitrator as a mediator to grant the settlement agreement enforceability under the Singapore Convention will become common, or whether the practice of appointing an arbitrator as a mediator will still continue since it would be sufficient to turn a settlement into an arbitral award.

4. Required Documents

To seek enforcement under the Singapore Convention, it is necessary to provide the settlement agreement signed by the parties and evidence that it resulted from mediation (Article 4, paragraph 1). For the latter, the requirement is (i) the mediator's signature on the settlement agreement, (ii) a document signed by the mediator indicating that the mediation was carried out, or (iii) an attestation by the institution that administered the mediation, or (iv) in the absence of item (i), (ii) or (iii), any other evidence acceptable to the competent authority (of the Party to the Singapore Convention). As for item (iv), if enforcement in the territory of a particular Party is intended, then it may be possible to research the laws thereof. But if there is a possibility of enforcement in a state that may become a Party to the Singapore Convention in the future or enforcement in the territories of more than one Party, then it would be difficult to prepare the appropriate evidence therefor. Therefore, it would be better to prepare to meet the requirements listed in items (i) to (iii) above. In addition, certain electronic communications are permitted for signatures (paragraph 2 of the same article).

Similar to arbitration, mediation can be in the form of not only institutional mediation administered by an ADR institution but also ad hoc mediation where a mediator is appointed by the parties and assists them in resolving the dispute. The Singapore Convention allows the enforcement of settlement agreements resulting from both types of mediation. Notably, since the aforementioned item (iii) does not exist in ad hoc mediation, the mediator's signature as described in items (i) and (ii) above should be obtained to enforce the settlement agreement under the Singapore Convention. However, it is currently not common for mediators to sign settlement agreements, and it is unclear whether it will become easier to obtain such signatures in the future. Incidentally, though a settlement agreement may be enforceable under the New York Convention if it is made into an arbitral award as mentioned in Part II 3 above, it is not common to turn a settlement agreement that resulted from an ad hoc mediation into an arbitral award.

Therefore, considering enforcement under the Singapore Convention, institutional mediation, where a party can obtain the attestation mentioned in item (iii) above, would be better than ad hoc mediation. However, even in the case of institutional mediation, when the mediation is administered by an ADR institution that is not located in the territory of a Party to the Convention, there is a risk that such ADR institution may not take into account enforcement under the Singapore Convention. Therefore, in general, an ADR institution located in the territory of a Party to the Singapore Convention may take into account enforcement under the said Convention. For example, Article 26, paragraph 2 of the Commercial Mediation Rules of the JCAA provides for the signing by the mediator of the settlement agreement, and Article 26, paragraph 3 of the said rules provides for the JCAA's attestation thereof confirming the contents thereof and that the settlement agreement resulted from the mediation administered by it.

5. Dispute Resolution Clause

A settlement agreement that is covered by the Singapore Convention is also a type of international contract. The other party may file a complaint in the country where the other party is located in relation to an international contract without a dispute resolution clause. Therefore, this article will examine whether settlement agreements should also provide for a dispute resolution clause. It is then generally better to stipulate an arbitration clause in an international contract because a court judgment is not always recognized in a foreign country, and it takes a long time to serve a complaint and other documents to initiate a lawsuit against a foreign party. The kind of dispute resolution clause that should be stipulated in a settlement agreement will also be examined herein.

In the first place, as stated in Part I above, it is highly likely that a settlement agreement that resulted from mediation will be voluntarily performed by the parties. In addition, if the dispute to be resolved by a settlement agreement arises from an international contract that provides for a dispute resolution clause, then the dispute resolution clause may be interpreted to apply to the dispute regarding the settlement agreement as well. Furthermore, if, despite having agreed on the terms of the settlement agreement, the parties are unable to agree on the dispute resolution clause and cannot conclude the settlement agreement itself, then the mediation would be in vain. Moreover, more settlement agreements are expected to become enforceable under the Singapore Convention. Therefore, the parties may decide not to provide for a dispute resolution clause in an international settlement agreement resulting from mediation.

However, if the Subject Location of the other party is not in the territory of a Party to the Singapore Convention, and enforcement there needs to be considered, then it would be better to provide for a dispute settlement clause. In such case, when the main terms of the settlement agreement require one party to give some performance to the other party, then filing a legal action at the Subject Location of the other party may be selected because it would be easy to enforce the court judgement there. However, in such action, the party seeking enforcement must prove that it may claim such performance from the other party based on the settlement agreement, unlike enforcement under the Singapore Convention where such enforcement is assured and the other party must prove one of the grounds for refusal to prevent such enforcement (Article 5). Therefore, if there would be problems with the fairness, speed, etc., of such legal action, then it would be better to choose arbitration (at least at the Subject Location of the other party).

If a dispute resolution clause is stipulated in an international settlement agreement covered by the Singapore Convention and the Subject Location of the other party is in a country that becomes a Party to the Convention, the question arises as to whether the dispute resolution shall first be made under the dispute resolution clause, or enforcement may be sought under the Singapore Convention without such dispute resolution.

It seems safer to provide for both a dispute resolution clause as well as a stipulation that the party may enforce the settlement agreement under the Singapore Convention.

Ⅲ. Enforcement under the Singapore Convention Implementation Act

1. International Settlement Agreement

As stated in Part II 1 above, the Singapore Convention is not considered self-executable. Thus, it is necessary to consider enforcement under the Singapore Convention Implementation Act in Japan.

First, international settlement agreements that are enforceable under the Singapore Convention Implementation Act (Article 2, paragraph 3) are broader in scope than the international settlement agreements that falls under item enforceable under the Singapore Convention (Article 1 of the Singapore Convention). An international settlement agreement would fall under the Singapore Convention in the following circumstances: (a) when the parties have their places of business in different states, or (b) when the state in which the parties have their places of business is different from either (i) the state in which a substantial part of the obligations under the settlement agreement is performed, or (ii) the state with which the subject matter of the settlement agreement is most closely connected. An international settlement agreement would also be covered under the Singapore Convention Implementation Act (c) when some or all of the parties have a place of business, etc., outside Japan, (d) when some or all of the parties have places of business, etc., in different states, or (e) when the state in which some or all of the parties have places of business, etc., is different from the state in which either (i) the place where a substantial part of the obligations under the agreement is performed, or (ii) the place with the closest connection to the subject matter of the agreement belongs (Article 2, paragraph 3).

Item (c) above also includes cases not included in items (a) and (b) above. For example, if a Japanese corporation with a place of business in a foreign country concludes a settlement agreement with a corporation in such foreign country under which the obligation shall be performed in such foreign country, then the settlement agreement may be enforced in Japan. The settlement agreement may also be enforced in Japan if a Japanese corporation has a subsidiary in a foreign country, which concludes a settlement agreement with a corporation in such foreign country under which the obligations shall be performed in such foreign country. For example, the accounts receivable held by the subsidiary from the Japanese parent corporation may be enforced in Japan. Furthermore, item (c) above includes cases in which a person that holds more than fifty percent (50%) of the issued shares in some or all of the parties has a place of business outside Japan (Article 2, paragraph 3, item (i) of the Singapore Convention Implementation Act). Therefore, even a settlement agreement between Japanese companies may be considered an international settlement agreement when a foreign owned company is a party to such agreement.

This article will consider below the issues that may arise when a foreign owned company or a foreign company enforces an international settlement agreement in Japan.

2. Civil Enforcement Agreement

As mentioned in Part II 2 above, upon accession to the Singapore Convention, Japan made

an Opt-in Reservation and stipulated in Article 3 of the Singapore Convention Implementation Act that the Singapore Convention Implementation Act shall apply when the parties to an international settlement agreement agree that it could be enforced through civil enforcement based on the Singapore Convention or the laws and regulations implementing the Singapore Convention (a **"Civil Enforcement Agreement"**). However, to avoid conflict with the Singapore Convention, there is no limitation on the timing, manner, or form of the Civil Enforcement Agreement. As described in Part III 3 below, while it is necessary to submit a document or a recording medium of an electronic or magnetic record containing the terms of the international settlement agreement (Article 5 of the Singapore Convention Implementation Act) when enforcing an international settlement agreement in Japan, a document, etc., of the Civil Enforcement Agreement is not required. However, a party considering civil enforcement in Japan should also make the Civil Enforcement Agreement in writing, etc., for ease of proof. In this case, the international settlement agreement should provide that *"[T]he Parties may enforce this Agreement through civil enforcement based on the United Nations Convention on International Settlement Agreements Resulting from Mediation."* in accordance with Article 3 of the Singapore Convention Implementation Act. But even if the international settlement agreement provides the aforesaid stipulation in accordance with the reservation in Article 8, paragraph 1, item (b) of the Singapore Convention, such provision should be interpreted as a Civil Enforcement Agreement. If a party seeks enforcement under the Singapore Convention, it should research the relevant law and stipulate the terms of the agreement appropriate to such law, but if the terms of the law are unclear or if the state is not yet a Party to the Singapore Convention, then it would be better to stipulate that the parties agree to the application of the Singapore Convention.

3. Required Documents

A party that intends to apply for civil enforcement based on an international settlement agreement must file a petition with the court for an enforceability order, indicating the obligor as the respondent (Article 5, paragraph 1 of the Singapore Convention Implementation Act), and submit (i) a document prepared by the parties containing the terms of the international settlement agreement, and (ii) a document prepared by the mediator or another person, who prepares or preserves records or performs any other administrative work, that certifies that the international settlement agreement resulted from mediation (Article 5, paragraph 2). As mentioned in Part II 4 above, the Singapore Convention refers to *"any other evidence acceptable to the competent authority (of a Party to the Convention),"* but in Japan, this is limited to item (ii) above.

Regarding these documents, the petitioner may instead submit a recording medium of an electronic or magnetic record stating the content that is required for these documents (Article 5, paragraph 3 of the Singapore Convention Implementation Act, see also Article 4, paragraph 2 of the Singapore Convention in Part II 4 above). When submitting a document drafted in a foreign language or a recording medium prepared in a foreign language, the petitioner must also submit a Japanese translation of that document (the main clause of Article 5, paragraph

4), but if the court finds it appropriate after hearing the opinion of the respondent, the court may decide not to require the submission of all or part of such Japanese translation (the proviso of the said paragraph). In the amendment of the Arbitration Act that was made at the same time as the enactment of the Singapore Convention Implementation Act, the Tokyo District Court and the Osaka District Court gained concurrent jurisdiction over arbitration-related cases (Article 5, paragraph 2 of the Arbitration Act). The Tokyo District Court and the Osaka District Court also have concurrent jurisdiction over cases related to petitions for enforceability orders of international settlement agreements. Judges who understand English are assigned to these courts, and the Japanese translation of the arbitral award written in English is expected not to be required in cases involving a petition for an enforceability order of the said arbitral award. The Japanese translation of orders for interim measures, which are prepared in English, is also expected to be dispensed with in cases involving a petition for an enforcement approval order of orders for interim measures. The same approach will be adopted for international settlement agreements drafted in English.

大江橋法律事務所
OH-EBASHI

OH-EBASHI
LPC & PARTNERS

Tokyo Office

Kishimoto Building 2F
2-2-1 Marunouchi, Chiyoda-ku, Tokyo 100-0005, Japan
TEL：+81-3-5224-5566　FAX：+81-3-5224-5565

Osaka Office

Nakanoshima Festival Tower 27F
2-3-18 Nakanoshima, Kita-ku, Osaka 530-0005, Japan
TEL：+81-6-6208-1500　FAX：+81-6-6226-3055

Nagoya Office

Nagoya Crosscourt Tower 16F
4-4-10 Meieki, Nakamura-ku, Nagoya 450-0002, Japan
TEL：+81-52-563-7800　FAX：+81-52-561-2100

Shanghai, China Office

Hang Seng Bank Tower 13F, 1000 Lujiazui Ring Road Pudong New Area, Shanghai 200120, China
TEL：+86-21-6841-1699

https://www.ohebashi.com　Ohebashi Legal

Too far, or not enough? Considerations for discovery in the United States and improving efficiency in international arbitration through an analysis thereof

Nishimura & Asahi (Gaikokuho Kyodo Jigyo)
Michael Martinez[1)]

Ⅰ. US-style discovery – an outlier

There are substantial differences in litigation procedure and practice between common law and civil law jurisdictions, in particular, when it comes to the taking of evidence and disclosure. Then, even among common law jurisdictions, the United States stands as an outlier, having perhaps the broadest scope of discovery among any jurisdiction. Civil law practitioners may scoff at it as overly burdensome and intrusive, whereas American lawyers may cling to it as essential to being able to fully present their case. These vastly different views on discovery arise out of fundamental differences in approach to litigation and, in particular, the role of the judge in the process.[2)] When it comes to international arbitration, document production arises as a hybrid of both systems, perhaps in an attempt to appease both sides. However, for the reasons below (among others), I posit that, tribunals in international arbitration should learn further into the civil law tradition and take a more active role in the proceedings at an earlier stage. This may seem somewhat unrelated to the topic of discovery, but, through an analysis of discovery in the United States, I hope to shed some

1) Michael Martinez is an associate in the dispute resolution practice group of Nishimura & Asahi (Gaikokuho Kyodo Jigyo)'s Tokyo office. He is admitted in Pennsylvania, USA and holds a B.S. in economics from the Pennsylvania State University as well as a J.D. and a LL.M. from the Temple University Beasley School of Law.

2) See, for example, American Bar Association, *Obtaining Discovery Abroad*, Third Edition, 2020, pp. 1-2. "One recurring theme in this publication is the general hostility of foreign courts to U.S.-style discovery. There are two primary sources of this hostility. The first is that most civil law countries use an inquisitorial system of justice characterized by an active judge. In such systems, the judge questions the witnesses and decides which documents to request. The gathering of the evidence is perceived as a sovereign function best left to an active judge. In contrast, the U.S. judicial system is characterized by a neutral judge and an active bar. It rests on the assumption that justice is achieved through the presentation of the facts before a passive judge or jury by opposing parties."
See Reto Marghitola, *Document Production in International Arbitration*, International Arbitration Law Library, Volume 33 (Kluwer Law International; Kluwer Law International 2015), p. 16. "Discovery of documents as practiced in the United States is vigorously rejected in the civil law world. Discovery of business documents, such as minutes of the meetings of the board of directors, is considered to be an intrusion, difficult to accept, into internal matters of a company."

light on why American (and common law) practitioners are so averse to increased arbitrator input and why those concerns should not apply to international arbitration.

1. Purpose of discovery

What is the purpose of discovery? The purpose differs between legal traditions, with common law practitioners attempting to find the "absolute" truth, whereas civil law practitioners may be more focused on satisfying the burden of proof.[3] These differing mindsets have shaped the legal procedure and stems from more than just legal tradition, but also from cultural experience. The third perspective on document production, seen in international arbitration, is a mixture of the common and civil law traditions with the often referenced International Bar Association Rules on the Taking of Evidence in International Arbitration ("IBA Rules")[4] limiting the scope of document production to documents that are "relevant to the case and material to its outcome" (Article 3.3(b)).

This is not quite the broad discovery envisioned in the United States nor the comparatively limited discovery seen in civil law jurisdictions like Japan, but something in between.[5] The addition of the "materiality" requirement greatly limits the world of documents whereas discovery in the US may only be limited to "relevant" documents, which is exceptionally broad. In addition, the IBA Rules limit the scope of the request to "a narrow and specific requested category of documents that are reasonably believed to exist" (Article 3.2(a)(ii)). This seems vague, but this article continues to describe how the tribunal may require the requesting party to "identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner". This identification of specifics could be relied upon to preclude so-called "fishing expeditions".[6]

Was this middle ground just a case of "splitting the baby" so to allow for acceptance by common law and civil law practitioners or, something else? As I mentioned in the introduction, I consider that this implementation of document production in international arbitration is meant to afford greater flexibility and adaptability which is aided by enhanced involvement by the tribunal throughout the course of the proceedings. In this sense, neither the "invasive" disclosures permitted in American litigation nor the hesitance to require disclosure in some civil law jurisdictions is appropriate for international arbitration.

---

3) See Marghitola, pp. 11-21 and Section 3.02 “The Common Law Search for the Truth” and Section 3.03 “Civil Law Approach is Based on the Burden of Proof”.

4) The IBA Rules may be accessed at: https://www.ibanet.org/MediaHandler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b.

5) See Marghitola, p. 18. “The IBA Rules provide for broader document production than the procedural rules of virtually all civil law jurisdictions. In particular, the IBA Rules include the possibility of requesting the production of categories of documents, which usually does not exist in civil law jurisdictions. A request for a category of documents typically includes a search for unknown facts. If the requesting party could clearly identify the documents, it would usually not have to rely on a request for a category of documents.”

6) I disagree somewhat with the implication of Marghitola’s assertion that “a request for a category of documents typically includes a search of unknown facts” (see fn. 5 above) insofar as such a request for a category of documents under the IBA Rules could be relied upon by a party to conduct a fishing expedition or that a tribunal would allow it.

In order to explore the above, we should first look at how the far reaching discovery in the United States came to be.

