Japan Commercial Arbitration Journal

VOL.4 [2023]

The Japan Commercial Arbitration Association (JCAA)

President

Shinsuke Kitagawa

Editorial Board

Editor–in-Chief

Professor Kazuhiko Yamamoto, Chief Arbitration and Mediation Officer, JCAA

Editorial Committee

Aoi Inoue
Anderson Mori & Tomotsune

Harumichi Uchida
TMI Associates

Junya Naito
Momo-o, Matsuo & Namba

Shiro Kuniya
Oh-Ebashi LPC & Partners

Tony Andriotis
DLA Piper

Chié Nakahara
Nishimura & Asahi

Nagashima Ohno & Tsunematsu

Mugi Sekido
Mori Hamada & Matsumoto

Professor Shusuke Kakiuchi
The University of Tokyo

Yoshihiro Takatori
Kasumigaseki International Law

Supporting Law Firms

Anderson Mori & Tomotsune

Kasumigaseki International Law Office / International Arbitration Chambers

Momo-o, Matsuo & Namba

Mori Hamada & Matsumoto

Nagashima Ohno & Tsunematsu

Nishimura & Asahi

Oh-Ebashi LPC & Partners

TMI Associates

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

© 2023 JCAA

All rights reserved

Japan Commercial Arbitration Journal

VOL. 4 [2023]

Table of Contents

Combining Interactive Arbitration with Mediation:
A Hybrid Solution under the Interactive Arbitration Rules **3**
Miriam Rose Ivan L. Pereira

The Use of Technology in the International Commercial Arbitration and the Consideration of Rulemaking **16**
Masaru Suzuki, Shinya Sakuragi

Current Status of International Arbitration from the Perspective of Corporate Law and Japan as the Place of Arbitration **24**
Kazuhisa Fujita

International Commercial Arbitration and Public Interests:
Focusing on the Treatment of Overriding Mandatory Rules **36**
Dai Yokomizo

Extending the Application of an Arbitration Agreement Involving a Corporation to Include its Representative **45**
Yuji Yasunaga

Scope, Amount and Sharing of Arbitration Expenses and Court Costs in Japan **53**
Kazuhiro Kobayashi

Disputes in India — Lessons from Mittal v Westbridge **63**
Leon Ryan, Shunsuke Domon

Potential for a New Arb-Med in Japan **73**
Junya Naito, Motomu Wake

Arbitrator Training and Assessment
—How to Increase and Strengthen Resource of Arbitrators and ADR Practitioners **79**
Yoshihiro (Yoshi) Takatori

On Dual Conciliation by Two Conciliators **89**
Shuji Yanase

Discussions and Challenges in Promoting Online Dispute Resolution **107**
Takeshi Ueda

Civil Litigation after the Introduction of IT, as Suggested by Scheduled Proceedings in Commercial Arbitration **116**
Shinji Kusakabe

A Message from JCAA **126**

Combining Interactive Arbitration with Mediation: A Hybrid Solution under the Interactive Arbitration Rules

Counsel, Oh-Ebashi LPC & Partners

Miriam Rose Ivan L. Pereira

Ⅰ. Introduction

The results of the latest 2021 international arbitration survey of Queen Mary University of London show a notable shift in favor of more hybrid solutions to commercial disputes. Out of 90% of those who preferred arbitration as a means of resolving cross-border disputes, 59% or almost two-thirds of the people surveyed preferred arbitration together with alternative dispute resolution ("**ADR**"), such as mediation.[1] Parties are clearly now more open to hybrid solutions. The arb-med-(arb) process embedded in the Interactive Arbitration Rules (2021) (the "**Interactive Arbitration Rules**") of the Japan Commercial Arbitration Association ("**JCAA**") is one such solution.

The Interactive Arbitration Rules were boldly launched by the JCAA in 2019 and later revised in 2021 to expand the automatic application of expedited arbitration procedures.[2] They offer a bespoke type of arbitration that can be combined with mediation. Users can choose these rules before or even after a dispute has arisen.[3] Unfortunately, the said rules have not yet gained traction in Japan perhaps due to lack of awareness and familiarity. This article aims to explain how the interactive and pro-transparency features of interactive arbitration can pave the way for an arb-med-(arb) hybrid solution under the said rules, and how the hybrid proceedings could generally look like.

Part II of this article explores the key provisions of the Interactive Arbitration Rules that promote efficiency and transparency through the increased interaction between the arbitral

1) White and Case, *2021 International Arbitration Survey: Adapting arbitration to a changing world*, 5. In the prior 2018 survey, the results were more evenly split. Out of the 97% of the respondents who preferred international arbitration, 48% did so on a stand-alone basis while 49% preferred it together with ADR. (White and Case, *2018 International Arbitration Survey: The Evolution of International Arbitration*, 2.)

2) Aiko Hosokawa and Miriam Rose Ivan L. Pereira, *JCAA's Amended Expedited Arbitration Procedures, Reduced Administrative Fees and New Appointing Authority Rules*, Oh-Ebashi LPC & Partners Newsletter, Autumn Issue (2021), 2-5.

3) Interactive Arbitration Rules, art. 3(1), and Commercial Arbitration Rules (2021) (the "**Commercial Arbitration Rules**"), art. 3(3).

tribunal and the parties, thereby providing the parties with a clearer picture of their dispute through the impartial lens of the arbitral tribunal.[4] Part III then examines how interactive arbitration can be an effective gateway to an arb-med or arb-med-arb[5] hybrid solution. This part also highlights the safeguards that are in place when the parties want the arbitrator to "switch hats" and act as the mediator (arb-med), and then again as the arbitrator (arb-med-arb), if the parties wish to convert a mediated settlement agreement into a consent award or continue with the interactive arbitration proceedings if the mediation is unsuccessful. Finally, a few remarks will be made on the potential use of interactive arbitration in combination with mediation under the Interactive Arbitration Rules.

Ⅱ. Hats Off to a More Interactive and Transparent Arbitral Tribunal

A. Key Provisions of the Interactive Arbitration Rules for More Efficiency and Transparency

We begin with the heart and soul of the Interactive Arbitration Rules. Articles 48 and 56 are the core provisions that shape and define the proactive role of the arbitral tribunal. The basic obligations imposed thereunder prompt the arbitral tribunal to be more interactive and transparent with the parties in the conduct of more tailored arbitral proceedings.

a. ***Article 48 (Arbitral Tribunal's Active Role in Clarifying Parties' Positions and Ascertaining Issues).*** This provision requires the arbitral tribunal to draft as early as possible a written summary of (i) the positions of each party on the factual and legal grounds of the claim and the defense ("**Positions**"), and (ii) the factual and legal issues ("**Issues**") tentatively ascertained by the arbitral tribunal arising from the Positions. The parties will be given an opportunity to comment on this summary. Thereafter, the arbitral tribunal may revise the Positions and Issues after considering the parties' comments. The Positions may be further amended by the arbitral tribunal upon the request of a party, which may be denied if it could result in delay. The arbitral tribunal may use the revised Positions in the arbitral award to describe the parties' respective positions.

The above early process of identifying the Positions and the Issues may be considered an enhancement of the procedure that is available in a standard arbitration proceeding under Article 46 of the Commercial Arbitration Rules. The said provision requires the arbitral tribunal, at an early stage, to use "reasonable efforts" to identify the issues to be determined upon consultation with the parties, and if it considers it "appropriate" to

4) For an overview of the Interactive Arbitration Rules, *see* Douglas K. Freeman, *The New JCAA Arbitration Rules — Japan's Attempt in Innovative Dispute Resolution*, Japan Commercial Arbitration Journal, Vol. 1 (2020), 7-10 ("**Freeman**"), and Aiko Hosokawa and Miriam Rose Ivan L. Pereira, *The New Interactive Arbitration Rules of the Japan Commercial Arbitration Association*, Oh-Ebashi LPC & Partners Newsletter, Summer Issue (2019), 2-4.

5) The terms "arb-med" and "arb-med-arb" describe the sequence of arbitration or mediation proceedings taken by the parties in resolving their dispute. This article focuses on the dispute being resolved first in an interactive arbitration proceeding. Thus, the med-arb variation, which is mediation before the commencement of an interactive arbitration case, is not covered by this article. Also not covered in this article is settlement by private negotiation, which is always an option for the parties at any stage of an interactive arbitration proceeding.

promote efficiency, prepare the terms of reference setting forth the matters referred to the arbitral tribunal and a list of major issues after giving the parties an opportunity to comment.

b. ***Article 56 (Expressing Arbitral Tribunal's Preliminary Views).*** Before the arbitral tribunal decides to hold a witness examination (which could be a costly exercise), this provision requires the arbitral tribunal to prepare and give the parties another written summary of (i) the Issues that the arbitral tribunal considers important and its views thereon that are preliminary and non-binding (as to the arbitral tribunal's subsequent decisions or the arbitral award), and (ii) any other matter considered important by the arbitral tribunal. The parties will also be given an opportunity to comment thereon, but they are prohibited from challenging the arbitral tribunal on account of it expressing its preliminary views on the Issues. This is effectively a waiver that has been built into the Interactive Arbitration Rules.[6] This would not, however, preclude the parties from challenging the arbitral tribunal on account of other circumstances that give rise to justifiable doubts as to its impartiality or independence.[7]

The above early evaluation or preliminary assessment of the major Issues of a case can be very useful for the parties in planning how they should build and present their claims or defenses, or in general, assessing their chances of winning.

Articles 48 and 56 of the Interactive Arbitration Rules also aid the arbitral tribunal in fast-tracking the proceedings to enable it to render an award within seven and a half months from the date it is constituted, or an even shorter period if expedited arbitration procedures apply (i.e., three months for disputes valued at JPY 50 million or less, or six months for disputes valued at more than JPY 50 million but not more than JPY 300 million as well as disputes valued at more than JPY 300 million but which the parties have agreed in writing to be subject to expedited arbitration procedures).[8]

The fast, interactive and transparent arbitral tribunal that the JCAA envisioned for the parties under the Interactive Arbitration Rules is truly remarkable.

B. Disclosure of Views under the Interactive Arbitration Rules and Other Civil Law-Based Arbitration Rules

As described above, the Interactive Arbitration Rules require the arbitral tribunal to disclose its preliminary views on the Issues. The mandatory nature of such disclosure exercise has been compared to the permissive approach taken in the Prague Rules on the Efficient Conduct of Proceedings in International Arbitration (2018) (the "**Prague Rules**").[9]

Under Article 2.4 of the Prague Rules, at the case management conference or at any later stage of the arbitration, the arbitral tribunal *may*, if it deems it appropriate, indicate to the parties, among others, its preliminary views on the following matters: (a) the allocation

6) Aiko Hosokawa, *New Arbitration Rules Based on the Civil Law Tradition – The 2018 DIS Arbitration Rules, the Prague Rules, and the JCAA Interactive Arbitration Rules*, Japan Commercial Arbitration Journal Vol. 1 (2020), 18 ("**Hosokawa**").

7) Interactive Arbitration Rules, art. 34(1).

8) *Id*., arts. 43.1, 85(1), and 89(1) and (2).

between the parties of the burden of proof; (b) the relief sought; (c) the disputed issues; and (d) the weight and relevance of the evidence submitted by the parties. Compared to the Interactive Arbitration Rules, the disclosure of views under the Prague Rules covers a broader range of matters. Nevertheless, like the Interactive Arbitration Rules, expressing such views would not by itself be evidence of the arbitral tribunal's lack of independence or impartiality, and cannot be used as grounds for disqualification.[10)]

In contrast to both the Interactive Arbitration Rules and the Prague Rules, a consent-based approach was adopted by the German Arbitration Institute (Deutsche Institution für Schiedsgerichtsbarkeit e.V.) ("**DIS**") in its DIS Arbitration Rules (2018) (the "**DIS Rules**") with respect to the preliminary assessment by the arbitral tribunal of the issues. During the case management conference, and with a view to increasing procedural efficiency, the arbitral tribunal is required to discuss with the parties several matters, including each of the measures set out in Annex 3 (Measures for Increasing Procedural Efficiency) for the purpose of determining whether any of those measures should be applied to the proceedings.[11)] One of the measures listed in the said annex is providing a "preliminary non-binding assessment" of the factual or legal issues of the arbitration if all of the parties consent thereto.[12)] Thus, while discussing the option of providing a preliminary assessment of the issues is mandatory, the actual provision of such assessment is conditioned on both parties giving their consent. This two-step process has been abbreviated in the Interactive Arbitration Rules where the parties would already be consenting to the disclosure by the arbitral tribunal of its preliminary views on the Issues by agreeing to the application of the said rules. Thus, for parties who, at the outset, desire such kind of transparency on the part of the arbitral tribunal, the Interactive Arbitration Rules would suit them well.

The Interactive Arbitration Rules, Prague Rules and DIS Rules all sprung from a need for more proactive arbitral tribunals using a civil law approach to more streamlined proceedings.[13)] Among the three sets of rules, the Interactive Arbitration Rules embody the simplest proactive approach of mandating the disclosure of preliminary and non-binding views on the Issues while protecting the arbitral tribunal from challenges on account of such disclosure.

C. Duty to Stay Neutral Despite Disclosure of Preliminary Views

As mentioned above, the arbitral tribunal is protected from being challenged by the parties on account of its disclosure of its preliminary views on the Issues. However, there is still some

---

9) Freeman, at 8. The Prague Rules were launched *"to reduce the time and costs involved in arbitration proceedings."* (August Debouzy, *The Launch of the Prague Rules: Useful or Unnecessary Tool for International Arbitration*?, February 1, 2019, 1, available at https://www.august-debouzy.com/en/blog/1277-the-launch-of-the-prague-rules-useful-or-unnecessary-tool-for-international-arbitration ("**August Debouzy**").) The Prague Rules offer a *"framework and/or guidance for arbitral tribunals and parties on how to increase efficiency of arbitration by encouraging a more active role for arbitral tribunals in managing proceedings."* (Prague Rules, Preamble.)

10) Prague Rules, art. 2.4.

11) DIS Rules, art. 27.4.

12) *Id.*, Annex 3 (Measures for Increasing Procedural Efficiency), item F.

13) Hosokawa, at 12.

concern about the potential impact of such disclosure on the impartiality and independence of the arbitral tribunal. It has been cautioned that *"[T]he tribunal ... risks being perceived as biased in the eyes of the parties before its award has been issued."*[14] Taking this into consideration, in drafting the summary of his or her preliminary views on the Issues, the arbitrator could expressly reiterate that such views are just preliminary and will be subject to, and may change depending on, further submissions and evidence of the parties to reinforce the preliminary and non-binding nature of such views.[15]

To further minimize any concern about bias, the arbitral tribunal should make sure that the time it gives to the parties to comment on such preliminary views is sufficient.

In any event, an arbitral tribunal must perform its duty to express such views bearing in mind its fundamental and ongoing duty to stay neutral, i.e., maintain its impartiality and independence, throughout the proceedings.[16]

D. Less Guesswork Could Lead to Clearer Action Plans for the Parties

If done properly, giving the parties access to the thoughts of the decision maker (i.e., the arbitral tribunal) on the Issues of a case, which they would otherwise not normally have in a standard arbitration proceeding, as well as an opportunity to comment thereon, including to address or clarify any misunderstanding or insufficient understanding on the part of the arbitral tribunal, would undoubtedly be invaluable to the parties. Such interaction or exchange of views with the arbitral tribunal would also enhance the parties' sense of control over the potential outcome of the case[17] by enabling them to make informed decisions about their subsequent submissions, including evidence selection, strategies, or action plans. Further, as a positive consequence of having a proactive tribunal, it has been put forth that *"[I]f the tribunal, together with the parties, examines the issues more fully at the outset of the proceedings, everybody will focus on these issues more readily, thus leading to a 'narrower, quicker and hence cheaper process.'"*[18]

---

14) Freeman, at 8.

15) *See* Janet Walker, *The Prague Rules: Fresh Prospects for Designing a Bespoke Process*, Global Arbitration Review, September 3, 2021, 2 (“**Walker**”), where the author commented that *“for the tribunal to engage with the parties in the way envisaged by the Prague Rules, it is necessary for the parties to be persuaded that any questions asked by the tribunal members, or preliminary views expressed by them, do not represent conclusions reached, and that everything that is said is subject to contrary indications arising from the evidence subsequently adduced, and the submissions that the parties might subsequently make in the arbitration.”*

16) Interactive Arbitration Rules, art. 24(1).

17) *See* Emi Rowse (Igusa) and Nattawat Cherdhirunkorn, *International arbitration and the circle of control – a look at the psychological benefits of arbitration and the status of arbitration in Thailand*, Kudun & Partners Newsletter – Arbitration (September 2022), 2-4, where the authors explained, among others, how arbitration gives parties a sense of control based on the “circle of control” concept. Based on the diagram provided therein, one example is that while the outcome of the proceedings cannot be directly controlled by the parties, it can be affected or influenced by factors that can be controlled by them, such as the choice of arbitral institution and the applicable rules.

18) Klaus Peter Berger and J. Ole Jensen, *Due process paranoia and the procedural judgment rule: a safe harbor for procedural management decisions by international arbitrators*, Arbitration International (2017), 431.

Overall, the parties can benefit from resolving their dispute in an interactive arbitration case. The interaction required between the arbitral tribunal and the parties at two important stages of the interactive arbitration proceedings can effectively provide the parties with greater clarity of their Positions and the Issues of the case as seen through the impartial lens of the arbitral tribunal. Equipped with a clearer picture of their case, the parties can then present their cases and allocate their resources more effectively and efficiently. Parties can then spend less time guessing what the arbitral tribunal is thinking and more time creating clearer action plans.

Ⅲ. Interactive Arbitration as a Gateway to Arb-Med or Arb-Med-Arb

Given the streamlining benefits of interactive arbitration, a commercial dispute may sufficiently be resolved in an interactive arbitration proceeding as a standalone proceeding. The parties can benefit from the shorter timelines described earlier for rendering an award as well as the lower costs of such proceedings.[19] However, in some cases, the parties may wish to obtain better or more tailored terms through a mediated settlement agreement compared to what they might secure in an arbitral award. Resolving the dispute amicably may also be particularly important for parties who wish to continue or expand their business dealings with each other. In this regard, we will now examine how interactive arbitration can be used as a gateway to hybrid solutions like arb-med or arb-med-arb.

A. Combining Interactive Arbitration with Mediation under the Interactive Arbitration Rules

Mediation or settlement at the parties' initiative; arbitral tribunal has no facilitative role

The Interactive Arbitration Rules created a proactive arbitral tribunal without explicitly clothing it with the power to suggest mediation or settlement. Thus, in principle, the parties are expected to pursue the possibility of mediation or settlement at their own initiative.

In contrast to the Interactive Arbitration Rules, the Prague Rules and the DIS Rules expressly allow or require the arbitral tribunal to promote settlements. Article 9 of the Prague Rules *allows* the arbitral tribunal to assist the parties to reach an amicable settlement of the dispute at any stage of the proceedings, unless a party objects thereto. Any member of the arbitral tribunal may also serve as the mediator with the prior written consent of the parties. Thus, the Prague Rules encourage the arbitrator to actively assist the parties in amicably settling their dispute, including by taking up the role of a mediator.[20]

Going one step further, Article 26 of the DIS Rules *requires* the arbitral tribunal to, at every stage of the proceedings, encourage an amicable settlement of the dispute, or of individual disputed issues, unless any party objects thereto.

---

19) Interactive Arbitration Rules, arts. 43(1), and 89(1) and (2). The fees of the arbitrator(s) are lower and fixed based on the value of the dispute. (*Id*., arts. 94 and 95.)

20) August Debouzy, at 2.

The Interactive Arbitration Rules do not have a similar provision on settlements. However, notwithstanding the absence of a facilitative role of the arbitral tribunal in the Interactive Arbitration Rules, as has been aptly observed, *"the mandatory disclosure of its preliminary views may in fact effectively promote early settlement,"* an approach that conforms with current Japanese court practice.[21] Further, like the Prague Rules, the Interactive Arbitration Rules expressly allow the arbitral tribunal to take on the role of a mediator pursuant to an appointment of the parties[22] in an arb-med scenario.

We now turn our attention to how parties can combine interactive arbitration with mediation, a hybrid approach that is specially provided for in the Interactive Arbitration Rules.

Mediation at any time during the interactive arbitration proceedings

Under Article 59 of the Interactive Arbitration Rules, at any time during the interactive arbitration proceedings, the parties may agree in writing to refer their dispute to mediation under the JCAA's Commercial Mediation Rules (2020) (the "**Mediation Rules**"). The mediation must be completed within three months from the date of appointment of the mediator unless the parties agree to a different time limit.[23]

The Mediation Rules will apply to the mediation proceedings, except for certain provisions in cases where the arbitrator is appointed by the parties to serve as the mediator.[24] In such cases where the same neutral is used, no request fee or additional administrative fee for the mediation proceedings would be required, and the fees and expenses of the arbitrator for the mediation proceedings will continue to be determined in accordance with Articles 81 and 82 as well as Part 3 of the Interactive Arbitration Rules.[25]

Mediation of a dispute by a neutral party without any decision-making power is a consensual and voluntary process. Hence, although both parties have given their consent to initiate mediation, or in the arb-med context contemplated herein, switch to mediation during an interactive arbitration proceeding, either party can withdraw from the mediation process at any time.[26]

Arb-med or arb-med-arb under the Interactive Arbitration Rules

"Arbitration is an adjudicative process that generally results in a binding award, whereas mediation is a facilitative process that may result in a voluntary settlement."[27] This is a simple description of two important dispute resolution tools that can be effectively combined at the option of the parties under the Interactive Arbitration Rules.

---

21) Hosokawa, at 19.
22) Interactive Arbitration Rules, art. 60(1).
23) Mediation Rules, art. 25.
24) Interactive Arbitration Rules, art. 60(5). In particular, Articles 12-14, 16 and 17 of the Mediation Rules will not apply.
25) *Id*., art. 60(4).
26) Mediation Rules, art. 28(1)(5).
27) Hiro N. Aragaki, *A Snapshot of National Legislation on Same Neutral Med-arb and Arb-med around the Globe*, Multi-tier Approaches to the Resolution of International Disputes: A Global and Comparative Study, Cambridge University Press (2022), 25 ("**Aragaki**").

Under the said rules, once the parties refer the dispute to mediation, at the request of either of them, the interactive arbitration proceedings must be stayed (an arb-med situation).[28] If successful, the parties will conclude and sign a mediated settlement agreement that resolves the dispute. The said agreement must also be signed by the mediator, and upon either party's request, the JCAA will attest that it resulted from a mediation administered by it.[29] These formalities would satisfy the requirements to enforce an international settlement agreement set forth in Article 4 of the United Nations Convention on International Settlement Agreements Resulting from Mediation (2018) (the "**Singapore Mediation Convention**").[30] Further, in anticipation of Japan signing and ratifying the said convention, a new law was passed to make international settlement agreements enforceable in Japan subject to the conditions prescribed in the said law.[31]

The parties can end the arb-med process with the execution and attestation of the mediated settlement agreement and have the arbitral proceedings terminated pursuant to Article 62 of the Interactive Arbitration Rules, or they can request the arbitral tribunal to record their settlement in the form of an arbitral award on agreed terms (i.e., a consent award) (an arb-med-arb situation), which would be final and binding on them.[32] The award would give the mediated settlement agreement the effects of *res judicata* and make it enforceable under the more widely accepted Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the "**New York Convention**").[33]

However, if the mediation is unsuccessful and it is terminated at the request of either party, then the interactive arbitration proceedings can be resumed,[34] resulting in another type of arb-med-arb situation. In this case, if the parties appointed the arbitrator to serve as the mediator, then the parties would be barred from challenging the arbitrator based on his or her participation as a mediator.[35] This is another waiver that has been built into the Interactive Arbitration Rules, which can help avoid any frivolous attempt to derail the interactive arbitration process on account of the dual appointment.

---

28) Interactive Arbitration Rules, art. 59(2).

29) Mediation Rules, art. 26.

30) *See* Douglas K. Freeman, *The New JCAA Mediation Rules and Japan's Future in International Mediation*, Japan Commercial Arbitration Journal (2021), 39. The Singapore Mediation Convention entered into force on September 12, 2020. As of June 1, 2023, 56 countries have signed the convention, and 11 countries have ratified it.

31) Act No. 16 of 2003 (Act on the Implementation of the United Nations Convention on International Settlement Agreements Resulting from Mediation). Specific types of domestic mediated settlement agreements can also become enforceable in Japan if certain conditions are met as provided in the amendment to the local ADR law, i.e., Act No. 17 of 2023 (Act to Partially Amend the Act on Promotion of Use of Alternative Dispute Resolution).

32) Interactive Arbitration Rules, arts. 63(3) and 65, and Arbitration Act, art. 38(1)-(3).

33) Yuko Nishitani, *Perspectives and Challenges of Multi-tier Dispute Resolution in Japan*, Multi-tier Approaches to the Resolution of International Disputes: A Global and Comparative Study, Cambridge University Press (2022), 158. The New York Convention applies to the recognition and enforcement of international arbitral awards. (Article I(1), New York Convention.)

34) Interactive Arbitration Rules, art. 59(4).

35) *Id*., art. 60(1).

Based on the foregoing, no further consent is needed from the parties for the neutral to resume his or her role as the arbitrator in an interactive arbitration proceeding.[36)] In contrast, under Article 9(3) of the Prague Rules, if the mediation fails, the neutral can only continue with the arbitration proceeding with the consent of the parties or be *"replaced."*[37)]

B. Switching Hats under the Interactive Arbitration Rules

Parties' consent required to switch hats (dual role)

The switching of roles by a neutral in the midst of resolving a dispute is widely accepted in China and some other countries, but in countries like the U.S., lawyers, arbitrators and mediators are prone to being skeptical about it.[38)] In Japan, such role switching, if desired by the parties, is permitted.

As a rule, the arbitrator in an interactive arbitration case is barred from being appointed as the mediator, unless both parties agree in writing to such appointment.[39)] Nevertheless, the appointment may be effectively revoked if the parties agree later to remove such mediator.[40)]

The performance of such dual role by a neutral is consistent with the provisions of the Arbitration Act[41)] of Japan that encourage settlement. Under the said arbitration law, with the consent of both parties, the arbitral tribunal or one or more arbitrators appointed thereby may attempt to arrange a settlement for the civil dispute being arbitrated. Unless otherwise agreed upon by the parties, such consent or its revocation must be made in writing.[42)] One notable difference is that, under the Interactive Arbitration Rules, the consent of the parties to such dual appointment must always be made in writing while under the said arbitration law, the parties are given more flexibility and can agree that such consent or the revocation thereof need not be in writing.

Neutral cloaked with protection from challenges arising from dual role

If the parties agree to the same neutral playing a dual role in the interactive arbitration proceeding and the mediation proceeding, then, as noted earlier, the parties would be later barred from challenging the arbitrator based (solely) on the fact that he or she is serving or has served as a mediator.[43)] This is akin to the effective waiver described in the IBA Guidelines

36) In Aragaki, at 47, the author noted that Canada and Indonesia specifically allowed the arbitrator to resume his or her role without *"further procedural protections,"* e.g., *"ex post consent during the embedded med-arb phase."*

37) Walker, at 5. Article 9.3 of the Prague Rules provides that *"[I]f the mediation does not result in a settlement..., the member of the arbitral tribunal who has acted as mediator: (a) may continue to act as an arbitrator in the arbitration proceedings after obtaining written consent from all parties at the end of the mediation; or (b) shall terminate his/her mandate in accordance with the applicable arbitration rules if such written consent is not obtained."*

38) Thomas Stipanowich, *'Switching Hats': Developing International Practice Guidance for Single-Neutral Med-Arb, Arb-Med, and Arb-Med-Arb*, International Mediation Institute, May 4, 2021, available at https://imimediation.org/2021/05/04/switching-hats-developing-international-practice-guidance-for-single-neutral-med-arb-arb-med-and-arb-med-arb/.

39) Interactive Arbitration Rules, art. 59(1).

40) Mediation Rules, art. 19(2).

41) Act No. 138 of August 1, 2003. This law was partially amended by Act No. 15 of 2023.

42) Arbitration Act, art. 38(4) and (5).

on Conflicts of Interest in International Arbitration (2014) ("**IBA Guidelines**").

The IBA Guidelines provide that an arbitrator may assist the parties in settling their dispute after obtaining their express agreement that doing so would not disqualify the arbitrator from continuing to serve as arbitrator. Such express agreement of the parties is an effective waiver *"of any potential conflict of interest that may arise from the arbitrator's participation in such a [settlement] process, or from information that such arbitrator may learn in the process."* Further, if the settlement process fails, the parties would remain bound by their waiver.[44)] Based on the said guidelines, making the waiver effective even if the settlement process is unsuccessful precludes parties from using an arbitrator as a mediator for the purpose of disqualifying him or her later as the arbitrator.[45)] The same rationale can apply to the waiver of challenges under Article 60(1) of the Interactive Arbitration Rules on account of the arbitrator serving or having served as a mediator.

Again, this is not to say that the arbitrator cannot be challenged for other circumstances that give rise to justifiable doubts as to his or her impartiality or independence.[46)] The arbitrator himself or herself should also remain confident about his or her impartiality or independence in resuming the role of arbitrator after participating in the mediation process bearing in mind his or her fundamental and ongoing duty to stay neutral throughout the proceedings.[47)] In the IBA Guidelines, the arbitrator is recommended to step down *"if, as a consequence of his or her involvement in the settlement process, the arbitrator develops doubts as to his or her ability to remain impartial or independent in the future course of the arbitration."*[48)] In this regard, it has been cautioned that in expressly consenting to the arbitral tribunal assisting them in settling their dispute, the parties should be aware of the consequences of such assistance in the settlement process (e.g., mediation), such as the risk of resignation of the arbitrator.[49)]

The first successful (interactive) arb-med-arb case administered by the JCAA

Using the same neutral has the obvious advantage of established familiarity with the case, the parties, and their respective counsel. Presumably, there also exists a relationship of trust between the parties and the neutral, which the neutral can build on in mediating a potential settlement.

The favorable results that can be achieved by using the same neutral for both the interactive arbitration and the mediation is best illustrated by the first arb-med-arb case that was administered by the JCAA under the Interactive Arbitration Rules, and which successfully concluded with a consent award.[50)]

43) Interactive Arbitration Rules, art. 60(1).
44) IBA Guidelines, General Standard 4(d).
45) *Id*., Explanation to General Standard 4, para. (d).
46) Interactive Arbitration Rules, art. 34(1).
47) *Id*., art. 24(1).
48) IBA Guidelines, General Standard 4(d).
49) *Id*., Explanation to General Standard 4, para. (d).

The dispute therein involved a claim for damages by a Japanese company against one of its suppliers for the defect in the claimant's final products on account of the part or component manufactured by the respondent. The parties opted for interactive arbitration despite having a choice-of-court clause in their contract.[51] They had a panel of three arbitrators, and after the panel shared their preliminary views on the issues of the case, the parties opted for mediation where they appointed all three arbitrators to serve as mediators. A settlement was reached, which was then confirmed in the form of a consent award.[52]

C. Safeguards when Using the Same Neutral as the Arbitrator and Mediator

The following safeguards under the Interactive Arbitration Rules can help protect the legitimacy of both the interactive arbitration and mediation proceedings if the same neutral is used by the parties for both proceedings:

a. ***General ban on caucuses (separate discussions) and required disclosure of any caucus.*** An arbitrator who is appointed by the parties to serve as mediator for the same dispute is prohibited from consulting separately with any of the parties[53] in any form (orally or in writing), unless the parties agree in writing to such separate discussions.[54] The arbitrator is also required to disclose to all other parties, in each instance, the fact that any such separate consultation has taken place, but not the contents thereof.[55] As supplemented by the Mediation Rules, the contents of such separate discussion may only be disclosed if authorized by the disclosing party.[56]

   The general ban on caucuses aims to minimize the concern of potential bias that an arbitrator-mediator may develop after meeting separately with a party and receiving any "sensitive confidential information" therefrom, which the other party would not have an opportunity to comment on.[57]

   Nevertheless, if the parties agree to such private caucuses or separate meetings to facilitate the settlement of the dispute, then the neutral must disclose that such caucus or separate meeting took place but without disclosing the contents thereof (presumably to promote candor in mediation discussions) unless the disclosing party has authorized such disclosure of the contents as well.[58]

---

50) For further details of this case, *see* Masato Dogauchi, Shinji Ogawa and Jieying Peng, *New Style of Arbitration – The First Case under JCAA Interactive Arbitration Rules*, JCAA Commercial Arbitration Journal, Vol. 3 (2022), 7-10.

51) *Id*., at 8. This shows that even at the eleventh hour, if parties wish to avail of the streamlining and other benefits of interactive arbitration, they may agree to such arbitration under the Interactive Arbitration Rules even after the dispute has arisen.

52) *Id*., at 8-9. The parties reported that they *"found that the tribunal's non-binding and preliminary views on the important issues were helpful to decide the further course of action that they should take."* (*Id*., at 10.)

53) This is the opposite rule in a standard mediation proceeding where the mediator may have such separate discussions unless the parties agree otherwise. (Mediation Rules, art. 22(1).)