2. Role of civil litigation in the United States

Since its founding, the United States had taken the position of limited government involvement and emphasized the rights of private citizens. Combined with an economic theory of the "free market", this necessitated private citizen action in order to enforce regulations and laws against companies. In fact, the majority of cases against companies in the United States for breach of federal law are brought by private citizens, rather than the state or regulatory authorities.[7] In general, "[i]n the United States, civil litigation plays a more substantial role in the governmental and societal structure than in most other countries."[8] This includes deterrence of wrongdoing.[9] This mindset must be kept in mind while considering the peculiarities of discovery in the United States in comparison to civil law jurisdictions, international arbitration, and even other common law jurisdictions.

In these instances of private individual versus corporations, there is invariably an imbalance of information and resources, an example being if a private individual claims that a manufacturer had knowledge of a defect in its product.[10] In such a case, the "truth" of the matter would not come out without extensive discovery, in particular, if the manufacturer in fact did not have such knowledge (the difficulty in proving a negative). If the manufacturer was unaware, one way to prove this fact would be if the company turned over all of its internal communications and documents, so that the plaintiff could see for themselves that there was no such knowledge.[11] This kind of "fishing expedition" would be entirely out of place in a civil law jurisdiction and even in arbitration, where typically a tribunal may want to

---

7) See, for example, the abstract of, Sean Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the United States*, https://www.researchgate.net/publication/288157206_The_Litigation_State_Public_Regulation_and_Private_Lawsuits_in_the_United_States. "Of the 1.65 million lawsuits enforcing federal laws over the past decade, 3 percent were prosecuted by the federal government, while 97 percent were litigated by private parties."

8) Stephan N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DePaul L. Rev. 299 (2002), p. 309, 310, https://via.library.depaul.edu/cgi/viewcontent.cgi?article=1502&context=law-review. Subrin also points to Americans distrust of concentrated power and the disproportionate number of lawyers as opposed to judges in the United States as reasons for Americans' reliance on civil litigation.

9) See the abstract in Russell M. Gold, *Compensation's Role in Deterrence*, Notre Dame Law Review, Volume 91, Issue 5, October 2016, p. 1997. "[…] the primary objectives of class actions— compensation and deterrence—are intertwined […]". Accessible at: https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4672&context=ndlr.

10) Subrin, p. 311. "Broad discovery seems critical in many situations in which private individuals in the United States use civil litigation to enforce rights. This is particularly true in such cases as civil rights, products liability, securities, and antitrust, in which evidence to make a prima facie case frequently resides in the files and minds of the defendants. In these lawsuits, it would often be very difficult, if not impossible, for the plaintiff to plead her facts or evidence with particularity in the complaint, as is required in the pleading rules of other countries. The lack of precise pleading means that the defendant also frequently needs extensive discovery. The United States Supreme Court has repeatedly drawn the connection between notice pleading and liberal discovery. It is instructive that the three main cases in which the Supreme Court has insisted that the Federal Rules of Civil Procedure call only for simplified, notice pleading all involve civil rights and all speak to the important place of discovery in the overall procedural scheme."

expressly avoid it.

With regard to resources, the "American rule" on costs[12] sets out that each party bear its own costs, regardless of which party "wins". This cuts both ways as it, (1) may encourage private individuals to sue companies since they would not be obliged to pay the companies' legal fees if they lose, and (2) may discourage private individuals from suing companies since they would be unable to recoup their legal fees if they win. This paradigm, on one hand facilitates private individuals lawsuits against companies for large claims (that would more than cover their legal fees), but on the other hand precludes private individuals from suing companies for small claims. This seems to contradict the above fact that many private individuals bring actions against companies to enforce regulatory law. However, contingency fee arrangements, class actions, and punitive damages, all relatively unique to the United States, alleviate the financial risk for plaintiffs and pose as a real threat to companies that may compel compliance.[13] While practitioners from other jurisdictions may be put off by these practices, in the context of reliance on private individuals suing companies as a means for regulatory enforcement, they may be necessary.

As alien as it sounds, there is some method to the madness, when considering that a judge in a purely adversarial system like in the United States would tend to be much more "hands off" than a judge in an inquisitorial system, where the judge may be more inclined to ask questions or give views on the parties' arguments.[14]

---

11) See Gold, pp. 2045-2046. In the context of class actions: "But civil litigation serves an important societal function insofar as it can reveal or generate information about wrongdoing and wrongdoers that informs the broader public. This positive informational externality complicates the efficiency calculus about quick settlement. And indeed, class members may, at least in some instances, value obtaining the sort of information that only litigation can unearth. One scholar explains, 'Litigation is when the facts come out . . . Litigation over the safety of a drug or product reveals all of the research on that drug or product—whether published or 'proprietary.'"

12) See, for example, US Department of Justice Civil Resource Manual on attorney's fees, https://www.justice.gov/jm/civil-resource-manual-220-attorneys-fees. "The general rule in this country, the so-called 'American Rule' is that each party must pay its own attorney's fees. See *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975)."

13)

14) As explained by Subrin, pp. 301-302. "That said, it does seem true that two of the biggest differences between civil law countries and the United States with respect to pretrial discovery are the centrality of the judge in civilian civil litigation and the continuity of the proceedings. We are accustomed to lawyers conducting pretrial discovery, supervised in a general way by judges when there is active case management, followed by a self-contained trial in the rare case that does not settle or is not otherwise terminated. After the pleadings in civil law countries, the judge decides what evidence he or she needs and proceeds to request documents and interrogate witnesses in person, summarizing the testimony in writing. The civil law judge's role is to decide the case on as limited an issue as necessary. As Professor Langbein argued in his provocative article, *The German Advantage in Civil Procedure*, the German judge has no need to explore every possible avenue in preparation for trial. He only explores what he thinks is relevant, and if what he originally thought would decide the case turns out insufficient to the task, he then turns to another avenue. The advocates in civil law countries can propose witnesses to be questioned and questions to be asked, but it is the judge who does the questioning."

Ⅱ. Document production in Japan

In comparison to the United States, civil law jurisdictions such as Japan have more limited document production. In Japan, the parties may request for certain documents from the opposing party, but not to the extent of the disclosure typical in American litigation.

Comparing Japanese practice to the United States, one can see why privilege (both attorney-client and litigation) has developed so robustly in the United States as exceptions to the rule, the rule being "turn everything over". Looking at these two regimes and with many jurisdictions falling closer to Japan, it can be understood why there is "general hostility" among most other jurisdictions to US-style discovery.[15)]

Though different, one cannot say that either legal tradition is superior to the other or that one provides more "just" outcomes.

Ⅲ. Document production in arbitration

International arbitration inherently involves different jurisdictions and, thus, different legal traditions. As such, document production in international arbitration takes a kind of "middle ground", somewhere in between broad discovery in the US and narrower document production in Japan. This seems like a reasonable compromise, but issues can still arise, for example, if a Japanese company is suddenly subject to document production in arbitration and must turn over "relevant and material" documents, but has never taken steps to preserve them. To an American company steeled by US discovery, the issuing of a document hold/preservation notice is something they may be well-accustomed to, but a Japanese company may have never thought to take such measures and the documents could be lost.

How should this situation be addressed in international arbitration? One could say that, the company should have been aware of the disclosure risk when they entered into a contract governed by the law of a US state. However, even in arbitral proceedings governed by such law, the tribunal may be inclined to grant some production requests, which, while limited, could be much more than would be expected in the courts of a civil law jurisdiction. Considering the inherent differences between US litigation and international arbitration, we should not cling to traditions arising out of a system where (i) private individuals take on a substantial burden of enforcing law against companies, and (ii) in such cases there is a disparity in information and resources between plaintiff and defendant.

In international commercial arbitration, this imbalance is less severe, if at all. Due to the more level playing field, discovery for fishing expeditions in order to find the "absolute truth" are unnecessary due to the very nature of arbitration, which arises out of the agreement of the parties that are sufficiently sophisticated to negotiate and agree to an alternative dispute resolution provision. In this way, the arbitration proceedings are an extension of the contract.

15) American Bar Association, *Obtaining Discovery Abroad*, Third Edition, 2020, p. 1. "One recurring theme in this publication is the general hostility of foreign courts to U.S.-style discovery."

Therefore, arbitration practitioners may want to reframe their perspective from one of being part of a quasi-judicial function to being service providers carrying out a contractual mechanism (that happens to resolve a dispute). This notion finds some (albeit indirect) support from recent US Supreme Court decisions.

Ⅳ. Supreme Court's distinction between private and governmental tribunals

In the past, US federal district courts were empowered by federal statute 28 USC Section 1782 to authorize discovery for persons or entities in the US "for use in a proceeding in a foreign or international tribunal." There was a split among US district courts as to whether "foreign or international tribunal" included private arbitration panels. The US Supreme Court in *ZF Automotive US, Inc. v. Luxshare, Ltd*. and *AlixPartners, LLP v. Fund for Protection of Investors' Rights in Foreign States*[16] held that Section 1782 only permits discovery in connection to proceedings presided over by "governmental or intergovernmental adjudicative bodies." This means that Section 1782 does not apply to private arbitration panels in international commercial arbitration. The Court held that this was because the arbitration panels in *ZF Automotive* and *AlixPartners* were not created by governments and were not exercising sovereign power.

This distinction pointed out by the Supreme Court between a government appointed/authorized tribunal and a private tribunal supports the above supposition that international commercial arbitration is not performing a judicial function (empowered by the state), but is rather a product of contract and the exercise of the parties' rights thereunder.[17]

Ⅴ. Way forward

Therefore, it may be better for the tribunal to take such factors into consideration early on in the proceedings. This may necessitate increased tribunal involvement, such as mid-stream conferences, where the tribunal can hear more of the parties arguments and give comments at an earlier stage, rather than backloading everything to the final hearing. Through such increased involvement the tribunal will (i) be forced to review the parties' submissions and evidence in depth at an earlier stage, (ii) will be able to give comments on the issues so the parties can focus their arguments, and (iii) may be able to better adapt the proceedings to fit the needs of the parties.

While the above may sound unpalatable to American and common law lawyers as some kind of distortion of a quasi-judicial process, we must keep in mind that at the end of the day, we are service providers trying to resolve a dispute, not arbiters of justice. It has been said

16) *See ZF Automotive U. S., Inc. v. Luxshare, Ltd*., 596 U.S. ___ (2022) and *AlixPartners, LLP v. Fund for Prot. of Investors' Rights in Foreign States*, 142 S. Ct. 638 (2021).

17) This concept was first brought to the attention of the author by Professor Joshua Karton, Queens University Law School, in his presentation entitled “Taking Arbitration-Agreements-as-Contracts Seriously” held on 18 February 2023 in Tokyo, Japan.

that arbitration practitioners should not view themselves as engaging in quasi-judicial proceedings but, instead, carrying out a function of contract. When viewed in this light, this adaptability and increased tribunal involvement may be more agreeable to attorneys from the common law tradition.

The above is contemplated by the IBA Rules, Article 2, which requires consultation with the parties on the taking of evidence at the earliest appropriate time (Article 2.1) and encourages the tribunal to identify issues it may regard as relevant to the case and material to its outcome and/or for which early determination may be appropriate (Article 2.3). However, in practice, while Article 2.1 may be touched on at an early case management conference, Article 2.3 and express input from the tribunal on the relevant issues may be glossed over, with the tribunal only providing input on the substance of the dispute at the hearing or even only in the final award.

Given the need for flexibility and adaptability in international arbitration in light of the mix of law and legal traditions in addition to the reasons I have set out above, tribunals should consider placing more emphasis on Article 2 of the IBA Rules (or other similar rules) and not be hesitant to provide input to the parties at an earlier stage in the proceedings.

NISHIMURA & ASAHI

Leading Japanese law firm for international arbitration

Delivering solutions with over 35 years of experience in arbitration

Tokyo Nagoya Osaka Fukuoka Sapporo Bangkok Shanghai Dubai
Düsseldorf Frankfurt Hanoi Ho Chi Minh City Jakarta* Kuala Lumpur* Manila*
New York Singapore Taipei Yangon

* Associate office

www.nishimura.com/en

Arbitration as a Means of Resolving ESG Disputes

TMI Associates Attorney-at-law
Shuhei Kubota

Ⅰ. Rising Role of Legal Departments Regarding ESG Matters

In recent years, the corporate governance landscape has undergone a significant transformation with the increasing prominence of Environmental, Social, and Governance (ESG) investment. This paradigm shift is not merely a trend, but is instead a profound change driven by growing societal expectations, regulatory demands, and investor pressure. ESG investment emphasizes the importance of companies adopting sustainable and ethical practices, considering not only financial performance but also investment targets' impact on the environment, social well-being, and governance structures. As this investment philosophy gains traction, the role of legal departments within organizations has seen a substantial expansion, reflecting the complexities and challenges that ESG considerations introduce.

Legal departments are now at the forefront of ensuring that companies meet their ESG commitments. This responsibility extends beyond traditional legal compliance to include navigation of the intricate regulatory landscape, risk management of ESG issues, and insurance of transparency and accountability measures in the field of corporate reporting. The integration of ESG factors into business operations demands a proactive legal strategy that anticipates regulatory changes and aligns corporate policies with evolving standards and stakeholder expectations.

One of the key areas where legal departments play a crucial role is in regulatory compliance. With the global advent of stringent ESG-related regulations, companies are required to adhere to a plethora of new laws and standards. Legal teams must stay abreast of these developments, interpret their implications, and guide the company in implementing necessary changes in order to remain compliant. This involves extensive collaboration with other departments (such as the sustainability, finance, and human resources departments), to develop comprehensive compliance programs that address ESG criteria.

Legal departments are similarly instrumental in ESG-related risk management scenarios. Environmental concerns, such as climate change and resource scarcity, social issues, including labor rights and community impact, and governance aspects, such as board diversity and

ethical business practices, all present potential risks to companies. Legal professionals must identify, assess, and mitigate these risks, ensuring that the company's operations do not expose it to legal liabilities or reputational damage.

Transparency and accountability in ESG reporting are also critical areas where legal departments provide significant contributions. Investors and stakeholders demand detailed and accurate disclosures about a company's ESG performance. Legal teams ensure that these reports meet regulatory requirements and are free from misrepresentations, thereby building trust and enhancing the company's credibility.

The expansion of the role of legal departments in the realm of ESG investment primarily centers around preventive legal practices aimed at anticipating and mitigating risks. The importance of such preventive legal measures in relation to ESG has been widely recognized.

However, in recent years, actual disputes related to ESG have been occurring worldwide, and terms such as "ESG disputes" and "ESG litigation" have become increasingly common. While there is no definitive definition of ESG litigation, it generally refers to disputes taking place before judicial and quasi-judicial bodies (e.g. arbitral tribunals, national human rights institutions, consumer watchdogs, and OECD National Contact Points) that involve material issues of ESG-related policies or laws, such as those concerning climate change, business, and human rights[1)].

This paper will provide an overview of recent ESG litigation trends both globally and in Japan. Additionally, it will explore the potential of arbitration as a means for resolving disputes related to ESG matters.

Ⅱ. Overview of ESG Litigation

ESG litigation can be broadly divided into two main categories: (1) lawsuits against governments; and (2) lawsuits against corporations. These two categories, while distinct, are interrelated. The outcomes of lawsuits against governments often serve as the theoretical foundation for subsequent lawsuits against corporations. Many plaintiffs in these cases are NGOs or individuals supported by such organizations. Recently, there has been a rise in intercorporate ESG-related disputes, with noteworthy developments including government regulations and lawsuits initiated by consumers or investors concerning corporate greenwashing practices.

1. Lawsuits Against Governments

(a) *Urgenda*-style Litigation

One of the most prominent ESG lawsuits against governments is the Urgenda climate case[2)].

1) Setzer J. and Higham C. (2023). *Global Trends in Climate Change Litigation: 2023 Snapshot*. London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science.

2) Urgenda Foundation v. The Netherlands [2015] HAZA C/09/00456689 (24 June 2015); aff'd (9 October 2018) (District Court of the Hague, and The Hague Court of Appeal (on appeal)) (affirmed by the Supreme Court, 20 December 2019)

In this landmark lawsuit, the Urgenda Foundation and 900 Dutch citizens sued the Netherlands to compel the government to take more robust actions regarding the emission of greenhouse gases. The Hague District Court ruled in favor of Urgenda, declaring that the government's plan to reduce emissions by 17% was insufficient to meet the United Nation's goal of limiting global temperature increases to less than two degrees Celsius above pre-industrial levels. The court emphasized the government's duty to protect its citizens from severe climate change consequences, based on human rights obligations and the precautionary principle. Citing principles such as Article 21 of the Dutch Constitution, the European Union's emissions targets, and the European Convention on Human Rights ("ECHR"), the court ordered the government to reduce greenhouse gas emissions by at least 25% from 1990 levels by 2020. This decision was upheld by both the Hague Court of Appeal and the Netherlands' Supreme Court.