54) Interactive Arbitration Rules, art. 60(2). On account of the potential due process issue arising from caucusing, it is not common in international arbitration proceedings led by Japanese arbitrators. (Hosokawa, note 8, at 12.)

55) Interactive Arbitration Rules, art. 60(2).

56) Mediation Rules, art. 22(2).

These safeguards for using the same neutral as the arbitrator and mediator are particularly important if the mediation fails and the mediator resumes his or her role as the arbitrator. In any event, the arbitrator must comply with the obligations of impartiality and equal treatment of the parties.[59)]

b. ***Without prejudice rule and other restrictions.*** Mediation proceedings are generally private and confidential.[60)] Further, to encourage frank discussions, the Interactive Arbitration Rules render all offers, admissions or other statements made by the parties during the mediation proceedings inadmissible as evidence in the interactive arbitration proceedings, unless otherwise agreed by the parties. The same without-prejudice rule applies to recommendations made by the mediator during such mediation proceedings.[61)] The parties will also be bound by the restrictions on evidentiary use and disclosure contained in Article 24 of the Mediation Rules.

c. ***Removal of the mediator by one or both parties, or the JCAA; resignation.*** As mentioned earlier, the parties may agree to remove the mediator.[62)] A mediator may also be challenged and removed upon the request of one of the parties or by the JCAA, on its own motion, and after giving the parties and the mediator an opportunity to comment, if it has become "inappropriate" for the mediator to perform his or her duties.[63)] The JCAA may also remove a mediator if it finds circumstances that are analogous to the grounds for disqualifying a judge from performing judicial duties under Article 23(1) of the Code of Civil Procedure of Japan.[64)] Lastly, the neutral himself or herself may resign from the role of mediator, if necessary.

   In any event, a mediator would not be disqualified from resuming his or her role as the arbitrator simply on account of his or her participation in the mediation.[65)] There should be other reasons for challenging the neutral, i.e., other circumstances that give rise to justifiable doubts as to its impartiality or independence.[66)]

Ultimately, the parties can choose their arbitrators and mediators subject to the waivers, restrictions and safeguards built into the Interactive Arbitration Rules.

---

57) *See* Weixia Gu, *Mapping and Assessing the Rise of Multi-tiered Approaches to the Resolution of International Disputes across the Globe: An Introduction*, Multi-tier Approaches to the Resolution of International Disputes: A Global and Comparative Study, Cambridge University Press (2022), 13, where the author explained that *"[A]s a mediator meeting with a party in caucus, a neutral will almost certainly receive sensitive confidential information which is not meant to be communicated to the other side and which would not in the normal course of an arbitration be communicated to the tribunal. If the mediation is unsuccessful, such information may consciously or subconsciously influence the neutral's mind when determining the case as arbitrator. This will be despite the other side being unaware of the nature of the information and therefore not having an opportunity to rebut any adverse impression that the information may have conveyed to the neutral's mind."*

58) Mediation Rules, art. 22(2).

59) Interactive Arbitration Rules, arts. 24(1) and 40(2).

60) Mediation Rules, art. 23.

61) Interactive Arbitration Rules, art. 59(3).

62) Mediation Rules, art. 19(2).

63) *Id*., art. 19(1).

Ⅳ. Concluding Remarks

For seven decades, the JCAA has aimed to serve and be in tune with the needs of the business community. Launching and improving the Interactive Arbitration Rules have clearly been steps in this direction. Although the rules have yet to take root among its users, their potential for giving parties a more efficient and transparent type of arbitration is clear. Having a better grasp of the important Issues of the dispute from the neutral perspective of the arbitral tribunal before any costly witness hearings are held can also empower the parties to consider the possibility of settlement through mediation.

Adequate protections are in place under the Interactive Arbitration Rules to shield the arbitral tribunal from being challenged for expressing its preliminary and non-binding views, and if applicable, for agreeing to take on the role of mediator if requested by the parties in the case of an arb-med scenario. The flow and use of information in mediation are also sufficiently regulated when the neutral plays a dual role.

Interactive arbitration can be combined with mediation to get the best of both worlds. By opting for the streamlining effects of interactive arbitration, parties can better focus and use their time and resources as they are guided by a proactive arbitral tribunal. By mediating their dispute at the right time, particularly when the Positions and Issues are clear, parties can better negotiate a win-win solution for themselves. In sum, this ADR cocktail may be exactly what users need to quench their disputes.

64) *Id*, art. 19(3). Article 23(1) of the Code of Civil Procedure of Japan states that: *"In the following cases, a judge is disqualified from performing the duties of a judge; provided, however, that in the case set forth in item (vi), this does not preclude a judge from performing duties as a commissioned judge based on a commission from another court: (i) if the judge, or the judge's spouse or former spouse, is a party to the case, or is related to a party to the case as a joint obligee, joint obligor, or obligor for redemption; (ii) if the judge is or was formerly the relative of a party to the case within the fourth degree of consanguinity or the third degree of affinity, or is or was formerly the cohabiting relative of a party to the case; (iii) if the judge is the guardian, supervisor of the guardian, curator, supervisor of the curator, assistant, or supervisor of the assistant of a party to the case; (iv) if the judge becomes a witness or expert in the case; (v) if a judge is or was formerly a party's representative or assistant in court in the case; (vi) if the judge participated in granting an arbitral award in the case or participated in reaching the judicial decision in the prior instance against which an appeal has been entered."* (*Id*., note 1, at 6.)

65) Interactive Arbitration Rules, art. 60(1).

66) *Id*., art. 34(1).

The Use of Technology in the International Commercial Arbitration and the Consideration of Rulemaking

Partner of TMI Associates, Specially-appointed Professor of Chuo Law School
Masaru Suzuki

Associate of TMI Associates
Shinya Sakuragi

Ⅰ. Introduction

In recent years, Japan has actively collaborated with both the public and private sectors to further develop and improve its international dispute resolution infrastructure, especially with regard to international arbitration and mediation. Initiatives have included, among others, the establishment of dedicated facilities, amendment of the Japanese Arbitration Act (the "Act")[1], signing of the United Nations Convention on International Settlement Agreements Resulting from Mediation (the "Singapore Convention") and enactment of a domestic act to implement the Singapore Convention, building up capacity in order to increase the number of practitioners available to handle international disputes, and promotion of Japan's international dispute resolution system. In addition, we believe that one of the measures needed to further enhance the credibility of Japan's international dispute resolution system is to sort out and overcome the legal challenges relating to the use of technology in international dispute resolution, which have rapidly come to the forefront due to the COVID-19 pandemic, and to establish a legal mechanism that guarantees equal access to technology to all parties involved. In this article, we present the challenges of using technology in international dispute resolution and the future direction of rulemaking in order to reinforce Japan's already solid international dispute resolution base and make it even more reliable.

Ⅱ. The Challenges of Using Technology in International Arbitration

The utilization of online technology in dispute resolution has greatly simplified the logistics involved in conducting hearings. This has resulted in reducing the time and costs demanded of the parties involved and significantly leading to enhanced efficiency of the process. In today's digital society, where information and communication technology are highly developed,

1) The Act was enacted in August 2003 and amended in April 2023, and it follows the UNCITRAL Model Law 2006 at this point.

it has become possible to connect people in multiple locations spanning different time zones in real time and to conduct dispute resolution procedures in a virtual space. Various technologies such as web conferencing systems, case management systems, and electronic bundles are now generally used, especially in international arbitration proceedings. In addition, the use of virtual reality and blockchain technology in international dispute resolution has been proposed in recent years.[2] Through remote interaction, these technologies enable travel restrictions, such as those introduced during the COVID-19 pandemic, to be overcome. Furthermore, in also making the dispute resolution process more efficient, some of these technologies have created an effective tool that is appealing to both arbitrators and mediators. In this sense, the usefulness and necessity of using technology in international dispute resolution is now commonly understood.

On the other hand, it has been pointed out, particularly in the field of international arbitration, that such use of technology might cause legal issues in terms of equal treatment or procedural fairness between parties. For example, (a) if an arbitral tribunal conducted a virtual hearing despite an absence of agreement between the parties to conduct the hearing remotely, this would potentially constitute grounds for revocation of an arbitral award or refusal of enforcement; (b) if the parties were unable to carry out sufficient activities to prove their claims because of a technical problem, such as poor network connectivity, it might affect the validity of an arbitral award; (c) if use of a particular technology by one party was very costly, it would incur excessive costs for the counterparty; and, in particular, (d) if one party did not have access to the requisite technology although the other party was using such technology to good effect in the procedures, a serious problem would arise. These concerns highlight the importance of ensuring fairness and equal treatment when implementing technology in dispute resolution.

To address the challenges arising from the use of technology in dispute resolution procedures, various initiatives have been undertaken by international organizations specialized in international dispute resolution. For example, the United Nations Commission on Trade Law (UNCITRAL) Working Group II is currently in the process of identifying legal issues in those cases for the development of dispute resolution in the digital economy and is studying the need for rulemaking as legal instruments, including the UNCITRAL Model Law (hereinafter referred to as the "Model Law"), for the purpose of leveling the playing field for those involved in disputes.[3] The Working Group of the International Chamber of Commerce (ICC), one of the major international arbitration institutions, also published a report entitled *Leveraging Technology for Fair, Effective and Efficient International Arbitration Proceedings*.[4] Further, the

2) It has been pointed out that virtual reality will be more useful than documents to gain a detailed and precise understanding of situations on the ground, especially in construction disputes, and that blockchain technology will be useful to prevent tampering with digital evidence.

3) United Nations Commission on International Trade Law, Working Group II (Dispute Settlement) "Stocktaking of Development in Dispute Resolution in the Digital Economy" (2022) A/CN.9/WG. II/WP.222.

4) https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/icc-arbitration-and-adr-commission-report-on-leveraging-technology-for-fair-effective-and-efficient-international-arbitration-proceedings/

International Council for Commercial Arbitration (ICCA) published a comprehensive report on virtual hearings in international arbitration, including findings of each jurisdiction's legal system.[5] These initiatives can have a certain impact on how technology should be used in the resolution of international commercial disputes.

Ⅲ. Protection of Parties' Procedural Rights in Virtual Hearings under the Act

How are virtual hearings positioned in Japan's arbitration legislation? Article 32, paragraph 1, of the Act provides that "An arbitral tribunal may hold oral hearings to have the parties produce evidence or state their opinions; provided, however, that if one party makes the request set forth in Article 34, paragraph (3) or otherwise petitions to hold oral hearings, the arbitral tribunal shall hold said oral hearings at an appropriate stage of the arbitration procedure." Subsequently, Article 32, paragraph 3, of the Act provides that "If an oral hearing is to be held to hear opinions or inspect goods or documents, the arbitral tribunal shall notify the parties of the date, time and place of the oral hearing, leaving a reasonable period of time prior to the date of the oral hearing." According to the explanatory notes accompanying the Act, "hearing" refers to "procedures in which an arbitral tribunal and both parties come together [in a] specific place"[6], which can be interpreted literally as excluding virtual hearings wherein some or all of the parties involved are in different places. However, the current circumstances surrounding international dispute resolution when using technology are different from those when the Act was promulgated in 2003, and thus a legal framework that can accommodate virtual hearings is essential in light of the demands for more efficient dispute resolution procedures. Given the above, it is reasonable to assume that the explanatory notes were influenced by the practices of face-to-face hearings in the courts when the Act was promulgated[7], and there is also a view that an oral hearing is not a face-to-face hearing on the grounds that Article 32, paragraph 3, of the Act was intended to substantially reflect Article 24, paragraph 2, of the Model Law.[8] We, therefore, conclude that conducting virtual hearing will not be inconsistent with Article 32 of the Act. If one looks at other jurisdictions, including major seats of arbitration in Asia such as Singapore and Hong Kong, there does not seem to be any legislation that explicitly prohibits or restricts virtual hearings; rather, such hearings are generally accepted under the relevant arbitration acts as they enable proceedings to be conducted in situations where face-to-face hearings are limited.

In any case, since the Act, which is based on the Model Law, consists mainly of dispositive provisions and leaves many of the procedures to agreement between the parties, it is possible

5) Microsoft Word - ICCA Reports no. 10_Right to a Physical Hearing_final_amended_7 Nov 2022 (arbitration-icca.org)

6) Masaaki Kondo et. al., "*Arbitration Act, Commentary*", Shojihomu (2003) p.168-170.

7) Yoshimi Ohara et. Al., Japan Chapter in "*Does a Right to a Physical Hearing Exist in International Arbitration?*", The ICCA Report No. 10 (2022) p. 3.

8) Article 24, paragraph 2, of the UNCITRAL Model Law provides that the "parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents" and it does not refer to the "place" of the hearing.

to conduct virtual hearings if the parties agree on the arbitration procedures, notwithstanding Article 32, paragraph 1, of the Act. In reaching such procedural agreements, a fair and appropriate format must be adopted by the parties, including measures to prevent wrongdoing or fraud in using technology, with reference to various guidelines for virtual hearings that have been released by international arbitration institutions and other organizations since the pandemic.

If one party refuses a virtual hearing, can the hearing be conducted remotely by a decision of the arbitral tribunal itself? In cases of institutional arbitration, we have seen many examples in which arbitral tribunals recommended virtual hearings rather than postponing hearings, especially during the pandemic, when travel restrictions and other factors that might delay dispute resolution affected proceedings. This is partly because an arbitral tribunal is normally obligated by applicable arbitration rules to make efforts to promote dispute resolution efficiently.[9] However, in virtual hearings, unlike face-to-face ones, arbitral tribunals and counsels are unable to perceive the movements of witnesses as they testify, which not only considerably reduces the amount of information obtainable but also raises the possibility of fraud through abuse of the remote format, such as by having a third party who cannot be seen on the screen give instructions to the witness. In addition, in some countries and regions where communication networks are not well developed, audiovisual communication during virtual hearings may not proceed smoothly. Accordingly, legal issues might arise in terms of a party's procedural rights to present its case before an arbitral tribunal, and the tribunal's decision to conduct a virtual hearing may be challenged in the form of a request for an injunction against the virtual hearing, a petition for revocation of the arbitral award on the grounds that the party suffered a disadvantage in the virtual hearing, or a refusal to enforce a foreign arbitral award.

In this regard, as far as we know, there is no report on specific cases in which disadvantages suffered by parties because of virtual hearings were at issue in Japanese courts. However, in the ICCA report entitled *"Does a Right to a Physical Hearing Exist in International Arbitration?"*, one interesting case is reported.[10] In the case, the unsuccessful party requested the Federal Court of Australia (FCA) to rescind the arbitral award made after a virtual witness hearing had been conducted, on the grounds of lack of procedural fairness, unequal treatment, and lack of sufficient opportunity to present their case. More specifically, the revocation of the arbitral award was sought on the grounds that the petitioner's witness encountered various "technical difficulties" in testifying during their examination in the arbitration proceedings, such as (a) the planned video link not working and another platform having to be used to testify instead, (b) the video being received via a personal computer while the audio was received via a telephone, (c) the witness being unable to access the relevant materials, (d) the interpreter being unqualified and having to be replaced, and (e) other factual witnesses being in the room when the witness in question testified. However the

---

9) For example, Article 40, paragraph 3, of the JCAA Commercial Arbitration Rules and Article 22, paragraph 1, of the ICC Arbitration Rules.

10) Sino Gragon Trading Ltd v Noble Resources International Pte Ltd (2016) FCA 1131

FCA rejected the petitioner's claim and dismissed the request for revocation of the arbitral award on the grounds that (a) the petitioner chose the method of examining the witness in question, (b) the petitioner selected the video-conferencing system but failed to check its functionality in advance, (c) the technical difficulties did not prevent the adoption of the witness's testimony, and (d) the petitioner did not object during the examination of the witness or when the closing statement was made. In its judgment, the FCA stated that "the mode of evidence by telephone or video conference, although less than ideal compared with a witness being physically present, does not in and of itself produce 'real unfairness' or 'real practical injustice'", and it emphasized that the petitioner had not objected in a timely manner. A party who has received an adverse arbitral award should not be allowed to raise the issue *ex post facto* even though the party did not raise any objections at the time of the virtual hearing or any other appropriate time.[11] In addition, another relevant and interesting court case is a ruling of Swedish Court.[12] The recent ruling by the Svea Court of Appeal, it was confirmed that the Swedish Arbitration Act allows for remote hearings and is technology-neutral. The ruling came in response to a challenge by a respondent who objected to a remote hearing conducted against their will. The claimant argued that the award violated Swedish public policy and the principle of party autonomy. However, the Court of Appeal determined that the Arbitration Act's provisions do not exclude remote participation in hearings and that arbitral tribunals have the authority to decide on the format of participation. The court emphasized the importance of considering the parties' rights, impartiality, efficiency, expeditiousness, and technical elements for effective communication. Ultimately, the Court of Appeal found no procedural irregularities or violation of Swedish public policy in the case, thus dismissing the request to invalidate or set aside the award.

Another case has been reported in the *Final Report of International Economic Research Project (for Revitalizing International Arbitration) for the Construction of an Integrated Economic Growth Strategy for FY2020*, published by the Ministry of Economy, Trade and Industry of Japan in 2020.[13] According to the report, in the arbitration procedure between a Korean company and a Vietnamese company, the Vietnamese company took a negative attitude regarding virtual arbitration procedures recommended by the arbitral tribunal, stating that (a) not being fluent in English, they preferred to have the benefit of the more visual information provided by face-to-face hearings, and (b) there were concerns about communication connectivity because of Vietnam's limited Internet capacity.[14]

---

11) Article 27 of the Japan's Arbitration Act provides that "In an arbitration procedure, if a party, knowing that any provision of this Act or rules of an arbitration procedure which have been provided by the agreement of the parties (limited to those unrelated to public order) has not been complied with, does not state his/her objection without delay (if a time limit within which an objection should be stated is provided for, by said time limit), such party shall be deemed to have waived his/her right to object, unless otherwise agreed between the parties."

12) ICA Sverige AB v Bergsala SDA AB, the Svea Court of Appeal, 30 June 2022. Case No T 7158-20

13) See the complete final report at https://www.meti.go.jp/meti_lib/report/2020FY/000115.pdf; English summary is available at https://www.meti.go.jp/meti_lib/report/2020FY/000114.pdf

14) According to the final report, the Vietnamese company finally accepted the virtual hearing.

Ⅳ. Toward Rulemaking in the Use of Technology in International Arbitration Proceedings

The Arbitration Act does not explicitly provide rules governing the use of technology in proceedings, instead adopting a position that gives the parties autonomy. However, it cannot be denied that the current situation in which various technologies are introduced into the dispute settlement process might result in certain disadvantages to the parties in terms of equal treatment or procedural fairness. From the perspective of legislative policy, however, it is not desirable for Japan, which has adopted the Model Law, to introduce its own unique provisions in line with the use of technology and diverge from the Model Law. As mentioned above, the UNCITRAL Working Group is currently examining the possible challenges in dispute resolution in the digital economy, and we should wait and see how the results of the project are reflected in the Model Law.

Apart from legislative policy, the issues associated with virtual hearings in the case of institutional arbitration are those that can be addressed by the arbitration rules of the relevant arbitration institution. Indeed, the JCAA provides in its Commercial Arbitration Rules and the Interactive Arbitration Rules that arbitral tribunals are at liberty to decide to conduct virtual hearings. In April 2020, the ICC published its *Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic*[15], and in January 2021 the ICC amended its Arbitration Rules to specify that virtual hearings may be conducted by a decision of the arbitral tribunal. The Singapore International Arbitration Centre (SIAC) also issued its own guidelines *Taking your Arbitration Remote* in August 2020.[16] Furthermore, the International Bar Association (IBA) Rules for the Examination of Evidence in International Arbitration, which have been widely adopted and referred to as evidentiary rules in international arbitration practice, were amended in 2020. The 2020 amendments of the IBA rules established, in Article 8, new provisions for the adoption of virtual hearings. Under the new provisions, the arbitral tribunal may, at the request of the parties or at its own discretion, order that the examination of evidence be conducted remotely on a particular date, in which case the arbitral tribunal must consult with the parties on a protocol for conducting the remote hearing. The protocol must include (a) the technology to be used, (b) pre-testing or training of the technology, (c) a start and end times in light of the time zone in which the participants are located, (d) how to present the arbitration materials to witnesses or arbitrator(s), and (e) how to ensure that the witness is not unduly affected or distracted. In Japan, the Japan International Dispute Resolution Center published, in 2021, a report and recommendations on virtual hearings[17] and a draft agreement between an arbitral tribunal and parties at the time

15) ICC, *Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic*: ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic - ICC - International Chamber of Commerce (iccwbo.org)

16) SIAC, *Taking your Arbitration Remote*: Microsoft Word - SIAC Guides - Taking Your Arbitration Remote (F) (28Aug-1045am)(14pg)

17) https://idrc.jp/wp-content/uploads/2020/11/reportandrecommendation_webhearing.pdf

of such hearings.[18] These guidelines include detailed draft provisions on best practices for virtual hearings. As virtual hearings become more widespread and practice accumulates, it seems likely that these guidelines will become more refined and, in the future, be established as permanent rules. By continuing to analyze how these guidelines are being applied and to examine specific issues in the use of technology, we will be able to ensure due process in dispute resolution procedures.

V. Conclusion

In conclusion, Japan has demonstrated its commitment to strengthening its international dispute resolution infrastructure, particularly in the field of international arbitration mediation. However, as technology plays an increasingly prominent role in dispute resolution, addressing the legal challenges (i.e., fairness and equal treatment issues) associated with its use has become imperative. This article has shed light on the challenges posed by technology in international dispute resolution and has provided insights into the future direction of rulemaking. By navigating these challenges effectively, we believe that Japan will fortify its international dispute resolution framework, ensuring its strength and reliability in the years to come.

18) https://idrc.jp/images/link/JIDRC_sample_agreement_for_a_virtual_hearing_ENG.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 / HO CHI MINH CITY
HANOI / YANGON / SINGAPORE / PHNOM PENH / BANGKOK / SILICON VALLEY / LONDON / PARIS

Current Status of International Arbitration from the Perspective of Corporate Law and Japan as the Place of Arbitration

Senior Advisor, Investment Management Division, Hitachi, Ltd.

Kazuhisa Fujita

Efforts have been made to revitalize international arbitration in Japan since the Government's Basic Policy (Honebuto no Hoshin) of 2017[1)] highlighted the development of the infrastructure therefor as a measure of the national growth strategy.

I have dealt with corporate legal affairs for many years and been involved in international arbitration from the perspective of a private company. I also had the opportunity to observe the arbitration operation of the International Chamber of Commerce (ICC) when I served as the chairperson of the Arbitration Committee of ICC Japan until August 2021. This article summarizes the current state of international arbitration in Japan and offers my personal views on its future prospects from the perspective of a private company and that of an arbitration institution.[2)]

Ⅰ. Arbitration as a Means of Settling International Disputes

1. Advantages of Arbitration

Needless to say, arbitration is the global standard for resolving international business disputes. If the amount of credit and debt is clear and requires 100 or 0, such as a loan contract, then filing a lawsuit before a court may be a suitable means of resolution. However, for other contracts, arbitration is the typical means of dispute resolution. In fact, in various international contract templates prepared by companies, arbitration is the method of choice for dispute resolution. Although the arbitration rules and the place of arbitration stipulated in the template may change, it is unlikely that any other means of dispute resolution other than arbitration will be chosen. Incidentally, in the 2021 International Arbitration Survey conducted

1) Basic Policy for Economic and Fiscal Management and Reform 2017 - Improving Productivity through Investment in Human Resources - Cabinet Decision on June 9, 2017. International arbitration is further addressed in the Basic Policy on Economic and Fiscal Management and Reform 2022 in the section on the establishment of an international financial center.

2) This entire article is based on the author's personal views and does not represent those of his company or organization.

by Queen Mary University of London,[3] 90% of the respondents indicated that arbitration was their preferred means of dispute resolution. In recent years, mediation has also been preferred as the first step, while arbitration has been stipulated as the final resort for disputes that cannot be resolved through mediation.

In my experience, litigation in Japan is generally used for disputes between domestic parties, while arbitration is often adopted, both in Japan and overseas, as a convenient method for employment-related disputes between employees and companies. It can also be said that litigation is only selected for non-contractual disputes, such as tort liability. For other general disputes related to international contracts, arbitration is also selected in the relevant contract in most cases. In particular, overseas construction contracts often stipulate a mechanism that allows a quick arbitration process of complaints between parties at the construction site.

So why choose arbitration? The advantages of choosing arbitration typically include:

(a) Avoiding the jurisdiction of a particular state can prevent prejudice. A court of justice is an exercise of public power, and there are courts that sometimes make decisions in favor of their own state.

(b) The existence of multilateral treaties on the enforcement of arbitration awards, such as the New York Convention,[4] facilitates enforcement in foreign countries.

(c) Arbitration proceedings are, in principle, kept private and confidentiality is protected.

(d) Normally, the proceedings are concluded after only one proceeding, which means that it can be settled more quickly than court proceedings where appeals are allowed.

(e) Parties may choose their own professional and neutral arbitrators. Arbitration is particularly suitable for dispute resolution in the fields of technology and shipping, and there are many cases in which experts are appointed as arbitrators in construction and maritime arbitration.

2. Points to Note in Choosing Arbitration

While the five advantages listed above certainly exist, there are some other concerns to keep in mind when choosing arbitration because some advantages may not be advantageous in certain cases.

The following is a summary of points of note in choosing arbitration proceedings:

(a) Costs

It used to be said that arbitration was less time-consuming and less expensive than court proceedings, but in practice, arbitration involving international business disputes may not

3) The “2021 International Arbitration Survey: Adapting Arbitration to a Changing World” is the edition of the annual arbitration survey conducted by The School of International Arbitration, Queen Mary University of London. It contains a variety of data on arbitration in general. Available at http://www.arbitration.qmul.ac.uk/research/2021-international-arbitration-survey/.

4) Officially titled the “Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958),” which was ratified by Japan as the “Convention on the Recognition and Enforcement of Foreign Arbitral Awards” (Convention No. 10 of 1961). This Convention was established to facilitate the enforcement of arbitral awards between Member States.

actually make much difference in terms of cost compared to court proceedings.

The breakdown of arbitration costs are fees paid to (i) the arbitration institution, (ii) arbitrators, (iii) lawyers representing the parties, and (iv) other miscellaneous costs. Arbitration is a dispute resolution system managed by the parties without relying on a national institution such as a court. Therefore, in addition to the fees paid to the arbitrators, the parties will have to bear various kinds of costs, for example, for assistance by the arbitration institution, if any, and for securing a place for the hearing, if necessary.

Notably, 70-80% of the total costs are attorney's fees (the third cost mentioned above), and in many cases, bills are charged on a time basis. That means the longer the dispute resolution process takes, the higher the attorney's fees. From this perspective, the parties have to carefully monitor the duration of the process. The length of time required for arbitration proceedings varies depending on the statistics of the arbitration institution, but it is thought to be 1-2 years, which is not much different from court proceedings although arbitration proceedings can end in one proceeding. However, in court proceedings, it is not foreseeable whether the appeals will be filed and it is difficult to estimate how much time will be taken.

On the other hand, with respect to arbitration, one must distinguish between common law-based cases and civil law-based cases regarding the place of arbitration and arbitrators. Though discovery procedures are, in general, conducted based on the IBA Rules of Evidence,[5] in actual practice, evidence collection tends to take considerably more time in an Anglo-American arbitration. As a result, it can be a factor for increasing attorney's fees. Therefore, the answer to which dispute resolution is cheaper depends on what is being compared. For example, while an Anglo-American arbitration may be more expensive than litigation in civil law countries, including Japan, it seems that compact arbitration proceedings are still cheaper than litigation with multiple appeals.

(b) Issues Inherent in Arbitration

The problem is rather inherent in the fact that arbitration proceedings are carried out between the parties, which is a characteristic of arbitration. First, no proceedings can be conducted unless there is an arbitration agreement between the parties. In this regard, it is common for international contracts to include a dispute resolution clause, and at that time, an arbitration agreement is usually concluded.

However, even if an arbitration agreement has been reached in advance, the proceedings may not proceed smoothly. In Part I(1)(d) and (e) above, the advantages of arbitration are the speed of the procedure and the fact that the parties themselves can select an arbitrator. However, if the counterparty is uncooperative, and even if procedures are prescribed in the arbitration rules, such counterparty may cause delays in practice.

As mentioned above, although there are points to be noted in choosing arbitration, the significance of arbitration as a means of resolving international disputes is not diminished. For disputes submitted to international arbitration, in many cases, they are of a certain scale

5) The "IBA Rules on the Taking of Evidence in International Arbitration" established by the International Bar Association (IBA). The latest edition is the 2020 version published by 17 February 2021.

(disputed amount), and the parties are companies that are engaged in international activities and have adequate resources and creditworthiness.

Ⅱ. Meaning and Current Status of Selecting the Place of Arbitration

1. How to choose the place of arbitration

If international arbitration is chosen, the place of arbitration is usually clearly specified in the arbitration clause. The place of arbitration is (a) as to the question of international jurisdiction, which national court should be involved in the arbitration proceedings; (b) as to the question of the law governing the arbitration proceedings, what procedural law should be followed in the conduct of such proceedings; and (c) when the arbitral award made in a country is to be recognized and enforced in another country, whether the award will be recognized as a foreign arbitral award under the New York Convention mentioned earlier.

The place of arbitration tends to be thought of as the place where the arbitration proceedings (hearings) are actually conducted, but the concept of the place of arbitration itself is purely a legal one. The country where the place of the hearing is located is not the place of arbitration. In fact, when the Internet environment was not as good as it is now, arbitration hearings were often held at the place of arbitration, and the parties concerned gathered at the place of arbitration for each hearing. However, nowadays, the hearing does not necessarily have to be held at the place of arbitration; it can and has been taking place at multiple locations. Moreover, all proceedings can be conducted online. In particular, it can be said that when the movement of people was restricted due to COVID-19, it became more common to proceed with arbitration proceedings by holding hearings online.

Therefore, in selecting the place of arbitration, a decision can be made based purely on the above three points and legal analysis. However, in practice, well-known places of arbitration tend to be selected. Notably, in the contract templates of Japanese companies, unless there are special circumstances, the place of arbitration is assumed to be Japan (Tokyo), the home country.

2. Harmonization of arbitration law

As mentioned above, the law governing arbitration proceedings is a factor for selecting the place of arbitration. It is particularly important that there is legislation on arbitration in place in terms of ex-post control, such as revoking the arbitral award after it was rendered or authorizing enforcement based thereon. Every state has developed such arbitration laws as domestic laws. They stipulate matters such as the method of appointing arbitrators, the form of hearing procedures, the validity of arbitral awards, and the procedures for the revocation and enforcement of arbitral awards.

Nonetheless, international commercial arbitration has a long history, and certain customary practices have been established internationally. It can be said that the provisions of the “arbitration law” of each country do not differ much except for the details thereof. In 1985, the United Nations Commission on International Trade Law (UNCITRAL)[6) in particular

formulated a “Model Law” that influenced the enactment of domestic laws in various countries, thereby achieving the harmonization of arbitration law. In Japan, the provisions concerning arbitration procedures that were stipulated in the former Code of Civil Procedure, etc., became independent and were enacted as the “Arbitration Act” in 2003 in line with the provisions of the UNCITRAL Model Law. The UNCITRAL Model Law was later partially revised in 2006, and legislative work is currently underway in Japan to bring the Arbitration Act into conformity with the UNCITRAL Model Law of 2006.[7)]

3. Cities selected as the place of arbitration

Now, specifically, which places of arbitration are being selected? According to the 2021 International Arbitration Survey mentioned earlier, the preferred places of arbitration are London, Singapore, Hong Kong, Paris and Geneva. New York and some European cities have historically been chosen as well.

There are two types of place of arbitration that are often chosen:

(a) Tradition: The first is rooted in tradition. This applies to cities with a long history of international arbitration, such as Paris, London and New York.

(b) Neutrality: Neutrality means that there are experts who are neutral to the parties involved and able to deal with diverse languages. Geneva, Zurich, Stockholm and Singapore fall into this category. In the past, Russian companies were said to prefer Stockholm. Assuming that there is a hometown advantage in choosing the country where one of the parties to the contract is located, it became a natural trend to select a neutral city from the countries where both parties are located.

Ⅲ. Japan as the Place of Arbitration

1. Current status of Japan as a place of arbitration

Some popular cities that have been chosen as the place of arbitration have been described above but what about Japanese cities? Can they be chosen as the place of arbitration? It has long been said that the number of arbitrations with Japan as the place of arbitration is small compared to the international presence of Japanese companies.

In fact, as shown in Figure 1, the number of cases handled by the Japan Commercial Arbitration Association (JCAA) is much lower than that handled by the Singapore International Arbitration Centre (SIAC). In addition, according to the ICC’s data,[8)] the number of ICC arbitrations with Japan as the place of arbitration was only four (4), and for the past five (5) years, the total number of arbitrations was eighteen (18) (See Figure 2). European and American countries, such as Paris, London, Geneva, New York and Zurich are popular places

6) UNCITRAL arbitration rules are often used in *ad hoc* arbitrations that do not involve an arbitration institution.

7) On 28 February 2023, the bill to partially amend the Arbitration Act has been submitted to the Diet and as of the day when this article is written, is under discussion.