Similar lawsuits inspired by the Urgenda case have been filed in various countries. In Germany, the *Neubauer, et al. v. Germany* case involved German youth challenging the Federal Climate Protection Act (*Bundes-Klimaschutzgesetz*, or "KSG"). They argued that the KSG's 55% reduction target by 2030 was insufficient to meet the Paris Agreement global temperature goals. The Federal Constitutional Court ruled that the KSG's failure to set forth adequate provisions for emission reductions beyond 2030 violated the fundamental rights to life and dignity owed tofuture generations via protection of the environment. The court then ordered the legislature to update the law to include stricter targets(Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Mar. 24, 2021, Case No. BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20). Additionally, in France, the *Notre Affaire à Tous v. France* case saw the plaintiffs arguing that the French government's inadequate climate action plans violated their rights under the ECHR and the French Charter for the Environment. The court found the government liable for failing to meet its climate commitments and ordered it to take stronger action to reduce emissions (Administrative Court of Paris, Judgment of 3 February 2021, Nos. 1904967, 1904968, 1904972, 1904976).These types of cases are often referred to as "*Urgenda*-style cases"[3] in that they typically challenge the ambition or implementation of a government's economy-wide climate policy response.[4]

Although there has not yet been any *Urgenda*-style litigation in Japan, the civil society group Climate Litigation Japan and a group of citizens recently filed a human rights remedy application with the Japan Federation of Bar Associations ("JFBA"). Climate Litigation Japan is requesting the JFBA to recommend the Japanese government to implement stronger and more specific policies to combat climate change, to address climate change measures as issues of life and human rights, to establish laws that define disasters and heat strokes caused by climate change as human rights violations, and to urge Japanese courts to recognize

3) Maxwell L., Mead S., and van Berkel D. (2021). Standards for Adjudicating the Next Generation of Urgenda-Style Climate Cases. Journal of Human Rights and the Environment.

4) Setzer J. and Higham C. (2023). *Global Trends in Climate Change Litigation: 2023 Snapshot*. London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, p32

damage from disasters and heat stroke as human rights violations due to climate change in climate litigation cases, as well as acknowledge the standing of plaintiffs in such cases. In its application, Climate Litigation Japan stated that "[i]n Japan, climate change is still often treated as a natural issue, and the awareness of human rights is not well developed. Even though there is significant damage, there is a sense that people just have to endure it. In the Japanese judiciary, plaintiffs are not even granted standing when climate change is the cause. The reasons for this include the limited causality between the damage and the cause, and statements from judges such as, While we understand the severity of climate change, it is still just a future concern and public opinion has not yet risen."[5)]

(b) Integrating Climate Considerations

Another type of lawsuit against governments involves demanding that climate change be considered when granting permits for corporate projects. According to the 2023 report by the Grantham Research Institute, these cases are categorized under "Integrating climate considerations" case.[6)]

One example of this type of case is *Gloucester Resources Limited v Minister for Planning* in Australia, in which the Land and Environment Court refused a coal mine application due to its significant impact on climate change and the environment (*Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7). Another notable case is *Friends of the Earth Ltd v Heathrow Airport Ltd* in the United Kingdom, in which the Court of Appeal ruled that the government's plans for a third runway at Heathrow were unlawful because they did not take into account the Paris Agreement's climate commitments (R (Friends of the Earth Ltd and Plan B Earth) v Heathrow Airport Ltd [2020] EWCA Civ 214).

In Japan, there have been several cases that can be classified under the "integrating climate considerations" category. One notable example is the Yokosuka Climate Case, in which 45 Japanese citizens filed a lawsuit to block the construction of a new coal-fired power plant, arguing that the environmental impact assessment ("EIA") did not adequately consider climate change impacts. The Tokyo District Court ruled against the plaintiffs, primarily on the basis that the damage from climate change did not constitute an individual interest protected by law. The court recognized the standing of the plaintiffs concerned regarding air pollution, but dismissed the claims related to climate change and CO2 emissions (Tokyo District Court, Judgment of 27 January 2023, No. 275/2019).

While "integrating climate considerations" cases are formally made against the government, they significantly influence corporate activities through the permit and licensing system. By challenging the permits granted to corporations, these cases indirectly impose stricter environmental standards and force companies to consider the ESG impact of their projects.

---

5) Climate Litigation Japan, Human Rights Relief Petition, June 12, 2024 https://docs.google.com/document/d/19wC40lAKUe8K7oq5tJnb14LDG3p-BH1gGZhI4n_bfjg/edit

6) Setzer J. and Higham C. (2023). *Global Trends in Climate Change Litigation: 2023 Snapshot*. London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, p42

2. Lawsuits Against Corporations

(a) Climate Change

Similar to the increase in lawsuits against governments, there has also been a rise in ESG litigation against corporations. Often, these lawsuits use the rulings from government cases as theoretical foundations for their claims against companies.

One notable example of this is the *Milieudefensie et al. v. Royal Dutch Shell plc* case, in which the plaintiffs, including various environmental groups and Dutch citizens, claimed that Shell's climate policies were insufficient to meet the Paris Agreement's targets and that the company's actions violated human rights by contributing to climate change. The District Court of The Hague ruled that Shell must reduce its CO2 emissions by 45% by 2030, relative to 2019 levels. The court based its decision on Shell's duty of care under Dutch law and its responsibility to respect human rights (District Court of The Hague, Judgment of 26 May 2021, C/09/571932 / HA ZA 19-379). The *Urgenda* ruling established that the Dutch government must protect citizens from climate impacts based on human rights obligations. This precedent influenced the *Milieudefensie v. Shell* case, where the court similarly held Shell accountable for reducing emissions, extending the *Urgenda* principles to corporate responsibility and the duty of care.

However, there is a German court case with an opposing judgment on a similar matter. In the *Deutsche Umwelthilfe (DUH) v. Mercedes-Benz AG* case, environmental group DUH sued Mercedes-Benz, arguing that the company's emission targets were inadequate under Germany's Climate Protection Act. DUH claimed that Mercedes-Benz had a duty to adopt more stringent measures to reduce its CO2 emissions to meet climate goals. The Regional Court of Stuttgart, however, dismissed the case, ruling that it was up to the legislature to decide the appropriate measures to protect the climate and that this could not be preempted by an individual action before a civil court (Stuttgart Regional Court, Judgment of 13 September 2022, 17 O 33/21).

In Japan, there are not currently any notable cases in which climate change has been a major point of contention in lawsuits against corporations. However, the Supreme Court's ruling recognizing the liability of building materials manufacturers with respect to asbestos-related health damages may influence future cases concerning corporate responsibility for climate change. On May 17, 2021, the Japanese Supreme Court issued a landmark ruling affirming such liability in a case consolidating several lawsuits filed by construction workers and their families, who suffered from asbestos-related diseases due to exposure at construction sites. The plaintiffs argued that the manufacturers failed to adequately warn about the dangers of asbestos, despite being aware of its health risks. They contended that the companies neglected their duty to provide safety measures and adequate information to protect workers from asbestos exposure. The defendant manufacturers argued that they had complied with the regulations in place at the time and that asbestos use was widespread and legally permitted. They also claimed that they could not have foreseen the extent of the health risks associated with asbestos exposure and that they had no specific legal obligation to warn about such risks beyond existing regulatory requirements. Additionally, they asserted

that the responsibility for worker safety primarily lay with the employers and contractors at the construction sites. The Supreme Court, however, ultimately ruled in favor of the plaintiffs, acknowledging the manufacturers' responsibility for failing to prevent asbestos exposure and adequately warn about its risks. The court held that the companies should have taken proactive measures to mitigate the health risks associated with asbestos use. Some experts suggest this ruling could influence future cases concerning corporate accountability for climate change impacts, drawing parallels between the failure to prevent known harms in both contexts.[7)]

(b) Business and Human Rights

Limbu and Others v. Dyson Technology Ltd. stands out as a notable case in the field of business and human rights. The plaintiffs, a group of 24 migrant workers from Nepal and Bangladesh, alleged that they had been subjected to forced labor and exploitative working conditions at Malaysian factories producing Dyson products. They claimed that Dyson was liable for negligence, false imprisonment, intimidation, assault, battery, and unjust enrichment due to its high degree of control over its supply chain, and its enforcement of mandatory policies. The plaintiffs also argued that they were forced to work excessive hours without proper compensation, subjected to harsh and abusive treatment, and lived in degrading conditions. They alleged that Dyson's policies, including the Dyson Ethical and Environmental Code of Conduct and the Dyson Modern Slavery and Human Trafficking Statement 2020, were inadequately enforced, thereby leading to their mistreatment. The High Court of Justice, however, dismissed the case, concluding that Malaysia was the more appropriate forum for the claims. The court applied the *Spiliada* test, which helps determine the most suitable jurisdiction based on factors such as the location of the alleged harm and the applicable law. The court found that the "center of gravity" of the case was Malaysia, where the alleged abuses occurred, and noted that Malaysian law would be more appropriate to address the novel legal issues raised in the case (High Court of Justice, Judgment of 19 October 2023, [2023] EWHC 2592 (KB)).

As seen in the case above, upstream companies in the supply chain may potentially be held accountable for human rights violations, thereby making international jurisdiction a significant issue in such cases.

While the author is not aware of any prominent cases of this type in Japan, if such a case arises, both the local subsidiary and the parent company in Japan can be sued together, which may potentially grant jurisdiction to the Japanese courts. According to Article 3-2(3) of the Civil Procedure Code, the presence of the defendant's address in Japan is generally regarded as establishing jurisdiction. Exceptions may apply if evidence is concentrated abroad or if applying foreign law is challenging (Article 3-9). Conversely, if human rights violations occur in Japan and the victim sues a foreign corporation conducting business through the supply

7) Mie Asaoka, Considering the Supreme Court Ruling on Construction Asbestos: Avoiding Damage from Climate Change, 2021, https://energy-shift.com/news/d80fef10-11c0-4121-9d4d-9079fe1aa38d

chain, subjective joinder may be an issue. Article 3-6 of the Code allows for subjective joinder if the claims are closely related. Therefore, jurisdiction may be recognized by suing both the Japanese subsidiary and the upstream foreign corporation for joint torts.

As previously mentioned, to the best of the author's knowledge, there are no well-known judicial cases in Japan concerning business and human rights. However, outside judicial procedures, the OECD National Contact Point ("NCP") has addressed cases such as the following[8].

The Japan Cabin Crew Union filed a complaint against KLM Royal Dutch Airlines, alleging discriminatory employment practices for Japanese cabin attendants who were hired on fixed-term contracts, unlike their Dutch counterparts who had permanent contracts. This was claimed to violate the OECD Guidelines for Multinational Enterprises. The Japanese NCP accepted the complaint and sought mediation, but KLM declined to participate, citing ongoing collective bargaining and judicial processes. Although the parties did not reach an agreement, the NCP recommended that KLM align its employment policies with the OECD Guidelines, stressing the importance of non-discrimination and equal treatment.

Ⅲ. Arbitration as a Means for Resolving ESG Disputes

Arbitration offers several distinctive features, one of which is neutrality, as providing a neutral forum is especially beneficial in international disputes to avoid any home-court advantage. Another significant feature is procedural flexibility, allowing parties to customize the arbitration process to suit their specific needs, unlike the rigid procedures seen in court litigation. Arbitrator expertise is also a hallmark of arbitration, as arbitrators are often selected for their specialized knowledge relevant to the dispute, ensuring informed decision-making. Additionally, arbitration awards are internationally recognized and enforceable under the New York Convention, thereby offering robust enforceability. Lastly, confidentiality is another crucial feature of the arbitration system, as arbitration proceedings are typically private and thereby protect sensitive information and business secrets from public disclosure.

As mentioned earlier, claims for damages and specific performance against governments and companies related to climate change are increasing. These claims seek court orders limiting greenhouse gas emissions, compensation for the damage caused by emissions, future damages for when emissions are not reduced, pollution-related damages, and reimbursement for climate change measures, and it is said that arbitration is generally unsuitable for resolving these disputes[9]. There is typically no arbitration agreement between the plaintiff and the

8) The NCP procedure is designed to promote adherence to the OECD Guidelines for Multinational Enterprises. It involves receiving complaints about corporate behavior, conducting initial assessments, and facilitating mediation between the parties involved. NCPs do not make binding judgments but can offer recommendations. The process includes evaluating whether issues are substantiated and merit further examination. If mediation fails, the NCP may issue statements to guide compliance with the guidelines, encouraging enterprises to resolve disputes and improve practices in line with OECD standards.

9) Lennarz, in: Kahl/Weller, Climate Change Litigation, 2021, p. 106

defendant companies, as these claims often arise from tort or public international law rather than contractual relationships. Additionally, claimants usually aim to generate publicity rather than confidential resolution of the matter, thereby seeking to exert public pressure on companies.

However, as ESG clauses become incorporated into various contracts, it is likely that arbitration, in addition to litigation, will be increasingly utilized as a method for resolving ESG disputes in the future. ESG clauses are now commonly found in various types of contracts, including supply contracts, transactional documents, public sector contracts, employment agreements, shipping agreements, and insurance agreements. The purpose of these clauses is to prevent harmful business practices, enhance stakeholder relationships, improve reputational benefits, and ensure compliance with regulatory requirements. ESG clauses in commercial contracts typically involve due diligence requirements, compliance obligations, monitoring and reporting requirements, and warranties and indemnities. Breaches of ESG clauses can result in agreed remediation processes, contract termination, or damages. These ESG clauses are relatively new and innovative, and have therefore not yet been widely tested in courts, including in Japan. It is pointed out that these types of clauses will eventually result in disputes involving intricate issues of contractual interpretation, enforceability, and compliance. Additionally, disputes may arise from traditional breach of contract claims related to non-performance of ESG obligations and violations of ESG representations and warranties.[10] When disputes related to such ESG clauses arise between companies or between companies and investors, arbitration can serve as a reasonable means of dispute resolution.

In addition to this, many cases in the field of business and human rights, where certain relationships already exist between the victims and the companies, are inherently suitable for resolution through arbitration. Unsurprisingly, if one of the plaintiffs' objectives is to hold the defendant company publicly accountable for its social responsibilities, the confidentiality of arbitration may be seen as a disadvantage. However, for complex cross-border disputes, the flexibility of arbitration procedures can provide the advantage of swift human rights remedies. For the victims, this can offer significant benefits. For the companies who perceive ESG as a significant reputational risk, the ability to resolve issues quickly through confidential proceedings, combined with the neutrality of the process and the assurance of the legitimacy of the outcomes, presents considerable advantages. It should also be noted that the ability to resolve disputes confidentially may encourage companies to more proactively take on ESG-related obligations[11].

Indeed, the collapse of the Rana Plaza building near Dhaka, Bangladesh in 2013 is often cited as a tragedy in the context of business and human rights. It is well known that arbitration was utilized in resolving the issues arising from this incident. After the disaster,

10) Julianne Hughes-Jennett and Nayomi Goonesekere, in: ESG Subcommittee of the IBA Arbitration Committee, Report on Use of ESG Contractual Obligations and Related Disputes, 2023, p.18

11) Julianne Hughes-Jennett in: ESG Subcommittee of the IBA Arbitration Committee, Report on Use of ESG Contractual Obligations and Related Disputes, 2023, p.34

global brands and unions signed the 2013 Accord on Fire and Building Safety in Bangladesh (the "Bangladesh Accord"), an agreement that stipulated arbitration for resolving disputes as follows.

> *5. Dispute resolution. Any dispute between the parties to, and arising under, the terms of this Agreement shall first be presented to and decided by the SC* [Steering Committee]*, which shall decide the dispute by majority vote of the SC within a maximum of 21 days of a petition being filed by one of the parties. Upon request of either party, the decision of the SC may be appealed to a final and binding arbitration process. Any arbitration award shall be enforceable in a court of law of the domicile of the signatory against whom enforcement is sought and shall be subject to The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention), where applicable. The process for binding arbitration, including, but not limited to, the allocation of costs relating to any arbitration and the process for selection of the Arbitrator, shall be governed by the UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006)*[12)]*.*

Two arbitration matters were initiated by unions under this arbitration clause. Both cases concluded with settlements, leading to the termination of the claims. The terms of the settlements remain confidential.

It should also be noted that the effectiveness of pre-existing arbitration agreements between individual workers and companies or upstream supply chain companies may be limited because, under Japanese arbitration law, arbitration agreements between individual workers and employers concerning potential future disputes related to working conditions or other labor relations are currently considered invalid (Supplementary Provision Article 4 of the Arbitration Act). Nevertheless, utilizing the Japanese litigation system poses significant barriers for resolving international disputes, as all proceedings must be conducted in Japanese. It should also be emphasized that Japanese arbitration law does not restrict arbitration agreements for disputes with individual workers that have already arisen.

The UN Guiding Principles on Business and Human Rights emphasize ensuring access to effective remedies for victims, including judicial, administrative, and arbitration mechanisms, to address business-related human rights abuses. Thus, there should be an increase in the use of arbitration in ESG disputes as one of the diverse range of dispute resolution mechanisms. It is expected that more examples of resolving ESG disputes through arbitration will emerge, leading to the accumulation of experience in resolving such disputes among stakeholders.

12) The Accord on Fire and Building Safety in Bangladesh, 13 May 2013, https://bangladesh.wpengine.com/wp-content/uploads/2018/08/2013-Accord.pdf

TMI Associates constantly endeavors to meet the needs of its clients and society as a whole by utilizing its comprehensive internal and external networks in new and emerging legal practice areas.

TMI Associates

23rd Floor, Roppongi Hills Mori Tower, 6-10-1 Roppongi, Minato-ku
Tokyo 106-6123, Japan
Tel: +81(0)3-6438-5511 Fax: +81(0)3-6438-5522
E-mail: info_general@tmi.gr.jp
https://www.tmi.gr.jp

Tokyo / Nagoya / Osaka / Kyoto / Kobe / Fukuoka / Shanghai / Beijing / Yangon / Singapore / Ho Chi Minh City
Hanoi / Phnom Penh / Bangkok / Jakarta* / Kuala Lumpur* / Silicon Valley / London / Paris *Affiliated office

TMI ASSOCIATES

The Development of Sports Arbitration in Japan and Challenges for the Future

Adjunct Professor at Chuo Law School, Attorney at Law

Shin-Ichiro Abe

Ⅰ. History of Sports Arbitration in Japan

The history of sports arbitration in Japan only begins in the twenty-first century. The Japan Sports Arbitration Agency ("JSAA") was formed in 2003, converted into an incorporated foundation in 2009 and then converted into the form in which it exists today a public interest incorporated association in 2019. On its formation, JSAA adopted its Sports Arbitration Rules. This became the dawn of sports arbitration procedure in Japan.

Today, there are six types of JSAA arbitration in use today: (1) Sports Arbitration; (2) Arbitration for Doping Disputes; (3) Specified Sports Arbitration; (4) Sports Arbitration for Governance Code; (5) Sports Arbitration for Affiliated Sports Bodies; and (6) Doping Disputes of the Ladies Professional Golfers Association of Japan. These cover diverse needs and are available not only to the athletes who compete in sports events but also sports organizations.[1)] Some sports events however, are not covered by JSAA arbitration. For example, FIFA has established its own internal judicial bodies, the Appeal Committee, Disciplinary Committee and Ethics Committee.[2)] The Appeal Committee has the function of handling appeals against the Disciplinary Committee, with the Court of Arbitration for Sport ("CAS") being available for appeals against the determinations of the Appeal Committee. The Japan Football Association (JFA) has established internal bodies corresponding to the judicial bodies of FIFA, its umbrella organization.[3)] JFA's Rules Committee and Adjudication Committee make determinations which can then be appealed to its Appeal Committee. Similarly, players may appeal decisions of the JFA's Appeal Committee to the CAS. Because of this existing structure, JFA related disputes are not contemplated under JSAA arbitration rules.

1) See the JSAA homepage: https://www.jsaa.jp/

2) See: https://inside.fifa.com/about-fifa/organisation/committees

3) See the JFA "Judicial Body Management Regulations" (Japanese): https://www.jfa.jp/documents/pdf/basic/br04.pdf

Ⅱ. The Need for a Dispute Resolution Body Different from the Courts

1. Why is a specialized dispute resolution body needed for sports arbitration? In Japan, there currently is no specialized legislation for sports related disputes. Accordingly, the traditional perception of the field of sports arbitration has been that it is a distinctive type of dispute outside the scope of "legal disputes"[4] that can be handled by the courts under the Courts Act.[5] Indeed, there is a case precedent in which a sports related dispute was dismissed by the Tokyo District Court (Tokyo District Court Judgement December 1, 2010 No. *ta* 1350, p. 240).
2. It is against this backdrop that a need arose for a special body to resolve sports disputes. Recently however, support has emerged for the view that sports disputes can be considered legal disputes within the remit of the Japanese courts. The argument for the legal nature of sports disputes is based in the contractual relationship between sports organizations (in some cases, from local organizations to higher municipal, prefectural, or national levels) and the athletes who compete in the events.[6] There is a case precedent in which this proposed idea was decided by the court.[7] It is likely that this idea will continue to be explored going forward. For the present, the best approach may be to categorize sports disputes and make a determination on an individual basis for each category as to whether it has the nature of a legal dispute.[8]
3. A characteristic of sports disputes is that they often involve urgent issues that must be resolved within a very short period of time, for example cases in which an athlete is not selected to be a representative for the sport when the match in question will be held the next week. In order to respond appropriately within a limited period of time in cases like this, a special dispute resolution body designed to resolve disputes swiftly is preferable to the courts.
4. The perspective of costs must also be considered. In sports disputes one of the parties to the dispute will most often be an athlete. Other than well-known top athletes, individual athletes are not able to pay high dispute resolution costs from their own pocket. Similarly, where a case drags in the courts causing litigation costs to soar, it is not realistically possible for the individual athlete to bear the costs personally. Needless to say, it is critical to help athletes avoid such situations. A dispute resolution body that can resolve dispute at low cost is necessary for this purpose.

---

4) Courts Act, Article 3.

5) Masato Dogauchi, "Supōtsu chūsai chōtei" Dogauchi=Hayakawa "Supōtsu-hō e no shōtai" (Minerva Shobo, 2011) p. 61, Kojima=Inomata "Chūsai-hō" (SEIRIN SHOIN, 2014) p. 30, Yamamoto=Yamada "ADR Chūsai-hō (2nd Edition)" (NIPPON HYORON SHA, 2015) p. 293 etc.

6) Kazushige Ogawa "Supōtsu funsō wa dono yō ni kaiketsu sa rete iru ka?" Norihide Ishido ed. *Supōtsu-hō e no fāsutosuteppu p*. 137 (Horitsu Bunka Sha, 2018)

7) Tokyo District Court Judgement, March 31, 2015 LEX/DB25524851

8) Similar view expressed in Hiroshi Shimizu "Supōtsu chūsai handan no shikkō kanōsei ni tsuite" TOYOHOGAKU Volume 61 No. 1 p. 239, 2017.

Ⅲ. The Functions of Sports Arbitration Procedure

Based on the functions of a dispute resolution body for sports arbitration as discussed above, there are clearly specific functions that the procedure of sports arbitration should achieve as follows. First, the procedure should be designed to handle the entirety of a sports dispute. Second, the procedure must include a mechanism for expedited dispute resolution. The athletic lifespan of athletes is brief. While a decision on the athlete's fate is pending, the start of the sports competition in which the athlete seeks to compete may be imminent. This is a field that strongly calls for an expedited dispute resolution procedure capable of responding to these kinds of circumstances unique to sports competitions. Third, for the reasons discussed above, it is necessary that costs can be kept in check so that they do not become prohibitive.

Ⅳ. The Role of JSAA

Giving careful consideration to the essential functions of a dispute resolution body and procedure in this field, JSAA offers three main types of procedures for sports disputes generally.[9] First, under the procedure for "Sports Arbitration" athletes can seek to overturn a decision of their relevant sports organizations and this is carried out in accordance with the Sports Arbitration Rules. The scope of disputes covered under this procedure is limited for policy reasons as can be seen from the wording of the Sports Arbitration Rules. Article 2, Paragraph 1 of the Sports Arbitration Rules circumscribes the scope to cases where a "competition participant, etc." who is dissatisfied with decision made by a competition organizer or its relevant organization regarding a sports competition or the operation thereof, applies for arbitration, where the "competition participant, etc." is the complainant and the competition organizer is the respondent. With respect to the meaning of "competition participant, etc.", an amendment to the definition in Article 3, Paragraph 2 of the Sports Arbitration Rules was made in 2013 to expressly exclude council members, directors and staff of the competition organizer and any other persons involved in its organization.[10] Consequently, disputes concerning matters such as the appointment of officers of a sports organization were thereafter excluded from this procedure. As to included matters, these typically relate to decisions made by a sports organization regarding the selection of athletes for the national team or disciplinary action taken against an athlete. The aim of limiting the scope in this way is to achieve a speedy and low-cost process (as will be described in further detail below, athletes are only required to pay a filing fee of 50,000 yen). Since disputes of this kind do not qualify as "legal disputes" that can be handled by the Japanese courts (Courts Act, Article 3), JSAA fills a large gap for the resolution of disputes of this kind. According to JSAA statistics, during the period from 2003 to the end of March 2024, a total of 88 arbitral

9) Japan Sports Law Association ed. “Shōkai supōtsu kihon-hō” p. 281, Seibundoh 2011.

10) “Supōtsu ni kansuru chūsai ni tsuite no shin kisoku oyobi jūrai no kisoku no ichibu kaisei ni tsuite” dated August 21, 2013, The Japan Sports Arbitration Agency.

decisions have been given under this procedure, with several decisions being made each year.

Second, there is the procedure for Specified Sports Arbitration. This applies to all disputes relating to sports but requires the existence of a specific agreement to arbitrate. In effect, the procedure is intended to deal with disputes in relation to the business of sports. Because of this, the lower rates available to "competitors, etc." (*i.e.*, the athletes) under the Sports Arbitration procedure are not available to users of the Specified Sports Arbitration procedure, and instead the filing and administration fees are set at the same rates as the Japan Commercial Arbitration Association ("JCAA"). This procedure has been in place since 2004, but the first decision for an arbitration case under this procedure was given in 2024, in which the author was one of the arbitrators.

Third, there is the Anti-Doping Arbitration procedure, which is used for dispute resolution in relation to decisions of The Japan Anti-Doping Disciplinary Panel of the Japan Anti-Doping Agency ("Anti-Doping Disciplinary Panel"). An athlete who wishes to appeal the decision of the Anti-Doping Disciplinary Panel in respect of a drug test, may apply for arbitration under this procedure. Additionally, if a party believes that the sanctions imposed by the World Anti-Doping Agency or an international sports federation are too lenient, such party may file for arbitration against such bodies as well as the athlete. According to JSAA statistics, during the period from 2003 to the end of March 2024, a total of eight arbitral decisions have been given based on this procedure and there have been quite a few years during that timeframe in which no arbitral decision was made.

As alluded to above, JSAA has a fee schedule for each of these procedures. Because the anticipated users of Sports Arbitration and Anti-Doping Arbitration are mainly the athletes, the filing fees for these procedures are kept on the low end at 50,000 yen per case in the interests of ensuring that the process is accessible to the athletes. In contrast, the expected users of the Specified Sports Arbitration procedure are those involved in the business of sports. Accordingly, the filing fee and administration fee for this procedure are aligned with the fees set by the JCAA.

Ⅴ. The Operation of CAS at the Tokyo Olympic Games

A noteworthy chapter in the recent history of sports arbitration in Japan is composed of the arbitration that occurred during the delayed 2020 Tokyo Olympic Games held in the summer of 2021. For the period starting from ten days prior to the opening of the Olympic Games to its closing, a temporary office of the CAS was established for the occasion. The facilities of the Japan International Dispute Resolution Center ("JIDRC") were used for this purpose. This temporary office was made up of two divisions: the Ad Hoc Division to cover appeals from the decisions of the various sports organizations within 24 hours after an application and the Anti-Doping Division.[11] The arbitration panels were tasked with making decisions that could determine whether or not an athlete could compete in the Olympic Games that were to begin

11) See: https://www.tas-cas.org/fileadmin/user_upload/CAS_Media_Release_Tokyo_Announcement.pdf

within days. As such, the proceedings to be handled were of a highly urgent nature. Nine arbitral decisions of the CAS Ad Hoc Division were published in relation to the 2020 Tokyo Olympics Games.[12)]

Through JSAA in cooperation with the Japan Federation of Bar Associations, a *pro bono* service was established to provide free legal consultation and representation services to athletes during the Tokyo Olympic Games.[13)] According to the report published by the organizers of these *pro bono* services, a total of seven inquiries and four applications were handled and the feedback from the athletes was positive.[14)] As one of the attorneys among the pool of *pro bono* attorneys for the service, the author represented the Georgian women's doubles tennis players in submitting an appeal to the CAS Ad Hoc Division regarding their eligibility to participate in the Tokyo Olympic Games.[15)] The application was filed on a Wednesday night, the hearing was held the very next night and the arbitral decision given at noon the following day. The process was completed with remarkable speed.

Ⅵ. Some Challenges to Meet Going Forward in Japan

The following are two points that are the subject of ongoing discussion surrounding the continuing development of sports arbitration in Japan.

1. Issue Concerning Automatic Acceptance Provisions in Arbitration Agreements

As a major premise for arbitration generally, there must an arbitration agreement between the parties in order for arbitration to proceed. The same is true for sports arbitration. The practical reality in this field in Japan however, is that there is almost never an agreement between the sports organization and the athlete which provides for arbitration in the event of a dispute. But if an athlete instead tried to seek a remedy from the courts to contest a decision made by a sports organization against the athlete, there is a possibility that the application would be denied given the restrictions of Japanese court proceedings as discussed above. Even if a court could handle the subject matter, the courts are not suitable for resolving disputes in this area considering the urgency of matters surrounding a decision on whether an athlete can compete in an impending event. This ultimately leaves the athlete no option other than arbitration. On the other hand, from the perspective of the sports organization, having to respond to an appeal from an athlete not only incurs time and cost, it also raises the troublesome possibility that its decision will be overturned. Accordingly, there is strong incentive for the sports organization to steer matters away from developing into disputes. For these reasons, in the past, the internal regulations sports organizations have generally not provided for arbitration as a means of dispute resolution, and once disputes

12) See: https://www.lawinsport.com/topics/sports/item/a-summary-of-cas-decisions-at-the-tokyo-2020-olympic-games

13) See: https://www.tas-cas.org/fileadmin/user_upload/CAS_Media_Release_Tokyo_Announcement.pdf

14) See: https://probono2020.tokyo/Tokyo_2020_Pro_Bono_Service_Report_EN_final.pdf

15) See: https://www.tas-cas.org/fileadmin/user_upload/Award_CAS_OG_20-05.pdf

have developed, sports organizations have not consented to arbitration in response to an application by an athlete. These circumstances have generated calls for sports organizations to establish an automatic acceptance provision in their internal regulations in order to ensure that athletes have an avenue to appeal decisions of the organization. This is a provision that would be triggered when an athlete sought arbitration to appeal a decision made by the sports organization to the effect that the sports organization would be deemed to have entered into an arbitration agreement with the athlete and thereby be required to participate in the arbitration notwithstanding the absence of an express agreement between the athlete and the sports organization to arbitrate. Needless to say, because there is no authority for compelling a sports organization to adopt such a provision, it cannot be expected that they would do so without some incentive. Fortunately, they are now being nudged in the right direction by the evaluation criteria for government subsidies. In evaluating applications for subsidies made available to sports organizations by the Japanese government through the Japan Sports Council as the point of contact, the Japanese government considers whether the applicant organization has adopted this automatic acceptance provision into its internal rules. As a result of this, many sports competition organizers have chosen to adopt the provision into rules. It is believed that 78% of sports organizations adopted the automatic acceptance provision into their internal rules by November 2022. The challenge going forward is to bring this voluntary adoption to 100% of all sports organizations in Japan.

2. Standard Adopted as the Framework for JSAA Arbitral Decisions

Conventionally, decisions in sports arbitration are to be made by the arbitration panel independently for each case, without being bound to precedent as the courts are when rendering judgements. In reality however, a standard has been followed for arbitral decisions of JSAA since its inception in 2003.[16] Under this standard, at least one of the following criteria is required to be present in order for an arbitration panel to overturn the decision of a sports organization:

(1) the decision of the Japanese sports federation violated its own rules;
(2) even if the decision did not violate the rules of the organization, it was markedly unreasonable;
(3) there were procedural defects in reaching the organization's decision; and
(4) the rules established by the domestic sports federation themselves violated legal order or were otherwise markedly unreasonable.

These standards not only serve as criteria for determining national team player selection, but also apply to disciplinary actions within sports organizations. In Japan, these four requirements are known as the "*de facto* precedents for sports arbitration"[17] and are well regarded.

It can be said the above standards take the approach of recognizing a certain degree of

16) As an early example, in JSAA-AP-2003-001 (weight lifting), criteria 1 through 3 were applied and in JSAA-AP-2003-003 (para swimming) criterion 4 emerged.

17) Yoshihisa Hayakawa ed. "Supōtsu to hō" p. 47, YUHIKAKU, 2021.

autonomy based on the doctrine of partial society or the doctrine of private autonomy, in respect of the operation of sports organizations, and overturning a decision based on whether there is an overriding interest at stake. Taking a look at each criterion, since the first is a violation of regulations, it is clear that this refers to a violation of written regulations and thus grounds for overturning a decision are clear in such cases. Criteria 2 through 4 can be seen as the application of the "general principle of law" set forth in the Article 43 of the Sports Arbitration Rules, or derived with regard to natural law and justice.

The existence of this four-part standard gives the parties to a dispute predictability on arbitration decisions, and being reasonable in nature, they can be expected to foster a sense of satisfaction among the parties. The interpretation of these four criteria and their application to the facts of each case in practice will be key going forward, and it can be expected that sophistication in these areas will develop further as the number of arbitral decisions grow.