8) Available at https://iccwbo.org/publication/icc-dispute-resolution-statistics-2020/ and https://iccwbo.org/media-wall/news-speeches/icc-unveils-preliminary-dispute-resolution-figures-for-2021/.

Figure 1 Number of Cases by Arbitration Institution

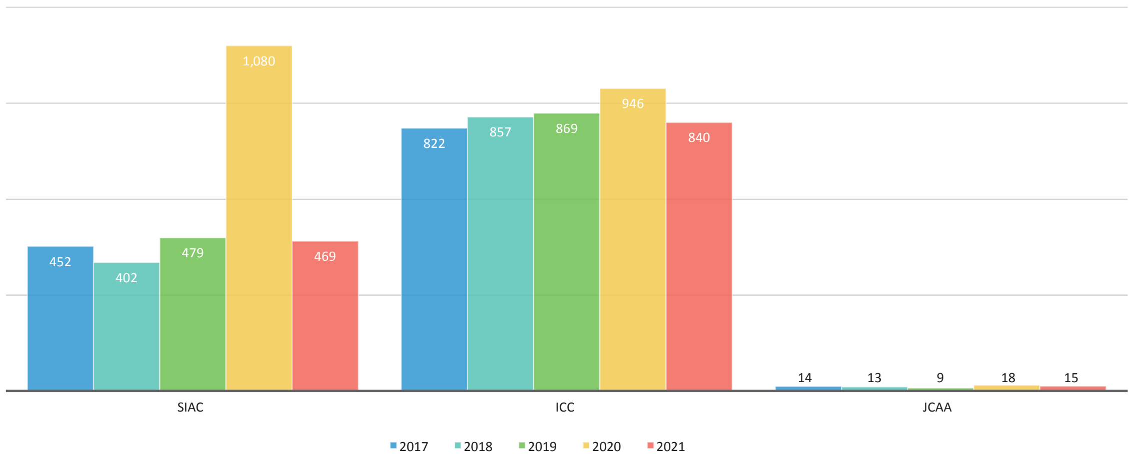


Figure 1

PLACES OF ARBITRATION IN 2021 ICC ARBITRATIONS

- Ranking of top 10 countries

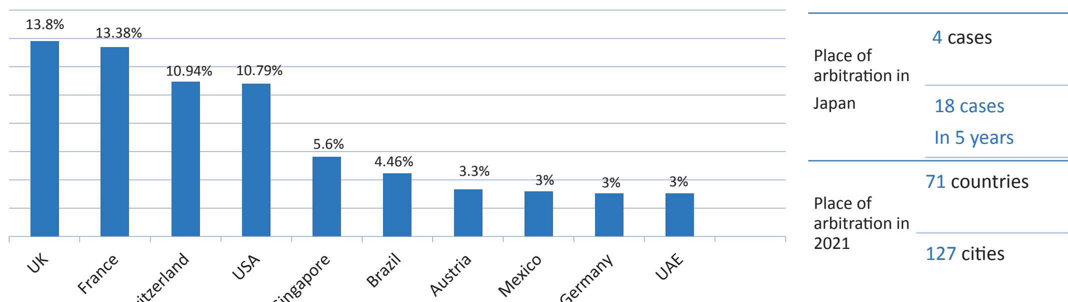


Figure 2

of arbitration for an ICC arbitration. In Asia, Singapore is the most popular one. Notably, Japanese companies were involved as parties in twenty (20) cases in 2021, which means that they were exclusively involved in disputes in venues other than Japan.

2. Advantages of having Japan as the place of arbitration

Based on the current situation, I would like to summarize what is generally said about the advantages of having Japan as the place of arbitration.

For Japanese companies, if the hearing proceedings are to be held face-to-face at the place

of arbitration, then there are practical and psychological advantages to having a Japanese city as a venue, not only in terms of the ease of attendance as parties, but also because the status of the hearing can be monitored without any time difference. For Japanese companies, arbitration in their own country is considered to be a great advantage psychologically and in terms of their trust in the legal system. Some experts argue that there is no merit in the proceedings being in Japan since large companies can appoint overseas law firms and handle arbitration without considering the geographical aspects. However, if the conditions are the same, then the convenience that Japanese companies can gain are worth emphasizing.

The Japan International Dispute Resolution Center (JIDRC) published a book titled, “International Arbitration in Japan,” [9] which describes the attractiveness of Japan as a place of arbitration, such as: (a) the development of arbitration legislation of a global standard; (b) low-cost, well-equipped facilities dedicated to arbitration hearings; (c) a support system backed up by the public and private sectors; and (d) Japan as a safe and secure country. Of these features, item (a) refers to the earlier-mentioned Arbitration Act enacted in 2003. Item (b) explains the dedicated facilities for arbitration hearings in Osaka (opened in 2018) and Tokyo (opened in 2020) operated by the JIDRC. Item (c) seems to refer to the fact that the JIDRC and other related organizations, in cooperation with the public and private sectors, have been actively holding symposia and trainings on arbitration that have nurtured a good understanding of arbitration procedures and a smooth working environment. Item (d) on safety and security pertains to having good public order and wonderful tourism resources. Some may wonder whether this last item has anything to do with the attractiveness of a place as an arbitration center. Nevertheless, many of my acquaintances say that among the economic centers of various countries, Tokyo is the most popular city for international conferences because it is mild in winter and has a good infrastructure.

3. Reasons why Japan is rarely selected as the place of arbitration

As stated in the previous section, if Japan is attractive as an arbitration venue, then a simple question arises as to why there are not more cases in which Japan is selected as the place of arbitration. Various reasons have been given for this, both those that have been elaborately discussed in articles and those that have been circulated in the media on the web. These reasons are discussed below with my comments.

(a) Language: There is an opinion that it is difficult for Japan to be selected as the place of arbitration in an arbitration conducted in English because Japan is a Japanese speaking country. However, even when the place of arbitration is Japan, it is customary for the arbitration to be conducted in English. There is no necessity for it to be held in Japanese because even lawyers qualified in foreign countries are permitted to represent a party in an international arbitration. Considering these points, it is unlikely that the situation is because of language.

(b) Arbitration is predominantly based on common law: Regions where arbitration has been

9) Available at https://idrc.jp/images/home/booklet_jp.pdf.

actively conducted have been said to be common law countries. While it is true that London, New York and Singapore are common law countries, this does not, however, seem to mean that such common law countries are the only predominant places of arbitration given that civil law cities like Paris and Swiss have also been chosen as arbitration venues in a significant proportion of the cases. Rather, it can be said that many prominent arbitrators have a common law background. For example, according to the ICC' s data for 2020, the nationalities of arbitrators are as shown in Figure 3, with UK and US accounting for about half. In addition, common law is often chosen as the governing law for international contracts. English law and New York law are likely to be the governing laws for contracts involving large-scale projects and multiple financial institutions and operating companies.

Given the foregoing, there may be a trend where the actual proceedings of hearings would more closely resemble those of common law-based lawsuits, naturally increasing the number of arbitrations under common law. However, civil law places of arbitration and arbitrators account for a certain percentage of arbitration proceedings and are not to be discounted. In this regard, parties familiar with the civil law system can expect an arbitration based on such system. In any case, I feel that the reason why Japanese arbitrators remain in the minority is that Japanese law is based on civil law.

(c) Japan has an excellent court system: Japan's court system guarantees impartiality and fairness, and some argue that arbitration is not used in countries where the courts are highly reliable. However, it is better to think that non-Japanese parties basically have little or no

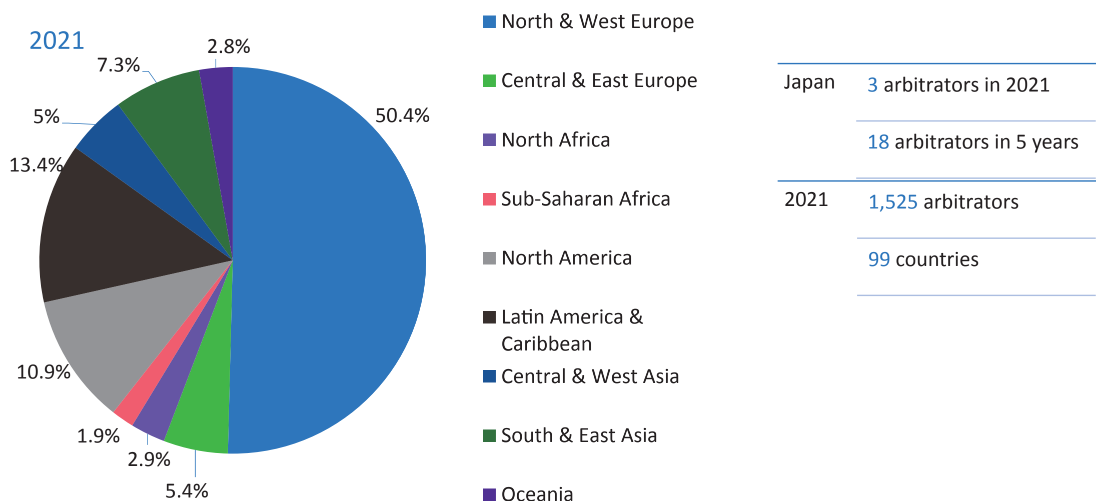


Figure 3

knowledge of Japanese law and Japanese courts. Thus, using Japanese courts as a means of international dispute resolution is likely to be limited to a small number, unless for example, the prompt seizure of Japanese property is an important consideration.

(d) The Japanese dislike conflicts: Some argue that Japanese people (Japanese companies) tend to avoid disputes, and that Japanese companies are rarely involved in international arbitration, not just in Japan. Therefore, there are few arbitrations in Japan. It is true that past articles written by those involved in corporate legal affairs have stated that arbitration is difficult to conduct for the following reasons: (i) management lacks understanding, and (ii) management requires an explanation of the economic benefits, which does not go down well. However, regarding item (i), it cannot be assumed that management lacks an understanding of the arbitration system only in Japan; this can also be true in other countries, and in fact, management decisions are probably centered on whether disputes should be resolved by methods such as negotiation, rather than arbitration or litigation. As for item (ii), it is natural for corporate managers to make economic calculations in choosing arbitration (the same applies to litigation). If arbitration is not carried out for this reason, then it may be a case where arbitration was unnecessary in the first place.

In fact, looking at the number of arbitrations in 2021 with prominent arbitration institutions in which Japanese companies are parties, there were twenty (20) cases at the ICC and thirteen (13) cases at the SIAC, which should be more given the scale of the economy, but these are not extremely low figures. The number of international arbitration cases is only proportional to the international economic activities of the parties involved, and it is difficult to conclude that Japanese companies are reluctant to engage in arbitration just because they are Japanese companies. It might also be assumed that if a company is reluctant to arbitrate, then it would not be a claimant but a respondent in many cases, but the statistics do not show this to be the case either.

(e) Arbitration clauses are not considered important by Japanese companies during contract negotiation: Generally, it is a prerequisite for the commencement of an arbitration that an arbitration clause is stipulated in the contract in advance. However, some have argued that Japanese companies may not have negotiated the selection of a Japanese city as the place of arbitration. It is pointed out that there are certain Japanese companies which do not have the practice of exchanging contracts in domestic transactions. Then such companies would likely have a low awareness of the need to stipulate an arbitration clause in their contracts in advance. That is certainly a problematic situation.

On the other hand, it is common for Japanese companies familiar with international transactions to include an arbitration agreement clause in the contract template that they prepare, and the place of arbitration is a Japanese city. The question is whether, in such cases, Japanese companies can easily change the place of arbitration. Certainly, it can be said that negotiations on more important matters for business take priority over arbitration agreements and the place of arbitration. Thus, it may be easy for a party to make concessions on the place of arbitration if the other party expresses difficulty in accepting Japan as the place of arbitration.

As a company, it is normal to think that the place of arbitration is acceptable as long as it has a sufficient track record in international arbitration. This is true not only for Japanese companies. However, if there is no difference in power in the business relationship of the parties and there is no special significance in using Japan as the place of arbitration, then it is only natural that the countries of the contracting parties would unlikely be chosen as the place of arbitration.

(f) Narrow base of experts who understand arbitration: There are also questions as to whether there are many experts who can serve as arbitrators to conduct arbitrations in Japan and whether corporate legal departments and corporate lawyers understand arbitration and encourage companies to make a management decision to proceed with arbitration. Although it is difficult to argue this based on objective data, I have personally observed that, compared to the past, the number of experts who can be appointed as arbitrators has increased, but further improvement is desired. In addition, interest in arbitration among corporate legal departments and corporate lawyers generally seems to be at a low level. In the 2021 statistics of the ICC, there were three (3) arbitrators with a Japanese nationality, and in the SIAC, there was one (1) Japanese arbitrator. However, the Japan Association of Arbitrators has more than four hundred (400) members, including approximately a hundred (100) members specializing in international arbitration. There is a chicken-and-egg relationship between the training of experts and the number of arbitration cases, but I believe that the base of lawyers specializing in international arbitration is gradually expanding.

Conversely, if a company is unreasonably avoiding arbitration, the responsibility lies with the corporate legal department, which has failed to persuade the company to make a reasonable decision. Also, if the legal department does not have the knowledge, the outside lawyer retained by the company should play the role of encouraging companies to make the right decision. Although this cannot be verified, the opinions expressed by various experts suggest that more effort needs to be made in this area.

Ⅳ. Nevertheless, there is a Path to Make Japan the Place of Arbitration

The Basic Policy of 2017 stated that efforts would be made to improve the infrastructure for the revitalization of international arbitration, but what is actually happening?

Cities that are well-known for being arbitration venues generally have inexpensive and user-friendly facilities dedicated to arbitration hearings.[10] In this respect, the establishment of the JIDRC was a major step forward for Japan. Recognition of arbitration as a dispute resolution mechanism is also steadily increasing, with lectures on arbitration being given at Japanese law schools and events, such as mock international arbitration for students. I heard that some young lawyers have recently started to work in the field of international arbitration. In this sense, the groundwork has been laid for revitalizing international arbitration in Japan.

10) For example, Singapore's Maxwell Chambers (https://www.maxwellchambers.com) is a well-known arbitration facility.

It is essential for Japanese companies to be aware of the advantages of pursuing arbitration in their own country, and to utilize the expertise of specialists, such as company legal departments and retained lawyers, to prepare for the eventuality of international disputes, even if they only rarely occur.

However, there are limits to the extent to which Japanese companies can choose Japan as the place of arbitration as they become more involved in international arbitration. For Japan to take a certain position in the world of international arbitration, the recognition and choice by foreign companies will be essential. What is needed for this is an increase in the competence of the legal profession in the field of arbitration and global promotional activities by the public and private sectors. Ultimately, this may mean increasing the presence of Japan as a whole in the global business and legal community.

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

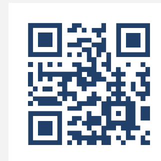
Nagashima Ohno & Tsunematsu, based in Tokyo, Japan, is widely recognized as a leading law firm and one of the foremost providers of international and commercial legal services. The over 500 lawyers of the firm work together in customized teams to provide clients with the expertise and experience specifically 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



Motohiro Yanagawa
(Tokyo Bar Association)

Shinichi Araki
(Dai-Ichi Tokyo Bar Association)

https://www.noandt.com

Your Most Trusted Partner

International Commercial Arbitration and Public Interests: Focusing on the Treatment of Overriding Mandatory Rules

Professor of Law at Nagoya University*

Dai Yokomizo

Ⅰ. Introduction

This paper aims to explore the application and consideration of overriding mandatory rules of states in international commercial arbitration, and explore potential measures that states could undertake to uphold their policies concerning public interests.[1)]

International arbitration is increasingly popular as a dispute resolution mechanism for cross-border transaction disputes due to its characteristics such as the neutrality of the seat of arbitration, the flexibility of arbitration proceedings, the possibility that experts in the relevant sectors can be appointed as arbitrators, the simplicity of the choice-of-law process, and the enhanced enforceability of arbitral awards.[2)] However, the applicable law in international arbitration does not always correspond to that which is applied in a national court, due to the fact that broad party autonomy in the choice of law is acknowledged in international arbitration, taking into account the parties' convenience. In particular, national courts contribute to the realization of the state's economic and social policies by applying overriding mandatory rules of the state to which they belong, to a fact or an act which is closely connected to that state. In contrast, it is not clear whether international arbitration contributes to the realization of a state's economic or social policies since an arbitral tribunal cannot be considered to belong to a certain state's legal order, such as that of the seat of arbitration, in an institutional way.[3)] Thus, the following questions arise: although there is currently a strong

---

* This article is an outcome of the Grants-in-aid for Scientific Research (the Japanese Society for the Promotion of Science, for Scientists (A): 2019-2023) project: "Analysis on Multi-layered Structure of Global, National, and Local Legal Orders and the Principles of their Coordination" (Principal Researcher: Prof. Hiroki Harada).

1) In this paper, "public interests" mean interests of the society as understood as a whole, not interests of individuals.

2) For advantages of international arbitration, see, Gilles Cuniberti, *Rethinking International Commercial Arbitration* (Edward Elgar, 2017), pp. 19-28.

3) Sylvain Bollée, *Les méthode du droit international privé à l'épreuve des sentences arbitrales* (Economica, 2004), pp. 23-24; Dai Yokomizo, "Arbitration and the State: A Japanese Perspective", *Nagoya University Journal of Law and Politics*, No. 291 (2021), p. 1, pp. 2-3.

tendency that states promote the development of international arbitration, might such development disturb the realization of states' economic and social policies? If that is the case, how could states take measures to respond to this challenge and to what extent would such measures be effective?

This paper will reflect on these issues, focusing on the treatment of overriding mandatory rules in international arbitration. In the following sections, it will describe the differences between how the choice of law is ordinarily determined by national courts in cross-border litigation, and the determination of the applicable law in international arbitration, as a preliminary step to discuss the treatment of overriding mandatory rules (II). Then, it will analyze discussions on the treatment of overriding mandatory rules in international arbitration and reflect on the question as to what kind of impact international arbitration may bring about to states' economic and social policies (III). Furthermore, based on these reflections, it will discuss possible responses a state could adopt to international arbitration and the effectiveness of such responses (IV). Finally, it will point out the possibility of transforming international arbitration itself (V).

This paper's conclusion will be as follows: the application of overriding mandatory rules of relevant states may be considerably limited in international arbitration since it depends on the parties' intent; and the possible responses states could adopt to this may not be sufficiently effective due to the freedom of choice broadly given to the parties with regard to the seat of arbitration, the applicable law, and the seat of enforcement.

Ⅱ. Differences between international litigation and international arbitration with regard to the choice of law

In international litigation, when the international adjudicatory jurisdiction of a court before which the plaintiff has taken an action is affirmed, the court will determine the applicable law and apply it according to the choice-of-law rules of the forum. The choice of law by the parties is usually limited to certain legal relations such as contracts and torts.[4] Furthermore, the law designated by the choice-of-law rules is usually limited to a state's law.[5]

In contrast, in international arbitration, the parties can choose any state as the seat of arbitration, and, in general, the party autonomy in the choice of law is broadly allowed when selecting the law applicable to substantive issues.[6] In addition, the applicable law is not limited to a state's law. The parties can choose a non-state law such as the UNIDROIT principles of international commercial contracts.[7]

This broad party autonomy in international arbitration is justified by the respect for the

4) In Japanese choice-of-law rules (*Ho no Tekiyo ni kansuru Tsusokuho* [hereafter referred to as "*Tsusokuho*"]), the choice of law by the parties is limited to juridical acts (Art. 7), *negotiorum gestio* and unjust enrichment (Art. 16), and torts (Art. 21) in patrimonial matters (As regards *negotiorum gestio*, unjust enrichment, and torts, the parties can choose the applicable law only *ex post*).

5) However, the Hague Principles on Choice of Law in International Contracts, adopted by the Hague Conference of Private International Law in 2015, allows the parties to choose a non-state law (Art. 3).

interests of business operators, who request a rapid and efficient dispute resolution in international transactions.[8)]

Ⅲ. Overriding Mandatory Rules in International Arbitration

The application or consideration of overriding mandatory rules which contribute to state's economic or social policies (such as competition law, export/import regulations, and foreign exchange control regulations) has been discussed in conflict of laws since the middle of the twentieth century, as states' intervention in private relations has increased.[9)]

1. Overriding Mandatory Rules in International Litigation

In international litigation, it is generally accepted that an overriding mandatory rule of the forum applies regardless of the applicable law, when a fact or an act falls within its scope of application.[10)] For example, in Japan, the Tokyo District Court applied Japanese labor law in a case concerning the dismissal of an American employee employed by a Californian company and working in Japan, although the law applicable to the labor contract in question was Californian law.[11)]

In contrast, it is not clear how to deal with overriding mandatory rules of a foreign state. First, as regards overriding mandatory rules of a state designated by a choice-of-law rule of the forum, several authors claim that the relevant rules on a legal issue in question would apply as a whole, including any overriding mandatory rules.[12)] However, other authors claim that the applicability of an overriding mandatory rule should be determined independently from the operation of the choice-of-law process, since each overriding mandatory rule has its own scope

---

6) For example, Art. 28 (1) of the the UNCITRAL Model Law on International Commercial Arbitration: "(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules."; Article 36 (1) of the Japanese Arbitration Law: "The arbitral tribunal shall decide the dispute in accordance with such rules of law as are agreed by the parties as applicable to the substance of the dispute." However, as for the Japanese law, not a few authors argue for a restrictive interpretation of Article 36 so that it applies only to contractual matters. See, Yokomizo, *supra* note (3), p. 10.

7) For discussions in Japan, see, Takeshi Kojima/Takashi Inomata, *Chusai-Ho* [Arbitration Law] (Nihon Hyoron-sha, 2014), p. 395; Kazuhiko Yamamoto/Aya Yamada, *ADR Chusai-ho Dai 2 Han* [ADR Arbitration Law, 2nd Edition] (Nihon Hyoron-sha, 2015), p. 383 [Kazuhiko Yamamoto].

8) Philippe Leboulanger, "La notion d'«intérêt» du commerce international", *Revue de l'arbitrage*, 2005 nº 2, p. 487, p. 489.

9) Moritz Renner, *Zwingendes transnationales Recht* (Nomos, 2010), pp. 49-54.

10) Hannah L. Buxbaum, "Mandatory Rules in Civil Litigation: Status of the Doctrine Post-Globalization", in George A. Bermann/Loukas A. Mistelis (eds.), *Mandatory Rules in International Arbitration* (Juris, 2011), p. 31, p. 32.

11) Tokyo District Court, Ruling, April 26, 1965, *Rominshu* [Civil Cases on Labor Relations], Vol. 16, No. 2, p. 308. There was no choice-of-law rule relating to labor contracts until the amendment of the Japanese choice-of-law rules in 2006.

12) In particular, Kazunori Ishiguro, *Kokusai Shiho Dai 2 Han* [Private International Law, 2nd Edition] (Shinseisha, 2007), pp. 60-61.

of geographical application and would not mesh well with the choice-of-law process, which determines the applicable law to govern the nature of parties' private relations. [13)]

Second, as for overriding mandatory rules of a third state other than the forum state and the state designated by a choice-of-law rule, the views are divided as to whether such rules should be applied, or only be taken into consideration. The former view considers the direct application of an overriding mandatory rule of the third state under certain conditions (such as indirect jurisdiction, due process, and the compatibility with the forum's public policy), the latter view prefers to merely take into consideration the fact that the party's act violates the said rule in the interpretation of the applicable law (such as substantive contract law).[14)] In Japan, there is a case in which the court adopted the latter view.[15)] Furthermore, the Tokyo District Court denied, in a recent case in which the law applicable to the contract in question was Japanese law, the application of an overriding mandatory rule of Argentina.[16)] However, there has been no Supreme Court decision which has dealt with this issue so far.

2. Overriding Mandatory Rules in International Arbitration

As for the application of overriding mandatory rules in international arbitration, opinions are generally divided. What appears to be common ground is that, at best, overriding mandatory rules in the applicable law shall be applied.[17)]

As for the practice in this regard, one author investigated into 219 arbitral awards published between 1990 and 2006 by the International Chamber of Commerce (ICC), and tried to analyze 46 cases among them in which the application of overriding mandatory rules was concerned in some way.[18)] However, he concluded that a coherent doctrine on overriding mandatory rules in the ICC arbitration has not been established.[19)] Other authors also point out that no one knows how arbitrators apply or consider overriding mandatory rules due to the confidentiality of arbitration.[20)]

The most convincing justification for the application of overriding mandatory rules in

---

13) Klaus Schurig, "Zwingendes Recht, 〉Eingriffsnormen〈 und neues IPR", *RabelsZ*, Vol. 54 (1990), p. 217, p. 245; Hans-Jürgen Sonnenberger, "Eingriffsrecht – Das trojanische Pferd im IPR oder notwendige Ergänzung?", *IPRax* 2003, p. 104, p. 107; Yoshiaki Sakurada/Masato Dogauchi, *Chushaku Kokusai Shiho* [Commentary on Private International Law], Vol. 1 (2011), pp. 43-45 [Dai Yokomizo].

14) See generally, Pierre Lalive, "L'application du droit public étranger", *Annuaire de l'Instut de droit international*, Vol. 56 (1975), p. 157, p. 173. For the discussion in Japan, see, Yokomizo, *supra* note (13), pp. 43-45.

15) Tokyo High Court, Judgment, February 9, 2010, *Hanrei Jiho* [Judicial Reports], No. 1749, p. 157.

16) Tokyo District Court, Judgment, March 26, 2018, *unpublished* (Case ID: Hei 28 (wa) No. 19581, *available* at Westlaw Japan [WLJPCA03268007]).

17) Hossein Fazilatfar, *Overriding Mandatory Rules in International Commercial Arbitration* (Elgar, 2019), p. 82. But see, Laurence Shore, "Applying Mandatory Rules of Law in International Commercial Arbitration", in Bermann/ Mistelis, *supra* note (10), p. 131, pp. 131-132 (pointing out that it is generally accepted in practice that arbitrators shall apply overriding mandatory rules in the seat of arbitration, that they should apply overriding mandatory rules in the applicable law, but that the treatment of overriding mandatory rules of the third country is not clear).

18) Renner, *supra* note (9), pp. 110-127.

19) *Ibid*., p. 124.

20) Alec stone Sweet/Florian Griesel, *The Evolution of International Arbitration* (Oxford, 2017), p. 186.

arbitration seems to be the agreement by the parties, namely, that the arbitral tribunal should apply overriding mandatory rules of a state as far as the parties desire it since the adjudicative power of the tribunal is based on the agreement by the parties.[21] According to this view, an overriding mandatory rule in the law applicable to contracts should be applied by the tribunal unless the parties have explicitly showed their intent to exclude its application,[22] and an overriding mandatory rule of the state of the seat of arbitration should also be applied since it can be considered that the parties have chosen to be subject to the control of the said legal order by choosing that state as the seat of arbitration.[23] Furthermore, it is claimed that the arbitral tribunal can consider an overriding mandatory rule of a third country as a matter of fact in the interpretation of the applicable law.[24]

However, according to the above-mentioned view, the scope of the party autonomy restricted by the application of overriding mandatory rules will be determined by the parties' intent.[25] In fact, under this view, in cases where the parties explicitly exclude the application of overriding mandatory rules, the tribunal cannot apply them.[26] To avoid this, some authors claim that the tribunal may specially apply an overriding mandatory rule without relying on the parties' agreement.[27] However, this view is criticized in that such application is beyond the scope of the power of the arbitrators which has been delegated by the parties.[28] Practical difficulties in the identification of overriding mandatory rules and the determination of the conditions on the application of these rules have also been noted.[29]

From the perspective of the arbitral tribunal,[30] international arbitration is a dispute resolution mechanism based on the parties' agreement, and hence, it seems theoretically difficult to require the arbitral tribunal to apply legal rules beyond the scope of parties' agreement. Thus, in cases where the parties explicitly exclude the application of overriding mandatory rules of the state designated by a choice-of-law rule, it would be difficult for the tribunal to justify the application of these rules.[31] Furthermore, as regards overriding mandatory rules of the state which is the seat of arbitration, considering that the parties' choice of the seat of arbitration only means that they are subject to the law with regard to the arbitration proceedings of said country, it is doubtful that the parties would have intended to

---

21) Alan Scott Rau, "The Arbitrator and 'Mandatory Rules of Law'", in Bermann/Mistelis, *supra* note (10), p. 77, pp. 91-92.

22) *Ibid*., pp. 98-99.

23) *Ibid*., p. 110.

24) *Ibid*., p. 106.

25) Renner, *supra* note (9), p. 102.

26) *Ibid*; *id*., "Private Justice, Public Policy: The Constitutionalization of International Commercial Arbitration", in Walter Mattli/Thomas Dietz (eds.), *International Arbitration & Global Governance* (Oxford, 2014), p. 125.

27) See, in particular, the views referred to in Shore, *supra* note (17), pp. 135-142.

28) Rau, *supra* note (21), pp. 91-92.

29) Renner, *supra* note (9), pp. 103-106; *id*., *supra* note (26), p. 125.

30) For the necessity of distinguishing the perspective of the arbitral tribunal and that of the state court in examining international arbitration, see, Renner, *supra* note (9), pp. 80-81.

31) Ralf Michaels, "Roles and Role Perceptions of International Arbitrators", in Mattli/Dietz, *supra* note (26), p. 47, p. 70.

be subject to overriding mandatory rules with regard to substantive legal matters under that state's laws. Therefore, it should be concluded that the application of overriding mandatory rules with regard to substantive legal matters of the state of the seat of arbitration by the arbitral tribunal cannot be justified by the parties' intent. In sum, it depends on the parties' agreement whether the arbitral tribunal is obliged to apply overriding mandatory rules of a state, such that overriding mandatory rules in the applicable law chosen by the parties are basically allowed; whereas overriding mandatory rules of the third state may only be considered in the interpretation of the applicable law.[32)]

On the other hand, from the perspective of the state, this issue can be understood as follows: when a state is chosen as the seat of arbitration, to what extent does that state desire the application of its overriding mandatory rules in international arbitration? Take Japan as an example in this regard. Considering that broad party autonomy is allowed in international arbitration, as mentioned earlier; that the relation between the legal order of the seat of arbitration and the case is not relatively strong; and that the arbitral tribunal cannot be said to belong to the state legal order in an institutional way, it can be said that, currently, the Japanese law does not require the arbitral tribunal to apply Japanese overriding mandatory rules *ex officio* like Japanese courts in cases where Japan is the seat of arbitration.[33)] In other words, Japanese law at present considers that, in this regard, the response *ex post* at the stage of setting aside or enforcement proceedings is sufficient (Art. 44 (1) viii) and art. 45 (2) viiii) of the Arbitration Act). Thus, although an overriding mandatory rule of Japan has not been applied by the arbitral tribunal, it will not constitute a violation of Japan's public policy if the award has the same conclusion as the case in which that rule would be applied.

Ⅳ. Possible Responses from the State to international arbitration and Their Ineffectiveness

It is clear that most states are reducing the level of intervention with arbitration in order to be chosen as the seat of arbitration.[34)] This policy is based on the idea that a speedy and fair dispute resolution by way of arbitration extends and facilitates international transactions, which serves the social interests of the state.[35)] However, considering that, as has been concluded in the previous section, it depends on the parties' intent whether overriding mandatory rules are applied or not in international arbitration, it is possible that the development of international arbitration hampers the realization of states' other social and

32) In cases where a party claims the application of an overriding mandatory rule of a certain state whereas the other party denies it, the application of that rule depends on the interpretation of the parties' intent at the moment of the conclusion of the arbitration agreement.

33) Tatsuya Nakamura, *Chusaiho Gaisetsu* [Overview of Arbitration Law] (Seibundo, 2022), p. 369.

34) Arthur Taylor Von Mehren, “To what Extent Is International Commercial Arbitration Autonomous?” in *Le droit des relations économiques internationales: Études offertes à Berthold Goldman* (Litec, 1982), p. 217, pp. 220-221; Jean Billemont, *La liberté contractuelle à l’épreuve de l’arbitrage* (LGDJ, 2013), pp. 6-8.

35) Billement, *supra* note (34), p. 6.

economic policies, even though it promotes interests in international transactions.[36] Then, what kind of responses can states take in order to avoid the occurrence of such a possibility?

The state might intervene with international arbitration at the initial stage of arbitration proceedings in terms of arbitrability, as well as at its final stage through setting aside or refusing the recognition and enforcement of an award.

First, regarding the current general tendency on the extension of arbitrability, states may exclude disputes with regard to certain matters or sectors involving public interests (such as financial sectors), attaching importance to the realization of their social or economic policies through their overriding mandatory rules.[37]

Second, states may set aside or refuse the recognition and/or enforcement of arbitral awards which do not respect their policies concretized by their overriding mandatory rules by way of introducing a stricter control with regard to arbitrability or public policy.[38]

However, the above-mentioned responses may not be so effective. The business operators engaging in international transactions may simply choose another state more friendly to arbitration as the seat of arbitration, or to choose a friendly state's law as the applicable law, if a state narrows down the scope of arbitrability.[39] Furthermore, the control at the stage of the recognition/enforcement of an arbitral award is possible only when the party seeks recognition/enforcement in that state.[40] If there is difficulty in enforcing the award in one state, the winning party may simply seek enforcement of an award in another state in which assets of the losing party are located.

Thus, from the fact that the parties freely choose the seat of arbitration, the applicable law, and the place of enforcement, state intervention with international arbitration may not be so effective.[41] As a result, the imperativeness of overriding mandatory rules of states may take a back seat in the case of international arbitration.[42]

V. Conclusion

This paper has examined how overriding mandatory rules of states are applied or considered in international commercial arbitration, and reflected on possible responses states could adopt to international arbitration in order to realize their policies involving public interests and their

36) Leboulanger, supra note (8), p. 506. See also, Robert Wai, "Conflicts and Comity in Transnational Governance: Private International Law as Mechanism and Metaphor for Transnational Social Regulation Through Plural Legal Regimes", in Christian Joerges/Ernst-Ulrich Petersmann, *Constitutionalism, Multilevel Trade and International Economic Law* (Hart Publishing, 2011), p. 229, p. 245 (pointing out the tendency that arbitrators attach importance to an appropriate resolution for the parties and not to the impact on the third party).

37) Cf. Billement, *supra* note (34), p. 125.

38) Johanna Guillaumé, *L'affaiblissement de l'État-Nation et le droit international privé* (LGDJ, 2011), pp. 479-482.

39) Sweet/Griesel, *supra* note (20), pp. 185-186.

40) Horatia Muir Watt, "Économie de la justice et arbitrage international (Réflexions sur la gouvernance privée dans la globalisation)", *Revue de l'arbitrage*, 2008 N° 3, p. 389, p. 408.

41) Sweet/Griesel, *supra* note (20), p. 186.

42) Sweet/Griesel, *supra* note (20), p. 185.

effectiveness. The application of overriding mandatory rules is considerably limited in international arbitration since it depends on the parties' intent, and the possible measures adopted by states in response to this situation may not be sufficiently effective due to the freedom of choice broadly given to the parties with regard to the seat of arbitration, the applicable law, and the seat of enforcement. This is the conclusion of this paper.

Then, how can state policies involving public interests that overriding mandatory rules seek to realize be achieved? One possibility is to create a system in which international arbitration in itself autonomously considers interests of third parties or social interests, in place of states.[43] The possibility for such "constitutionalization of international arbitration" is to be examined in the future.[44]

43) Muir Watt, *supra* note (40), pp. 412-413 (suggesting the publication of precedents and the introduction of proceedings open to the public); Von Mehren, *supra* note (34), p. 227 (suggesting conflict-of-laws rules specific to international arbitration as the *lex mercatoria*). For more concrete reform proposals, see, Sweet/Griesel, *supra* note (20), p. 238-252; Cuniberti, *supra* note (2), pp. 139-198.

44) Michaels, *supra* note (31), pp. 71-72; Peer Zumbansen, "Piercing the Legal Veil: Commercial Arbitration and Transnational Law", *European Law Journal*, Vol. 8 (2002), p. 400, pp. 430-432; Moritz Renner, "Towards a Hierarchy of Norms in Transnational Law?", *Journal of International Arbitration*, Vol. 26 (2009), p. 533, p. 554.

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

Extending the Application of an Arbitration Agreement Involving a Corporation to Include its Representative

Associate Professor of Law, Hiroshima University

Yuji Yasunaga

Ⅰ. Introduction

1. Issue

In principle, an arbitration agreement is only effective between the parties (or, signatories) to the agreement. However, in some cases, a question arises whether an arbitration agreement can be extended to third parties (e.g., a representative of a signatory corporation or an affiliate of the corporation) in order to achieve a consistent resolution of related disputes in arbitration proceedings. There are several published court decisions in Japan concerning such cases.[1)]

2. Purpose of this Article

Most of the relevant court decisions in Japan affirmed extensions of the arbitration agreements at issue based on the determination that the governing law of the arbitration agreements was not Japanese law but U.S. or English law. In other words, what played a critical role in these precedents was—in addition to the method of determining the governing law—the foreign law itself. Therefore, it is essential to introduce and examine foreign law in order to properly handle disputes related to international commercial transactions in Japan. This paper focuses on how German law has addressed this issue, which has not been sufficiently examined in Japan.

It is also important, of course, to address the issue of how to understand Japan's arbitration law as it relates to this issue. It seems that the issue of extendability to a corporate representative of a signatory corporation, which was also addressed by the Supreme Court in the famous Ringling Circus case,[2)] has been a relatively popular topic of discussion in the

1) See, the judgment of the Nagoya District Court of November 27, 1995 (Kaiji Hou Kenkyu Kaishi No. 150, p. 33); the judgment of the Supreme Court of September 4, 1997 (Minshu Vol. 51, No. 8, p. 3657); the judgment of the Tokyo District Court of October 17, 2014 (Hanrei Taimuzu No. 1314, p. 271); the judgment of the Tokyo District Court of June 19, 2020 (Hanrei Jiho No. 2493, p.10); the judgment of the Tokyo District Court of April 15, 2021 (LEX/DB No.25589014).

relevant legal commentary. Therefore, in this article, I would like to discuss this issue in relation to German law (Ⅱ.), and examine some of the interpretative theories in Japan (Ⅲ.).

Ⅱ. Germany

1. General Overview

There are currently three views on this issue in Germany.

The first view is one that permits the broadest extension of arbitration agreements ("First View"). That is, while in principle only the party that concluded the arbitration agreement (in the case of a legal entity concluding an arbitration agreement, only the legal entity) can invoke the arbitration agreement, the effect of the arbitration agreement extends to the representative of a signatory entity who acts on behalf of the signatory entity in concluding the arbitration agreement. This is because a legal entity can only act through an authorized representative. Under the First View, even if a person is not acting as a representative of the signatory legal entity but is acting on behalf of the business activities of the entity, the effect of an arbitration agreement extends to that person. It is not necessary for the person to have been appointed as a representative by the time of the conclusion of the arbitration agreement. The decision of the Higher Regional Court of Munich of February 13, 1997 (NJW-RR 1998, 198) supports the First View.

The second view holds that even if the effect of an arbitration agreement extends to some extent, the extension shall be limited at most to representatives of a signatory legal entity who acted in concluding the arbitration agreement ("Second View").[3] The Second View criticizes the First View for its overly broad scope for extending the effects of an arbitration agreement.

The third view stands for the proposition that the effect of an arbitration agreement extends to the representatives only when it is clear that the representatives themselves acted for the signatory entity in concluding the arbitration agreement and intended to bind themselves as well through interpretation of the arbitration agreement ("Third View").[4] The rationale for the Third View is that the parties' intent should be prioritized because the arbitration agreement is based on the principle of private autonomy, and that the extension of the effect

2) See, the judgment of the Supreme Court of September 4, 1997. X Corporation (a Japanese corporation), which was engaged in producing events and general entertainment, concluded an entertainment contract (which included an arbitration agreement) with Company A (a U.S. corporation) to the effect that X would acquire the right to invite a circus troupe operated by A to Japan, and conducted a two-year performance tour of A's circus troupe. However, the show was a failure, and X suffered significant damages. Therefore, X filed a suit in court against Y, the representative of A, for damages based on tort, alleging that Y had deceived X from the beginning of the contract negotiations with the intention of cutting corners in the performances. In response, Y sought dismissal of the suit, arguing that the effect of arbitration agreement concluded between X and A extended to the relationship between X and Y as well. In this case, the court held that the Federal Arbitration Act of the United States was the governing law of the arbitration agreement and, based on the said Act, accepted Y's argument and dismissed X's lawsuit.

3) Thomas/Putzo/Seiler, Kommentar zur ZPO, 41. Aufl., 2020, § 1029, Rn. 14.

4) Musielak/Voit/Voit, Kommentar zur ZPO, 18. Aufl., 2021, § 1029, Rn. 8; Werner Müller/Annette Keilmann, Beteiligung am Schiedsverfahren wider Willen?, SchiedsVZ 2007, 116.

of the arbitration agreement should be carefully considered because the effect (disadvantage) of not being able to file an action in court would occur if the arbitration agreement were to take effect. The Third View is considered the majority view in Germany and is also supported by the decision of the Higher Regional Court of Nuremberg of April 29, 2013 (BeckRS 2014, 3501) and the decision of the Higher Regional Court of Munich of January 16, 2019 (BeckRS 2019, 342).

2. Examination of German Law

As long as the arbitration agreement is an agreement between the parties, it is understandable that the Third View is the majority theory. Here, I would like to focus on the decision of the Higher Regional Court of Munich of February 13, 1997 and examine the reasons for and the appropriateness of adopting the First View, which differs from the majority theory. A summary of this case follows.

Case In November 1995, Y1, the publisher of the weekly magazine D, placed its own advertisement in D magazine targeted at advertisers of D magazine. In the advertisement, the number of readers of D magazine was compared with that of F, a daily magazine published by publisher X, and it was stated that D magazine was superior to F magazine. The data referred in the advertisement was based on “Media Analysis' 95” published by the Association of Media Analysis Industry (Arbeitsgemeinschaft Media-Analyse e.V.), to which X and Y1 belonged. X filed a lawsuit against Y1 and Y1's representatives, Y2 and Y3, seeking to stop the advertisement and an injunction against similar advertisements, claiming that such comparison of readership data was misleading and constituted unfair competition that would undermine F magazine's reputation. In response, Y1 sought dismissal of X's action, arguing the defense of an arbitration agreement contained in the article of the Association of Media Analysis Industry, and Y2 and Y3 also sought dismissal of X's action, arguing that the effect of the arbitration agreement between X and Y1 extended to them.

The First View was explicitly upheld in this case. Nevertheless, it is noteworthy that the court also added the following reasons.

The arbitration agreement relied upon by Y1 stipulates that any dispute arising from the utilization of the data of the Association of Media Analysis Industry should be subject to arbitration, and this dispute is indeed a dispute arising from the utilization of this data. The article also intends that all advertising disputes arising in connection with media analysis data shall be resolved internally through arbitration by the Association that collected the data.

[. . .]

The situation in which a representative must be involved in arbitration proceedings on behalf of a corporation, on the one hand, and in court proceedings as an individual, on the

other hand, should be avoided. Also, the possibility of circumventing the arbitration agreement by filing a lawsuit against only the representative, thereby rendering it meaningless, should be avoided as well.

In terms of the necessity and permissibility of extending the arbitration agreement, this ruling can be evaluated as follows. That is, assuming that the dispute between X and Y1 in this case was a dispute subject to the arbitration agreement and that the dispute between X and Y2/Y3 was based on the same facts, the dispute between X and Y2/Y3 must be resolved in the arbitration proceedings as an integral part of the dispute between X and Y1. In addition, since X, as a member of the Association, agreed that related disputes may be resolved internally by arbitration, it is permissible to extend the effect of the arbitration agreement to Y2/Y3 (rather, an action against Y2/Y3 could be a circumvention of the arbitration agreement between X and Y1). Regardless of whether one supports the First View, the circumstances pointed out by this decision are reasonably persuasive to reach a suitable conclusion.

The decision of the Higher Regional Court of Nuremberg of April 29, 2013 and the decision of the Higher Regional Court of Munich of January 16, 2019, which are not discussed in detail here, also appear to be reasonable in their conclusions when examined from the perspective of the necessity and permissibility of the extension of the arbitration agreement. If the above analysis focusing on the substance of the case depicts one aspect, the conflict of views in German lower court cases may not be as substantial as it appears. Rather, the German lower court judgments seem to arrive at a reasonable conclusion by taking into account the individual circumstances in which the extension of the effect of the arbitration agreement is necessary and permissible, while selecting an interpretative theory (or contractual interpretation) to support that conclusion. Focusing only on the conflict of views may lead to overlooking the substantial factors that influenced the conclusion. Although there are only a few cases that could be assessed, which may give the impression that my analysis is oversimplified, I believe that is not far off the mark, since there is also an article in Germany that comes to the same conclusion.[5)]

Based on the above introduction and examination of German law, it is difficult to immediately support the views that the effect of an arbitration agreement is extended to the representative, as in the First View and the Second View, because it has the disadvantage of disregarding the intention of the parties and may lead to unnecessary extension of the effect. On the other hand, while the Third View is justified in principle because it emphasizes the intent of the parties, it also seems to be inflexible in its posture of not taking into account any specific individual circumstances.[6)]

---

5) Dorothee Ruckteschler/Christian Piroutek, Die Bindung Dritter an Schiedsklauseln: Erkenntnisse aus der (internationalen) Praxis, in: Rüdiger Wilhelmi/Michael Stürner (Hrsg.), Mehrparteienschiedsverfahren, 2021, 80-82. By comparing the two Higher Regional Court of Munich cases discussed above, this paper's analysis states that in both cases the court clearly sought to protect the corporate representative.

Ⅲ. Examination of Interpretation Theory in Japan

Finally, I will examine the arguments in Japan on this issue.

Aside from the interpretative theory of German law, it may be necessary for the Japanese interpretative theory to construct a judgment framework that is not one of the above three views, but one that can directly consider the substantial balance of interests.

Reviewing previous discussions in Japan from this perspective, it appears that such a framework for judgments has already been proposed. Namely, the majority view in previous discussions is that, in principle, the arbitration agreement shall not be extended to third parties other than the signatories of the arbitration agreement, but, as an exception, an extension based on a reasonable interpretation of the intention of the parties is permitted (for example, extension is permissible when it is understood that the parties to the arbitration agreement have promised that a representative of a corporation may also be bound by the arbitration agreement). Further, in cases exceeding the interpretation of the intention, an extension is admissible due to a breach of the principle of good faith or abuse of rights.[7] If the extension based on a breach of the principle of good faith or abuse of rights is recognized, the same effect as if an arbitration agreement had been concluded with a third party will be created. The above judgment framework itself would not be disputed.

It is not clear whether there is an actual conflict in existing views. However, if there is, it seems that there is a conflict between, on the one hand, the view that emphasizes the interpretation of reasonable intent between the parties to the arbitration agreement and, on the other hand, the view that recognizes a breach of the principle of good faith and abuse of rights in a flexible manner. What should we think about this point? Although it is necessary in principle to search for a reasonable intention between the parties at the time the agreement was concluded, it is not easy to do so unless there is a clear statement (this is especially the case when considering the decision of the Higher Regional Court of Nuremberg of April 29, 2013). Therefore, in the end, it may be necessary to examine the substance of the case in detail and flexibly recognize a breach of the principle of good faith and abuse of rights.

The question that remains, then, is how to examine the circumstances that constitute an abuse of rights and a breach of the principle of good faith in individual cases. As has already been pointed out, it would be easier to grant the extension in the case (1) where one party to the arbitration agreement (“X”) files a lawsuit against the corporate representative (“Z”) of the other party (“Y”) and Z seeks to extend the effect of the arbitration agreement between X and Y than in the case (2) where X files for arbitration against Y and Z seeking

6) In the aforementioned decision of the Higher Regional Court of Munich of January 16, 2019 pointed out that “in this case, the circumstance that Y, the representative of A, is using the arbitration agreement between X and A in his favor in order to dismiss the claim of X does not affect this conclusion. Whether or not an agreement is disadvantageous to a third party is not determined by the circumstances of each legal proceeding, but is determined objectively from the perspective of whether or not the third party concerned loses its rights due to the agreement.” As can be seen from this, a rigorous approach taken by the Third View was evident.

7) See e.g., Kazuhiko Yamamoto & Aya Yamada, ADR Chusai Hou [ADR Arbitration Law] (2nd ed.), Nihon Hyoron Sha, 2015, p. 323.

unified dispute resolution through arbitration proceedings.[8)] In the latter case, Z has never agreed to settle disputes in arbitration proceedings, while in the former case, X has at least agreed to settle certain disputes with Y in arbitration proceedings. Therefore, as far as the necessity of extending the effect of the arbitration agreement against Z is recognized as described below, it is more easily recognized as permissible (rather, seeking court proceedings against Z could be a circumvention of the arbitration agreement between X and Y). Therefore, it seems reasonable to determine whether the arguments of X or Z in that former case are justified by the balance of interests between the parties from the perspective of whether the dispute between X and Z needs to be resolved in a unified manner with the dispute between X and Y in the arbitration proceedings. However, since the starting point is that there is no arbitration agreement between X and Z, the responsibility for establishing the necessity of extending the effect of the arbitration agreement between X and Y lies on the side of Z.

In addition, it should be noted that there has been a view that the approach under the U.S. Arbitration Act, which was applied by the Supreme Court in the Ringling Circus case, is also appropriate in Japan.[9)] This view pointed out that it is impermissible to allow an action to be brought against an individual representative of a party company based on tortious conduct, etc., because such an action would circumvent the purpose of the arbitration agreement. The results of the above examination could support this argument.

Ⅳ. Conclusion

The above is a brief examination of the issue at hand with reference to German law. This article supports the view that relatively broadens the applicability of abuse of rights and a breach of the principle of good faith, considering that there are limits to the search for reasonable intent between the parties. However, if we return to the principle that arbitration proceedings are based on the agreement of the parties, there could be some doubts about this view. Although there may be a need to examine the issue from a broader perspective that is not limited to the cases discussed here or to German law, I hope that this article will advance discussions.

＊This article is a summary and English translation of my article published in the JCA Journal 69(5), 2022. I would like to add three new pieces of information learned since its publication. First, in *Chusai Goui no Shukanteki Hanni ni tsuite* [A Study on the Subjective Limit of the Arbitration Agreement], JCA Journal 69(8), 2022, p. 18 ff., Kimimasa Hata provides a more detailed article on the interpretation of Japanese law and comes to almost

8) See e.g., Tatsuya Nakamura, Chusai Goui no Kouryoku no Jinteki Hanni [Effect of Arbitration Agreement and its Personal Scope], in Chusai hou no Ronten, 2017, 163-164. However, Akihiro Hironaka & Yui Takahata, Chusai Goui no Hi Shomeisha ni taisuru Kouryoku [GE Energy v. Outokumpu: Reflections on Non-Signatories to Arbitration Agreements], JCA Journal 68(6), 2021, p. 6 expresses a skeptical attitude toward this view.

9) See e.g., Takeshi Kojima & Takashi Inomata, Chusai Hou [Arbitration Law], Nihon Hyoron Sha, 2014, pp. 128-129.

the same conclusion as I. Second, the judgment of the Sapporo District Court of February 8, 2022 (LEX/DB No.25572088) held that the effect of the arbitration agreement extended to persons who were not parties to the agreement (i.e., employees who played a primary role in the conclusion and performance of the contract) based on contractual interpretation. Although this judgment can be evaluated as adopting basically the same view as this article, the importance of this judgment lies in the fact that it recognized (perhaps for the first time) the extension of the arbitration agreement under the application of the Japanese Arbitration Law. Third, the judgment of the Tokyo District Court of June 1, 2022 (LEX/DB No. 25606253) also affirmed the extension of the arbitration agreement to the representative of the signatory cooperation. In this case, the governing law of the arbitration agreement was English law. In the past few years, a series of related precedents have been issued in succession, and it will be interesting to see how the discussion develops in the future.

Tokyo・Osaka・Nagoya・Fukuoka・Takamatsu
Sapporo (Scheduled to open the fall of 2023)

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)

New York
(Scheduled to open the fall of 2023)

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

Scope, Amount and Sharing of Arbitration Expenses and Court Costs in Japan

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

Kazuhiro Kobayashi

Ⅰ. Introduction

The scope, amount and sharing of arbitration expenses and court costs vary in each jurisdiction. Under the so called American rule (the "American Rule"), "all litigants, even the prevailing one, must bear their own attorney's fees" (Black's Law Dictionary (11th ed, 2019)). On the other hand, under the so called English rule (the "English Rule"), "a losing litigant must pay the winner's costs and attorney's fees" (Black's Law Dictionary (11th ed, 2019)). This article introduces the scope, amount and sharing of arbitration expenses and court costs in Japan.

Ⅱ. Arbitration Act

Japan enacted the Arbitration Act of Japan (Act No. 138 of 2003) (the "Arbitration Act") and adopted the UNCITRAL Model Law on International Commercial Arbitration (the "UNCITRAL Model Law")(1985) in 2003. Then, in Japan, on April 21, 2023, the Arbitration Act was revised to adopt the UNCITRAL Model Law on International Commercial Arbitration as amended in 2006. Though the revised Arbitration Act has not come into effect yet, article numbers thereof are referred to. The UNCITRAL Model Law, however, stipulates no provisions regarding arbitration expenses.

The Arbitration Act sets forth clauses on arbitration expenses from Articles 50, 51 and 52. Basically, the Arbitration Act guarantees the parties' freedom to agree on the arbitral procedures (Article 26, paragraph (1), etc.) as the UNCITRAL Model Law. Article 50, paragraph (1) of the Arbitration Act allows the parties to agree on a reward for the arbitrator, and Article 52, paragraph (1) thereof provides, "The sharing of expenses paid by the parties in relation to the arbitration procedure between the parties shall be as provided by the agreement of the parties." Therefore, the parties may agree to the scope, amount and sharing of the arbitration expenses.

In case the parties do not agree on arbitration expenses, the arbitral tribunal, itself, may

decide on the reward for the arbitrator, though such reward shall be reasonable (Article 50, paragraph (2) of the Arbitration Act). Under Article 51 thereof, the arbitral tribunal may order the parties to prepay the estimated amount of the expenses for the arbitration procedure. Otherwise, it is difficult for the arbitrator to collect such award from the parties, especially the losing party. When the arbitration procedure terminates, "each party shall bear the expenses he/she paid in relation to the arbitration procedure." (Article 52, paragraph (2) thereof). In other words, Japan adopts the American Rule in case of no agreement between the parties.

However, I believe that there are few cases where the parties agree on ad hock international commercial arbitration in Japan, but in many cases, parties to arbitration in Japan agree on institutional arbitration. Therefore, the arbitration rules of each arbitral institution apply to such cases. Thus, it is necessary to review such arbitration rules to see whether the American Rule or English Rule is adopted in practice. I also believe that The Japan Commercial Arbitration Association (the "JCAA") has administered the most international commercial arbitration cases in Japan, though other arbitral institutions such as the International Chamber of Commerce may also do so. Therefore, the provisions of the JCAA's arbitration rules will be introduced in III.

Ⅲ. JCAA's Arbitration Rules

The JCAA offers three sets of arbitration rules, (i) the UNCITRAL Arbitration Rules (2010) supplemented by the Administrative Rules for UNCITRAL Arbitration of The Japan Commercial Arbitration Association, (ii) the Commercial Arbitration Rules and (iii) the Interactive Arbitration Rules, to meet various needs and preferences of the parties. The amount, scope and bearing of the arbitration expenses under such rules will be explained below.

1. The UNCITRAL Arbitration Rules (2010) supplemented by the Administrative Rules for UNCITRAL Arbitration of The Japan Commercial Arbitration Association

Although the UNCITRAL Model Law stipulates no provisions regarding arbitration expenses, the UNCITRAL Arbitration Rules (2010) (the "UNCITRAL Arbitration Rules") set forth clauses on arbitration expenses from Article 40 through Article 43. Article 40, paragraph 1 of the UNCITRAL Arbitration Rules provides, "The arbitral tribunal shall fix the costs of arbitration..." and paragraph 2 thereof defines the costs of arbitration as follows:

(a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself...;

(b) The reasonable travel and other expenses incurred by the arbitrators;

(c) The reasonable costs of expert advice and of other assistance required by the arbitral tribunal;

(d) The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;

(e) The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;

(f) Any fees and expenses of the appointing authority...

Rule 20.1 of the Administrative Rules for UNCITRAL Arbitration of JCAA (the "JCAA Administrative Rules"), however, provides, "The amount of an arbitrator's remuneration shall be based on the hourly rate multiplied by the number of the Arbitration Hours" and "The amount of each arbitrator's remuneration shall be fixed by the JCAA." Therefore, the arbitral tribunal may not decide the arbitrators' fees. Rule 20.2 thereof provides, "The JCAA shall determine an hourly rate within the range of USD500 to USD1,500 for each arbitrator taking into account the arbitrator's experience, the complexity of the case and related matters...." Furthermore, "If an arbitrator ceases to perform his or her duties due to his or her resignation or other reasons..., the JCAA, ..., may decide to reduce the arbitrator's remuneration ...." (Rule 21.1 of the JCAA Administrative Rules)

In addition, the claimant shall pay the administrative fee to the JCAA when it submits a request for arbitration (Rule 16.1 of the JCAA Administrative Rules). Rule 24 of the JCAA Administrative Rules specifies the administrative fee as follows:

Amount or Economic Value of Claim	Amount of Administrative Fee
Less than JPY5,000,000	Amount equal to 10% of the amount or the economic value of the claim
JPY5,000,000 or more but less than JPY20,000,000	JPY500,000
JPY20,000,000 or more but less than JPY100,000,000	JPY500,000 *plus* 1% of any amount in excess of JPY20,000,000
JPY100,000,000 or more but less than JPY1,000,000,000	JPY1,300,000 *plus* 0.3% of any amount in excess of JPY100,000,000
JPY1,000,000,000 or more but less than JPY5,000,000,000	JPY4,000,000 *plus* 0.25% of any amount in excess of JPY1,000,000,000
JPY5,000,000,000 or more but less than JPY10,000,000,000	JPY14,000,000 *plus* 0.1% of any amount in excess of JPY5,000,000,000
JPY10,000,000,000 or more	JPY19,000,000 *plus* 0.05% of any amount in excess of JPY10,000,000,000 (JPY25,000,000 is maximum)

The JCAA may also request the parties to pay the fees and costs other than the administrative fees in advance (Rule 16.2 of the JCAA Administrative Rules).

Article 42, paragraph 1 of the UNICTRAL Arbitration Rules provides, "The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case." Therefore, it can be said the English Rule is adopted principally in arbitration under the UNCITRAL Arbitration Rules supplemented by the JCAA Administrative Rules.

2. The Commercial Arbitration Rules

If the parties do not specify the applicable rules among (i) the UNCITRAL Arbitration Rules, (ii) the Commercial Arbitration Rules and (iii) the Interactive Arbitration Rules, the Commercial

Arbitration Rules shall apply (Article 3.2 of the Commercial Arbitration Rules). In addition, I believe that there are more arbitration proceedings administered by the JCAA in accordance with (ii) the Commercial Arbitration Rules than (i) the UNCITRAL Arbitration Rules and (iii) the Interactive Arbitration Rules. Therefore, the Commercial Arbitration Rules are the standard rules for arbitration to be administered by the JCAA.

Under Article 80.1 of the Commercial Arbitration Rules, "The costs of the arbitration include the administrative fee, the arbitrator(s)' remuneration and expenses, and other reasonable expenses incurred with respect to the arbitral proceedings; and the fees and expenses of the counsels and other experts incurred by the Parties to the extent the arbitral tribunal determines that they are reasonable."

"The amount of an arbitrator's remuneration shall be based on the hourly rate multiplied by the number of the Arbitration Hours" (Article 93.1 of the Commercial Arbitration Rules) in the same way as the arbitration in accordance with the UNCITRAL Arbitration Rules. But the hourly rate of an arbitrator is the fixed amount of JPY50,000 (not including consumption tax) (Article 93.2 thereof). Then, "When the Arbitration Hours exceed 150 hours, the hourly rate shall be reduced by 10% for every 50 hours in excess of the initial 150 hours...." (Article 95.1 thereof). In addition, the upper limit of an arbitrator's remuneration is provided. In case of a sole arbitrator, such limit is as follows (Article 94.1 thereof):

Amount or Economic Value of Claim	Upper limit of Remuneration (not including consumption tax)
Less than JPY20,000,000	JPY2,000,000
JPY20,000,000 or more but less than JPY100,000,000	JPY2,000,000 *plus* 2.5% of any amount in excess of JPY20,000,000
JPY100,000,000 or more but less than JPY500,000,000	JPY4,000,000 *plus* 1.5% of any amount in excess of JPY100,000,000
JPY500,000,000 or more but less than JPY1,000,000,000	JPY10,000,000 *plus* 0.4% of any amount in excess of JPY500,000,000
JPY1,000,000,000 or more but less than JPY5,000,000,000	JPY12,000,000 *plus* 0.1% of any Amount in excess of JPY1,000,000,000
JPY5,000,000,000 or more but less than JPY10,000,000,000	JPY16,000,000 *plus* 0.08% of any amount in excess of JPY5,000,000,000
JPY10,000,000,000 or more	JPY20,000,000 *plus* 0.02% of any amount in excess of JPY10,000,000,000 (JPY30,000,000 is maximum)

In case of three arbitrators, the upper limits of the remunerations of the presiding arbitrator and of co-arbitrators are 120% and 80% of that of a sole arbitrator, respectively (Article 94.3 thereof). Accordingly, the total remunerations of the three arbitrators do not exceed 280% of the upper limit of a sole arbitrator's remuneration. Furthermore, "if an arbitrator ceases to perform his or her duty because of death, challenge, removal (except for removal by the agreement between the Parties), or resignation," such arbitrator's remuneration shall not be paid (Article 96.1(2) thereof). Therefore, the remuneration of arbitrators is basically more

reasonable in arbitration under the Commercial Arbitration Rules than the UNCITRAL Arbitration Rules, depending on the yen-dollar exchange rate.

On the other hand, the amount of the administrative fee in arbitration under the Commercial Arbitration Rules is as same as that in arbitration under the UNCITRAL Arbitration Rules (Article 103.1 of the Commercial Arbitration Rules), though provisions on the arbitration fee of the Commercial Arbitration Rules are slightly different from those of the JCAA Administrative Rules. In a similar manner to arbitration under the UNCTIRAL Arbitration Rules, the claimant shall pay to the JCAA the administrative fee when it submits a request for arbitration (Article 14.5 of the Commercial Arbitration Rules) and "a sum of money in an amount ... so as to cover the arbitrator(s)' remuneration and expenses, and other reasonable expenses incurred with respect to the arbitral proceedings" usually in advance (Article 82.1 thereof).

As mentioned above, the fees and expenses of the counsels incurred by the parties are included in the costs of arbitration to the extent the arbitral tribunal determines that they are reasonable (Article 80.1 thereof). Then, "The arbitral tribunal may apportion the costs ... between the Parties, taking into account the Parties' conduct throughout the course of the arbitral proceedings, the determination on the merits of the dispute, and any relevant circumstances" (Article 80.2 thereof). Therefore, the arbitral tribunal may impose all or part of the winning party's counsels' fees on the losing party. But the arbitral tribunal is not required to do so principally in the determination on the merits of the dispute. On the contrary, the arbitral tribunal may cause the winning party to bear all of its own counsels' fees. Thus, neither the English Rule nor the American Rule is applied in principle.

3. The Interactive Arbitration Rules

The Interactive Arbitration Rules are special provisions of the Commercial Arbitration Rules. Without any special provisions, the same provisions of the Commercial Arbitration Rules apply to arbitration in accordance with the Interactive Arbitration Rules. With respect to the costs of arbitration, the same provisions set forth in Article 80.1 of the Commercial Arbitration Rules as quoted above apply as Article 81.1 of the Interactive Arbitration Rules. But the remunerations of arbitrators under the Interactive Arbitration Rules are a fixed amount depending on the amount or economic value of claims and are quite different from those under the Commercial Arbitration Rules. In case of a sole arbitrator, the remuneration is as follows (Article 94.1 of the Interactive Arbitration Rules):

Amount or Economic Value of Claim	Sole arbitrator's remuneration (not including consumption tax)
Less than JPY50,000,000	JPY1,000,000
JPY50,000,000 or More but less than JPY100,000,000	JPY2,000,000
JPY100,000,000 or More but less than JPY5,000,000,000	JPY3,000,000
JPY5,000,000,00 or More but less than JPY10,000,000,000	JPY4,000,000

JPY10,000,000,000 or more	JPY5,000,000

In case of three arbitrators, the remuneration of a presiding arbitrator and co-arbitrators is as follows (Article 95.1 thereof):

Amount or Economic Value of Claim	**Co-arbitrator's remuneration (not including consumption tax)**	**Presiding arbitrator's remuneration (not including consumption tax)**
Less than JPY50,000,000	JPY700,000	JPY1,200,000
JPY50,000,000 or more but less than JPY100,000,000	JPY1,500,000	JPY2,500,000
JPY100,000,000 or more but less than JPY5,000,000,000"	JPY2,500,000	JPY4,000,000
JPY5,000,000,00 or more but less than JPY10,000,000,000	JPY3,500,000	JPY5,000,000
JPY10,000,000,000 or more	JPY4,000,000	JPY6,000,000

Therefore, the total of the arbitrators' remunerations is as follows:

Amount or Economic Value of Claim	**Total of arbitrator's remunerations (not including consumption tax)**
Less than JPY50,000,000	JPY2,600,000
JPY50,000,000 or more but less than JPY100,000,000	JPY5,500,000
JPY100,000,000 or more but less than JPY5,000,000,000	JPY9,000,000
JPY5,000,000,00 or more but less than JPY10,000,000,000	JPY12,000,000
JPY10,000,000,000 or more	JPY14,000,000

Accordingly, if more time is reasonably required to conduct the arbitral proceedings, the arbitrators' remunerations in arbitration under the Interactive Arbitration Rules are more reasonable than those in arbitration under the Commercial Arbitration Rules. On the other hand, if less time is reasonably required to do so, the arbitrators' remunerations in arbitration under the Commercial Arbitration Rules are more reasonable than those in arbitration under the Interactive Arbitration Rules.