Ⅶ. Conclusions

Sports arbitration in Japan is relatively new and as such, the number of cases is not high at this time. Nonetheless, from the perspective of the athletes for which it serves as a last rampart against the decisions of the more powerful sports organizations, the significance of these sports arbitration procedures cannot be overstated. Furthermore, it can be expected that the significance of sports arbitration as a means of resolving sports disputes will become increasingly recognized among the related parties involved going forward. The Japan Association of Arbitrators which was established for the purpose of training, researching, and increasing the number of arbitrators and related practitioners in the field of arbitration, has established a "Sports Arbitration/Mediation Committee" (of which the author is a member) just this year. Through developments such as these, greater awareness of the importance of sports arbitration is also starting to spread in the field of arbitration generally. Going forward, it will be increasingly important to examine ways to further gain the trust of sports organizations and athletes in Japan's sports arbitration procedures and encourage these parties to use them for resolving disputes.

Kasumigaseki International Law Office
International Arbitration Chambers

Kasumigaseki Building, 23F, 3-2-5,
Kasumigaseki, Chiyoda-ku
Tokyo, 100-6023, Japan
TEL: +81-3-5157-1218

In addition to legal counsel practice, representing clients for cross-border dispute resolution including international litigation, arbitration and mediation, we serve as independent arbitrator and mediator, to be appointed on Ad Hoc basis, and/or by arbitration/mediation institutions, such as JCAA, and ICC . Our practice area includes both domestic and international dispute resolutions, for large, middle, and small sized companies, on various commercial/civil area, such as intellectual property, anti-trust, product liability, and compliance investigation, and corporate/business rehabilitation related matters and projects.

Shinichiro(Shin) Abe
Attorney at law
Arbitrator

Kiyotaka Matsui
Attorney at law

If you need any assistance for appointment and/or selection of arbitrators and mediators, or any service as legal counsel to represent you or your company, for any institutional international ADR or Ad Hoc ADR, please contact us (International Arbitration Chambers), through the following.

International Arbitration Chambers
E-mail: secretary@kiaal.com

URL: https://kiaal.com/en/

Through the above contacts, we also provide legal consultations on various commercial matters, not only for cross-border dispute resolution, but also for corporate/business rehabilitation matters, compliance investigation, and cybersecurity/data protection matters, such as GDPR.

Advanced Technologies in Tokyo Facilities for Arbitration Hearings

Professor of Law at Rikkyo University
Partner at Uryu & Itoga
Yoshihisa Hayakawa

Ⅰ. TFAH and Backgrounds

This paper aims to introduce advanced technologies being used in the contemporary scenes of international arbitration.

"Basic Policy on Economic and Fiscal Management and Reform 2017," which was approved by the Cabinet of Japan in June 2017, aimed to "develop a foundation to activate international arbitration" in Japan as one of the important policies of the Japanese Government.[1)] Responding to the policy, "Japan International Dispute Resolution Center (JIDRC)" was established, as a driving-force entity for implementing specific projects for the policy in February 2018.[2)]

As one of the specific projects, JIDRC started the operation of Osaka Facilities for arbitration hearings in May 2018 and Tokyo Facilities for arbitration hearings in March 2020.[3)] In order to make Japan as an attractive place as a venue for arbitration hearings and, ultimately, as a seat of international arbitration, advanced technologies for arbitration hearings were drastically introduced with the governmental budget. The COVID pandemic accelerated the use of advanced technologies in the actual arbitration hearings.

Since the five-year period of the governmental project expired, these government-related facilities had to be closed. All the know-hows and knowledges of the advanced technologies for arbitration hearings were, however, substantially passed on to a new entity, which was established by the private sector. And the advanced technologies are regularly used now by the new entity in its daily operation of new facilities for arbitration hearings in Tokyo.

The new entity is called "Tokyo Facilities for Arbitration Hearings (TFAH)."[4)] TFAH has one main hearing room and four breakout rooms for the operation of arbitration hearings with advanced technologies, and is located in the very center of Tokyo. TFAH also provides its

1) https://www5.cao.go.jp/keizai-shimon/kaigi/cabinet/honebuto/2017/2017_basicpolicies_en.pdf
2) https://idrc.jp/en/
3) https://idrc.jp/images/home/booklet.pdf
4) https://tokyofacilities.com/

-Hearing Room in TFAH-

-A Breakout Room in TFAH-

service based on the advanced technologies with its professional engineers to other facilities where much larger-scale hearings or events are organized. Even after the closure of the government-related hearing facilities, arbitration hearings with advanced technologies in Japan can be smoothly operated at the facilities of TFAH or at other facilities with the assistance of TFAH.

The author of this paper used to serve as Executive Director and Secretary General of JIDRC, and now serves as an Advisor to TFAH. Based on the actual experiences in these facilities, this paper will explain the advanced technologies which are actively used now in the contemporary scenes of international arbitration.

Ⅱ. Advanced Technologies in International Arbitration

1. Hybrid-style Hearings

During the COVID pandemic, arbitration hearings could not be easily organized. At the arbitration hearings, in nature, many participants, including arbitrators, counsels and witnesses, have to gather together in a closed room. It was a situation to be avoided during the COVID pandemic.

In international arbitration, in nature, participants have to come to a hearing venue not only from the same country but also from other countries. During the COVID pandemic, however, international travel was very difficult or practically impossible. It was another obstacle for organizing arbitration hearings at the time.

One of the immediate solutions was to simply use online meeting systems for the arbitration hearings similarly as other types of meetings actually did during the COVID pandemic. There is a serious risk, however, that a witness may cheat if he or she attends the arbitration hearing with online meeting systems from the place where no other person can monitor his or her behavior. The witness may read out a script secretly prepared and located out of the frame of the camera. The witness may use a headphone or earphone from which a coaching voice can be secretly heard.

-A Hybrid-Style Setting in Hearing Room of TFAH-

Another serious risk of the simple use of online meeting systems is the stability of the Internet connection. An Internet connection from home is sometimes weak and unstable. Normally, there is no professional engineer for a potential trouble of the Internet connection. If sounds and/or pictures are not seamlessly provided due to a problem of the Internet connection, the arbitration hearings cannot be organized as scheduled.

In order to avoid these risks, hybrid-style hearings became popular for the arbitration hearings during the COVID pandemic. Participants in one country are requested to come to hearing facilities with advanced technologies located in the same country. Participants in the other country are requested to come to hearing facilities with advanced technologies located in the other country. Since these two or more hearing facilities with advanced technologies are connected to each other with online meeting systems, all the participants can smoothly organize an arbitration hearing with the advanced technologies.

In the hybrid-style hearings, no one has to travel across the border. Advanced technologies with professional engineers provide a stable and seamless Internet connection. Cheating activities can be prevented by the advanced cameras and sound systems in the hearing facilities.

With the prevention measures against COVID in the hearing facilities, the hybrid-style hearings effectively realized many arbitration hearings even during the COVID pandemic.

Moreover, even after the COVID pandemic, the hybrid-style hearings are still popular in the contemporary scenes of international arbitration. Even if one or more participants, including arbitrators, counsels and witnesses, suddenly cannot come to the designated hearing facilities for some reason, the hearing schedule does not have to be changed as far as the participant(s) can join the arbitration hearings in a hybrid-style manner. Even if a witness has difficulty in promising to participate in the arbitration hearings over the border due to his or her too hectic schedule, usually, he or she can come to the hearing facilities in his or her own country which is virtually connected to the main hearing facilities in a foreign country.

In the Tokyo Facilities of JIDRC, many hybrid-style hearings were organized for many arbitration cases, including nineteen cases of sport arbitration during the Tokyo Olympic

-A View with the Four Cameras surrounding a Witness in TFAH-

Games 2020. Similarly, many hybrid-style hearings were and are organized in TFAH with the following advanced cameras and sound systems.

2. Cameras

As explained above, a witness may cheat if the witness is captured by one single ordinary camera. The witness may read out a script secretly prepared and located out of the frame. The witness may read out messages displayed on a digital device, including a smartphone, secretly located out of the frame.

A simple use of the online meeting systems from the witness's home with his or her own PC cannot avoid this kind of risk. Even when the witness comes to hearing facilities for the hybrid-style hearing, this kind of risk cannot be avoided, either, if the hearing facilities provide only a single ordinary camera. In order to prevent a potential cheating behavior, the hearing facilities have to have a set of several cameras which can capture the entire feature of the witness and the entire feature of the room where the witness is located.

In TFAH, for example, four cameras are usually prepared to capture the entire feature of the witness from his or her front side, right side, left side and back side. Another wide-angle camera is also prepared to capture the entire feature of the room where the witness is located in order to ensure that there is no other person in the room. With this kind of setting, the integrity of cross examination can be assured even when the witness comes to TFAH alone for the arbitration proceedings in a foreign country.

Among the cameras surrounding the witness, the front camera capturing the face of the witness is the most important. Arbitrator(s) would like to carefully check any possible change of his or her facial expression at the time of each set of question and answer in the cross examination. A zoom-up function of the camera may assist this kind of inspection by the arbitrator(s). The other cameras may also assist the arbitrator(s), which are always capturing any possible change of the body motions of the witness during the cross examination.

One or more professional engineers are always working in the backstage in order to ensure a clear view of the cameras and to resolve any potential problem which may occur during the

-Microphones, Speakers and the Backstage for the Engineers-

arbitration hearing.

3. Sound Systems

As explained above, a witness may cheat with a headphone or earphone from which a coaching voice can be secretly heard. A simple use of the online meeting systems from the witness's home with his or her headphone or earphone cannot avoid this kind of risk. In order to prevent a potential cheating behavior, the witness should come to hearing facilities for the hybrid-style hearing, which provides a room with perfect sound systems.

In TFAH, for example, all rooms are sound insulation rooms with perfect sound systems. With special equipment, including specially-designed microphones and speakers, a participant without any headphone or earphone can smoothly communicate with others in the same room and/or others participating online. One or more professional engineers are always working in the backstage in order to ensure a clear sound, to prevent any type of howling and to resolve any potential problem which may occur during the arbitration hearing.

With this kind of equipment, the integrity of cross examination can be also assured even when the witness comes to TFAH alone for the arbitration proceedings outside of Japan. In addition, the hybrid-style hearing can be seamlessly proceeded, no differently from the in-person hearing, with the sound systems and the assistance of the professional engineers.

4. Evidentiary Documents

Even before the COVID pandemic, there were several skillful vendors which provided a service of displaying evidentiary documents on the monitor screens located in the hearing facilities.[5)] The specific evidentiary documents relevant to a series of questions made by one of the counsel team in the process of cross examination were immediately displayed by the

-Three monitors prepared for each participant: one for the evidentiary documents (left), one for the camera views (center) and one for the live transcription (right)-

vendor according to the request of such counsel team. It was useful for the smooth operation of the process of cross examination, especially when the evidentiary documents codified in a hearing bundle were of a large amount.

During the COVID pandemic, as described above, the online meeting systems were widely used for various types of meetings, including the arbitration hearings. Almost all the online meeting systems have a function of screen sharing, which an ordinary person without special skills can easily manage. In TFAH, for example, the function has been frequently used for the simultaneous sharing of the relevant evidentiary documents with all other monitor screens, which are located at each seat of the participants. And the counsel teams have actually shared the relevant evidentiary documents by themselves, without any assistance of the vendors, in the process of cross examination.

Procedural costs in the arbitration hearings will be reduced if this kind of displaying service is provided by each of the counsel teams without the assistance of the above-mentioned vendors. In addition, the relevant evidentiary documents will be more smoothly and precisely displayed by the member(s) of each of the counsel teams. The members of the counsel team already know the order of the relevant evidentiary documents to be shared, which should be displayed in accordance with a series of questions they themselves have prepared in advance.

5. Monitor Screens and Presentations

At the beginning of the arbitration hearing, an opening statement by each of the counsel teams is usually scheduled in the actual practices of international arbitration. Such an opening statement enables arbitrator(s) to easily understand the summaries of the statements of the claimant and the arguments of the respondent, the issues to be proved by the coming cross examination and the plans of cross examination of each of the counsel teams.

5) https://www.opus2.com/en-apac/solutions/hearings/
https://www.epiqglobal.com/en-us/technologies/legal-solutions/epiqtmx

At the phase of opening statement, nowadays, presentation slides with pictures, charts and figures are frequently used for the better understanding of the arbitrator(s). In TFAH, for example, three monitor screens are usually prepared for each of the participants. One of the monitor screens, which is prepared for displaying the relevant evidentiary documents at the phase of cross examination, is also used for displaying the presentation slides at the phase of opening statement.

Participants can comprehensively understand the contents of the opening statement with the assistance of the presentation slides displayed on one monitor screen and with the effective performance of the presenter displayed on another monitor screen for the camera views.

6. AI-based Automatic Live Transcription

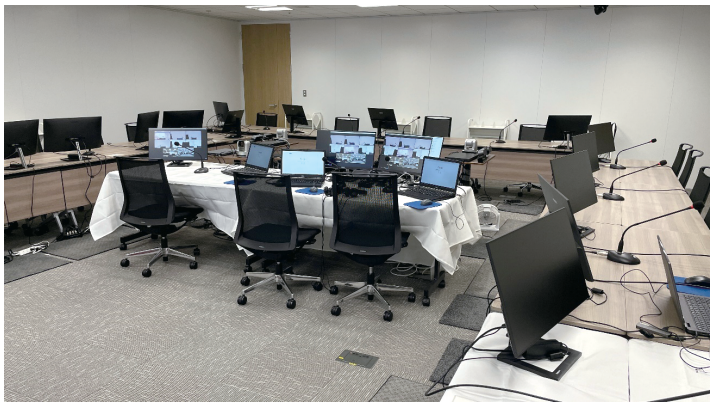
In the arbitration hearings, the transcription of what the participants actually discussed has to be produced. In the actual practices of contemporary international arbitration, "live transcription" is now commonly used, in which transcription is produced on time through the process of cross examination. What the participants are discussing now can be visually checked with one of the monitor screens where the live transcription is displayed on time. In TFAH, for example, three monitor screens are usually prepared for each participant: one for the evidentiary documents, one for the camera views and one for the live transcription.

At the end of each day of the arbitration hearing, the data of the live transcription is shared with both of the counsel teams. Each counsel team tries to check the accuracy of the transcription, correct one or more mistakes, if any, and exchange the results. If both of the counsel teams agree on the corrected transcription, the agreed transcription becomes the final version of the transcription of the cross examination.

Until recently, live transcription could be realized only by professional transcribers with special skills. In JIDRC and TFAH, for example, skillful transcribers were sometimes invited to Tokyo for this task from the English-speaking foreign countries.

Nowadays, however, automatic live transcription realized by artificial intelligence (AI) is becoming common. Some online meeting systems have already implemented this function and users of the online meeting systems can use it free of extra charge. Accuracy of the AI-based automatic live transcription is rapidly improving day by day. In TFAH, for example, this function of the online meeting systems has been already used for the live transcription in the actual arbitration hearings. At the present, the counsel teams had to correct many mistakes of the original version of the transcription made by AI. Sooner or later, however, accuracy of the original will be almost perfect.

In international arbitration, English is a de facto language. Live transcription has been used on the premise that the language used in the arbitration hearing is English. Professional transcribers for this task are generally native speakers of English. In the domestic arbitration cases, however, Japanese language is commonly used. AI-based live transcription is now being developed not only for English but for other languages. Sooner or later, we can easily use live transcription for Japanese language with AI.



-The seats for the interpreters next to the witness(es)-

7. Interpretation now and in the near future

Interpretation is seriously needed if one or more witnesses do not speak the language agreed or determined to be used in the arbitration hearing, which is English language in almost all cases. One or more interpreters are usually arranged at the hearing facilities for consecutive interpretation. In TFAH, for example, seats for the interpreters are arranged next to the witness(es).

Nowadays, however, AI-based interpretation has been rapidly developed. The accuracy of translation in written manner between English and other languages, including Japanese, has been drastically improved day by day. The live transcription made by AI is smoothly translated by the AI-based translation program and the written result is clearly read out by another computer program. In the very near future, we will not have to prepare seats for the interpreters in the hearing facilities.

Ⅲ. Final Remarks

This paper aimed to explain the advanced technologies, based on the author's experiences in JIDRC and TFAH, which are actively used now in the contemporary scenes of international arbitration.

As described above, the advanced technologies have been drastically developed in the arbitration hearings. Not only for the phase of the arbitration hearings but for the entire process of arbitration proceedings, advanced technologies have been developed as well. A file management platform, which has been already provided by some arbitration institutions, is one good example. With the file management platform, all the digitalized documents can be submitted to the platform online and they are orderly managed by the arbitrator(s) and the members of the counsel teams. A hearing bundle for the arbitration hearing can be easily produced from the digitalized documents accumulated in the platform.

These advanced technologies contribute to the reduction of the procedural costs and the more effective operation of the arbitration proceedings. Instead, some types of the tasks or

jobs of human beings in the scenes of international arbitration may be disappearing, including the tasks of transcribers, interpreters and young associate lawyers. The phenomenon is, however, easily found not only in international arbitration but also in other legal and non-legal fields. The phenomenon must be another new problem to be seriously tackled from now on.

Serving a Party in Japan by Hague Service Convention

Tony Andriotis **Shingo Okada** **Eric Yao**[※1]

When arbitration proponents are asked why they prefer international arbitration over cross-border litigation, they often bring up enforcement and the New York Convention, party autonomy, finality, flexibility in language, procedure, geography, evidentiary rules, and the ability to choose arbitrators and counsel regardless of seat or governing law.