With respect to the administrative fee, there are no differences between the Interactive Administrative Arbitration Rules and the Commercial Arbitration Rules.

In the same manner as arbitration under the Commercial Arbitration Rules, the arbitral tribunal may impose all or part of the winning party's counsels' fees on the losing party, but it is not required to do so (Article 81.2 of the Interactive Arbitration Rules). Neither the English Rule nor the American Rule is applied in principle.

4. Summary

The amount of the arbitration fees, especially the arbitrators' fees are different among arbitration under the UNCITRAL Arbitration Rules, arbitration under the Commercial Arbitration Rules and arbitration under the Interactive Arbitration Rules. In addition, as to the fees of the parties' counsels and sharing the costs of arbitration, the UNCITRAL Arbitration Rules adopt the English Rule basically, but neither the English Rule nor the American Rule is not adopted expressly under the Commercial Arbitration Rules or the Interactive Arbitration Rules. Under these two rules, it depends on the arbitrators. Arbitrators' decisions are likely to be affected by the legal practices in the jurisdictions of the arbitrators. Article 27.4 of the Commercial Arbitration Rules and the Interactive Arbitration Rules provides, "In the case where the JCAA appoints an arbitrator ... and a Party requests that the arbitrator be a person of a different nationality from that of any of the Parties, the JCAA shall respect such request", though it is said that arbitration under the Interactive Arbitration Rules is suitable for disputes between companies under the Civil Law. Therefore, I do not think that there are any specific features as to the nationality in arbitration administered by the JCAA. But statistically, there are more Japanese arbitrators than arbitrators of any other nationalities. It is little wonder, considering that the JCAA administers the arbitration between Japanese companies and that Japanese companies may appoint Japanese people as co-arbitrators in case three arbitrators are adopted in arbitrations between Japanese companies and non-Japanese companies. The legal practices in Japanese civil litigation are introduced below for reference. But please note that such Japanese arbitrators are not always attorneys admitted in Japan but sometimes attorneys admitted in foreign jurisdictions, such as New York, USA.

Ⅳ. Civil Procedure

The title of Chapter IV of the Code of Civil Procedure of Japan (Act No. 109 of June 26, 1996) (the "Code of Civil Procedure") is Court Costs, but such Chapter itself sets forth no provisions regarding the scope and the amount. Instead, the Act on the Costs of Civil Proceedings of Japan (Act No. 40 of April 6, 1971) (the "Civil Costs Act") regulates the costs of not only "civil litigation proceedings" but also "civil execution proceedings, civil preservation proceedings, ... and other such court proceedings in civil cases ...", which includes civil mediation cases (Article 1). First of all, the costs of civil procedure include the fee to be paid to the court in order to file an action, (Article 3, paragraph (1), Appended Table 1). The fees are as follows:

(i) the part of the value of the subject matter of the suit up to one million yen: 1,000 yen per 100,000 yen of that part of its value,

(ii) any part of the value of the subject matter of the suit in excess of one million yen, up to five million yen: 1,000 yen per 200,000 yen of that part of its value.

(iii) any part of the value of the subject matter of the suit in excess of five million yen, up to ten million yen: 2,000 yen per 500,000 yen of that part of its value.

(iv) any part of the value of the subject matter of the suit in excess of ten million yen, up to

one billion yen: 3,000 yen per one million yen of that part of its value.
(v) any part of the value of the subject matter of the suit in excess of one billion yen, up to five billion yen: 10,000 yen per five million yen of that part of its value.
(vi) any part of the value of the subject matter of the suit in excess of five billion yen: 10,000 yen per ten million yen of that part of its value.

Thus, if the plaintiff claims one billion yen against the defendant, the fee is 3,020,000 yen (1,000x10+1,000x20+2,000x10+3,000x990). The following table is prepared to be similar as the table mentioned in III.1. above.

Subject Matter of the Suit	Amount of Fee
Less than JPY1,000,000	1%
JPY1,000,000 or more but less than JPY5,000,000	JPY10,000 *plus* 0.5% of any amount in excess of JPY1,000,000
JPY5,000,000 or more but less than JPY10,000,000	JPY30,000 *plus* 0.4% of any amount in excess of JPY5,000,000
JPY10,000,000 or more but less than JPY1,000,000,000	JPY50,000 *plus* 0.3% of any amount in excess of JPY10,000,000
JPY1,000,000,000 or more but less than JPY5,000,000,000	JPY3,020,000 *plus* 0.2% of any amount in excess of JPY1,000,000,000
JPY5,000,000,000 or more	JPY11,020,000 *plus* 0.1% of any amount in excess of JPY5,000,000,000

The fee is said to be more expensive than in other jurisdictions especially in case the subject matter of the suit is a large amount, though it is less than the fee for any arbitral institutions up to some extent. In addition, the fee shall increase to 1.5 times in case of an appeal to the court of second instance and double in case of a final appeal to the Supreme Court.

In addition, when the plaintiff files a complaint with the court, the plaintiff shall prepay the expenses for serving the complaint on the defendant. The parties and their attorneys can also easily recognize as the court costs such expenses and other expenses to be paid to the court such as fees and expenses for expert witnesses and interpreters.

On the other hand, the court costs are not deemed to include the fees for attorneys in practice. Although, the Civil Costs Act provides "the travel expenses, daily allowance, and lodging fees" for an attorney (Article 2, item (v)) and "the expenses of preparing and submitting documents such as the complaint or other such petition, briefs, copies of documentary evidence, and translations" (Article 2, item (vi)), the amounts are limited. For example, the daily allowance is currently 3,950 yen (Article 2, paragraph (2) of the Rules on the Costs of Civil Proceedings of Japan (Rules of the Supreme Court No. 5 of 1971)). The expense of preparing and submitting the complaint and briefs is 1,500 yen up to five copies, and 1,000 yen per fifteen copies in execs of five copies, and the expense of preparing and submitting copies of documentary evidence is 1,500 yen up to fifteen copies, and 1,000 yen per fifty copies in execs of fifteen copies (Article 2-2, Appended Table 2 thereof). Furthermore, though the winning party would be able to demand such expenses as discussed below, such party shall file a petition to fix the amount of court costs to be borne with the court clerk of

the court after the judicial decision on the bearing of costs, which is included in the judgement, becomes enforceable (Article 71 of the Code of Civil Procedure). Therefore, the parties rarely file such petition, considering the amount of court costs, the time for such proceedings and collectability. Accordingly, Japanese practitioners do not think of their fees as court costs. But please note that approximately 10% of the actual damages are usually included in the total of the damages as a matter of substantive law but not procedural law in case of a tort claim but not a claim under contract.

Incidentally, "If a plaintiff is not domiciled in Japan or does not have a business office or other office in Japan, at the petition of the defendant, the court shall issue a ruling ordering the plaintiff to provide security for court costs." (Article 75, paragraph (1) of the Code of Civil Procedure).

As to sharing the court costs, Article 61 of the Code of Civil Procedure provides "The defeated party bears the court costs" and Article 64 thereof provides, "In the case of a partial defeat, the burden of court costs on each party is determined by the court at its discretion; provided, however, that depending on the circumstances, the court may have either party bear all court costs." Therefore, in principle, the defeated party shall bear the court costs depending on the degree of the defeat. However, Article 62 thereof provides, "Depending on the circumstances, the court may have the winning party bear all or part of court costs incurred due to any act that was unnecessary for the expansion or defense of the winning party's rights, or court costs incurred due to any act that was necessary, in light of the progress of the litigation as of the time of the act, for the expansion or defense of the adverse party's rights." And Article 63 thereof provides, "If a party delays litigation due to a failure to present allegations or evidence in a timely manner, failure to keep a court date or observe a time frame, or any other grounds attributable to that party, the court may have that party bear all or part of court costs incurred due to the delay, even if that party wins the case." Therefore, unnecessary acts and delay will be taken into consideration.

When the court enters a final judgement, "the court shall reach a judicial decision sua sponte on the bearing of all court costs...." (Article 67 of the Code of Civil Procedure). But the parties rarely file a petition to fix the amount of court costs to be born as mentioned above.

As mentioned above, limited parts of the fees for attorneys are included in the court costs and even though the court usually imposes the court costs on the losing party, the winning party rarely tries to collect the court costs. Accordingly, it can be said that the American Rule is the general practice in Japanese civil litigation.

V. Conclusion

In common arbitration in Japan, which is administered under the Commercial Arbitration Rules of the JCAA, the arbitral tribunal may impose all or part of the winning party's counsels' fees on the losing party, but it depends on the arbitrator. In civil litigation in Japan, the winning party does not usually collect its counsels' fees from the losing party.

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　FAX：+86-21-6841-1659

https://www.ohebashi.com　Ohebashi Legal

Disputes in India ― Lessons from *Mittal v Westbridge*

Anderson Mori & Tomotsune (Singapore Office), Partner
Leon Ryan

Anderson Mori & Tomotsune (Singapore Office), Partner
Shunsuke Domon

Ⅰ. Introduction

Japan is one of the largest foreign investors in India, with around 1,500 Japanese companies operating in India[1]. In many cases, Japanese companies will purchase shares in Indian entities, and together with their Indian business partners carry out business in the sub-continent. Given the sheer volume of business being conducted, Japanese companies are also finding themselves involved in disputes in India, with either their Indian business partners or Indian third parties.

Japanese companies will naturally prefer for such disputes to be submitted for international arbitration. Indeed, the relevant contract would likely have expressly specified arbitration as the choice of dispute resolution. However, when Japanese companies commence arbitration proceedings, it is not uncommon to immediately encounter a problem of arbitrability. The Indian counterparty in these disputes may claim that the dispute comes under the exclusive jurisdiction of the National Company Law Tribunal ("NCLT"), and hence is not arbitrable. The NCLT is a tribunal created under the Companies Act in India, and has certain specified powers over certain company matters. This includes, for example, claims concerning the oppression of minority shareholders.

The Japanese company is then dragged into a dispute over the proper characterization of the dispute. Is it merely a contractual dispute arising from the contract, or is it a dispute that comes under one of the specific areas which the NCLT has jurisdiction over? In the former situation, the dispute is arbitrable. In the latter, then it becomes arguable that parties cannot proceed to arbitration and can only instead deal with the matter at the NCLT.

Complicating matters further is the reality that claims do not exclusively fit into categories of "contractual" or "oppression" and can well have elements of both a contractual and a claim for oppression. Naturally, if the Indian party wishes to disrupt the arbitration proceedings, or

1) Data taken from the Indian Government's "Invest in India" website - https://www.investindia.gov.in/country/japan-plus

even if it wishes to obtain a perceived "home ground" advantage, it will seek to characterize the dispute as being under NCLT's specified jurisdiction. In practice this leads to a variety of "dressed-up" claims, where claims which are contractual in nature are purposely farmed to fall under NCLT's jurisdiction.

The recent case of *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1 ("*Mittal v Westbridge*") provides some practical guidance for parties who might be facing this problem. In *Mittal v Westbridge*, the Singapore Court of Appeal ("SGCA") was presented with the exact issue of arbitrability as mentioned above. In a shareholder dispute, the Indian party insisted that the dispute concerned minority oppression and could only be heard by the NCLT, while the other party argued that the dispute was contractual and fell under the parties' arbitration agreement. The SGCA thus had to decide whether the dispute was arbitrable. In order to reach a decision on arbitrability, the SGCA also had to decide the prior question of what was the law to apply to decide whether the dispute was arbitrable.

The SGCA decided that the arbitrability of a dispute will be determined by both the law of the arbitration agreement and the law of the seat. The court then determined that both the law of the arbitration agreement and the seat was Singapore law in this case. Given that the dispute was arbitrable under Singapore law, the arbitration could proceed. In this way, the non-Indian party was able to partially avoid the NCLT issue and proceed to the dispute resolution method originally agreed upon by the parties (i.e., arbitration).

The decision of the SGCA is thus noteworthy because it shows that by making the appropriate selection of the law of the arbitration agreement and the law of the seat, the risk of a "dressed up" claim can be mitigated. This article considers the reasons provided by the SGCA, and how they might guide future companies investing in India.

Ⅱ. The laws of arbitration

As *Mittal v Westbridge* discusses a variety of different applicable laws, it is useful to first consider the different laws which might be engaged in an arbitration. Typically, up to four relevant laws might be engaged:

(a) The law of the underlying main contract
(b) The law of the seat of arbitration
(c) The law of the place of enforcement
(d) The law of the arbitration agreement

The law of the main contract is the law chosen by the parties to govern their substantive contractual obligations in the main contract. This is typically expressly stated in the main contract (e.g. "*This contract is governed by the laws of Country A*").

The law of the seat of arbitration (sometimes called the "curial law") is the law that will be used by the court of the seat. Setting aside proceedings, for example, will apply the law of the seat. The law of the seat is usually indicated by the selection of the seat in the arbitration agreement (e.g. "*The seat of the arbitration shall be Country A*"). A phrase such as "*arbitration in Country A*" may also interpreted as a selection of the seat[2).

The law of the place of enforcement governs the enforcement of any award. Under the UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006 ("Model Law"), an award may be refused in certain limited circumstances under the law of the enforcing state (see Article 36 of the Model Law).

The law of the arbitration agreement governs the arbitration agreement and will apply for issues such as validity, formation, and interpretation of the arbitration agreement. This law of the arbitration is usually not expressly mentioned in the contract. This practical reality was acknowledged by the Supreme Court of the United Kingdom in *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38 ("*Enka v Chubb*") – "*it is rare for the law governing an arbitration clause to be specifically identified (either in the arbitration clause itself or elsewhere in the contract)*".

Seeing as the law of the arbitration agreement is rarely expressed, the common law has adopted a 3 stage test to determine the law of the arbitration agreement. The 3 stage test is currently adopted in both the UK (e.g. *Enka v Chubb*) as well as Singapore (*Mittal v Westbridge*). When applying the 3 stage test, the court asks the following questions:
Stage 1: Have parties made an express choice of law for the arbitration agreement?
Stage 2: If there is no express choice, have parties made an implied choice of law?
Stage 3: If the parties have not made an express or implied choice, what is the law with the closest connection to the arbitration agreement?

Ⅲ. Mittal v Westbridge – Factual Background

1. The Shareholders Dispute

Mittal was the founder of People Interactive (India) Private Limited ("Company"), a well-known matrimonial service operating in India. Westbridge is a private equity fund incorporated in Mauritius. Westbridge invested in the Company in early 2006, and parties executed a Shareholders Agreement ("SHA"). The SHA contained a governing law and arbitration clause, that provided that the law of the main contract was Indian law, and that disputes would be referred to arbitration seated in Singapore:

- "*This [SHA] … shall be governed by … the laws of the Republic of India*"
- "*In the event of a dispute relating to the management of the Company or relating to any of the matters set out in this Agreement... All such disputes… shall be referred to arbitration…*"
- "*The arbitration proceedings shall be carried out in accordance with the rules laid down by the International Chamber of Commerce and the place of arbitration shall be Singapore.*"

(emphasis added in bold)

Under the SHA, the Company was expected to complete an initial public offering ("IPO")

2) See the SGCA case - BNA v BNB [2020] 1 SLR 456 concerning the phrase "arbitration in Shanghai". The court stated "*In our judgment, the natural meaning of the phrase "arbitration in Shanghai" is that Shanghai is the seat of the arbitration*".

within five years of the closing date. If the IPO was not carried out, Westbridge had the option to redeem its shares. The IPO was not achieved, and as a result Westbridge wished to exit the Company in 2017. Unfortunately this caused the relationship with Mittal to significantly deteriorate. Attempts were made to sell the Company to a potential buyer called Info Edge (India) Limited ("Info Edge"). However this worsened the situation, since Mittal viewed Info Edge as a competitor. With the relationship now almost irreversibly damaged, Mittal complained that he was initially not aware that Westbridge had investments in Info Edge, and further accused Westbridge of not properly disclosing sensitive information of the Company to Info Edge.

2. Initial proceedings

Mittal commenced formal dispute proceedings by submitting a complaint to the NCLT on 3 March 2021 (the "NCLT Proceedings"), arguing that he was the target of minority oppression and that Westbridge should be restrained from further oppressive behavior. In response to the NCLT Proceedings, Westbridge commenced court proceedings in Singapore (the "SG Proceedings"), seeking an anti-suit injunction against Mittal, arguing that the NCLT Proceedings had breached the arbitration agreement in the SHA.

Mittal attempted to avoid the effect of the SG Proceedings by filing a suit in the Bombay High Court (the "Bombay Proceedings"). Mittal asked the Bombay court to declare that only the NCLT was competent to hear the dispute, and to restrain Westbridge from proceeding/ enforcing with the SG Proceedings. The SG Proceedings was first heard in the Singapore High Court ("SGHC"). The SGHC decided that the law determining arbitrability was the law of the seat (Singapore law), and that under Singapore law the dispute was arbitrable. The court also decided that the disputes fell under the scope of the arbitration agreement. As a result, the SGHC confirmed the anti-suit injunction against Mittal.

Ⅳ. The Decision of the Singapore Court of Appeal (SGCA)

1. Appeal to the SGCA

Now prevented from continuing with the NCLT Proceedings, Mittal appealed to the SGCA. Mittal made two alternative arguments before the SGCA, both essentially arguing that he should be allowed to pursue the NCLT Proceedings. His first argument was that the disputes (which he characterized as disputes for oppression and mismanagement), did not fall within the scope of the arbitration agreement. According to Mittal's argument, the arbitration agreement was governed by Indian law, and under Indian law claims for mismanagement and oppression were non-arbitrable since they came under the exclusive jurisdiction of the NCLT. His second argument was similar, arguing that whether a dispute was arbitration should be determined by the law of the arbitration agreement (which he argued was Indian law) and under that law the current disputes were objectively non-arbitrable.

Westbridge made two arguments in response. First, Westbridge argued that the law of the seat (Singapore law) should apply to the question of arbitrability and that under Singapore

law the disputes were arbitrable. Second, even if the law of the arbitration agreement were relevant, the law of the arbitration agreement as per the 3 stage test was actually Singapore law. In addition to arguing that the disputes were arbitrable, Westbridge also argued that the dispute fell under the scope of the arbitration agreement. Here Westbridge argued that if Singapore law applied then the arbitration agreement was capable of encompassing all disputes, and that even if Indian law applied, the disputes are contractual in nature and hence do not trigger the NCLT's exclusive jurisdiction.

The following issues thus had to be decided by the SGCA:

(a) Are questions of arbitrability determined according to the law of the seat or the law of the arbitration agreement?

(b) What is the law of the arbitration agreement in the SHA?

(c) What is the proper characterization of the disputes here (i.e. do they under the arbitration agreement)?

(d) If the disputes are arbitrable, should the Singapore court grant a temporary stay of the anti-suit injunction?

2. *What law determines arbitrability – the composite approach*

The SGCA decided that at the pre-award stage, the issue of arbitrability would be decided by the law of the arbitration agreement, *as well as* the law of the seat. The SGCA called this the "composite approach".

The SGCA was initially presented with two possible choice of laws for deciding arbitrability – the law of the seat, or the law of the arbitration agreement. Westbridge was able to refer to substantive supporting authority that the law of the seat should be replied. For one, arbitrability at the *post award* stage (e.g. in a setting aside challenge) was already decided by the law of the seat under the Model Law. Under Article 34 (2)(b) of the Model Law, an award may be set aside if the "*subject-matter of the dispute is not capable of settlement by arbitration under the law of this State*", referring to the law of the seat. It is thus intuitive for a party to expect that arbitrability will be decided under the same set of laws at all stages.

However, in the view of the SGCA, the concept of arbitrability was closely linked to public policy, or in other words whether the dispute is of a nature as to make it contrary to public policy for that dispute to be arbitrated. Bearing this in mind, to determine arbitrability it is necessary to consider the public policy of both the law of the seat, as well as the law of the arbitration agreement. The court considered the hypothetical situation of parties expressly choosing a specific law to govern the agreement – if under that law certain disputes were not arbitrable, then parties in essence would have agreed to those disputes also not being arbitrable.

The SGCA also seem persuaded by the view that the law of the seat would only kick in when an arbitration agreement comes into effect. Prior to that, for example, where there is dispute on whether the arbitration agreement even covers certain disputes, the law of the seat has not yet taken effect since there is dispute as to the application of the arbitration agreement itself. At this point the only law that could apply was the law of the arbitration

agreement to decide the arbitrability issue. However, this does not mean that the law of the seat is irrelevant to that issue. Rather, if the arbitration concerns an issue that happens to be non-arbitrable by the law of the seat, that would be an "additional" obstacle by reason of Article 34 (2)(b)(i) of the Model Law.

The SGCA was also motivated by some concerns of international comity, noting that "*whilst it is public policy in Singapore to encourage arbitration, such encouragement cannot override principles of comity or insist on the application of Singapore law to a substantive matter involving a foreign system of law expressly chosen by the parties*". While Singapore does generally have a "pro-arbitration" view, a Singapore court would not ignore public policy concerns of a foreign system of law when applicable.

Having decided on the composite approach, the next step was thus to decide what exactly was the law of the seat and the law of the arbitration agreement. For the law of the seat, this was relatively straight forward. Both Westbridge and Mittal seemed to accept that the words "*the place of the arbitration shall be Singapore*" in the SHA indicated that the seat was Singapore and that accordingly the law of the seat was Singapore law. Both parties also seem to have accepted that under Singapore law, the disputes were arbitrable.

3. What is the law of the arbitration agreement?

As for arbitrability under the law of the arbitration agreement, the SHA does not specify any express choice of law. The dispute resolution clause of the SHA is simply silent on the issue. As such, in order to find out what is the law of the arbitration agreement, the court applied the 3 stage test described above at II above. In applying the test, the court made observations about each stage.

In relation to the first stage (express choice), the SGCA noted that merely having a governing law for the main contract was not sufficient to be an express choice of law. Instead, there must be explicit language choosing a law for the arbitration agreement. In short, almost nothing less than "*the arbitration agreement shall be governed by the laws of Country A*" would amount to an express choice of law.

In relation to the second stage (implied choice), the SGCA stated that the starting point is that the law of the main contract will be the implied choice of law for the arbitration agreement. However this starting point can be displaced by the facts of the case. In particular if using the law of the main contract would have an impact on the effectiveness of the arbitration agreement, then the normal starting point can be displaced. In the current case, the SGCA noted that if Indian law was the law of the arbitration agreement, the parties' intention to arbitrate all disputes would be affected. The normal starting point was accordingly displaced.

In relation to the third stage (i.e., the law with the closest connection to the arbitration agreement), the SGCA views that this is "a straight forward exercise". The law of the seat would normally have the closest connection with the arbitration agreement since the law of the seat will govern the procedure of the arbitration including challenges to the tribunal or its jurisdiction and the award (if issued). Accordingly, in this case, the law of the seat (Singapore

law), was the law of the arbitration agreement. Thus, applying the composite approach, under the law of the seat *and* the law of the arbitration agreement (both being Singapore law), the disputes were arbitrable.

It is worth noting that the treatment of stage 2 in this case also appears to be an implicit approval of the "validation principle", discussed in *Enka v Chubb*. In short, this is an old common law principle of contractual interpretation that states that where there is ambiguity in the contract, an interpretation that upholds the validity of the agreement should be preferred. In the arbitration context, an interpretation of implied choice which upholds the validity of the arbitration agreement is likely to be preferred.

4. The proper characterization of the disputes

In addition to deciding that the disputes were arbitrable, the SGCA had to also decide on whether the commencement of the NCLT Proceedings was in breach of the arbitration agreement. Or in other words, whether Mittal ought to have brought his complaints to arbitration instead of the NCLT. On this issue, Mittal had attempted to argue that his disputes were in the nature of "oppression" and hence can only be brought to the NCLT.

The SGCA did not take the label of "oppression" at face value. Rather, the court examined the individual claims raised by Mittal to the NCLT. After examining each of the claims, the SGCA decided that practically all of the claims fell under the scope of the arbitration agreement (i.e. "*dispute[s] relating to the management of the Company or relating to any of the matters set out [the SHA]*"). In the light of this, the SGCA concluded that the commencement of the NCLT Proceedings was a breach of the arbitration agreement.

5. Whether a stay should be granted on the anti-suit injunction

Finally, the SGCA considered whether there were grounds for granting a limited stay on the anti-suit injunction to allow the Bombay and NCLT Proceedings to conclude. Even though commencing the NCLT Proceedings was in breach of the arbitration agreement, the SGCA in principle still had the discretion to impose a limited stay on the anti-suit injunction. One possible reason for this would be to avoid conflicting decisions between the Singapore courts, the Indian courts, and also the arbitration tribunal. Mittal argued for a limited stay to allow for the issue of arbitrability and the jurisdiction of NCLT to be resolved by the Bombay court, since otherwise he would be compelled to go to arbitration to obtain an award which an Indian court might refuse to enforce.

The SGCA decided not to grant a limited stay because (a) there was no clear evidence when the Bombay proceedings would end; (b) it was speculative to conclude that an arbitration would be fruitless due to the possibility of unenforceability – even if the arbitration were unenforceable in India, the arbitration process may have the effect of compelling parties to test their legal positions and assess their respective cases.

V. Practical guidance points for commercial parties and counsel

The full impact of the decision in *Mittal v Westbridge* is likely to take some time to be fully understood. That being said, there are a few immediate short term learning points.

Perhaps the most important take away is the clear expression by the SGCA that the ideal situation would be for parties to expressly state the law of the arbitration agreement. Hence, for a Japanese company seeking to invest into India, it would be prudent to select a law other than Indian law to be the law of the arbitration agreement and the law of the seat. For example, if parties agree for arbitration to be seated in Singapore then the law of the arbitration agreement should also be expressly stated as being Singapore law or laws of the seat of the arbitration (e.g. "*the arbitration agreement shall be governed by Singapore law*"). In addition to avoiding Indian law related problems such as the exclusive jurisdiction of the NCLT, choosing the same law for the law of the seat and the law of the arbitration agreement will also provide one system of laws to decide all pre-award issues.

Unfortunately, while this is a potential solution, it might not be feasible in practice. As it stands, arbitration clauses are only briefly considered during contract negotiations, leaving no real opportunity for in-depth consideration of the law of the arbitration agreement. The commercial realities of contract negotiations would also place any commercial party in an awkward position to (a) raise a discussion of possible future disputes at a time when parties are normally commercially optimistic; and (b) proposing amendments which deviate from the model clauses of arbitration institutions. There may be fears that any party proposing these changes may be forced to make concessions elsewhere. The fact that an express choice of law is left out from the model clauses of major arbitration institutions also does not help. Indeed, it is questionable if parties can realistically anticipate the types of disputes that might arise in the future and decide on an appropriate law of the arbitration agreement. It is hoped that the major arbitration institutions will update their model clauses with express references to a choice of law for the arbitration agreement.

In addition to the practical problems, while the solution of making an express choice of law will avoid arbitrability problems at the pre-award stage, parties will still have to deal with arbitrability at the enforcement stage. A Japanese company which expressly selected Singapore law as the law of the arbitration agreement would likely be able to force the other party to arbitrate, however once the award is obtained and enforcement is attempted in India, it is still possible that an Indian court would refuse to enforce the award since it considers the underlying dispute as not arbitrable. That said while an express choice of law would not solve the problem entirely, it will at least mitigate the risk of parties being affected by "dressed up" oppression proceedings before the NCLT. At very least, an express choice of law would be effective at preventing claims from going directly to NCLT at the start.

Finally, the judgment also provides a note of caution to parties who may seek to use statutory tribunals such as the NCLT in order to frustrate an arbitration. In this case, Mittal commenced the NCLT Proceedings as well as the Bombay Proceedings in an attempt to avoid the arbitration. While the SGCA was still willing to consider if a limited stay should be given, it

was unclear to the SGCA how long it would take for the Bombay Proceedings to conclude. Westbridge argued that it will likely take up to ten to twelve years for the Bombay Proceedings to fully conclude. While not fully accepting Westbridge's argument, the SGCA noted that it was uncertain whether the Bombay Proceedings would be resolved within the next year. This uncertainty was one of the factors that resulted in the SGCA declining to grant a limited stay since SGCA noted that any limited stay, if granted, should not run for longer than twelve months. Using domestic litigation proceedings to avoid an arbitration can thus backfire, particularly in jurisdictions where the court process may take a long time.

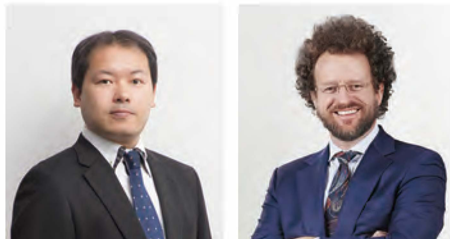
Ⅵ. Conclusion

Future Japanese companies seeking to invest in India should attempt as far as possible to expressly state the law of the arbitration agreement, and to choose a law other than Indian law. Doing so would at least prevent an Indian counter party from insisting on bringing the dispute before the NCLT. After all, the practical outcome of *Mittal v Westbridge* was that Mittal's original attempt to sue Westbridge before the NCLT was foiled. Instead, he was obliged to arbitrate the disputes instead. Japanese companies are likely to be in the same position as Westbridge, and hence should protect themselves accordingly. While in the short term there are likely to remain practical barriers to expressly stating the law of the arbitration agreement, it is hoped that in time as the issue gains greater prominence, it will also be a point discussed during the negotiation process.

The judgment in *Mittal v Westbridge* provides an important clarification of the law, as well as practical guidelines for commercial parties in the future. Since the law of the arbitration agreement is an essential component of any arbitration agreement, it is likely that the legal principles discussed in the case will be developed further in time to come. Also, in light of the status of Singapore as one of the most popular seats for international arbitration, it will be interesting to see if the laws of other jurisdictions will develop in a similar manner.

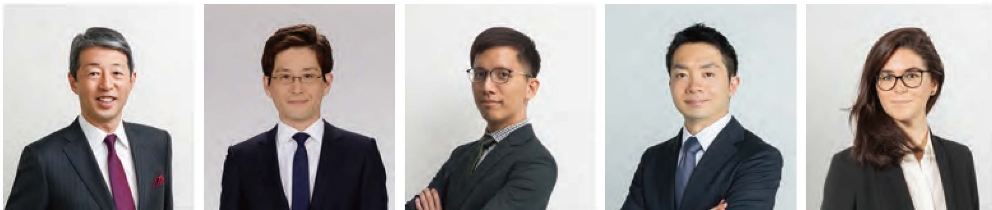
Anderson
Mōri &
Tomotsune

Trusted for International Arbitration



Aoi Inoue
Co-head

David MacArthur
Co-head



Yoshio Iteya
Partner, joined 2021
Tokyo/Beijing

Masahiro Yano
Partner, promoted 2022
Osaka

Leon Ryan
Partner, promoted 2022
Singapore

Shunsuke Domon
Partner, promoted 2023
Singapore

Morgane Guyonnet
Associate, joined 2022
Tokyo

Founded on decades of experience and know-how, AMT's international arbitration practice continues to grow, with new leadership and rising talent across the Asia-Pacific region.

Anderson Mōri & Tomotsune
Osaka Nagoya Beijing Shanghai Hong Kong Singapore Hanoi Ho Chi Minh City Bangkok Jakarta London
www.amt-law.com

Potential for a New Arb-Med in Japan

Momo-o, Matsuo & Namba
Attorney-at-Law, admitted in Japan and the State of New York
Junya Naito

Momo-o, Matsuo & Namba
Attorney-at-Law, admitted in Japan and the State of New York
Motomu Wake

Ⅰ. Introduction

Civil litigation in Japan is characterized by various features. One prominent feature is that a significant proportion of cases are resolved by settlement at court[1)] and judges lead settlement negotiations.[2)] Emphasis should be placed on the point that there are virtually no restrictions on how judges lead such settlement negotiations. First, judges are free to commence settlement negotiation "[i]rrespective of the extent to which litigation has progressed."[3)] Second, judges are able to discuss settlement of the case with parties not only through the so-called "joint session," in which judges discuss settlement of the case in front of both parties, but also so-called "caucusing," in which judges discuss settlement *ex parte*. Third, judges are able to disclose their "preliminary views" ((*zanteiteki*) *shinshō*, hereinafter referred to as "evaluation") of cases.[4)] When we explain this "Japanese style of settlement negotiation in litigation" to non-Japanese lawyers, many of them, especially lawyers from common law jurisdictions, seem to think that Japanese litigation is quite different from that of his/her jurisdiction.

Needless to say, there are critics of this "Japanese style of settlement negotiation in litigation" undertaken by judges.[5)] However, many users of Japanese civil litigation have a

1) See https://www.courts.go.jp/app/files/toukei/594/012594.pdf (in Japanese, last checked on March 2, 2023). According to this statistics, in 2021, over 35% of cases which were filed in the District Courts of Japan were resolved by settlement at court. In addition, over 15% of cases which were filed in the District Courts were withdrawn by plaintiffs. From our experience, it is presumed that a certain percentage of such withdrawal cases include "quasi" settlement cases, under which the parties make out-of-court settlement and thereby the plaintiff withdraws the Complaint.

2) Article 89 of the Code of Civil Procedure of Japan stipulates "[i]rrespective of the extent to which litigation has progressed, the court may attempt to arrange a settlement or have an authorized judge or a commissioned judge attempt to arrange a settlement."