Another key advantage of international arbitration, however, is far more fundamental, and like enforcement, is tied in with international agreements. We are speaking, of course, of service of process, or lack of need thereof. International service of process can be highly complex, and, at times, can delay the start of a dispute resolution process by years.

Though Japan has been a signatory to the *Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters* (**"Hague Service Convention"**)[1] since 1965, up until very recently it was not clear whether Japan would allow for international service of process by mail. Often, interpretation on Japan's intent was left to non-Japanese courts, and even then, we were faced with situations, as with the United States, where the courts themselves differed in their views depending on miniscule differences in address. As such, you might be in a situation in which a Court in one part of New York recognized service by mail in Japan, such as Queens, NY, while another Court in New York, such as Brooklyn, NY, did not. Though we won't be herein delving into the complexities of America's court system, the bottom line here is simply that interpretation was varied, and, as a result, the whole thing was a mess.

Adding to this lack of clarity, the general judicial service practice in Japan is by mail as Japanese courts can entrust service to Japan Post according to Japan's *Code of Civil*

※1 Tony Andriotis heads up the International Disputes Practice Group of DLA Piper's Tokyo office, while also teaching International Arbitration in his capacity as an Adjunct Professor at the Tokyo Campus of Temple Law School, and as an Adjunct Lecturer at Keio Law School. He is also the Professional and Institutional Relations officer at the JCAA. Associates Shingo Okada and Eric Yao are vital members of the DLA Piper Disputes team. Tony is admitted to practice law in New York (USA), while Shingo is admitted in Japan and Eric is admitted in Ontario (Canada).

1) *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, November 15, 1965, 658 UNTS 163, online: < https://www.hcch.net/en/instruments/conventions/full-text/?cid=17 >.

Procedure.[2] As such, even Japanese courts differed as to whether serving individuals residing in Japan by mail was effective.

The confusion was based partly – if not wholly - on Japan's objection to "other alternative methods of service" under the *Hague Service Convention* in 1970, without explicitly mentioning service by mail. In December 2018, the Government of Japan finally stepped up to clarify the situation and officially declared its opposition to alternative service by mail described under Article 10 (a) of the *Hague Service Convention*, as permitted by the same article,[3] thus solving the debate once and for all.

Japan's hesitation on fully embracing the *Hague Service Convention* is not completely out of character for the Asian economic giant. For example, Japan only signed the *Hague Convention on the Civil Aspects on International Child Abduction* (**"Hague Convention on Child Abduction"**)[4] in 2014, and only after a global pressure campaign was pushed into full gear. Further, Japan's refusal to enter into *Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters* (**"Evidence Convention"**) has created additional complication in the international dispute resolution front Specifically.[5] As a result of Japan's absence from the Evidence Convention, depositions required under the court proceeding of a foreign jurisdiction cannot be conducted on Japanese soil. Consequently, for example, Japan based depositions taken in furtherance of a US litigation can only be conducted at the US Embassy in Tokyo or the US Consulate in Osaka.[6]

Japan's reluctance to fully embrace certain key Hague Conventions can be seen as a deliberate strategy to protect Japanese interests. In commercial contexts, these opt-outs shield Japanese parties from international disputes by complicating foreign judicial proceedings through the imposition of intricate red tape. This strategy effectively creates a barrier against frivolous lawsuits originating outside Japan. However, this barrier also imposes obstacles on legitimate lawsuits. While the avoidance of international service of process, as facilitated by the international arbitration system, may be advantageous in managing international disputes generally, it is evident that Japanese individuals and entities remaining within the Japanese legal system may benefit from certain advantages—particularly when the Japanese party is the defendant or respondent.

When it comes to service of process, Japan also prohibits the direct engagement of a judicial official or process server to effect service, thus making service through the Central Authority[7] of Japan essentially the only practical way to serve a party in Japan, thus further complicating

2) See Art. 99.

3) HCCH, *Declaration/Reservation/Notification*, online: < https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=407&disp=resdn >.

4) HCCH, Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, online: < https://www.hcch.net/en/instruments/conventions/full-text/?cid=24 >.

5) HCCH, Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, online: < https://www.hcch.net/en/instruments/conventions/full-text/?cid=82 >.

6) See *Depositions in Japan*, online: < https://jp.usembassy.gov/services/depositions-in-japan/ >.

7) Capitalized terms used but not defined in this article will have the meanings provided for in the *Hague Service Convention*.

the situation. This article aims to provide step-by-step guide on serving a party in Japan under the *Hague Service Convention*, and ultimately serves as a testament as to yet another key reason as to why international arbitration is a preferred dispute resolution method. Keep in mind, however, that the service hurdles we describe below may appeal to certain Japan based companies that desire to retard the filing of any claims against them.

Hague Service Convention

The purpose of the *Hauge Service Convention* is to improve judicial (and extrajudicial) documents to be served abroad by "simplifying and expediting the procedure," to ensure these documents are brought to the "notice of the addressee in sufficient time."[8] There are 84 Contracting Parties, including Japan, as of June 2024.[9] Although the *Hague Service Convention* allows alternative service methods if the State of destination does not object, and the most notable alternative service methods include service by sending judicial documents by postal channels directly to personas abroad, or engage judicial officers, officials or competent servers of the State of destination directly, Japan expressly objects to these alternative service methods described under Article 10 (a), (b), and (c) of the *Hague Service Convention*.[10] In addition, Japan also objects to service directly through diplomatic or consular agents under Article 8 of the *Hague Service Convention*.[11] Therefore, the only practical way to service in Japan would be through the Central Authority of the State (*i.e.*, the Ministry of Foreign Affairs in the case of Japan), as stipulated in Article 5 of the *Hague Service Convention*.[12]

Step-by-Step Guide: Service through Central Authority of Japan

Step 1 – Translate All Documents to be Served into Japanese

Japan requires full translation for any document to be served under Article 5 of the *Hague Service Convention* per Article 5(3) of the convention.[13] Although not explicitly stated, it is recommended that the translation be done by professional translators and/or include a declaration by the translator stating the translation is a true and accurate representation of the original language.

Step 2 – Fill out the Model Form

The Model Form,[14] annexed to the *Hague Service Convention*, is mandatory for anyone

8) Preamble, *Hague Service Convention*.

9) HCCH, *Status Table* (21 March 2024), online: < https://www.hcch.net/en/instruments/conventions/status-table/?cid=17 >.

10) See online < https://www.hcch.net/en/states/authorities/details3/?aid=261 >.

11) *Ibid*.

12) Japan opposes to alternative service methods described in Arts 8, 10(a), 10(b), and 10(c), which only leaves Article 9, through consular channels to forward documents to authorities of another Contracting State an alternative service method option. However, except for limited and extraordinary situations, this option is not practical.

13) HCCH Authority - Japan - Central Authority & practical information, online: < https://www.hcch.net/en/states/authorities/details3/?aid=261 >.

14) HCCH, Model Forms, online: < https://www.hcch.net/en/publications-and-studies/details4/?pid=6560&dtid=65 >.

serving a document under Article 5 of the convention. The Model Form is relatively simple to fill out and it consists of three parts: (1) – Request (see Step 2.1), (2) – Certificate (see Step 2.2), and (3) – Summary of the Document to be Served (see Step 2.3).

Step 2.1 – Request

In Step 2.1 – Request, the requesting party provides information identifying the applicant, the receiving authority, and party to be served, the method of service, and a list of documents to be served. The applicant, in this case, means the forwarding authority of the requesting state.[15] The forwarding authority is different in each jurisdiction. In the case of Canada, the forwarding authorities include clerks of the courts and members of the law societies of all provinces and territories (i.e., lawyers from all Canadian provinces and territories).[16] This is the same for the US, where any court official or attorney can be the forwarding authority.[17] In contrast, the forwarding authorities in UK are essentially designated to specific courts: The Senior Master of the Royal Courts of Justice for England and Wales, the Scottish Government Justice Directorate for Scotland, and The Master (King's Bench and Appeals) of Royal Courts of Justice for Northern Ireland.[18]

The receiving authority is the Central Authority described in Article 2 of the *Hague Service Convention*, and in the case of Japan, is the Consular Policy Division of the Ministry of Foreign Affairs.[19]

The applicant shall include the name and address of the party to be served in Japan. The applicant can choose how they want the documents to be served. In most cases, the service will be effected in accordance with the provisions of Article 5(a) of the *Hague Service Convention*. The applicant must list all documents to be served under the list of documents box.

Step 2.2 – Certificate

Certificate is left blank for the Central Authority or competent authority of Japan to complete when the documents are served.

Step 2.3 - Summary of the Document to be Served

Summary of the Document to be Served can be a very simple description of the type of the documents (e.g., summon, judgement, order, etc.) and a brief summary of the purpose of the

15) Art. 3, *Hague Service Convention*; see also HCCH, *Guidelines for Completing the Model Form* at 2, online: < https://assets.hcch.net/docs/1e4b0a96-9e87-4b10-99c8-8647c843b80e.pdf >.

16) HCCH, *Canada – Forwarding Authorities (Art. 3)*, online: < https://www.hcch.net/en/states/authorities/details3/?aid=390 >.

17) HCCH, *United States of America - Central Authority & practical information*, online: < https://www.hcch.net/en/states/authorities/details3/?aid=279 >.

18) HCCH, *United Kingdom - Central Authority & practical information*, online: < https://www.hcch.net/en/states/authorities/details3/?aid=278 >.

19) HCCH, Japan - central Authority & practical information, online: < https://www.hcch.net/en/states/authorities/details3/?aid=261 >.

documents and the proceeding (e.g., remedy or relief sought, and amount if known).[20)]

Model Form VS Local Equivalent Versions

Most jurisdictions have incorporated the Model Form into their system, with minor formatting or stylus changes, but these forms remain materially the same as the Model Form in substance. For example, *British Columbia Supreme Court Civil Rules* specifies that "if service is to be made in accordance with Article 5 of the [Hague Service] Convention, Forms 12 and 13 must be used."[21)] Forms 12 and 13 are Model Form with slightly different formatting and a new subtitle. Similarly, the *Ontario Rules of Civil Procedure* Forms 17A, 17B, and 17C[22)] are materially the same as the Model Form, with some minor formatting differences. The US also has its own version of the Model Form: USM-94,[23)] which is almost identical to the Model Form.

Since the requirements for civil procedure and proof of service may differ in each jurisdiction, as some jurisdictions allow an applicant to use the Model Form, while others are very strict with their own forms, there is no right answer to whether or not to use the Model Form whenever possible. For example, although there are specific forms in Ontario, the Ministry of the Attorney General of Ontario instructs individual applicants required to serve a counterparty under the *Hague Service Convention* in a family law context situation to get the Model Form directly from the HCCH official website.[24)] However, considering the Certificate/ Proof of Service Form needs to be submitted back to the court of the requesting country as evidence of complete and successful service, it is wise to follow the civil procedure rules and use the prescribed forms if applicable to minimize administrative hurdles. Regardless of which version of the form is used, the District Court in Japan carrying out the service under Article 6 of the *Hague Service Convention* might ultimately swap the certificate form with its own Japanese localized version when serving the addressee.

Step 3 – Prepare Document Package: 2 Copies per Item

The complete document package contains two copies of all documents, which include the Model Form (or equivalent), each of the judicial documents to be served (e.g., the complaint,

---

20) HCCH, *Guidelines for Completing the Model Form* at 4, online: < https://assets.hcch.net/docs/1e4b0a96-9e87-4b10-99c8-8647c843b80e.pdf >.

21) *Supreme Court Civil Rules*, BC Reg 168/2009, at R 4-5 (10) & (12), online: < https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/168_2009_01 >; Form 12 < https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/courthouse-services/court-files-records/court-forms/supreme-civil/12.pdf?forcedownload=true >; Form 13 < https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/courthouse-services/court-files-records/court-forms/supreme-civil/13.pdf?forcedownload=true >.

22) *Rules of Civil Procedure*, RRO 1990, Reg 194, online: < https://ontariocourtforms.on.ca/en/rules-of-civil-procedure-forms/ >.

23) US Marshals Service, USM-94: Request for Service Abroad of Judicial or Extrajudicial Documents, online: < https://www.usmarshals.gov/resources/forms/usm-94-request-service-abroad-of-judicial-or-extrajudicial-documents >.

24) Ontario, Ministry of the Attorney General, *Service of Documents Outside of Canada*, 3055E (203/01) (King's Printer for Ontario, 2023) at 2, online: < https://ontariocourtforms.on.ca/static/media/uploads/courtforms/family/hague/3055e-jan23.docx >.

judgement, summons, etc.), and Japanese translations of the documents to be served.[25)]

Depending on the rules in the requesting country, the applicant may need to get an endorsement or permission from the court of the requesting country to serve outside of its jurisdiction. The applicant shall check and ensure this requirement has been fulfilled, if applicable.

Step 4 – Send Package to Ministry of Foreign Affairs of Japan and Wait

Once the document package has been prepared, it can be submitted to the following:

Consular Policy Division
Ministry of Foreign Affairs
2-2-1 Kasumigaseki Chiyoda-ku
TOKYO, 100-8919
Japan

The Ministry of Foreign Affairs of Japan is the Central Authority described in Article 2 of the *Hauge Service Convention* assigned to receive requests for service coming from other contracting states of the convention. Generally, the applicant incurs no fees because the Japanese government bears the costs of service. However, fees apply if the applicant specifically elects to serve by a marshal.[26)]

Once the Ministry of Foreign Affairs of Japan receives and reviews the document package and the Request Form, the package will be forwarded to the Supreme Court of Japan to be further reviewed, and if no issues are found, the package will finally be dispatched to the District Court responsible for effecting the service (i.e., the competent authority under Article 6 of the *Hague Service Convention*). The District Court will serve the document package to the named party via Japan Post's special service delivery (*tokubetsu soutatsu*). Once served, the Certificate form (of service) will travel through the abovementioned route in reverse before being returned to the applicant on the Request form.

The Japanese authority does not disclose the average time required for the abovementioned process, but this process usually takes about 3 to 6 months to complete.

Practice Tips

- Certified Copies of Court Documents: Although not expressly stated, having court seals on the judicial documents certifying the copies are "true" may smooth the process.
- The applicant can contact the Ministry of Foreign Affairs and inquire about the status of the process and resolve issues by phone (in Japanese), and in theory, by fax (in Japanese and English).[27)] Thus, it is advantageous to appoint a forwarding authority (i.e., a lawyer) with

25) Japan, Ministry of Foreign Affairs, *Annex 1 – If a Contracting State to theService Convention requests Japan to serve documents* at 4-5, online: < https://www.mofa.go.jp/files/000409873.pdf >.

26) HCCH, *Japan - Central Authority & practical information*, online: < https://www.hcch.net/en/states/authorities/details3/?aid=261 >.

knowledge of Japanese, if applicable.

- A case manager from the Ministry of Foreign Affairs is assigned to each case requesting service under the *Hague Service Convention*.
- The applicant on the Request form in the Model Form (or equivalent) does not necessarily have to be the actual party submitting the document package to the Ministry of Foreign Affairs. Instances of the court in the requesting country was named the applicant on the Request form while the document package was forwarded by a lawyer qualified to practice in the requesting country (where both parties were valid forwarding authorities) have been observed.

Conclusion

As shown above, international arbitration is preferred over cross-border litigation due to advantages like enforcement under the New York Convention, party autonomy, finality, and procedural flexibility. A key benefit is the avoidance of complex international service of process, which can delay dispute resolution. Despite Japan being a signatory to the *Hague Service Convention* since 1965, it only recently clarified its stance on service by mail, previously causing inconsistent interpretations across jurisdictions. This clarification, along with Japan's cautious approach to other Hague Conventions, reveals a strategic intent to protect domestic interests by complicating foreign legal processes. Nevertheless, these service complexities can be overcome by following practical steps to ensure proper service. Japanese courts are often open to guiding parties through the process, but complexities emerge when dealing with courts in jurisdictions outside of urban centers that are less accustomed to cross-border litigation.

27) Ibid.

Asymmetrical Approaches of Extraterritorial Evidence Legislation between the U.S. and Japan*)

Associate Professor of Law
University of the Ryukyus, Graduate School of Law
Attorney-at-law admitted in Japan, the State of New York, and Maryland
Atsushi Shiraki

Ⅰ. Introduction

Evidence controls the case whether in Japan or the U.S., and whether in civil or criminal proceedings. In a highly globalized and digitalized world, this is even more true: access to evidence is access to justice itself. Globalization has enabled people, goods, and money to move easily across national borders. It is no longer unusual for civil litigation to be filed against an individual or a legal entity located in a foreign jurisdiction. In addition, with the development of digital technology, documents as evidence are usually stored as electronic data in data servers around the world. As a result, it has become increasingly necessary to access evidence outside a forum jurisdiction to realize justice, even in a domestic dispute at a domestic court.