3) See *Id*.

4) It is said that this Japanese practice was influenced by German practice. See Hidetoshi Yasui, "裁判官の心証開示の必要性 [Necessity of Judges' Disclosure of Evaluation of Cases]," (Hōgaku-Ronsō, Vol. 54, No. 4 (2010), p. 174).

favorable opinion of "Japanese style of settlement negotiation in litigation," as this practice in general has been and is carried out without opposition from practitioners and clients. For example, in case where we are retained by a client at the pre-litigation stage, the client often asks "[I]s it possible to negotiate a settlement after the litigation has been filed?" The client asks such question because he/she wants to leave open the possibility of a settlement, even after the case has been filed at court, and this indicates a high expectation for settlement negotiation opportunities even after the case has been filed. In addition, many clients request that settlement discussions proceed on the basis of the judges' evaluation of the case. This is because, in addition to the need to clarify what kind of judgment would be rendered in case the settlement negotiation breaks up and whether there is any rationality in making concessions as part of the settlement negotiation, there is also a need to "prepare" for future judgment in case a settlement is not reached. Parties are more likely to accept concession for settlement after the judges disclose their evaluation of the case, one reason being that Judges in Japanese courts are generally highly regarded. From this perspective, it seems that parties to a lawsuit, especially corporations, generally regard settlement negotiations within the litigation proceedings, including disclosure of evaluation and caucusing by judges (who will render a judgment of the case), as a positive system.

The above does not mean that there is no criticism of the approach taken by Japanese judges in leading settlement negotiations on an individual case. Many practitioners have experienced cases where there were problems with the approach. In addition, there are some debates concerning the method of settlement negotiation, such as "[t]o what extent should judges tell one party what another party said during caucusing?" or, "[i]f judges reveal their evaluation to one party, should they always have to reveal it to another party?" or "[t]o what extent should judges express their evaluation during settlement negotiation?"

Ⅱ. Settlement negotiation in arbitration proceedings

How is settlement negotiation treated in arbitration proceedings? The arbitration rules of many arbitration institutions specify the possibility of resolution by settlement. For example, Article 33 of the ICC Arbitration Rules, Article 26.9 of the LCIA Arbitration Rules, Article 32.10 of the SIAC Arbitration Rules, and Article 62.3 of the JCAA Commercial Arbitration Rules stipulate "Award by Consent."

On the other hand, the Arbitration Rules of the arbitral institutions mentioned above, with the exception of the JCAA, are largely silent on whether an arbitrator may be involved in settlement negotiations, and, if so, to what extent the arbitrator(s) may be involved to facilitate settlement negotiations. At most, Appendix IV (CASE MANAGEMENT TECHNIQUES) of the ICC Rules contains language describing techniques to "encourag[e] the parties to consider settlement of all or part of the dispute either by negotiation or through any form of

5) See Akira Ishikawa, "訴訟上の和解 [Settlement in Litigation]," pp. 79-85 (2012). Prof. Ishikawa states that judges who have power to render a judgment shall not act as a mediator, and disclosure of evaluation and caucusing are not permissible under Japanese law.

amicable dispute resolution methods such as, for example, mediation under the ICC Mediation Rules" and "where agreed between the parties and the arbitral tribunal, the arbitral tribunal may take steps to facilitate settlement of the dispute, provided that every effort is made to ensure that any subsequent award is enforceable at law."

However, if the scope of the arbitral tribunal' s possible involvement in settlement negotiations is not clear, the following prerequisite questions may arise:

(1) Should an arbitral tribunal move the case to mediation proceedings, or can the tribunal facilitate settlement negotiation within arbitration proceedings?
(2) Can an arbitral tribunal conduct caucusing?
(3) Can an arbitral tribunal disclose its evaluation of the case to the parties?

In addition, if it is not clear whether the information discussed or found in the settlement negotiation will be used for the arbitral award, the parties will not be able to actively participate in settlement negotiation. Such issues not only impede settlement negotiation, but also increase the risk of setting aside the arbitral award, rendered in the event of a breakdown of settlement negotiation.

Although there may be several reasons, but partly for the reasons given above, in international arbitration, settlement negotiations/mediation led by arbitrator(s) are not so common.[6)] In fact, the authors have had the experience of trying to conduct settlement discussions in arbitration proceedings with the parties' agreement to do so, but had difficulty in clarifying the specific procedure for the settlement/arbitration by arbitrator(s). However, this does not mean that there is no demand for settlement negotiation/mediation during arbitration proceedings. From our experience, clients, in particular Japanese corporations who are familiar with "Japanese style of settlement negotiation," often ask questions such as "[w]ill there be any settlement negotiation during this arbitration proceeding?" or "[t]he arbitration is coming to a later stage and we are ready to settle; will there be any settlement proposals from the arbitrator(s)?"

In addition, the importance of mediation has been reaffirmed internationally. The United Nations Convention on International Settlement Agreements Resulting from Mediation (the so-called "Singapore Convention"), which sets out the legal framework for making settlement agreements reached through commercial mediation enforceable, was adopted by the UN General Assembly in 2018. In 2023, Japan enacted an act for enforcement of the Singapore Convention and completed the parliamentary approval process to ratify the Singapore Convention.

---

6) However, some practitioners state that settlement negotiation is common in commercial arbitration. For example, a Japanese practitioner states that when he was appointed as an arbitrator, in almost all cases, he recommended settlement negotiation to parties of the cases. See Noboru Kashiwagi, "インタラクティヴ仲裁規則と仲裁廷の暫定的な考え方の提示について [Interactive Arbitration Rules and Disclosure of Arbitral Tribunals' Preliminary Views], (JCA Journal, Vol. 66, No. 6 (2019), p. 5).

Ⅲ. Potential for expansion of "Japanese-style settlement negotiation"

As noted above, there is a high demand for settlement negotiation in the course of arbitration proceedings, even where no special prior agreement, such as an Arb-Med-Arb agreement, has been reached by parties before the start of the arbitration proceeding. However, under the arbitration rules of many arbitral institutions, protocol for such settlement negotiation is not clear.

In this regard, the JCAA Commercial Arbitration Rules provide a relatively detailed protocol. Article 58.1 of the Rules provides that "[t]he Parties, at any time during the course of the arbitral proceedings, may agree in writing to refer the dispute to mediation proceedings under the Commercial Mediation Rules of the JCAA." The Rules also stipulate (i) although, in principal, an arbitrator assigned to the dispute shall not be appointed as mediator, if the parties agree in writing to appoint the arbitrator as mediator, the arbitrator can serve as an mediator,[7] and (ii) although, in principal, the mediator shall not conduct "caucusing," if the parties agree in writing to allow the arbitrator to conduct "caucusing," the mediator can do so.[8] In fact, this protocol seems to have been oftentimes used: One of the authors has actually experienced several JCAA arbitration cases which were referred to mediation proceedings under the above-mentioned Articles by the parties' agreement.

As arbitration is an "Agreement-based Means of Dispute Resolution,"[9] as long as parties of a case agree and the arbitrator' s integrity and neutrality for a possible arbitral award is guaranteed, the "dual role" of an arbitrator and a mediator, as well as "caucusing," need not be prohibited in arbitration filed in arbitral institutions other than the JCAA. However, in our experience, when arbitrator(s) would like to start settlement negotiation in the course of an arbitral proceeding, it is preferable for the arbitrator(s) to fully examine as to whether default rules exist and what agreement is required to deviate from the default rules if provided. *Minkowitz v. Israeli*,[10] a state court decision in the Superior Court of New Jersey, Appellate Division, clarifies this point. In *Minkowitz v. Israeli*, the court held that a person who acts as a mediator after being appointed as an arbitrator may not render an arbitral award after mediation has failed, unless both parties agree. Here, the court found that because the arbitrator/mediator rendered an award after guiding mediation, he "exceeded his powers,"[11]

7) Article 59.1 of the Commercial Arbitration Rules of the JCAA

8) Article 59.2 of the Commercial Arbitration Rules of the JCAA

9) Yasuhei Taniguchi & Isomi Suzuki, "国際商事仲裁の法と実務 [Law and Practice of International Commercial Arbitration]," p. 6 (2016).

10) *Minkowitz v. Israeli*, 433 N.J. Super. 111, 77 A.3d 1189 (Super. Ct. App. Div. 2013)

11) *Id. at* 148 citing N.J. Stat. § 2A:23B-23

12) Although *Minkowitz v. Israeli* is a case regarding family law, in *Pami Realty, LLC v. Locations XIX Inc.*, 468 N.J. Super. 546, 260 A.3d 852 (Super. Ct. App. Div. 2021), the state court stated that the holding of *Minkowitz v. Israeli* was not limited to family law cases.

13) *Minkowitz v. Israeli* is only related to New Jersey state law. However, U.S. federal law, 9 U.S. Code § 10(a)(4), stipulates the same grounds of setting aside of an arbitral award. Therefore, the above holding may be expanded to U.S. federal law.

and the award should be set aside.[12) 13)] In the court' s words, "[. . .] absent the parties contract to the contrary, once a neutral assumes the role of mediator, he or she may not assume the role of arbitrator."[14)] In this regard, the JCAA rules clarify such prior agreement, and the JCAA rules therefore seem to have certain advantages.

However, the JCAA rules are not perfect either, and do not clarify whether arbitrators may disclose an evaluation of the case in settlement negotiation. Although disclosure of evaluation may facilitate settlement negotiation, without rules, it is not clear whether arbitrators who also act as mediators may disclose such evaluation. If an arbitrator with a "dual role" discloses its evaluation in mediation, and the mediation fails, there is a possibility that the losing party of an arbitral award will later assert that such disclosure constitutes grounds for setting aside the award. Therefore, it should be made clear whether disclosure of such evaluation is permissible and, if so, under what circumstances.

In this regard, as long as the place of arbitration is Japan, it would be difficult to say that mere disclosure of evaluation of the case without consent of parties constitutes grounds for setting aside an arbitral award. If one argues that disclosure constitutes such grounds, it is unlikely that it would be affirmed by the Japanese court, because, as mentioned above, settlement negotiation (mediation) with such disclosure is quite normally conducted in Japan by Japanese judges, and Japanese courts would not regard it as grounds for setting aside the award under the Act of Arbitration of Japan.[15)] However, laws other than Japanese law may deem such disclosure without consent of the parties as sufficient grounds for setting aside the award. In this respect, careful review would be advisable in an arbitration proceeding in a place of arbitration other than Japan.

With the adoption of the Singapore Convention and the future increase in the number of ratifying countries, dispute resolution through mediation is likely to become more and more important. In such settings, the launch of a new "Japanese-style Arb-Med," under which arbitrators with a dual role attempt to facilitate settlement negotiation through caucusing and/or evaluation of the case, may be one method to increase the number of arbitration cases in Japan.

On the other hand, if it cannot be confirmed whether such style constitutes grounds for setting aside of arbitral awards not only under Japanese law but also other jurisdictions' law, arbitrators and parties will hesitate to use mediation by arbitrators as mediators. To facilitate such "dual-role mediation" when such mediation is effective for dispute resolution, it is necessary to conduct concrete and in-depth studies on the suitability of this method in the future.[16)]

---

14) *Minkowitz v. Israeli*, 433 N.J. Super. 111, 147-148

15) Although a party who requests setting aside will argue that disclosure of evaluation renders it unable "to [render a] defense in the arbitration procedure" (Article 44, paragraph 1, item (iv)), and/or "the arbitration procedure is in violation of Japanese laws and regulations" (item (v) of the same paragraph), we have not found any authorities that state "disclosure of evaluation" constitutes grounds for setting aside.

16) Although we found that some Japanese scholars and practitioners have conducted research, the results are extremely outdated (from ten to twenty years old) and the subject countries were limited, we believe that up-to-date research is necessary.

Our attorneys are globally recognized in
various areas including complex litigation and international arbitration,
general corporate and M&A, bankruptcy, antitrust,
labor and employment and intellectual property.

Our clients deem us "Truly Indispensable."

MOMO-O, MATSUO & NAMBA

https://www.mmn-law.gr.jp/en/

Kojimachi Diamond Building, 4-1 Kojimachi, Chiyoda-ku, Tokyo 102-0083 Japan
Tel: +81-3-3288-2080 Fax: +81-3-3288-2081 e-mail: mmn@mmn-law.gr.jp

Junya Naito, Managing Partner (Dai-Ichi Tokyo Bar Association)

Arbitrator Training and Assessment—How to Increase and Strengthen Resource of Arbitrators and ADR Practitioners

Co-Convener, The Chartered Institute of Arbitrators (C.I.Arb.), Japan Chapter
Executive Director, The Japan Association of Arbitrators (JAA)
Fellowship of The Chartered Institute of Arbitrators (F.C.I.Arb.) and Approved Faculty

Yoshihiro (Yoshi) Takatori[1)]

Ⅰ. Official implementation of C.I.Arb. arbitrator training and assessment courses supported by the Japanese Ministry of Justice

1) The Chartered Institute of Arbitrators (C.I.Arb), the largest global ADR training/assessment organization, has been conducting training and assessment programs for arbitrators, mediators, and ADR practitioners in Japan for many years. Last year [2022], the Ministry of Justice of Japan started supporting these programs, joining the Japan Association of Arbitrators (JAA) and the Japan International Dispute Resolution Center (JIDRC) to become another co-sponsor of these programs.[2)] These assessment/training courses aim not only to develop arbitrators who will become capable of handling international arbitration, but practitioners and legal specialists capable of upholding arbitration proceedings by international standards. The plan is to continue these programs and courses on an annual basis.

2) Last year, the Entry (Associate) level course was held in March, followed by the Intermediate (Member) course in July. A month before each course started, C.I.Arb., with official support from the Ministry of Justice, jointly conducted pre-courses to explain the purpose and outlines of those assessment courses with JAA and JIDRC. These courses were extremely well received. The available seats filled up the next day after invitations were sent to potential applicants. In addition, these courses did not only interest young practitioners; a number of experienced arbitrators and academics also participated. The Advanced (Fellow) course is planned to be held in or after 2025, and a pre-course for the Advanced Fellow course has also been scheduled to be held in advance of the actual course. Due to the COVID-19 pandemic and lockdown, last year's pre-courses and the Entry level course were held online, but the Intermediate (Member) course was held by a

1) Special Thanks to Eric Yao of DLA Piper for his kind assistance with this article.
https://www.dlapiper.com/en/people/y/yao-eric

2) "Pre-Course for International Arbitration Qualification Course" (24 February 2022), Ministry of Justice, online: <https://www.moj.go.jp/kokusai/kokusai06_00030.html>.

hybrid of in-person sessions by the Approved Faculty of Japan Chapter of C.I.Arb. and online sessions by the faculty of the East Asia Branch of C.I.Arb. located in Hong Kong. The hybrid Intermediate (Member) course included role plays and bilateral oral interactive assessments.[3)]

3) The credentials for the faculty lecturing each course are also scrutinized. Being an approved arbitrator is not enough, one must also be certified as an Approved Faculty through assessments under rigorous international standards approved by C.I.Arb. Currently, the training and assessment courses for arbitrators and mediators have been conducted with much help from Approved Faculty from overseas. However, in the future, we aim to further train, develop, and expand the pool of talented individuals to become Approved Faculty in Japan to ultimately conduct these courses by the Japan Chapter independently without substantial support from overseas.

Ⅱ. What is The Chartered Institute of Arbitrators?

1) The Chartered Institute of Arbitrators, established in 1915, provides education/training and assessment programs to ADR experts, such as arbitrators and mediators in international commercial disputes. It is the largest ADR training and assessment institution globally, being recognized internationally. C.I.Arb. currently has more than 17,000 members in more than 149 countries, and is recognized and registered as a non-profit charitable organization in the UK. C.I.Arb. continues to participate in charitable activities and serve public interest through its more than 42 branches and many committees, and is still expanding.[4)] In 1979, C.I.Arb. received a royal charter from Queen Elizabeth II of the United Kingdom in recognition of its achievements in the field of justice (dispute resolution) on a global scale. In accordance with the royal charter, to "promote arbitration and ADR as a means of dispute resolution," C.I.Arb. provides education/training and assessment programs to arbitrators and ADR practitioners active in countries around the world, as well as professionals who are expected to play an active role in the future. Through such endeavor, C.I.Arb, has grown into an organization consisted of highly qualified members with extensive experience and training in accordance with international standards. As a result, C.I.Arb. established a prestige reputation that is highly trusted by many practitioners, including lawyers, and academics, etc., who aim to undergo training and assessment to become certified by C.I.Arb.[5)]

2) The East Asia Branch (EAB), based in Hong Kong, is one of the largest branches in the institute, overseeing chapters in China, Indonesia, South Korea, Malaysia, the Philippines,

3) "Pre-Course for International Arbitration Qualification Course (Membership/Intermediate Level)" (13 June 2022), Ministry of Justice, online: <https://www.moj.go.jp/kokusai/kokusai06_00033.html>

4) “About Us” (last accessed on 24 April 2023) The Chartered Institute of Arbitrators, online: <https://www.ciarb.org/constitution/>

5) Yoshihiro Takatori, “Certification/Training Program and Accreditation System (Pathways) by CIArb” (24 February 2022) Ministry of Justice, online :< https://www.moj.go.jp/content/001370654.pdf>.

Singapore, Vietnam, etc., and the Japan Chapter as well. In addition, there is a high level of trust in the faculty of the institute for their comprehensive knowledge and experience on the latest international commercial disputes, including investment treaties in recent years. Currently, in addition to arbitrators and mediators, C.I.Arb also holds training/educational and assessment programs worldwide for users of arbitration to better support not only the lawyers but also all practitioners and academics involved in dispute resolution. Established in 2006, the Japan Chapter is an organization consisting of members called "Friends" connected through an email mailing list. The Japan Chapter is a non-profit organization, which has been chaired, in chronological order, by Peter Scott Caldwell (former head of the East Asia Branch), Yoshihiro Takatori (author of this article), Ian de Stain (head of the British Chamber of Commerce in Japan at the time), and Douglas K. Freeman (current chair), together with a foreign lawyer Haig Oghigian, Takatori, as co-convener. In addition to conducting training and assessment programs mentioned above, the Japan Chapter regularly invites prominent arbitrators and mediators from around the world to hold lectures, study sessions, and lunch/dinner events that serve as a gathering ground for participants to exchange information, intellectual knowledge, and to connect freely. Due to the COVID-19 pandemic, while we have refrained from holding these face-to-face meetings, we plan to revive these events because COVID-19 appears to be getting under control and social restrictions are quite lifted.

Ⅲ. 3-step assessment programs

1) The qualifications, certifications, and approvals granted by the C.I.Arb. training and assessment programs can be divided into three levels: Associate (Entry), Member (Intermediate), and Fellow (Advanced).
   i . The Associate (Entry) course is a one-day introductory course by approved faculty for those interested in dispute resolution, regardless of whether they have legal qualifications or practical experience. After obtaining the certification of completion, the participants will be eligible to register as Associates. Basically, the assessment is based on a marksheet-based test conducted at the end of the class.
   ii . The Member (Intermediate) course is for lawyers and other legal professionals with experience in dispute resolution. Only those who have taken enough advanced courses, gone through the evaluation process, which includes oral discussions, and successfully completed the required assignments will be certified and approved. As described later, this procedure consists of a two-way interaction process, including roleplaying, to ensure Members are properly trained and have the required skills and knowledge.[6)]
   iii . The Fellow (Advanced) course is the most advanced of the three levels of certification. An advanced certification is only awarded to experienced practitioners who have passed

6) Yoshihiro Takatori, “Authentication and Training Program by CIArb. - Intermediate (Membership) When taking the course” (13 June 2022), Ministry of Justice, online: <https://www.moj.go.jp/content/001376346.pdf>.

the Institutes Fellowship Assessment exam. As an endorsement, a Fellow is permitted to use the F.C.I.Arb. title.

2) Applicants certified by C.I.Arb. courses are expected to play a leadership role in arbitration and mediation. By adopting the three-step courses as the foundation in delivering ADR services, C.I.Arb. is leading international standards and guidelines of practice for arbitration, mediation, adjudication, and settlement of civil and commercial disputes, and is globally regarded as the most recognized training and assessment courses. Eligibility for these courses is not limited to lawyers with professional legal qualifications/admissions; non-lawyer professionals and specialists who are interested in and willing to participate in dispute resolution, such as architects and engineers. On top of that, those who can demonstrate that they understand the fundamental framework of international arbitration and procedural management of international arbitration based on such understanding are eligible to take the courses. Having the legal qualification and/or admission to practice law is deemed to have fulfilled the above knowledge/experience prerequisite, these applicants are, therefore, eligible to take the courses.

Ⅳ. Sessions & Methods of Assessment and Certification

1) The training and assessment sessions in each course, including those held in Japan, are all conducted in English, with the aim of developing the practitioners to be capable of meeting global standards in international arbitration practice. For the Associate (Entry level) course, no oral communication assessment is administered, and the participants are evaluated by multiple-choice questions after completing the whole day lecture. On the other hand, the assessment requirements for the Member (Intermediate level) course and the Fellow (Advance level) course are much more extensive. The assessment process consists not only of written examinations, but verbal exchanges (oral responses to questions) and role playing exercises in each session. Various elements in the participants' oral responses, including the content, the timing, and the structure, are assessed/evaluated by Approved Faculty to evaluate each participant's interactive communication skills and ability to communicate in English. This ensures the would-be arbitrators have the capability to conduct arbitration proceedings even if English is not one's native language. However, it is not a test purely on one's English capability, and does not demand language fluency and pronunciation of native speakers. In addition, as mentioned above, the Member (Intermediate level) and the more advanced Fellow (Advanced level) courses are not for the purpose of textbook learning, but instead, they provide a forum for participants to analyze and devise rational arguments to further their claims from different standpoints: that of an arbitrator, a claimant, and a respondent. This process applies to each session of the training programs. Unlike ordinary training or lectures where the participants may ask questions and expect answers from the faculty, these courses facilitate the participants to state their stance and explain their thoughts and ideas in a logical, coherent, and clear way in accordance with the role they are playing, citing applicable laws and evidence. The

participants play various roles, and are expected to respond to questions for each position, including rebuttal and countering the rebuttal. While role playing, it is desirable to cite and refer to the UNCITRAL Model Law and UNCITRAL Arbitration Rules as the global standard of arbitration practice, and the evaluation/assessment will be mainly based on applicants' ability to form logical arguments and claims based on the UNCITRAL Model Law and UNCITRAL Arbitration Rules, and communicate in English.[7)]

2) Materials to be used in the interactive membership course include Module 1 - International Arbitration Workbook - Law, Practice & Procedure, which will be distributed in advance and is a compilation of basic matters and knowledge of international arbitration. The participants are recommended to review the materials in advance. In addition, since the assessment process requires participants to be able to cite from UNCITRAL Model Law and UNCITRAL Arbitration Rule when appropriate. The UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006) and the UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013) are distributed in advance, and participants are encouraged to apply appropriate citations as soon as possible. On the day of the session, case study scenarios will be distributed to the participants. Based on the case study scenario, the faculty will ask the participants questions and conduct role-plays based on the case study scenario. Participants are expected to respond and interact not only from the standpoint of an arbitrator, but also as a claimant and a respondent and form arguments from their perspectives. Specifically, case study scenarios as described above will be distributed to participants in 10 or more sessions, and the participants will be required to answer questions on procedural and substantial legal issues.

3) The training and assessment courses are especially unique in a way that they are not only conducted entirely in English, but they also enable applicants to develop communication and response skills as arbitrators and practitioners through the two-way oral communication and dialogues embedded in the courses from the Member (Intermediate level) course onward. The training program enables arbitrators and practitioners to become familiar with international arbitration standards through practice, and the program evaluates and certifies not merely based on "written" skills but also through interactive conversations from role-playing activities. Overall, the program is highly regarded to be very logical, sufficient, and practical. Indeed, communications regarding arbitration proceedings are paramount and shall leave no room for misunderstandings. However, the program does not require participants to speak English at the same level of fluency as a native speaker. Since it is not a test solely for one's English ability, it is sufficient if the participant's instructions and directions in English are accurately communicated to and understood by the parties. We have to keep in mind and recognize, as international

7) MOJchannel, “Pre-course of the international arbitration assessment/certification course by The Chartered Institute of Arbitrators Japan Branch (co-sponsored by the Japan Association of Arbitrators and the Japan International Dispute Resolution Center)” (31 March 2022), online: Youtube <https://www.youtube.com/watch?v=2JmRT7WPIxc>.

standards, that many arbitrators and practitioners who proceed with international arbitration are not native speakers of English, but speak English as a "foreign language" and use English as a communication tool.[8)] Therefore, English native speaker's fluency and pronunciation is not mandatory nor required.

Ⅴ. Training course by Keio University

In addition to the assessment courses administrated by the East Asian Branch of C.I.Arb. with the support of the Ministry of Justice and sponsored by JAA and JIDRC, as discussed above, Keio University, as a Recognized Course Provider of C.I.Arb., also offers courses that allow students to obtain C.I.Arb. certifications, since 2019. While the above-mentioned assessment courses, especially from the level of Member (Intermediate) course and upward, are aimed for the primary purpose of assessment and evaluation of the participants and to certify the applicants rather than for education or providing training (but, of course, participants still benefit greatly substantial training and education through role-playing, etc. sessions during the program), students of the training courses offered by Keio University can comprehensively learn basic theory and fundamental concept of the arbitration proceeding via classroom lectures. Furthermore, once the students complete the course, they will be certified as C.I.Arb. Members (Intermediate level) without going through further assessment. The courses are open to lawyers and other qualified legal professionals, and those with work experience considered equivalent to a legal license, and are not limited to JD or LLM students attending Keio University's School of Law. This contributes to furthering the training of arbitration professionals in Japan.

Ⅵ. Increasing Approved Faculty

In order to maintain the high quality and level of training and assessments, the faculty who conduct training and assessments based on the above-mentioned international standards, in addition to obtaining certification for each applicable course, Approved Faculties are also required to undergo accreditation assessment procedures to be listed on the Approved Faculty List (AFL). Only those approved as Faculty and recorded on AFL can teach and/or assess these membership courses.

Irrespective of whether they are CIArb members or not, those who have the relevant qualifications and practical experience in the field of ADR in which they wish to train and/or assess can apply to be enlisted on the AFL.

Anyone interested in being listed on the AFL must submit the following documents for the review process:[9)]

8) MOJchannel, “Pre- course of International Arbitration Assessment Course (Membership/Intermediate Level) by The Chartered Institute of Arbitrators, Japan Chapter (co-sponsored by the Japan Association of Arbitrators and the Japan International Dispute Resolution Center) (June 13, 2022)" (8 July 2022), online: YouTube <https://www.youtube.com/watch?v=JueFzLo6MRc>.

i . A completed application form;
ii . A completed branch approval form from a C.I.Arb. branch, or a letter of recommendation;
iii . CV; and
iv . Evidence of relevant qualifications and practical experience (e.g., academic certificates, list of publications, etc.)

The main criteria against which all applications will be assessed are:

1. If the applicant wishes to teach and/or assess a course that leads to Associate or Member grades, they must be a C.I.Arb. Member or above; and if they wish to teach and/or assess a course that leads to Fellow grade, they must be a C.I.Arb. Fellow. Otherwise, they must be a commensurate non-Member who has formally agreed in their C.I.Arb. contract to abide by the object and values of C.I.Arb.;
2. They must hold appropriate academic and/or professional qualifications for the ADR disciplines for which they are applying to train and/or assessed;
3. They must have reasonable practical experience of private dispute resolution and subject areas for the course for which they are applying;
4. They must have satisfactory teaching and/or assessment experience for the role for which they are applying;
5. They must demonstrate an ongoing commitment to alternative dispute resolution principles;
6. They must agree to follow all Education and Training Regulations;
7. They must possess strong communication skills;
8. They must have excellent spoken and written English skills, where relevant. And the above application documents must support these criteria.

In addition, in order to achieve such high standards of faculty approval, applicants are required to complete a Shadowing process for provisional certifiers.

"Shadowing is key part of the process by which an applicant becomes a fully Approved Faculty member of C.I.Arb. Due to the current Covid-19 restrictions, virtual shadowing is being permitted for shadowing. The Director of the Education and Training or senior tutor will observe the applicant either delivering or assessing a course. When it comes to delivering training, the purpose of shadowing is so that the applicant can learn about the course structure and also be observed teaching.

The main elements of this process are as follows:

1) If it is a Pathway module, the applicant will need to shadow on all the tutorials (and not just one), to be fully approved;
2) The senior tutor will have to prepare and involve the applicant in teaching in all of the tutorials in order to assess their teaching proficiency, their understanding of the programme and also their ability to deliver teaching face to face effectively;

9) Join CIArb. Approved Faculty List (AFL) by C.I.Arb.

3) A shadow report will need to be completed for each session and be returned to the Director of Education and Training;
4) For virtual courses, the senior tutor will have to explain the reason why they believe that the applicant will be able to teach face to face based on what they have observed virtually;
5) As courses run now virtually, provisionally approved faculty members will also need to receive virtual classroom training and be assessed, on their virtual delivering skills (this will be done once steps 1 to 4 are completed)".

Through the process described above, faculty shall be listed as approved and must be capable of giving lectures and provide assessments in accordance with the international standards. Securing and fostering such resources is also an urgent task in support of the training of arbitrators and arbitration practitioners. Currently, while there are very few Japanese faculties listed, including the author, we have already implemented the above-mentioned Shadowing process in each course held last year [2022] and in each course being held this year [2023]. We are working to increase the number of Approved Faculty. In order to promote Japan and Japan-related arbitration, we should aim not only to promote Japan as the "place of arbitration," but also to promote international arbitration in a broader sense, for interests of Japanese companies and Japanese practitioners. Rather than aiming to promote "Japanese" arbitration in a limited sense, it is necessary to secure and develop resources by training arbitrators and arbitration practitioners who can take an active role in practice, including in foreign countries/jurisdictions[10] in which foreign countries are the "place of arbitration." To this end, there is an urgent need to expand the number of Approved Faculty who can take a leading role in accomplishing this vision.

Ⅶ. Future prospects

As mentioned above, it is paramount to secure and develop human capital and resources in accordance with international standards. With support from the Ministry of Justice, C.I.Arb. has been able to implement and expand its programs, and we are aiming to enhance our endeavor even further. In addition, we plan to incorporate other arbitration and mediation institutions/associations beyond C.I.Arb., including foreign ones, and offer various training programs and seminar sessions (including online seminars) in Japan to train and develop mediators as well as arbitrators.[11] In particular, considering the expansion of the hybrid arbitration and mediation practice in recent years,[12] we would like to bring these training

10) Under JCAA arbitration, which effectively administrates civil law-type interactive arbitration and a highly efficient combination of arbitration and mediation, though there have been yet no cases the seat of which is foreign jurisdiction/state, it may be meaningful to promote the use of the JCAA Arbitration Rules and the combined operation of arbitration and mediation, for example, when Japanese companies are involved in arbitration overseas.

11) Yoshihiro Takatori & Chieko Tsuchiya, *International Arbitration Training* (Horitsu no Hiroba, 2017).

12) See the JCAA Commercial Arbitration Rules, at arts. 58 & 59, on the method of appointment of the mediator and correspondence with the parties, with the combined proceeding/operation of arbitration and mediation in mind, online: <https://www.jcaa.or.jp/en/arbitration/rules.html>.

programs that deepens the understanding of ADR to the parties involved, including the mediators, the lawyers and practitioners, as well as in-house lawyers of the parties to the mediation. The Japan Association of Arbitrators and C.I.Arb. are actively discussing those plans and possible projects for the future.

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, ICC, SIAC, KCAB, JIMC-Kyoto and SIMC. 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, compliance investigation and cyber-securities, and corporate/business rehabilitation related matters and projects.

Shinichiro(Shin) Abe
Attorney at law
Arbitrator

Yoshihiro(Yoshi) Takatori
Attorney at law admitted to N.Y. and Japan
Arbitrator/Mediator, F.C.I.Arb.

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.

On Dual Conciliation by Two Conciliators

Attorney-at-law, a member of the Tokyo Bar Association.

Shuji Yanase

I. Introduction

The Mediation Rules of the Japan Commercial Arbitration Association (JCAA) permit an agreement to appoint two conciliators (Article 17, para 3). In line with the number of judges or arbitrators, the number of conciliators is normally one or another odd number with a view to facilitating determination by way of majority.[1)]

For what purposes would the parties agree to appoint two conciliators? Would the conciliation work well with two conciliators? There will be difficulties both in its proceeding to be presided over by the conciliators and in their reaching an agreed-recommendation for settlement terms. Would there be any merits in making the conciliators two at all? When a disputing party is about to propose, or agree upon, the conciliation with two conciliators, they will have to answer these questions.