Contrary to the growing importance of access to extraterritorial evidence, the legislative regime between the U.S. and Japan is exceedingly undeveloped. Internationally, the Hague Conference on Private International Law (HCCH) historically made an effort to provide faster, fairer, and more affordable access to foreign evidence by establishing two multilateral treaties on that topic. The first attempt was the Convention of 1 March 1954 on Civil Procedure (March 1, 1954) (Hague Civil Procedure Convention), and the second was the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil and Commercial Matters (March 18, 1970) (Hague Evidence Convention). However, the U.S. and Japan share neither of them.[1)] While both countries have two bilateral agreements, the Consular Convention of 1963[2)] and a

*) This article is based on some parts in Chapter II of my doctorate dissertation titled "Dealing with Extraterritorial Evidence between the U.S. and Japan in the Civil and Commercial Context" at the University of Hawai'i at Mānoa, William S. Richardson School of Law, though modified.

1) While Japan is a member state of the former and not the latter, the U.S. is a member of the latter and not the former. *Status Table of Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil and Commercial Matters*, Hague Conference on Private Law, https://www.hcch.net/en/instruments/conventions/status-table/?cid=82 (last visited Dec. 3, 2020); *Status Table of Convention of 1 March 1954 on Civil Procedure*, Hague Conference on Private Law, https://www.hcch.net/en/instruments/conventions/status-table/?cid=33 (last visited Dec. 3, 2020).

2) Consular convention and protocol, Japan-U.S., March 22, 1963, 15 U.S.T. 768 [hereinafter Consular Convention].

diplomatic agreement of 1954 on judicial cooperation to take foreign evidence, neither option is commonly employed by either. Rather, on the U.S. side, practitioners have prioritized using the Federal Rules of Civil Procedure (hereinafter *FRCP*), a domestic civil procedure rule at federal level, to obtain evidence in Japan, which makes the regime dealing with foreign evidence between the two countries asymmetrical and more complex. Moreover, while civil procedure and evidence laws in both countries have developed significantly in the past 70 years, there has been a lack of dialogue to reflect those changes to the regime of access to extraterritorial evidence between the two. As a result, it is not easy for legal practitioners in both countries to ascertain available options to achieve faster, fairer, and more affordable access to foreign evidence.

This article strives to elucidate the shortcomings of the current legislative regime mainly from a practical perspective. In the second chapter, I will explore the conflicting basic policies between Japan and the U.S., which are firmly rooted in their governance and civil procedural systems. In the third chapter, I provide an overview of specific routes to access extraterritorial evidence for both countries, including their deficiencies. In the fourth chapter, I conclude my argument by emphasizing the urgent need for cooperation between the U.S. and Japanese governments to enhance the regime of extraterritorial evidence to respond to the growing legal needs to access foreign evidence in this highly globalized and digitized era.

Ⅱ. Conflict of Basic Policies on Extraterritorial Evidence between the U.S. and Japan

1. Japan

Generally, Japan prefers a reciprocating approach to access and provides extraterritorial evidence based on reciprocal international agreements with foreign countries.[3] In terms of relations with the U.S., Japan also has options to access evidence located in the U.S. through one of two reciprocal agreements. First, in 1953, Japan and the U.S. agreed on a cooperative scheme based on a letter rogatory[4] by exchanging note verbals.[5] Internationally, access to foreign evidence through the letter rogatory is recognized as the typical bilateral approach to obtain extraterritorial evidence, which was mainly developed in civil law countries.[6] This agreement serves as a master agreement for individual requests and acceptance of

3) *See* Nozomi Tada, Kokusai minji shōko kyōjyohō no kenkyu [International Judicial Assistance in the Taking of Evidence Abroad in Civil or Commercial Matters] 28-31 (2000).

4) A letter rogatory, sometimes reoffered as a letter of request, is explained as "[a] document issued by one court to a foreign court, requesting that the foreign court (1) take evidence from a specific person within the foreign jurisdiction or serve process on an individual or corporation within the foreign jurisdiction and (2) return the testimony or proof of service for use in a pending case." *Letter of request*, Black's Law Dictionary (11th ed. 2019).

5) A note verbal is defined as "an unsigned diplomatic note, usu[ally] written in the third person, that sometimes accompanies a diplomatic message or note of protest to further explain the country's position or to request certain action." *Note verbal*, Black's Law Dictionary (11th ed. 2019).

6) *See, e.g.*, David McClean, *Judicial Cooperation: Resolving the Differing Approaches*, *in* Diversity and Integration in Private International Law 128, 131(Verónica Ruiz Abou-Nigm & María Blanca Noodt Taquela eds., 2019).

extraterritorial evidence between the courts in the future. Second, both countries concluded a consular convention in 1963, which allows a consular officer to voluntarily take a deposition within his or her receiving country.

2. The U.S.

In contrast to Japan, the U.S. developed a unique unilateral approach to extraterritorial evidence by prioritizing domestic rules over international treaties or agreements for both outbound and inbound cases.[7] The U.S. generally prefers domestic discovery rules, just as it does in domestic civil litigation, to access evidence in foreign jurisdictions.[8] U.S. plaintiffs obtain a discovery order against a foreign defendant from a U.S. court and try to force them to be deposed or to produce evidence under his or her control, even if they or the targeted documents are in a foreign country. This practice also applies to a scene of the access to extraterritorial evidence located in Japan. Japanese scholars and practitioners, like those in other civil law countries,[9] have criticized the U.S. unilateral practice as an infringement on their national sovereignty. They claimed, based on the understanding that the two existing bilateral schemes are exclusive as a tool to access extraterritorial evidence, that U.S. courts should rely on one of the two bilateral options to access evidence in Japan.[10]

However, as if it were an exchange for its invasive approach in outbound cases, the U.S. allows not only foreign courts but also foreign litigants to utilize U.S. discovery under 28 U.S.C. § 1782 (of the two, the discovery filed by a foreign litigant is referred to as "1782 direct discovery") for inbound cases. Since U.S. discovery is a uniquely powerful mechanism to obtain evidence due to its wide coverage, severe sanctions against its disobedience, and timely implementation, 1782 direct discovery attracts foreign litigants in civil law countries that do not have similar tools to access evidence controlled by an opposing party or a third party in the civil litigation process.[11] These two independent domestic rules, the discovery rules under the FRCP for outbound cases and 28 U.S.C. § 1782 for inbound cases are

7) Situations where extraterritorial evidence is at issue can be divided into the two; where State A needs evidence in State B and State B passes it to State A, and where State B needs evidence in State A and State A passes it to State B. When evidence located in State A is offered to State B, the situation is described as an outbound case for State B or an inbound case for State A.

8) *See, e.g.*, Geoffrey C. Hazard, Jr.& Michele Taruffo, American Civil Procedure An Introduction 127 (1995); Garry B. Born & Peter B. Rutledge, International Civil Litigation in United States Courts 968 (5th ed. 2011); Diego Zambrano, *A Comity of Errors: The Rise, Fall, and Return of International Comity in Transnational Discovery*, 34 Berkeley J. Int'l L. 157, 164 (2016).

9) *See, e.g.*, Brief of Amicus Currie the Republic of France in Support of Petitioners, *Société Nationale Industrielle Aérospatiale* v. United States District Court, 482 U.S. 522 (1987) (No. 85-1695); Brief for the Federal Republic of Germany as Amicus Curiae, *Société Nationale Industrielle Aérospatiale* v. United States District Court 482 U.S. 522 (1987) (No. 85-1695).

10) *See, e.g.*, Akira Takakuwa, Kokusai Minjisoshōhō·Kokusai Shihōronshū 129 (2011); Etsuo Doi & Masahiro Tanabe, Beikoku deisukabari no hō to jitsumu [The U.S. Discovery and its Practice] 139 (2013); Hideyuki Kobayashi & Masako Murakami, Shimban Kokusai minji soshōhō [International Civil Litigation] 164 (2020). *But cf.* Takao Sawaki & Masato Dōgauchi, Kokusai shihō nyūmon [Introduction of International Private Law] 341 (8th ed. 2018).

11) *See* Lucas V.M. Bento, The Globalization of Discovery 8 (2020).

coincidently in a trade-off relationship and function as one package for the U.S. unilateral approach on extraterritorial evidence.

3. Conflict of Basic Policies on Extraterritorial Evidence

As described above, the basic policy on extraterritorial evidence is in direct conflict between Japan, which adopts the bilateral (reciprocal) approach, and the United States, which relies on the unilateral (nonreciprocal) approach. Especially, in the U.S., each approach is firmly rooted in their governance systems and civil justice system and is unlikely to change in the future.[12] This sharp contrast has made the extraterritorial evidence regime between the two countries even more complicated and has hindered smooth cooperation in the taking of evidence abroad.

Ⅲ. Asymmetrical Options to Access Extraterritorial Evidence

This difference in the basic approach makes options to access extraterritorial evidence asymmetrical between the two countries.

1. Options and Practical Problems for Japanese Parties

(1) Overview of Three Pathways

A party before the Japanese court can resort to three vehicles to access evidence located in the U.S.: (1) the Consular Convention, (2) the letter rogatory, and (3) the 1782 direct discovery.

The Consular Convention allows a Japanese consular officer in the U.S. to take a deposition from an opposing party or a third party within the U.S. jurisdiction on a voluntary basis. On the other hand, through the letter rogatory route, a Japanese judge can ask the U.S. federal court to compel a targeted person to produce a particular testimony or document. One of the common downsides of these bilateral routes is that they are both time-consuming options. Japanese Civil Procedure Law (hereinafter *JCPL*) gives judges broad discretion in sending a request for foreign evidence to a Japanese consular officer in the Consular Convention route or the U.S. federal district court in the letter rogatory route.[13] When a party requests the court to use one of these bilateral approaches, and an opponent party disagrees with it, a judge usually asks both parties to submit memoranda focusing on the necessity and appropriateness to resort to the specific option. Normally, it takes several months for a judge just to make a decision on whether or not to resort to the bilateral approach. Moreover, even after a presiding judge decides to use one of these routes, the request from the judge goes through several different divisions or bureaus within the governmental authority.[14]

12) *See*, Atsushi Shiraki, *Development of Laws on Taking of Extraterritorial Evidence in Civil or Commercial Matters in the* U.S., 7 Waseda L.J. 61 (2023).

13) Minji soshōhō [Minsohō] [C.Civ. Pro] 1996, art.184, para.1 (Japan); Minji soshōhō kisoku [Rules of Civil Proceedings], Sup. Ct. Rule No. 5 of 1996, art. 103 (Japan) ("The commissioning procedures for the examination of evidence to be conducted in a foreign state shall be carried out by the presiding judge.").

As the third option, pursuant to 28 U.S.C. § 1782 (a), a party before the Japanese court can directly file a discovery motion at the U.S. federal district court without asking a Japanese judge to implement one of the two bilateral routes. The 1782 direct discovery allows a party before the foreign courts to use the discovery[15] on the menu of the FRCP against a defendant or a third party located in the U.S. This route provides the fastest and the most effective access to extraterritorial evidence in the U.S. with Japanese litigants. It is widely regarded as a "back door to gain access to information not available to them in their forum." [16]

(2) Practical Challenges of Three Pathways

(a) Consular Convention Route

The Consular Convention, signed in 1963, is the only bilateral treaty between the U.S. and Japan covering the taking of extraterritorial evidence. It holistically deals with the consular relations, privileges, and immunities generally, and just one article covers foreign evidence. Article 17(1)(e)(ii) allows a consular officer to take a deposition voluntarily.

From the Japanese view, the Consular Convention route has two articulate weaknesses in accessing extraterritorial evidence in the U.S. First, it allows a consular officer to take a deposition only. No other option for taking extraterritorial evidence, including the production of document, is allowed. Second, a consular officer cannot resort to using a coercive measure to take a deposition from an uncooperative deponent. Even if a potential deponent refuses to appear at a consular office, a consular or a requesting judge cannot impose any sanctions on him/her.

The reason why this route is not preferred by the Japanese judges can be better explained by tracing their thought process to reach the decision to resort to the Consular Convention route. First, it is not clear to them what "deposition" in Article 17(1)(e)(ii) of the convention corresponds to for the examination of evidence under JCPL. In the text of JCPL, there are no equivalent mechanism to take testimony to the "deposition" provided by the Consular Convention, and there are no detailed guidelines and practical materials available for judges on this route.[17] Neither Japanese practitioners nor judges can have a clear image of what a "deposition" in the Consular Convention would be like, so it is not surprising that they find using the Consular Convention route unattractive. Second, a deposition under the Consular

14) Saikō saibansyo jimusōkyoku minjikyoku [Supreme Court of Japan, General Secretariat Civil Affairs Bureau], Minji jiken ni kansuru Kokusai Shihokyojyo tetsuzuki manyuaru [Manual on International Judicial Cooperation in the Civil and Commercial Context] 241 (2020) (unpublished document) (on file with the Supreme Court of Japan). This material is not published but on the website of Masashi Yamanaka, Esq. He requested the Japanese Supreme Court to disclose materials relevant to judicial cooperation and obtained it in June 2020. *See* Masashi Yamanaka, *International Judicial Service*, Yamanaka-Law (Aug. 25, 2022, 3:35 PM), https://yamanaka-bengoshi.jp/2020/01/05/overseas-delivery/.

15) "Discovery" is an equivocal term. Under the FRCP, it includes initial disclosures, depositions, interrogatories, requests for the production of documents or inspection, requests for admission, and expert testimony. In this article, "discovery" usually means one of the two meanings or both: request for the production of documents and deposition.

16) Christopher J. Houpt & Mark G. Hanchet, *Section 1782 Discovery: A Back Door for Foreign Litigants*, Mayer Brown (Mar. 2012), https://www.mayerbrown.com/en/perspectives-events/publications/2012/03/section-1782-discovery-a-back-door-for-foreign-lit.

Convention is voluntary, and there is no guarantee that a deponent will appear and voluntarily answer questions expected by the Japanese judge. It is no wonder that they would not like to suspend the case for six months to a year for testimony that may not even be obtained or be useless. If the testimony of a witness existing in the U.S. is truly important to the case pending in the Japanese court, they are likely to ask the party who needs it to submit her statement to the court or to arrange the witness's appearance before them on a hearing day. If a potential witness is willing to cooperate, they would prefer to examine her directly at the Japanese court. If she refuses to do so, the Japanese judge may find it difficult to secure her voluntary testimony, even if the judge implements the Consular Convention route. Thus, in any case, there are a few situations where the Consular Convention route is essential in the Japanese civil procedure.

(b) Letter Rogatory Route

Unlike the Consular Convention route, the letter rogatory route is equipped with compulsory mechanisms to take foreign evidence, including tangible materials. 28 U.S.C. § 1782 is a federal statute that empowers the U.S. federal courts to implement a request for extraterritorial evidence from a foreign court. It provides standing to file a motion in the two following categories: 1) "any interested person," and 2) "foreign or international tribunal." [18] The former category is for the 1782 direct discovery, which will be explained in the next subsection. The latter is for the letter rogatory route. Through the letter rogatory route, Japanese courts can take advantage of the U.S. discovery against a party or a third party in the U.S. jurisdiction, as well as the 1782 direct discovery route.

The biggest challenge with this route is that it is time-consuming. The implementation of the request issued by the Japanese court usually takes much longer than in the Consular Convention route. While in the Consular Convention route, a request issued by the Japanese court goes through only the Japanese authorities, the letter rogatory travels through multiple government departments of both countries. Thus, when both the Consular Convention route and the letter rogatory route are available for Japanese judges, a guideline authored by the Japanese Supreme Court directs them to prioritize the former as the principal option.[19]

---

17) According to the guideline for consular offices, authored by the Japanese Ministry of Foreign Affairs in September 1964, they are required to follow the procedure of examination of witness in JCPL when they take "deposition" pursuant to the Consular Convention. Drafters of the convention on the Japanese side seemed to understand the "deposition" as "taking testimony" under JCPL, but it is somehow unavailable for Japanese judges; there are no instructions available for Japanese judges on what the "deposition" looks like in Japanese law. *See* North American Division, American Affairs Bureau, Ministry of Foreign Affairs, *Zaigai ryōjikan ga suru shōnin jinmon no sekō yōryō* [Guideline for Examination of Witness Presided by Consular Officer in U.S.]1 (1964) (unpublished material) (on file with Diplomatic Archives of the Ministry of Foreign Affairs of Japan).

18) Whether "international tribunal" includes international commercial arbitration had been one of the hottest issues in the interpretation of the 28 U.S.C.1782, which was split at the appellate level. In 2022, the majority opinion of the U.S. Supreme Court held that it does not cover international private arbitration. ZF Automotive US, Inc. v. Luxshare, Ltd.,142 S. Ct. 637 (2022).

19) Saikō saibansyo jimusōkyoku minjikyoku [Supreme Court of Japan, General Secretariat Civil Affairs Bureau], *supra* note 14, at 252.