In 2021 and up to 2022, I was asked to serve as one of the two conciliators in a Dual Conciliation for a commercial dispute case. The experience has prompted me to develop my thoughts on the subject of this essay. The experience provided a great contribution to identifying issues to be considered with respect to the Dual Conciliation. It must also have had some decisive influence in developing my thoughts and opinions. It should be noted, however, that this essay does not purport to report on any facts or circumstances with respect to the particular commercial conciliation case.[2)] The experience, together with all such facts and

1) The English term "Conciliation" or "conciliator" is used in this essay, as English translation of the Japanese original term of "*CHOTEI*" or "*CHOTEININ*". The Japanese term "*CHOTEI*" includes both Mediation and Conciliation (see III 1. (5) below). In "Mediation", mediator(s) normally act as intermediary and focus the proceeding on empowering the parities to settle. The English term "Conciliation" is used to indicate the procedure where conciliator(s) take a positive leadership to overcome animosity. "Dual Conciliation" in this essay is the name given to a Conciliation where the two disputing parties each appoint one conciliator and ask the two conciliators to submit their joint recommendation of settlement terms. See V.4. below.

2) JCAA Mediation Rules Article 23 provides to the effect that all parties relating to the procedure, including conciliators, shall not, with limited exceptions, disclose to any third parties any facts, circumstances or settlement process or terms.

circumstances, has been digested in my thoughts and incorporated into my opinions expressed in this essay.

Ⅱ. Needs and Risks in Dual Conciliation

The needs for Dual Conciliation are obvious. The parties have failed to resolve disputes by agreement, and have come to decide to try settlement by way of conciliation but are unable to agree upon conciliation by a sole conciliator. In the course of the disputes, the parties have accumulated intensified distrust and dissatisfaction to each other so that it is now difficult for them to believe that a sole conciliator will fully understand the respective positions of the parties to lead them to resolution of their disputes. The disputes are so severe that the parties would have to resort to the court for resolving the disputes. Nonetheless, they would like to take the last chance to amicably resolve the disputes by conciliation. Such circumstances will be a typical case where the Dual Conciliation is chosen.

Each of the parties wishes to appoint one conciliator and seeks the joint recommendation of settlement terms of the two conciliators. Upon receiving their joint recommendation of settlement terms, the parties are willing to examine the same. In this way, the parties wish for the possibility of settlement by agreement. In these circumstances, we see the needs for Dual Conciliation.

The Dual Consolidation has its own risks, unknown to the conciliation with one or other odd number of conciliators. It is impossible for the Conciliation Panel to determine any matter by way of majority of the two conciliators. The two conciliators may fail to agree upon the general policies or strategies for the conciliation, individual conciliation methods, or the terms of settlement to be recommended to the parties, or upon any other steps of conciliation. Having failed to agree upon a joint recommendation of settlement terms, the two conciliators may decide to submit to the parties their respective recommendations of settlement terms which are different from each other. There still remains a possibility for the parties to agree to settle the disputes by negotiation in the Dual Conciliation procedure with certain settlement terms which are different from either of those suggested by the two conciliators, but the parties and conciliators will see, in these circumstances, the fatal risk of failure of the Dual Conciliation. These are inherent risks associated with the Dual Conciliation.

Ⅲ. Constitution of the Dual Conciliation Panel

1. Choosing the Dual Conciliation

The number of conciliators will be decided, depending upon the features of disputes, by the strategies of the parties who elect conciliation for resolution of their disputes. In case of conciliation of disputes between two parties, the Dual Conciliation will be chosen for some or multiple reasons as set forth below.

(1) The situation of disputes requires the Dual Conciliation

The understanding of the case by the two parties is so much fundamentally different in major respects that the parties will be unable to come closer to settlement by their own mutual negotiation. They would be able to come closer to settlement only with the benefit of participation and discussion of the two conciliators, each with full understanding of the position of the party appointing the same conciliator. The parties regard the case that way, and therefore they cannot entrust settlement of the case to the conciliation by a sole conciliator. Should either of the disputing parties choose conciliation by a sole conciliator, the situation of the disputes is such as would bring about the critics of the same party that they have failed to fulfill their duty to exercise reasonable efforts to resolve the disputes by settlement.

The disputing parties will normally ask the two conciliators to submit, to the extent possible, such one and the same settlement terms as have been agreed upon by the two conciliators. The settlement terms agreed by the two conciliators will strongly urge the parties to settle the case with the amount of settlement money in the settlement terms. In the Dual Conciliation, the disputing parties appoint two conciliators and expect the two conciliators to reach their agreed-settlement terms. In practice, however, the conciliators may not be able to reach an agreement, and the Dual Conciliation may result in submission of two different settlement terms. The disputing parties could continue their endeavor to settle the case by further negotiation with the benefit of these two different settlement terms.

In case two conciliators are chosen, would it be sometimes appropriate for the disputing parties to tell to the conciliators that they may submit their respective and different settlement terms? Whether the two conciliators are requested to submit one and the same settlement terms or are permitted to submit their respective and different settlement terms will have material impact on the mind and behavior of the two conciliators in the conciliation. In case where one and the same settlement terms are requested, each conciliator recognizes that certain compromise will be necessary in the discussions with the other conciliator; in the latter case where different settlement terms are acceptable, the primary concern of each of the two conciliators would be preparation of his or her own recommendation for settlement terms. As for the conciliators, resolution of the disputes by a successful settlement is the pivotal concern in the former case, whereas in the latter case, while a successful settlement being the purpose of the conciliation, preparation of their respective own satisfactory settlement terms will be their important task. In order to ensure that the two conciliators will pay the utmost attention to resolution of the disputes by settlement and will exert their best efforts for that purpose, it is essential for the parties to request one and the same settlement terms.

(2) Limit of conciliation expense budget

Supposing the conciliation by three or more number of conciliators, each conciliator could have different view with respect to disputing issues, but the pending disputes may not justify to cause the disputing parties to bear the expense for receiving, in the conciliation, different opinions of such multiple number of conciliators. Two conciliators are sufficient. Resolution by court is always open. Therefore, the budget for conciliation has certain limit.

(3) Expectation for mutual discussion and agreement between the conciliators

The parties wish to receive recommendation for settlement which has been agreed by the two conciliators as a result of their discussions, rather than receiving a recommendation determined by way of majority. With respect to such disputes as were unable to be resolved by negotiation of the disputing parties and their attorneys, they wish to have discussion and conciliation, at the Dual Conciliation, between such parties and attorneys, together with the two conciliators appointed by the disputing parties, and wish to receive such recommendation of settlement terms as will be discussed and agreed by these two conciliators. By receiving the joint recommendation of settlement terms, the disputing parties wish to seek agreement for settlement. The proposed settlement terms agreed by the two conciliators should be their conclusion which they have reached as a result of their thorough examination of the disputes in their various aspects. The fact that the two conciliators have reached an agreement, by itself, should have a material impact on the disputing parties to move forward to settlement.

Mutual discussions between the two conciliators with a view to reaching their agreement on settlement terms should be the value for the disputing parties in the Dual Conciliation. Subjects of discussions between the two conciliators will be extensive. Major issues are set forth below.

(a) Amount of settlement money

In the Dual Conciliation, the amount of settlement money cannot be determined by way of majority and must be agreed by the two conciliators. They must reach an amount satisfactory to both of them, through their detailed discussions and mutual compromise. The agreed amount of settlement money will be the most important item in the settlement terms, and will at the same time be decisive on the reasons for recommendation of settlement. The disputing parties will normally have expressed in the Dual Conciliation that they wish the two conciliators reach an agreed amount of settlement money. In case the two conciliators have nevertheless difficulty in agreeing upon the amount of settlement money, the two conciliators should take the situation serious before concluding that they are unable to do so. The two conciliators should once again consider thoroughly and discuss with each other whether or not they have fulfilled their duty as conciliators notwithstanding their failure to agree upon the amount of settlement money.

If the amount of settlement money cannot be agreed upon by the two conciliators, they will, at the conciliation session, inform the disputing parties to that effect and listen to their opinions, and the two conciliators will decide, upon mutual consultation, how to proceed with the procedure thereafter of the Dual Conciliation.

(b) Reasons for the recommendation of settlement terms

The two conciliators are required to discuss with each other, with a view to reaching an agreement not only on the amount of settlement money but also on such reasons for recommendation of the agreed amount and other settlement terms as are to be presented to the disputing parties. Discussions of the two conciliators for the purpose of reaching an agreement on the amount of settlement money will be held, each with his or her own reasons for settlement recommendation in mind. The two conciliators' reasons for their respective

amounts of settlement money which are proposed to each other, may be similar but will not be identical in detail. Looking into the reasons in detail in the discussions, it is quite natural that they find that not only issues considered by one of the conciliators but also judgments on such issues are different from those issues and judgments which the other conciliator has in mind.

The reasons for recommendation of settlement terms will, to the extent agreeable to the two conciliators, be accompanied by the Conciliation Panel' s reply to major allegations of the disputing parties. They are, at the same time, expected to offer such reasons as the disputing parties may wish to utilize in formulating their internal reasons to accept the recommendation.

Fortunately, the conciliation is a method used for facilitating the settlement of dispute by agreement. While the judgment of a conciliator may contribute to settlement, it is not the major purpose of conciliation. It is the serious and enduring discussions to be held between the two conciliators with a view to reaching their agreement that are vitally important for the disputing parties in the Dual Conciliation. Through and by virtue of such discussions, a fair and reasonable settlement is sought.

(4) Risks of the disputing parties arising from the failure of the two conciliators to give their joint recommendation of settlement terms

In case the two conciliators should fail to give their agreed recommendation for settlement terms, the disputing parties must have spent the time and expense in the conciliation for settlement of dispute, but they would not see any new and fresh dispute risks arising directly as a result of the failure. They are therefore prepared to take this risk of the two conciliators' failure to give their joint recommendation of settlement terms.

Even if the two conciliators have failed to provide the disputing parties with a joint recommendation for settlement terms and the possibility for settlement by conciliation by these conciliators has become remote, the disputing parties may still have the opportunity to settle their disputes in the remaining procedure of the conciliation. When a joint recommendation for settlement terms is not agreed upon by the conciliators, the applicant for conciliation and the other disputing party will be informed to that effect and may wish to take the situation into their account so as to determine whether they should continue their efforts to settle or resort to the court. They may ask the two conciliators to submit their respective recommendations for settlement terms so that they may resume their settlement discussions, referring to and benefitting from such recommendations. The amounts of settlement money and reasons for the settlement terms presented by the conciliators to the disputing parties will clarify, for the disputing parties, each conciliator' s understanding of the case and the difference as to how the two conciliators view the disputes. They will tell to the disputing parties how the same disputes look differently to the two conciliators. They will make the disputing parties understand the disputes better than before and thus can empower settlement of the disputes. The Dual Conciliation has the ability to assist and encourage the disputing parties in settlement of the disputes even in case where the two conciliators fail to give the joint recommendation of settlement terms.

(5) Freedom and social value of conciliation

It is the important feature of conciliation that the entire process of procedure of conciliation, from the outset to conclusion, is left to the freedom of the disputing parties and conciliators. The disputing parties are not bound by the judgment of conciliators. They are free not to accept the recommendation of settlement terms. The conciliation is different in these respects from dispute resolution by court or arbitration, in which the judgment by the third party (the court or the arbitration panel) is sought. The freedom of conciliation stems from the fact the that the conciliation is a method of dispute resolution with and subject to an agreement between the disputing parties and is private in nature in the sense that it is not open to the public.

The *CHOTEI* in Japan has a very long history as method of dispute resolution where settlement is sought by agreement of disputing parties with assistance by *CHOTEININ* (mediators/conciliators) but in many cases with the involvement of courts[3)]. It has an established social value in Japan. The established social value is important particularly in case where the disputing party or parties are corporation(s). Such social value will make their internal decision on conciliation easier. In general, a settlement made in conciliation by acceptance of the recommendation of settlement terms will be accepted by shareholders and other stakeholders as a reasonable settlement of disputes.

In view of consideration of the aspects as discussed in 1. above, it is noted that there could be good reasons for two disputing parties to choose the Dual Conciliation by two conciliators.

2. Appointment of the two conciliators

Appointment of the two conciliators can be made pursuant to the rules of the institute selected by the applicant for conciliation, such as JCAA, or by one of the two methods of appointment, namely (1) Appointment of one conciliator by the applicant for conciliation and the other conciliator by the other disputing party, and (2) Appointment of each of the two conciliators by agreement of the applicant and the other party.

Article 7, paragraph 2 of the JCAA Mediation Rules provides for the method in (1) above. Appointment of the two conciliators for the Dual Conciliation, when the situation of disputes is severe, will be made by the method in (1) above.

There could be a case where each of the two conciliators is appointed by agreement of the disputing parties as in (2) above. In case the purpose of conciliation is, among others, to achieve a reasonable settlement by way of analysis and understanding of multiple aspects of the case to be developed by the two conciliators, the disputing parties may be able to appoint the two conciliators by agreement. The case would be such that the mutual distrust of the two disputing parties is not a major reason for the disputes.

---

3) In and after 1920's, a series of conciliation statues were enacted in Japan to deal with a rising number of disputes by *CHOTEI*, covering those on housing, farm tenancy, or mine pollution, as well as commercial, labor or other classes of disputes. After World War II, these statues were consolidated into other statues, to keep *CHOTEI* being actively used. See "The history of Japan's ADR" (Shuji Yanase, Columbia Journal of Asian Law Vol.26 No.1 Spring 2013 pp 40 to 44).

3. Appointment of conciliators who are suitable for the purpose of the Dual Conciliation

Supposing a case where the Dual Conciliation has been chosen for settlement and each of the disputing parties is to appoint one conciliator, what would be the criteria by which the disputing parties select their respective conciliators? What do they expect when selecting a conciliator? Their expectation will form the basis of the criteria for appointment.

(1) Precise understanding of the disputes:

The disputing party wishes the conciliator appointed by them to well understand their own allegations about the dispute and to explain that understanding precisely and sufficiently to the other conciliator. This is the first requirement for appointment. Depending upon the nature of dispute, this will be the primary requirement.

(2) Leadership and flexibility:

The conciliator appointed by the disputing party shall exercise an appropriate leadership, not only in the discussions in the conciliation sessions but also in the discussions between the two conciliators, and shall also apply such flexibility as would smoothly draw and clarify different views to find an appropriate agreement. Such leadership and flexibility are the second requirement.

The conciliator appointed by the disputing party is expected not only to make the discussions advance in the conciliation sessions but also to find and reach settlement of the disputes by and with the benefit of the discussions between the two conciliators. The conciliator is expected to find and agree with the other conciliator upon a recommendation for settlement terms which is capable of being accepted by the two disputing parties, and to submit the recommendation to the disputing parties jointly with the other conciliator. With a view to satisfying these expectations, the conciliator will apply his knowledge and experience in discussions with the other conciliator. The conciliator is expected to seek such settlement proposal as he or she will believe fair and appropriate in his or her own good judgment, and then to listen to opinions of the other conciliator on the proposal and to reconsider the proposal, and to repeat the forgoing process multiple times. The conciliator who is going to be appointed by the disputing party is expected to be equipped with the independent intelligence, leadership and flexibility to successfully undertake these processes.

(3) Comprehensive trust

The conciliation is generally quite flexible in its proceeding, and furthermore in its selection of issues and judgment thereon to constitute the recommendation of settlement terms. The standard for judgment is “fair and reasonable” in light of law and common sense. The unpredictability due to the flexibility of conciliation will be intensified in the Dual Conciliation, where there are two conciliators. For each of the disputing parties, fair and reasonable judgment of the conciliator to be appointed by it, which should be expressed in the entire course of conciliation, thus becomes important. Accordingly, the disputing party shall have the comprehensive trust in such judgment of the proposed conciliator. This will be the criterion and requirement for appointment. The disputing party has severe disputes which the disputing parties are unable to settle by themselves, and is about to take a chance, before going to the court, to settle the disputes by the Dual Conciliation. It will be the last opportunity to resolve

the disputes by the will of disputing parties. It is just and proper that the disputing party should require their comprehensive trust with the conciliator being appointed by it. In other words, as a matter of practice, the disputing party will be able to apply for, or agree upon, the Dual Conciliation, only if it has a proposed conciliator to whom it can entrust the duty with such comprehensive trust.

4. Fairness and independence of the Dual Conciliation

As stated in 3. above, the disputing parties will appoint the two conciliators of the Dual Conciliation, each appointing one conciliator. The conciliators are not appointed by agreement of the disputing parties. As a result, each conciliator will be unable to deny that he or she is cognizant of the disputing party who has appointed the same conciliator. The conciliators understand that they are expected to fully understand in detail all the materials and allegations presented by the disputing parties, but the conciliator appointed by a disputing party should also be aware that it is indispensable for the conciliator to carefully examine and understand the allegations and materials of that appointing party. Will the foregoing situation of the conciliator arising from his or her recognition concerning the appointing party subsist, due to lack of the third conciliator, from the beginning to the end of the proceeding of the Dual Conciliation?

As the Conciliation Panel has no third conciliator, the Conciliation Panel will be unable to secure its fairness and independence by participation of the third conciliator. Could the Dual Conciliation be recognized as a fair and independent mechanism for dispute resolution? These questions may arise with respect to the Dual Conciliation.

Applying common sense and experience, one may think that the Dual Conciliation has two conciliators and their recognitions on their respective appointing parties will be offset against each other and fairness and independence of the Dual Conciliation could not be a matter of concern. For the sake of cautiousness, however, let us examine the questions set out above. I would like to argue that it is reasonable to conclude that the appointment of conciliators to constitute the Conciliation Panel of the Dual Conciliation, by itself, does not jeopardize the fairness and independence of the individual conciliator or the Conciliation Panel of the Dual Conciliation. The reasons for this view are set forth below.

First, fairness and independence of individual conciliators are examined. The recognition of the two conciliators toward their respective appointing parties is a result of appointment by the disputing parties. In case of such panels for out-of-court dispute resolution as are provided by law, such as arbitration or mediation/conciliation panel, appointment of a specified number of the panel members is permitted to be made solely by each of the disputing parties. This appointment system is based on the judgment that it will make the method of dispute resolution reflect the will of the disputing parties and thus make it a desirable out-of-court dispute resolution method with an increased private flavor, and, at the same time, on the belief that the appointment by disputing parties by itself will not adversely affect the fairness and independence of arbitrator or mediator/conciliator. Likewise, it would be reasonable to consider that the appointment by disputing parties will not, by itself, affect

the fairness and independence of the conciliators of the Dual Conciliation.[4)]

The fairness and independence required by law in respect of the out-of-court method for dispute resolution are those from the view of disputing parties and in the eyes of the society at large. In this regard, the conciliator's internal mind is not taken into consideration unless it is recognized externally. The internal recognition of conciliator concerning the appointing party arising from the appointment, as stated above with respect to the Dual Conciliation, cannot benefit from the opportunity to be adjusted by discussions with the third conciliator. However, it should be diluted gradually as the conciliation sessions proceed, examinations of the case advance, and discussions of the two conciliators take place in a number of occasions. Taking these into consideration, the internal situation of conciliator is not beyond what is normally expected to occur in the mind and, therefore, externally should not threaten the fairness and independence of the conciliator.

Second, the fairness and independence of the Conciliation Panel is examined. The decision of Conciliation Panel composed of three conciliators will be made by way of majority. If a conciliator appointed by one of the disputing parties is of the opinion different from that of the other two conciliators, the same conciliator will become minority and cannot distort the decision of the Conciliation Panel. In case of the Dual Conciliation, agreement of the two conciliators is required for decision of the Conciliation Panel. Neither of the conciliators has the authority to make a decision of the Conciliation Panel. It is, therefore, obvious that neither of them is able to distort the decision of the Conciliation Panel. In the event that the two conciliators cannot reach an agreement, no decision of the Conciliation Panel is made and there can be no doubt as to the fairness and independence of the Conciliation Panel.

Ⅳ. Discussion and Agreement of the Two Conciliators

All proceedings in the Dual Conciliation are carried out in accordance with agreement of the two conciliators.

1. Conciliation process

Conciliation process takes place and advance in front of the disputing parties. Each of the conciliators and the Conciliation Panel will be required to pay, at every stage, careful attention to maintaining the fairness and independence of procedure.

(1) Presiding Conciliator

In case the two conciliators are appointees of the disputing parties, one by a party and the other by the other party, it will not satisfactory to the disputing parties if the two conciliators elect, by their agreement, either conciliator to preside over the proceedings. It will be satisfactory to the disputing parties if the two conciliators take the position of Presiding

4) The JCAA Mediation Rules provide, in paragraphs 2 to 5 of Article 15, for "the duty of the conciliator or the person who has been requested to become conciliator to review and disclose the "facts" that shall cause doubt, on the part of the disputing parties, about fairness or independence of such conciliator or person". The appointment itself is not regarded as the "fact" falling under these provisions.

Conciliator in turn for each Conciliation Session. It is advisable to announce to that effect to the disputing parties at the first Conciliation Session.

(2) Discussion between the two conciliators to prepare for the procedure at the forthcoming Conciliation Session and confirmation prior to such Conciliation Session

It would be desirable for the two conciliators to discuss, agree and confirm, prior to each Conciliation Session, the procedural steps at the forthcoming Conciliation Session.

(3) Advance in proceeding at the Conciliation Sessions

With respect to the proceeding at each Conciliation Session, the conciliator who does not act as Presiding Conciliator should be encouraged to intervene at any time in the proposed or ongoing steps of proceeding to freely express his or her opinion. This practice would be desirable, as it makes it obvious to each of the disputing parties that the conciliator appointed by it constantly participates, equally with the other conciliator, in the decision of proceedings.

(4) Discussion before the two disputing parties or in caucus

In the Dual Conciliation, in which severe disputes are discussed for settlement, the dialogue between the conciliators and either of the disputing parties, whether at the presence of the other disputing party or in caucus, is sometimes useful for making progress in settlement, rather than the argument among the disputing parties and two conciliators in the Conciliation Session.

As the conciliation process proceeds, the two conciliators must discuss with each other and agree to decide, from time to time and not only prior to but also during any Conciliation Session, whether and to what extent and at which stage the conciliation should be held by discussions in person or in caucus. The decisions should be made upon agreement between the two conciliators, after hearing opinion of the disputing parties, and with agreement of the disputing parties.

(5) Comprehensive prospect for the conciliation process

The agreement between the two conciliators concerning the proceedings of conciliation, as discussed above, can be made upon their quick exchange of opinions during the Conciliation Session. But in order to make it happen, it would be necessary to ensure that the two conciliators have discussed and fully exchanged their views to reach an agreement in advance upon the comprehensive prospect for the conciliation process. The comprehensive prospect for the conciliation process should have been discussed and agreed upon, largely based upon the conciliators' respective prospects for settlement of the case, inclusive of those on all issues and steps.

(6) Conclusion of negotiation on the settlement proposals of the disputing parties

In the negotiation of the amount of settlement money or other important issues, the disputing parties may submit their respective settlement proposals to the other party and the Conciliation Panel, and, in expectation of compromise, may further submit their revised proposals and may repeat this process. At which stage should this process be concluded, leaving the matter to the hands of the conciliators? After discussions with the disputing parties, the two conciliators must decide upon this question in view of the situation of conciliation discussions.

It is obvious from (1) through (6) above that the Dual Conciliation is, in its entire process, subject to certain tension which does not exist in case of the conciliation by the sole conciliator. The process should be taken with the agreement of the disputing parties, and requires the prior agreement of the two conciliators. The principle which underlies the requirement for such agreement or the purpose for requiring such agreement is that such agreement will ensure that the conciliation will proceed in accordance with a fair and reasonable procedure. With sharing this principle and purpose, the two conciliators should be able to agree with each other and to secure the agreement of the disputing parties.

2. Recommendation for settlement agreement

In the Dual Conciliation, the two conciliators will be requested by the disputing parties to issue, in their names, the joint recommendation of settlement terms.

In order to issue the recommendation for settlement agreement, the two conciliators must agree upon the settlement terms, particularly on the amount of settlement money, as well as the reasons for recommendation to be presented to the disputing parties. The amount of settlement money and the reasons for recommendation are closely connected with each other to form one and the same issue in substance, and accordingly they should affect each other in the course of discussions between the two conciliators. Would the two conciliators be able to reach an agreement on these matters? Would the two conciliators be able to reach an agreement on the prospect for settlement with the proposed settlement terms, or as to whether or not the disputing parties would accept the recommendation for settlement to be made by the conciliators? These are the most difficult assignment and questions which the two conciliators will be required to cope with.[5)]

(1) Amount of settlement money and settlement terms

In order to find the amount of settlement money and settlement terms agreeable to the conciliators, each of the conciliators has to identify issues of the case and to make his or her own judgment on each of them. After each Conciliation Session, each conciliator must re-examine the issues and, whenever he or she considers appropriate, should communicate with the other conciliator to explain his or her opinions on some important issues. In the Dual Conciliation, where each conciliator is requested to reach an agreement with the other conciliator, the conciliators should, as the Conciliation Sessions proceed, keep securing mutual good understanding of their respective views as to the facts and reasons for disputes of the case. By taking such steps, even if the conciliators shall have failed to reach an agreement as to identification of some issues of the case and judgment thereon, they will understand each other and are expected to avoid the situation where their views in respect of certain major issues are widely different from each other and to make their mutual efforts to make the difference closer.

---

5) Discussions between the two conciliators shall not be disclosed to the disputing parties. Some part can be disclosed at the Conciliation Session, but subject to the two conciliators' agreement which will be made solely with a view to facilitating the settlement. These restrictions arise from the purpose and legal nature of the Dual Conciliation Panel that it should be a single legal body created for settlement.

As between the two conciliators, place, time, and occasion for proposing the sum of settlement money, as well as the manner of discussion, would vary from case to case.

It is not easy for the two conciliators to reach an agreement on the amount of settlement money. Keeping in mind the purpose of actually achieving a fair and reasonable settlement, the conciliators would, in practice, be required to compromise. When the two conciliators agree upon the amount of settlement money as a result of their discussion and compromise, by way of what judgment does each of such conciliators come to agree? In case the conciliators are lawyers, they would have had substantially final judgement, if not final, on facts and legal issues of the case, and would agree upon the amount of settlement money within the limit set by that judgement. The judgment to further agree upon a specific amount within that limit should be made from a broader point of view. The point of view would extend to such matters as would not be considered if judgment were to be made by court, or would extend beyond the existing coverage of any statute or its application. Looking back the past, the conciliators' point of view would not be limited to the past relationship of the disputing parties. The conciliators would consider those factors which have led to the disputes and take into account the responsibilities of the disputing parties for their respective contributions to those factors. Looking upon the future of the disputing parties after the settlement, the conciliators might even consider the prospective benefit which the disputing parties would receive from the settlement. Judgments of the two conciliators from the broad point of view are presented to each other. Subjects of their final discussion and their standard for judgment in compromise may include the common sense and culture at large, which inevitably affect the fair and reasonable judgment of the two conciliators. It is beyond my capability to undertake further analysis and discussion on these subjects. Future research and study on the "Process of Dispute Resolution by Negotiation" , with comprehensive knowledge and insight of law and sociology, will tell us the details of the factors in the process.[6)]

(2) Reasons for recommendation of settlement terms

In the Dual Conciliation dealing with difficult cases to settle, the disputing parties normally request that the reasons for recommendation of settlement terms should be submitted to them to enable them to examine whether or not they should settle the case with the amount of settlement money and other settlement terms recommended by the Dual Conciliation Panel. They will request that the recommendation be in writing. The two conciliators must agree upon the reasons for recommendation of settlement terms.

The purpose of the reasons for recommendation of settlement terms is not to announce the two conciliators' judgment on the case, but to state the "reasons for recommendation for settlement" . The purpose is to state the reasons for the two conciliators' recommendation for the settlement with the terms presented by them. In stating the reasons, the conciliators must keep in mind the purpose of conciliation. It is the settlement of disputes by a fair and reasonable agreement.

---

6) Having said that, I note that innovation of a suitable fact-finding process is the prerequisite to any system of justice for dispute resolution, either in or out of the court.

The conciliators should be mindful that their duty is such that, even if a conciliator has succeeded in preparing his or her own clear and perfectly logical statement of reasons for recommendation, it is not what the Dual Conciliation aims at and will probably result in a draft statement for his or her own use. Stating a different reasoning or supplemental reason will satisfy the stating conciliator by clarifying his difference from the other conciliator, but does not accord with the purpose of conciliation to overcome the difference by compromise in pursuit of agreement. Furthermore, the different or supplemental reasoning may include some reason which a disputing party cannot accept and thus may hinder the settlement itself.

In the recommendation of settlement terms, which is to be issued jointly by the two conciliators, there will be stated only those reasons for recommendation which the two conciliators are able to agree. In most cases each of the two conciliators should have such reasons as have not yet included or reflected in the current draft recommendation. Agreement of the two is required for adding or reflecting any of such reasons in the current draft. The two conciliators will continue their discussions, each with a view to seeing it that important issues of his or her reasoning will be properly reflected in the recommendation of settlement terms.

Each of the two conciliators should have been appointed with significant trust of the appointing party, and must be an expert who has been providing services with highly respected view and judgment. Such two conciliators are to engage them in the discussions with a view to agreeing upon the joint statement of reasons for recommendation of settlement terms. In these discussions both of the conciliators will be required to be flexible for going through the “humble re-examination process” and the series of compromise in pursuit of the purpose of settlement.

Ⅴ. Merits of the Dual Conciliation

Decision by way of majority is not available in the Dual Conciliation as it does not have three conciliators. The pursuit of agreement is the only way to come up to any decision. This process for decision making is by itself the source of merits of the Dual Conciliation. At the same time, the difficulty in the decision making constitutes the inherent demerit and risk of the Dual Conciliation, and requires the control of conciliation expenses.

Accompanying with, and in anticipation of overcoming, the demerit and risk, the Dual Conciliation is expected to have the merits discussed below.

1. Dual Conciliation Session is the place for the Quadripartite Discussion

The Dual Conciliation takes place by the quadripartite discussion among the disputing parties and in addition the two conciliators. This form will become the scheme to make the four parties clearly recognize their respective roles and intensify their will toward settlement of the disputes.

The Dual Conciliation does not have a third conciliator to be appointed by agreement of the two conciliators or to be appointed by the relevant Mediation or Conciliation Institute. It has

only two conciliators who have been respectively appointed, directly and solely, by one of the two disputing parties. The two conciliators appointed by this method constitute the Dual Conciliation Panel. While being a member of the panel, each of the conciliators is an independent conciliator appointed by a disputing party with its reliance upon his or her capability.

Looking upon the setting of conciliation from the disputing parties' view, they will each see the conciliators who are, while being a member of the two-member-panel, likely to be independent conciliators, each with the capability to exercise influence over the other conciliator. The conciliators have, each and individually, the role to discuss with the other conciliator to seek an agreement with such other conciliator upon the recommendation of settlement terms. In that role, they are members of the Dual Conciliator Panel. However, in connection with his duty to seek an agreement of the conciliators on the recommendation of settlement terms, the conciliators are each an independent conciliator reserving the authority to refuse the agreement. These are all obvious to each of the disputing parties without any explanation.

Looking upon the scene of conciliation from the conciliators' view, they will see the conciliators sitting side by side, constituting clearly members of the Dual Conciliation Panel. Knowing well the role of a conciliator in the Dual Conciliation, each of the conciliators clearly understands that the other conciliator is the one with whom he or she must seek an agreement by continuing discussions.

In view of the form of conciliation, the Dual Conciliation provides the disputing parties, together with the Conciliation Panel, with the opportunity of discussion and conciliation among these three parties. But in the actual scene of discussions in the eyes of each of the disputing parties and of the conciliators, the Dual Conciliation looks like a place of settlement discussion of the four parities of the two disputing parties and two conciliators. The recognition of the Quadripartite Discussion is in consistent with the broad understanding of the disputing parties that "the Dual Conciliation provides the opportunity to seek settlement by the two disputing parties and two independent conciliators" .

This recognition of the Quadripartite Discussion gives the disputing parties a fresh willingness toward positive participation in the conciliation. Such recognition of the disputing parties makes the Quadripartite Discussion the place for settlement of disputes with the benefit and assistance of the conciliators' leadership.

Keeping sight at the Quadripartite Discussion, let us make an analysis of the dynamism of the Dual Conciliation. It is in the conciliation that the four parties' discussions and negotiations take place, so that the positions and roles of any of the four parties are distinctively different from those of the other parties. Each of the two conciliators is an outsider who came to participate the discussion or negotiation at a later stage. Each of the two conciliators exercises his or her leadership for settlement in the conciliation, as fair and independent conciliator, in connection with both procedural and substantive matters. In seeking for settlement of disputes, each of the two conciliators makes his or her best to find such fair and reasonable solution as could be agreed upon by the two conciliators, being fully aware of the risk that the

proposed solution so agreed by the two conciliators and presented to each of the two disputing parties may not be accepted by either or both of the disputing parties. Though having dissatisfaction and distrust against the other disputing party, each of the two disputing parties waits for the settlement terms in the recommendation which the disputing parties will receive from the conciliators. The four parties are engaged in the discussions of conciliation, anticipating that acceptance of the two conciliators' joint recommendation of settlement terms by both of the two disputing parties should be the last chance for resolution of the disputes by agreement.

2. The four parties, made of the two disputing parties and the two conciliators, aim at reaching an agreement

The settlement discussions of these four parties must be made for the purpose of bringing, for the first step, the two conciliators' agreement upon the joint recommendation of settlement terms. It is clearly understood by each of the four parties that in the Dual Conciliation the agreement between the conciliators is essential. Further, if the recommendation of settlement terms, agreed by the two conciliators, is not accepted by either of the disputing parties, the conciliation will fail. In the end, agreement of the four parties is required for accomplishing settlement by the conciliation.