(c) 1782 Direct Discovery Route

It is undeniable that the fastest, most convenient, and most straightforward option for Japanese parties to access evidence located in the U.S. is the 1782 direct discovery route. It allows them to directly file a motion at a U.S. federal court without asking the Japanese court to issue the request to a foreign court. The discovery requested by a Japanese party will be implemented in a timely manner by the U.S. court. It is much faster than the other bilateral approaches.[20] Until the *Intel*[21] in 2004, the interpretation of the requirements regarding the 28 U.S.C. § 1782 was split at the appellate court level,[22] but the Opinion of the Court in *Intel* unified the interpretation of several key languages and clearly indicated the factors to be considered on which lower court judges should rely, which made the 1782 direct discovery route very user-friendly for Japanese parties.[23]

However, the 1782 direct discovery route is not a silver bullet for the Japanese side. It is necessary for Japanese clients to retain a U.S. attorney to file the 1782 direct discovery motion, which dramatically boosts the cost of legal fees for them. Now, the 1782 direct discovery route is a *de facto* privilege only for corporate clients and a handful of wealthy individuals.

2. Options and their Practical Problems for U.S. Parties

(1) Overview of Three Pathways

For the U.S. side, the abovementioned two bilateral approaches are also available. However, for U.S. parties, they are usually the last resorts. Rather, U.S. parties and the U.S. courts are likely to access evidence in Japan through the discovery rules based on FRCP (hereinafter *FRCP route*), which is much faster, more effective, and more familiar to them.

(2) Practical Challenges of Three Pathways

(a) FRCP Route

The U.S. courts have prioritized the FRCP route over the two other bilateral routes when they access evidence located in foreign countries, including Japan. Not limited to the relationship with Japan, the FRCP route is generally the least time-consuming and the most effective option for U.S. parties to access extraterritorial evidence. The U.S. developed a powerful pretrial discovery system compared to other common law countries.[24] In the U.S., discovery plays a core role in the civil proceeding system based on the adversarial system,

20) *See* Bent *supra* note 11, at 259-60.

21) *Intel Corp. v. Advanced Micro Devices, Inc*., 542 U.S. 241 (2004).

22) *See Intel*, 542 U.S., at 253 n. 7.

23) In fact, Professor Yanbai Andrea Wang, an expert on the Section 1782 discovery in the U.S., revealed that the number of discovery cases through the Section 1782 has quadrupled since the decision. *See* Yanbai Andrea Wang, *Exporting American Discovery*, 87 Chi. L. Rev. 2089, 2109 (2020).

24) *See, e.g*., Jack I.H. Jacob, The Fabric of English Civil Justice 93, 100 (1987) ("Pre-trial discovery was originally developed in England, based on equity."); *Id.* ("It was exported to the U.S. and developed in a unique way."); Geoffrey C. Hazard Jr., *Discovery and the Role of Judge in Civil Law Jurisdictions*, 73 Notre Dame L. Rev.1017, 1018 (1998) ("This system of pretrial discovery is unique to the United States. Other common law countries have nothing like it.").

which constitutes the identity of American civil procedure law.[25)]

The U.S. courts have maintained the view that discovery orders may be enforced against parties and a certain category of non-parties outside the U.S. to take extraterritorial evidence. The U.S. courts usually order the Japanese defendants existing in Japan to travel to U.S. soil and respond to a deposition,[26)] and they are typically so concerned about sanctions or disadvantages in their own proceedings in the U.S. that they are obliged to obey the discovery order.

However, in relation to Japan, there are two specific occasions that the FRCP route does not necessarily work well. First, while U.S. extraterritorial discovery based on the FRCP can accomplish effective and quick access to evidence located in Japan against an opposing party, it sometimes does not function against a third party.[27)] Due to the limitation of personal jurisdiction of the U.S., the U.S. court may not compel non-party foreign citizens in a foreign jurisdiction to comply with a discovery order. In order to exercise personal jurisdiction over a third party in a foreign jurisdiction for the U.S. court, a subpoena should be processed to her. However, The FRCP and 28 U.S.C. § 1783 allow the U.S. court to issue a subpoena to only the U.S. national or resident as a third party in a foreign jurisdiction.[28)] Moreover, even if the U.S. judge could issue a subpoena against a third party who is a U.S. national or resident in Japan, the targeted person might not comply with it because she does not usually have an incentive to do so. Unless she plans to come back to the U.S. in the future, she does not need to be afraid of sanctions.

Second, a judgment rendered by the U.S. court based on the evidence obtained through the extraterritorial discovery against a Japanese individual or entity might not be recognized and enforced by the Japanese court in the future. In the U.S., gathering evidence in the pretrial stage is in the purview of both parties. In contrast, the civil procedure system in civil law countries, including Japan, has no distinction between pretrial and trial. In Japan, a judge is substantially involved in court proceedings from the beginning of litigation. Under the Japanese view, taking evidence by court is a part of the exercise of national sovereignty.[29)] In

---

25) *See* John H. Beisner, *Discovering a Better Way: The Need For Effective Civil Litigation Reform*, 60 DUKE L. J. 547, 554 (2010) ("Liberal pretrial discovery is a fundamental component of the civil justice in the United States.").

26) *See e.g., In re Honda Am. Motor Co., Inc. Dealership Rels. Litig.*, 168 F.R.D. 535, 538 (D. Md. 1996) ("Compelling the depositions of Honda Japan managing agents and Japanese nationals in Baltimore, Maryland, does not, in itself, infringe on Japanese judicial sovereignty.").

27) *See* BORN & RUTLEDGE, *supra* note 8, at 996 ("[I]f [a] foreign witness cannot be served in any U.S. judicial district, they will be beyond the reach of direct U.S. discovery."); Gary B. Born & Scott Hoing, *Comity and Lower Courts: Post-Aerospatiale Applications of the Hague Evidence Convention*, 24 INT'L L. 393, 395 (1990) ("In many circumstances, foreign persons refusing to provide information voluntarily will not be subject to the personal jurisdiction of U.S. courts. In such cases U.S. courts are unable to order discovery directly and must seek the assistance of foreign courts in obtaining the sought-after evidence.").

28) Fed. R. Civ. P. 45 (b) (3); 28 U.S.C. § 1783.

29) Thomas S. Mackey, *Litigation Involving Damages to U.S. Plaintiffs Caused by Private Corporate Japanese Defendants*, 5 TRANSNAT'L LAW. 131, 150 (1992) ("If the unsupervised American attorney takes a deposition or inspects documents in Japan using our American system exclusively, the American attorney would be in violation of Japan's judicial sovereignty.").

Japan, preferring the bilateral approach, it is generally understood that without the permission of a foreign country, it is not permissible for the Japanese court to obtain evidence located in a foreign jurisdiction as it would infringe on national sovereignty. Some scholars in Japan also argue that a U.S. judgment obtained by infringing on Japanese sovereignty cannot be recognized by the Japanese court because it would be deemed a foreign judgment against "public policy." [30] There are no court rulings on this issue in Japan so far, but if a plaintiff before the U.S. court is considering enforcing a U.S. judgment in Japan in the future, the unilateral approach based on the FRCP is not a wise option for a U.S. party.

In conclusion, at least in the two abovementioned situations, the FRCP route is not a perfect scheme to access extraterritorial evidence in Japan, and the U.S. side still needs to resort to one of the existing bilateral routes between the two countries.

(b) Consular Convention Route

The downside of the Consular Convention route is the same as what was explained on the Japanese side: it provides only for depositions as a means to take extraterritorial evidence (no options to access documentary evidence) and does not allow a consular officer to compel a deponent to testify.

In addition, several logistical problems exist, especially when the U.S. party takes a deposition in Japan, frequently causing a serious delay in a planned deposition. The Japanese government places several cumbersomenesses (not described in the convention) on U.S. litigants who hope to take a deposition in Japan. The Japanese government requires the U.S. participants to travel to Japan for deposition with a "special deposition visa." [31] The participants, including counsels for the U.S. plaintiff, cannot enter Japan through the visa waiver program between the two countries.[32] Additionally, the Japanese government requires that the deposition be implemented at the U.S. consular premise.[33] It is not allowed to take a deposition in a conference room of a law firm or a hotel in Japan. While the U.S. has one embassy and five consular offices in Japan, only the embassy in Tokyo and a consular office in Osaka have a limited numbers of special rooms for deposition. It is said that reservations are consistently fully booked, and it takes from a few months to a half year to obtain a room.[34] Considering these logistical hurdles, it is apparent that the Consular Convention route is a

30) Minji soshōhō [Minsohō] [C.Civ. Pro] 1996, art. 118, note. 1 (Japan). One of the four requirements for the recognition of a foreign decree is that the content of the judgment and the litigation proceedings are not contrary to public policy in Japan. *See*, *e.g.*, Hideyuki Kobayashi & Masako Murakami, Shimban Kokusai Minji Soshōhō [International Civil Litigation] 164 (2022).

31) *See Japan Judicial Assistance Information*, U.S. Department of States, Bureau of Consular Affairs, https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-Information/Japan.html (last visited Apr. 16, 2021)

32) *Id.*

33) *Id.*

34) Eliot G. Disner, *On the Road—Taking Depositions in Tokyo or: The Only Show in Town*, 72 APR N.Y. St. B.J., 35, 35 (APRIL 2000) (This report includes actual practice for U.S. lawyers to proceed to take a deposition in Japan under Consular Convention.); Mugi Sekido et al., Wakariyasui beikoku minji soshō no jitsumu [Practice on the U.S. Civil Litigation] 140 (Mugi Sekido eds., 2018).

much less attractive option than the FRCP route.

After the pandemic, Japan made a major shift to allow for online depositions, which it had long prohibited, but this does not completely alleviate the cumbersomeness of the Consular Convention route. The Ministry of Foreign Affairs of Japan (hereinafter *MOFA*) has not allowed depositions via the Internet remote system for more than a half-century. On the contrary, after the global expansion of the pandemic, MOFA suddenly and rather surreptitiously (without both prior and post notice of the change to the public) began to allow "the taking of video testimony in accordance with the same requirements applicable to in-person testimony and upon notice to the Government of Japan in each instance." [35] Yet, even so, Japan does not permit U.S. counsels to take video testimony of persons located in Japan without the required prior notice and without being administered by U.S. consular officers. Thus, logistical hurdles for the Consular Convention route will remain high.[36]

As a result of these drawbacks, even if it is necessary to depose witnesses residing in Japan, U.S. judges rarely adopt the Consular Convention route. Instead, they usually seek the FRCP route[37] and order a witness residing in Japan to travel to the U.S. territory for depositions, avoiding the burdensome process in Japan under the Consular Convention route.[38] In addition, in the case that the witness is not willing to respond to the discovery order and that the U.S. party needs to access documents or other tangible evidence possessed by the Japanese third party, the Consular Convention is also powerless, which is why the Consular Convention route is much less attractive to U.S. parties and courts than the FRCP route.

(c) Letter Rogatory Route

The letter rogatory route is a pathway to allow U.S. parties to access foreign evidence in Japan with compulsory measures, which is the same as what I explained for the Japanese side.

However, in addition to the weaknesses mentioned in the previous Japanese part, the following frustrations for the U.S. court and litigants can be identified. In practice, the letter

35) U.S. Department of States, Bureau of Consular Affairs, *supra* note 31 ("Japanese authorities have informed the United States that Japan permits the taking of video testimony in accordance with the same requirements applicable to in-person testimony and upon notice to the Government of Japan in each instance.").

36) *See* Embassy of Japan in the United States of America, Deposition in Japan, https://jp.usembassy.gov/services/depositions-in-japan/ (last visited Feb. 27, 2023).

37) The U.S. judges acknowledge the burdensome process of the deposition through the Consular Convention route. *See e.g., Murata Mfg. Co. v. Bel Fuse, Inc*., 242 F.R.D. 470, 472 (N.D. Ill. 2007) ("With the logistical difficulties of deposing the Japanese inventors in mind, I granted the defendants the time they wanted, but cautioned that there would be no extensions regardless of whether there were logistical difficulties in setting up the depositions in Japan since this was an issue that was long known to everyone."); *Schall v. Suzuki Motor of Am., Inc*., No. 4:14CV-00074-JHM, 2017 WL 5622498, at 6 (W.D. Ky. Nov. 21, 2017) ("[C]ompliance with these procedural requirements will constitute a considerable hardship".).

38) *E.g.,* Schall v. Suzuki Motor of Am., Inc., No. 4:14CV-00074-JHM, 2017 WL 5622498 (W.D. Ky. Nov. 21, 2017) (ordering an employee of the Japanese defendant company to travel to California and be deposed.); Yaskawa Elec. Corp. v. Kollmorgen Corp., 201 F.R.D. 443, 444 (N.D. Ill. 2001) (ordering the Japanese non-party to be deposed in Guam, not in Japan (the plaintiff favors), not in Chicago (the defendant favors).).

rogatory route works to access only testimony but not documentary evidence when the U.S. court requests it. A receiving court in Japan takes or examines evidence requested pursuant to the procedural law of its own based on the *lex fori* rule. Although JCPL has a mechanism to order to produce documents (*bunsho teishutsu meirei*) against an opposing party or a third party corresponding to the production of documents under the FRCP, Japanese courts have unreasonably sustained the position that an order to produce documents under JCPL cannot be used through the letter rogatory route.[39] This attitude of the Japanese courts has been one of the critical malfunctions in the regime of the international judicial cooperation between the U.S. and Japan because the U.S. party would be completely denied access to tangible evidence located in Japan through the coercive mechanism. It would also justify the U.S. unilateral approach to accessing document-type evidence located in Japan because the U.S. parties and judges do not have any other option to access it via either the letter rogatory route or the Consular Convention route.

Due to these two critical defects of the letter rogatory route, the U.S. side would find the letter rogatory route to obtain documents or data located in Japan to be far less cost-effective than discovery in the U.S., where extensive and prompt disclosure can be expected. Thus, the letter rogatory route remains unattractive for the U.S. side.

Ⅳ. Conclusion

The U.S. and Japan have built a robust economic and political relationship since the end of World War II, which also means that private legal disputes involving the two countries in the civil or commercial fields are more likely to arise. Despite the close relationship between the two countries, the current system to deal with extraterritorial evidence between them is exceedingly undeveloped.

Both governments failed to closely follow the development of the civil procedure laws of the other side and to make an effort to adjust the regime dealing with extraterritorial evidence through their dialogue. For both countries, current domestic mechanisms for evidence-taking are not what they were at the time of the establishment of the Consular Convention route (1964) and the letter rogatory route (1953). However, there has been no communications between the U.S. and Japan to update the existing bilateral schemes for 70 years. What has changed in the past 70 years was not just the legislation or rules to take evidence in both countries. The advent of the Internet has shaken the idea of "national sovereignty," commonly accepted in the international community. Moreover, the rapid development of digital technology has changed the format of "evidence" from documents to electronically stored

39) Takeo Kosugi, *Amerika no "Deisukabari" no nihon deno jisshi wo meguru mondaiten* [Problems of Implementation of U.S. Discovery in Japan], *in* Kokusai minji soshō [International Civil Litigation] (Masato Dōgauchi et al. eds., 2002) 247-248 ("There is no way for a U.S. court to compel a Japanese resident, whether a party or a third party, to produce documents".); Yasuhiro Fujita, Nichi-Bei Kokusaisoshō no Jitusumu to Ronten [Transnational Litigation: US./Japan -Points and Authorities-] 259 (1998) ; Yoshimasa Furuta, Kokusai Minjisoshōhō nyūmon [Introduction on International Civil Procedure] 139 (2012).

information. It is urgent for both governments to properly acknowledge the deficiencies of the current regime of extraterritorial evidence and to initiate dialogue to advance access to foreign evidence between the two countries. In a globalized world, there will be more and more cases in which justice cannot be realized solely based on evidence accessible within a forum jurisdiction. Though suggesting an alternative scheme to advance the regime of transnational evidence is outside of the boundary of this article, it is useful for practitioners to have a proper overview of current options and their flaws to access foreign evidence for practitioners in both countries. I hope this article will spur both countries to urgently initiate a dialogue for a cooperative relationship to implement a faster, fairer, and more affordable scheme to access extraterritorial evidence.

A Message from JCAA

President

Shinsuke Kitagawa

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

Currently, the public and private sectors in Japan are collaborating to increase the usage of international arbitration in Japan. For example, starting 1 April 2024, the amended Arbitration Act entered into force, allowing courts to enforce interim measures issued by arbitral tribunals. The amended Act also permits parties to forgo attaching Japanese translations of arbitral awards for enforcement, subject to court approval.

The JCAA is also actively promoting international arbitration in Japan. On 17 November 2023, to celebrate the 70th Anniversary of the JCAA, an International Arbitration Seminar was held at *Tsunamachi Mitsui Club*, Tokyo. The event was a great success, with about 400 participants from 46 countries attending in person or online.

In March 2024, the JCAA participated in California International Arbitration Week in San Francisco and moderated a session titled "The Quest for Speedy Dispute Resolution in Japan and California through International Arbitration". Speakers explored ways to enhance and expedite international arbitration, as well as discussed cultural differences between U.S. and Japan.

Lastly, from 20 to 22 November 2024, the JCAA Arbitration Days will be held at *Tsunamachi Mitsui Club*. Details will be published on the JCAA' s website, so please stay tuned for more information from the JCAA.

The JCAA remains dedicated to providing essential ADR and other services that meet the highest standards of satisfaction. Your trust and support are invaluable to us. We are sincerely grateful for your continued cooperation and support.

The Japan Commercial Arbitration Association (JCAA)

www.jcaa.or.jp