The recognition of this reality moves the thought and attitude of the four parties at the conciliation, toward searching for the possibility of settlement. The disputing parties come, in their respective manners, to be cooperative with the conciliation and to have positive thoughts in favor of settlement while understanding it is not easy. If a disputing party feels somewhat comfortable in finding, among the other three parties, the conciliator appointed by it with its significant trust, that feeling may also be contributory to the positive thoughts. The disputing parties stating opinions on procedural issues in response to the conciliators' question, sometimes together undertake the role to ensure the procedural fairness as if they were the third conciliator. In response to various questions which are asked by the conciliators to clarify and narrow the scope of disputes so as to prepare for the road to dispute resolution, the disputing parties show their efforts toward agreement, while making their respective own allegations.

These thought and attitude of the disputing parties toward seeking the possibility of settlement help the proceeding of conciliation take in the direction for settlement. The settlement terms in the recommendation will include both those which are relatively easy for agreement, such as the description of disputes being subject to settlement and the clause to confirm that there remain no further claims, and those which are difficult for agreement, such as the amount of settlement money. In conciliation, it is sometimes possible to take the method where those terms which can be agreed by the parties are fixed one by one so that the remaining terms in dispute are gradually narrowed. The attitude of the disputing parties in pursuit of settlement makes it possible to take this method. In the Dual Conciliation the settlement discussions of the four parties proceed in severe conflict, and the agreement on even one issue may become a significant step to lead to the complete settlement.

3. Agreement of the two conciliators

In the Dual Conciliation, while the procedure takes place for achieving the agreement between the four parities, the agreement between the two conciliators is vitally important. The two conciliators have important roles in the entire course of the Dual Conciliation, and whether or not, at its last stage, they can agree upon the sum of settlement money and the reasons for recommendation of settlement terms is the first hurdle which they must overcome to make the conciliation a success.

It is clear in the Dual Conciliation that the amount of settlement money to be presented by the two conciliators is required to be identical. But it is quite normal that the analysis of issues of the case and judgment on such issues of one conciliator are different in some respects from those of the other conciliator. In the discussions of the sum of settlement money and the reasons for recommendation for settlement terms between the two conciliators, it is important that they share the same understanding with respect to important issues, but their judgments on each of such issues are not required to be identical. The two conciliators are required to agree on the amount of settlement, while each may have different opinions with respect to details of the reasoning.

For the purpose of reaching an agreement on the sum of settlement money, it is essential that each conciliator has come to deeply understand the disputes themselves, based upon the facts which he or she has been able to appreciate from the allegations and materials delivered by the disputing parties, and to fully understand the entire story of the case, including the circumstances and history which have led to the disputes of the case, from the analysis of the result of all Conciliation Sessions.

Having completed a deep and full consideration of all issues relative to arriving at the sum of settlement money, each of the conciliators must have flexible opinions with respect to each of such issues. It is only with such flexible opinions that the two conciliators are able to negotiate the sum of settlement money. An agreement of the amount of settlement money will become possible by discussion and negotiation of a variety of matters by the two conciliators.

The conciliation is a procedure for settlement by overcoming the distrust and anger which the disputing parties have to each other. The conciliators must be free from distrust and anger. The two conciliators must each have respect to the experience and knowledge of the other, and should share, in the bottom of their mutual discussion, a humble attitude to listen to and learn from each other. Such attitude is necessary for reaching an agreement by discussion between any such independent parties as two conciliators.

It is nothing other than the two conciliators’ enthusiasm for the success in settlement that enables them to accomplish their diversified and difficult duties. If the two conciliators are able to proceed with the conciliation with enthusiasm and in cooperation with each other, the conciliation has a good prospect for accomplishing its purpose. The appointment of conciliators by the disputing parties at their choice, would equip the parties with a promising facility to lead the conciliation to a success. This will be a merit of the Dual Conciliation as a method of out-of-court dispute resolution.[7)]

4. Double dispute resolution capability

Having thus analyzed the conciliation by two conciliators for settlement of severe disputes between two disputing parties and looking upon the stream of the conciliation, one could see the conciliation by two conciliators as if it were made of two conciliations, each with the sole conciliator but combined into one, physically by the Quadripartite Discussion and spiritually and legally by the two conciliators. The conciliation has a conciliation mechanism where the two conciliations, each carried out by one of the two conciliators, are piled up and connected in harmony by the two conciliators through their discussion, negotiation and agreement, and the two disputing parties are offered to consider the joint recommendation of settlement terms of the two conciliators. Working in such conciliation mechanism, the conciliation by two conciliators could be called “Dual Conciliation” . Comparing with general conciliation, the Dual Conciliation could have a double dispute resolution capability, partly by way of its diversified examination of disputes by the two conciliators. It is the two conciliators who make the two conciliations, as recognized above, connected and combined into one Dual Conciliation.

Ⅵ. In closing

The two conciliators of the Dual Conciliation discuss and negotiate with each other to decide the recommendation of settlement terms of the Conciliation Panel. Process of making this decision is different from that by way of majority. In either of the two decision-making methods difference in opinion is narrowed down by discussion, but they are different in the process after a further difference remains. In the Dual Conciliation the conciliators are required to reach an agreement by mutual negotiation and compromise, within the limit of fairness and reasonableness in their respective judgment. Compromise in this situation is nothing but the determination made with a view to accomplishing the positive and meaningful purpose of resolution of dispute by settlement. It aims at a reasonable judgment and thus still remains in the process which is governed by intelligence.

The decision by majority is made by taking votes. This process complies with rules, but is not a process governed by intelligence. Neither minority nor supplemental opinions are reflected in the decision. While the decision is made in accordance with rules, the process may finish with something mixed with violent, arrogant, nonchalant or despairing feeling.[8] The method of determination by way of majority is widely and repeatedly employed in the society of present days. In this method, technics for getting the majority is often emphasized so much that the process of discussion and compromise aiming at reaching an agreement, which is governed by intelligence, is quickly abandoned.

While the settlement by agreement is a dispute resolution method which has been acknowledged and recommended in Japan since the ancient age or at the latest in the Edo Era from the 17th century, it was, sometimes in the history, criticized as “people’ s morality”

7) A success of the Dual Conciliation depends upon availability of conciliators willing to act in such manner and with such enthusiasm as discussed in 3, but would also depend upon the circumstances of the case and the culture of relevant society, affecting how much an amicable and private dispute resolution is regarded desirable.

presented by the administrators in power. Nevertheless, the settlement by agreement seeks an agreement of wills, to the extent possible, and is therefore consistent with the basic idea of the modern legal system, which is based upon the wills of individuals. The negotiation and compromise of the two conciliators to be made in seeking for an agreement of the recommendation of settlement terms are the further efforts, led by intelligence, to enhance the agreement to be made between the disputing parties to the level of “agreement of reasonable wills” .

In closing my essay on the Dual Conciliation, I would like to report that having been accustomed with the decision by majority which is frequently used in the present society, I have come to recognize, from my experience in acting as conciliator in the Dual Conciliation, once again, and, putting it accurately, to some extent freshly, the indispensable value of making efforts to reach an agreement.

8) Is such mixed feeling due to the fact that a process of a man in pursuit of the truth cannot be stopped by a decision by way of majority? The “truth” in this context typically means the truth in the natural science, but it can also be in the social science. The research and study for “truth” sometimes require the acknowledgement that there are matters remaining unsettled and forcing the wisdom and patience to leave them unsettled. An example in the field of law would be those substances which should constitute the freedom and the fundamental human rights. They are determined by interpretation of law. However, insofar as the man’s demand for treatment as a man of liberty and with acknowledgement of his dignity arises naturally and simply from his being a man, the efforts to find their substances are the research and study for finding “truth”. The interpretation of these rights, as it should be, cannot be free from that research and study for “truth”, and is, by its nature, difficult to settle.

Discussions and Challenges in Promoting Online Dispute Resolution

Professor of Law, Kyushu University

Takeshi Ueda

Ⅰ. Online Dispute Resolution: Concept and Expanding Discussion

Online Dispute Resolution ("ODR") has been the subject of discussion in Japan in recent years[1).

The concept of ODR does not necessarily have a set definition. ODR may be said to encompass information technology ("IT") versions of alternative dispute resolution ("ADR"), including mediation. In a broader sense, however, ODR can be used to refer to any utilization of IT in relation to the dispute resolution process, including case review , third-party consultation, voluntary negotiations between the parties that may occur prior to, during or following ADR, and even civil litigation[2)]. Furthermore, ODR - in its broadest sense - may include the phase of dispute prevention occurring prior to a dispute[3)] and the phase of enforcement of rights that follows dispute settlement[4)].

From a macroscopic perspective, ODR is a novel phenomenon resulting from the encounter between dispute resolution and technology, which have traditionally been discussed in different forums. As such, there exists a broad and manifold spectrum of topics through which ODR can be explored and discussed. For example, in terms of civil dispute resolution, ODR could be addressed in relation to civil procedural jurisprudence. The nature of disputes handled by ODR, particularly those arising from business-to-consumer or consumer-to-consumer online transactions conducted on digital platforms, makes it important to consider

1) Ōki Mori, "日本におけるODRの現状と今後の課題 [Current Status and Future Issues of ODR in Japan]" JCA Journal, vol.67, No.8 (2020) at 19-24 and references listed therein.

2) ODR Revitalization Panel, "ODR活性化に向けた取りまとめ [Final Report on ODR Revitalization]" (2020) at 5. (https://www.kantei.go.jp/jp/singi/keizaisaisei/odrkasseika/pdf/report.pdf), ODR Promotion Panel, "ODRの推進に関する基本方針～ODRを国民に身近なものとするためのアクション・プラン～ [Basic Policy on the Promotion of ODR – Action Plan for making ODR familiar to citizens]" (2022) at 3, n.1 (https://www.moj.go.jp/content/001370368.pdf).

3) Ethan Katsh & Orna Rabinovich "Digital Justice" (Oxford University Press, 2017) at 5.

4) Takeshi Ueda, "ADR機関等による私的な権利実現（私的実行）に関する予備的考察 [Preliminary Consideration on Private Realization of Rights (Private Enforcement) by ADR Organizations]" 仲裁とADR [Arbitration and ADR] No. 17 (2022) at 9-17.

them from a consumer law and competition law perspective.

In addition, focusing on the interface of the ODR displayed to the parties, it can be assumed that the design of the online system and the information found therein may influence the parties' perception, and by extension their dispute behavior. Therefore, it is also important to examine the system design, which can influence the parties' action alternatives from a legal-philosophical and a social-engineering perspectives. Furthermore, technical security considerations in the ODRs' system design and the policy efforts to effectively establish and operate ODRs are also necessary. In recent years, discussions have been held to design an optimal dispute resolution platform based on a comprehensive examination of various factors[5).

Section II of this paper will present the discussions that occurred within the ODR Promotion Panel(ODR推進検討会) ("Panel") established by the Japanese Ministry of Justice ("MOJ"), as well as an overview of the laws, regulations, and guidelines enacted as a result of these Panel discussions. Subsequently, Section Ⅲ will offer further analysis and reflections on these topics.

Ⅱ. Discussion of ODR Promotion Panel

1. About ODR Promotion Panel

The ODR Revitalization Panel, which was established by the Cabinet Secretariat, had already issued a report on the further revitalization of ODR, especially private ODR, on March 16, 2020[6). This panel discussed the issues that may arise when introducing ODR in Japan and the overall direction that Japan should take. In addition to this, "the Growth Strategy Follow-up" (approved by the Cabinet on July 17, 2020) also included the following comments: "*To promote online dispute resolution (ODR), we will conduct a review by the end of fiscal year 2020, including consideration of the necessity of revising the certification system, such as granting enforceability to settlement agreements in alternative dispute resolution (ADR) procedures for private dispute resolution outside of court and strengthening the confidentiality obligations of certified ADR providers....*"[7) In response to the above, in October 2020, the MOJ established the ODR Promotion Panel ("ODR推進検討会", chaired by Professor Shusuke Kakiuchi of the University of Tokyo)[8). The Panel met 18 times from October 6, 2020 to February 28, 2022 before concluding.

2. Enforcement of mediated settlement agreements

The Arbitration Law Subcommittee of the Legislative Council("法制審議会仲裁法制部会") had been discussing a system to render settlement agreements reached through mediation

5) Lisa Blomgren Amsler & Janet K. Martinez & Stephanie E. Smith "Dispute System Design" (Stanford University Press, 2020), Mayu Watanabe, "諸外国におけるODRの状況および日本でのODRの普及について [The State of ODR in Other Countries and the Spread of ODR in Japan]" NBL, Vol. 1197 (2021), at 21-27.

6) See supra note (2). See supra note (1) for contents.

7) https://www.kantei.go.jp/jp/singi/keizaisaisei/pdf/fu2020.pdf

8) https://www.moj.go.jp/shingi1/shingi04200001_00002.html

enforceable[9]. However, to the extent that this topic largely concerns the future development of ODR, the issue of the enforceability of settlement agreements reached through domestic ADR should be addressed through amendments to the Act on Promotion of Use of Alternative Dispute Resolution ("ADR Act").The Panel thus discussed possible amendments thereof.

The Panel also conducted interviews with 13 ADR organizations and circulated a questionnaire survey to domestic ADR organizations, receiving 153 responses. Based on the results of the study, the Panel compiled its opinion in a report on the enforceability of settlement agreements reached through mediation. According to the report, the Panel concluded that it is possible to circumvent various adverse effects stemming from enforceability, such as (i) conflicts with the voluntary nature of ADR, (ii) the reduced opportunity for the opposing party to consent to the commencement of proceedings, (iii) abuse of enforcement power, (iv) the increased burden on ADR organizations, and (v) the possibility of dismissal of petitions for executing decisions issued by courts, by establishing appropriate regulations and improving the environment to ensure the suitability of the operation.

After the 6th meeting session of the Panel, positive opinions on the enforceability of settlement agreements reached through mediation were compiled and submitted to the Arbitration Law Subcommittee of the Legislative Council as reference material[10].

3. Revision of the ADR Act and its subordinate regulations to promote ODR.

From its 8th session until its 15th session, the Panel discussed the need for amendments to the ADR Act and other laws and regulations necessary to promote ODR.

(a) Obligation to post notices at office

Article 11, Paragraph (2) of the current ADR Act requires certified dispute resolution business operators to post a clearly viewable notice at their offices where the certified dispute resolution procedures are to be carried out, indicating that it is a certified dispute resolution business operator and other matters relating to the contents of the services of certified dispute resolution and the provision method thereof pursuant to the Order of the MOJ. This provision assumes that the posting is done in the physical office (the same applies in the context of Art.9 (2) of the Regulation for Enforcement of the Act on Promotion of Use of Alternative Dispute Resolution). The existence of the office itself is also assumed in the application for certification (Art. 8 (1)(ii) of the ADR Act).

On the other hand, such requirement of a notice at a physical offices is poorly suited to ODR service providers who conduct dispute resolution procedures mainly on the Internet. Indeed,

9) https://www.moj.go.jp/shingi1/housei02_003006.html

10) https://www.moj.go.jp/content/001348833.pdf

On April 21, 2023, the Law Partially Amending the ADR Act (Law No.17, 2023) was enacted and promulgated on April 28,2023, which enables enforcement based on settlements reached in mediation conducted by certified dispute resolution providers in Japan.

https://www.moj.go.jp/MINJI/minji07_00328.html

it may not provide helpful and appropriate information to users of the services. In addition, given that it is considered that contemporary litigants often assess their disputes independently and gather information on the Internet, it can be assumed that there are situations where the purpose behind Article 11, Paragraph (2) of the Act can be better realized by posting information on the Internet.

The Panel discussed various proposals regarding the distinction between posting on the Internet and posting at the office. As a result, a proposal was compiled to allow ADR and ODR organizations a flexible range of options by stipulating in Article 11, Paragraph (2) of the Act that "*the information shall be posted in an easily viewable manner at the office, or made public through the use of the Internet or other methods.*" The Cabinet decided on February 28, 2023, to revise the ADR Act in accordance with this proposal[11].

(b) Fulfillment of accountability by ODRs that are not conducted in person

The ADR Act stipulates the obligation of certified dispute resolution service providers to explain certain matters to the parties to a dispute prior to the conclusion of a contract for execution of certified dispute resolution procedures (Article 14 of the ADR Act). However, in the case of an ODR providing so-called asynchronous dispute resolution (meaning where the procedure organizer and the parties do not necessarily meet on the same day and time, and each party submits procedural materials at any time, through chat rooms for instance), the advantages of asynchrony will be greatly reduced assuming that the explanation prior to the conclusion of a contract requires synchronous explanation in person or by web conference, among others. Therefore, the Panel discussed whether it would be possible to fulfill the information duty set forth under Article 14 of the ADR Act by providing explanations via chat, video viewing, etc.

During the Panel, it was remarked that, in the context of the duty to provide explanations under Article 14 of the ADR Act, it is important to ensure that the parties can ask questions to the certified dispute resolution provider about the content of the explanation. In addition, to solve concerns that a party may enter into a contract without understanding the explanations provided, it is necessary to obtain the party's express confirmation of understanding.

As a result, it was decided to include the following new subsection in Paragraph 9 of the Guidelines for the ADR Act.

"*(4) Explanations under Article 14 of the Act may be provided by using chat rooms, by having a person view videos or descriptions on a website, or by other methods using information and communication technology. However, when using such methods, the explanation must be provided in plain language and shall take the measures described in (a) and (b) below. If the electromagnetic record used for the explanation is preserved in such a way that the parties can easily view it until the document is delivered or the electromagnetic record is provided under the provisions of Article 14 of the Act, it will be deemed that the explanation was given by delivering the document or providing the electromagnetic record.*

---

11) On April 21, 2023, the Law Partially Amending the ADR Act was enacted. See supra note (10).

(a) Unless the certified dispute resolution service provider confirms that the party concerned has read and understood the explanations, the certified dispute resolution service provider shall not be able to enter into an agreement to implement certified dispute resolution procedures with the party concerned.

(b) An environment shall be provided in which persons who wish to ask questions can easily contact the certified dispute resolution service provider and receive a prompt response, by clearly indicating contact information at the time of explanation, etc."

(c) Security system

One of the challenges in promoting ODR is to ensure an information security system. Since the use of the Internet increases the risk of unwanted disclosures or leaks of information, it is desirable to have provisions ensuring information security in laws, regulations, and guidelines, even if specific security levels or methods are not required in the provisions. Therefore, as a result of the Panel's discussion, it was decided to add clauses to Paragraph 2 of the Guidelines (related to Article 6 of the Act), which require that appropriate information security be ensured.

The following clause was added to the Paragraph 2 (17) of the Guidelines regarding Article 6 of the Act (which Article requires the knowledge and skills necessary for carrying out the services): "*In addition, the above knowledge and skills also include those necessary to take information security measures appropriate to the nature of such services.*" This phrase can be understood as not always requiring the certified dispute resolution service providers to have technical knowledge and skills of information security themselves. For example, when outsourcing information security to a third party, it includes the knowledge and skills to form a relationship with the outsourced party to ensure that the party establishes an appropriate information security system.

Article 6, item (x) of the ADR Act requires certified dispute resolution service providers to stipulate methods for storing, returning, and otherwise handling materials. And to the Paragraph 2(10) of the Guidelines regarding Art. 6 (x) of the Act, the following example was added: "*If the materials (submitted by the parties) are electromagnetic records, it is permissible to specify the method of storage and management, and to make them irretrievable and erase them after a specified period of time has elapsed.*"

Article 6, item(xi) of the ADR Act requires certified dispute resolution service providers to establish a method for preserving in an appropriate manner suited to the nature of the information, the communications of the parties to a dispute or other third parties that are contained in opinions stated or materials submitted or presented through private dispute resolution procedures. And to the Paragraph 2(11) of the Guidelines regarding Article 6(xi) of the Act, the following clause was added as an addendum regarding organizational, physical, and technical measures: "*When information and communication technologies are used in business operations, the above measures are required, bearing in mind that there is a risk of information leakage due to virus infection, unauthorized intrusion, and other causes.*"

Article 6, item(xiv) of the ADR Act requires certified dispute resolution service providers to

establish measures to assure the confidentiality of communications that the applicant and the applicant's representatives, employees, and other staff as well as dispute resolution providers come to have knowledge of in connection with the services of private dispute resolution. And to the Paragraph 2(14)(c) of the Guidelines regarding Art. 6(xiv) of the Act, the same clause as in Paragraph 2(11) was added.

The revision of guidelines (b) and (c) was made on March 15, 2022, and entering in force on the same day[12)].

4. Basic policy to make ODR accessible

During its 13th and subsequent sessions, the Panel discussed policy directions for the promotion of ODR.

Compared to other countries, ODR in Japan stands behind in terms of social implementation and has a low level of public recognition. Therefore, the first step is for the private sector involved in the ODR sector, which has a high degree of freedom in designing organizations and procedures, to implement advanced ODR services and features, with the prospect that this will lead to the development of administrative and judicial ODR. Therefore, in addition to the development of laws and regulations, it is necessary to work on the policy side, with the Panel deciding to compile a "Basic Policy on the Promotion of ODR: An Action Plan to Make ODR More Accessible to the Public" on this ground, which was published on March 29, 2022.

The measures set forth in the policy cover a wide range of areas, and the ones discussed below merely constitute a general introduction thereof[13)].

The promotion goals consist of short-term target (to be implemented in the next one to two years) and medium-term target (to be implemented in the next five years or so).

The short-term target is to "*establish a foundation for the promotion of ODRs by first having as many citizens as possible know about ODRs, use them, and experience their convenience, while supporting the entry of private companies into the ODR market.*" In this context, the specific policies are as follows: (i) active dissemination of information; (ii) cooperation among various organizations in charge of each phase of dispute resolution (consultation, negotiation, mediation, etc.); (iii) provision of information necessary for startups to support entry into the ODR business; (iv) provision of training programs; (v) approach to platform operators; and (vi) speeding up certification procedures.

The medium-term target is "*to realize a society in which ODRs of the world's highest quality in terms of functionality, design, etc. are implemented in society, and anyone can receive effective assistance for dispute resolution anytime, anywhere with a single familiar device, such as a smart phone.*" In this context, the specific policies are as follows: (i) one-stop consultations, negotiations, and mediation; (ii) research and experimentation to develop an environment in which world's most advanced ODR is provided; (iii) participation in global

---

12) https://www.moj.go.jp/KANBOU/ADR/adr01-08.pdf

13) ODR Promotion Panel, supra note (2). For more details, see Ōki Mori "ODR (Online Dispute Resolution) – Outline of the Action Plan of the Ministry of Justice and Domestic Trends" Japan Commercial Arbitration Journal, Vol.3 (2022) at 72-77.

discussions and the formulation of international standards; and (iv) the development of a foundation for the use of AI technology.

Furthermore, the IT technology that underpins ODR, discussions regarding rules, and the practical operations may all undergo rapid changes in circumstances in the future. Therefore, it was also stipulated that a promotion and follow-up system should be organized as a coordinated body of the public, private, and academic sectors, including private ODR providers, government agencies, consultation organizations, various professional associations, courts, and researchers (including legal researchers and technology specialists).

In formulating the above policy, various opinions were expressed at the Panel, including the following: (i) It is necessary to be aware of ODR, which is not necessarily limited to the mediation phase, but includes the case review phase and the consultation phase, etc.; (ii) It is necessary to make policy efforts from the perspective of enhancing and revitalizing not only ODR but also ADR; (iii) It is necessary to provide financial support and public support for the development of infrastructure to support the entry of ODR market; and (iv) Measures with a sense of urgency are needed.

Ⅲ. Future Prospects

ODR can, in principle, be an infrastructure to support any civil dispute resolution or ADR process. Some ODR services may aim to resolve disputes within a reasonable cost range, as would be expected in ordinary civil litigation, while other types of ODR services may aim to transform the perceptions of the parties and form relationships between them over a longer time and at a higher cost. Conversely, there could be ODR services that aim to resolve disputes within a shorter time and at lower cost. ODR on digital platforms that have attracted attention in recent years (e.g., eBay's Resolution Center) typically belong to the latter category.

It is this last type of ODR that the author is particularly interested in. Consumer disputes and disputes arising from online transactions, for example, may be large in volume and small in amount. In such disputes, there is a concern that requiring the same level of time and cost from the parties as a trial may discourage them from taking action to resolve the dispute. A "reasonable," though not perfect, resolution may lead to substantial protection of rights. On the other hand, if the burden and cost of the parties' actions are excessively reduced, or if disputes are resolved under strong inducement to act, there is also a concern that the original premise that ADR is dispute resolution based on the will of the parties will be undermined.

In particular, there is room for adjusting the options available to and the burden falling on the parties depending on the design features of a fully digitalized ODR system, and further investigation is needed on the appropriate procedural design. In this regard, for example, in the area of consumer law in Japan, a method has been adopted whereby the substantive and procedural legitimacy of dispute resolution is secured while the burden of action on individual consumers is reduced through the pursuit of proceedings by consumer organizations (and a certification system for such organizations). In contrast, in the case of ODR, the argument is

not necessarily simple, but it is possible that the burden may be justified and legitimacy secured through the "design" itself rather than the "organization". The discussions have only just begun, and this is an issue that should continue to be closely monitored.

Leading Japanese law firm for international arbitration

Delivering solutions with over 35 years of experience in arbitration

Tokyo Osaka Nagoya Fukuoka Sapporo Bangkok Beijing Shanghai Dubai Frankfurt Düsseldorf Hanoi Ho Chi Minh City Jakarta*[1] Kuala Lumpur*[1] New York Singapore Taipei Yangon

*[1] Associate office

www.nishimura.com/en

Civil Litigation after the Introduction of IT, as Suggested by Scheduled Proceedings in Commercial Arbitration

Attorney-at-law, Anderson Mōri & Tomotsune Foreign Law Joint Venture

Shinji Kusakabe

Ⅰ. Introduction

Arbitration and litigation are two major methods of resolving disputes, but there are various differences in their systems and practices. This paper focuses on the difference in the planned nature of commercial arbitration and Japanese civil litigation and examines the implications of scheduling practices in arbitration for court proceedings, including the impact of the ongoing introduction of IT into Japanese civil litigation.

Ⅱ. Planned Nature of Arbitration Proceedings

1. Rules of procedure for arbitration

Arbitration is a means of dispute resolution that is available only when the parties to a dispute have agreed to resolve the dispute by arbitration. Given that the nature of arbitration is that it is based on an agreement between the parties, the arbitration procedure is essentially also governed by the agreement of the parties (Article 26(1) of the Arbitration Act (Act No. 138 of 2003, as amended)). However, in practice, the parties to an arbitration usually agree on the arbitration procedures by agreeing to use existing arbitration rules, and such arbitration rules serve as procedural rules in most arbitration cases.

2. System and practice of scheduled proceedings under arbitration rules

Various arbitral institutions have established their own arbitration rules which are available for use by disputing parties. In ad hoc arbitration, arbitration rules established for that purpose are also available. Therefore, it is not possible to provide a uniform overview of the system of scheduled proceedings under arbitration rules. However, in general, the arbitration rules of major arbitral institutions require or encourage arbitral tribunals to conduct proceedings in a planned manner or to establish a schedule of proceedings based on consultations with the parties. For example, Article 43(2) of the Commercial Arbitration Rules of the Japan Commercial Arbitration Association requires the arbitral tribunal to consult with

the parties and make a schedule of the arbitral proceedings in writing to the extent necessary and feasible as early as practicable[1)] . For this reason, it is a matter of course that arbitration proceedings based on such arbitration rules should be conducted in a planned manner with a procedural schedule.

Practically, it is common for the arbitral tribunal that is formed to hold a preparatory meeting after the claimant submits a written request for arbitration and the respondent submits a written answer, and then to consult with the parties who attended the meeting to formulate a procedural schedule. While it is up to the arbitral tribunal to decide what kind of procedural schedule to draw up, in my case, when I have served as an arbitrator, my basic policy is generally as follows, and necessary revisions are made based on the intentions of the parties in each case[2)] .

(a) The entire proceedings shall proceed in three steps: (i) determination of issues through the submission of written arguments and documentary evidence; (ii) witness examination; and (iii) conclusion of each party's arguments.

(b) In step (i), the submission of written arguments and documentary evidence between the parties other than the request for arbitration and the written answer and the documentary evidence submitted with them shall be scheduled for two rounds of back and forth between the parties. Any further submissions shall require the approval of the arbitral tribunal[3)] . The initial submission deadline is set at a specific date and the subsequent submission deadline is until a certain period elapses from the date on which the last preceding submission was actually made by the other party. No hearings are scheduled during step (i), and if a request for explanation by the arbitral tribunal is necessary to determine the issues in dispute, it is conducted by means of communication such as e-mail (if verbal discussion is necessary, telephone or web conferences may be held as appropriate). Upon the completion of the submission of written arguments and documentary evidence between the parties, another preparatory meeting shall be held to confirm the results of the determination of issues, and

1) Other examples of rules governing scheduled proceedings or procedural schedules in arbitration rules of arbitral institutions include Article 24 of the ICC Rules of Arbitration and Article 15 of the LCIA Arbitration Rules. Article 17 of the UNCIRAL Arbitration Rules, which are arbitration rules for ad hoc arbitration, can also be considered as rules to the same effect.

2) This basic policy for procedural schedules is mainly based on the situation in which both parties are familiar with the Japanese litigation system. This is reflected in the structure in which witnesses are examined intensively after discussing and finding specific issues in dispute. However, if, for example, one or both parties to the arbitration are familiar with a court system that incorporates wide-ranging discovery and expect arbitration proceedings to follow that model, then the policy must be revised accordingly.

3) In the author's practical experience as an arbitrator, it is generally sufficient for each party, after submitting a request for arbitration or a written answer, to be given two opportunities to submit written arguments and documentary evidence, in order to make major arguments and prove them. However, it is not uncommon for one or both parties to request an additional opportunity to submit a written argument and documentary evidence in order to rebut the other party's last arguments or proof. In such cases, the author often allows each party at least one additional opportunity, considering Article 25(2) of the Arbitration Act, which requires that the parties be given a full opportunity to explain the case. However, it is rare for the parties to request an additional opportunity to submit written arguments and documentary evidence thereafter.

the necessity and method of examining the evidence, the method of summarizing the arguments by each party and other matters shall be discussed and decided.
(c) In step (ii), a hearing shall be held if witness examination is necessary. If the hearing cannot be completed in one day due to many witnesses or for other reasons, the hearing shall be held on consecutive days to the extent possible.
(d) In step (iii), each party shall submit its final written argument or orally explain presentation materials at a hearing in a manner determined based on the intention of the parties.

Ⅲ. Planned Nature of Court Proceedings

1. Rules of procedure for litigation

Litigation is a means of resolving disputes provided by national courts and the Code of Civil Procedure of Japan (Act No. 109 of 1996, as amended; the "CCP") serves as the procedural rules for court proceedings. Unlike in the case of arbitration, generally, the parties to a dispute in litigation cannot decide the procedure by agreement[4], and the procedure proceeds according to the rules set forth in the CCP.

2. System and practice of planned proceedings under the CCP

Article 147-2 of the CCP requires courts and parties in all civil suits to endeavor to abide by the planned progress of the litigation in order to achieve fair and speedy proceedings. Article 147-3, Paragraph (1) of the CCP stipulates that "If due to the complexities of a case, such as the large number of particulars that shall be examined or complications involving the same, or if due to any other circumstances, it is found to be necessary in order for the court to hold fair and speedy proceedings", the court shall consult with both parties and formulate a procedural plan based on the outcome of that consultation. These provisions were newly established in the CCP under the "Act for Partial Amendment to the Code of Civil Procedure and Other Acts" (Act No. 108 of 2003) in 2003.

However, in practice, there have been almost no plans based on Article 147-3 of the CCP. In addition, if "plan" is taken literally to mean considering in advance the methods and steps needed for carrying out a certain thing or the contents thereof, it seems difficult to consider that the procedures are being conducted in a planned manner based on Article 147-2 of the CCP[5] .

4) The proviso to Article 281(1) of the CCP allows the parties to agree not to appeal to the court of second instance while reserving the right to appeal to the highest court, but this is a rare exception.

5) In materials related to civil litigation, it is generally explained that the planned progress set forth in Article 147-2 of the CCP is being implemented (e.g., Mikio Akiyama et al. "Kommentale Code of Civil Procedure III [2nd Edition]" [Nihon Hyoronsha, 2018] p. 276). In such materials, it seems that the progress of the proceedings, in which intensive witness examination is carried out after discussing and finding specific issues in dispute, is evaluated as planned. However, the progress of such proceedings has been assumed by the CCP itself since before Article 147-2 was newly established in 2003. If such progress of the proceedings is evaluated as planned, the substantial meaning of this provision seems to be considerably diluted, at least at the present time when the practice of intensive witness examination after discussing and finding specific issues in dispute has been well established.

Ⅳ. Causes of Failure to Conduct Scheduled Proceedings in Litigation

With the amendments to the CCP in 2003, the ideal form of scheduled court proceedings had been studied mainly by practitioners[6)], but in recent years, such a move seems to be rare. From the viewpoint of the difference between arbitration and litigation, the following describes my personal view on the main reasons why scheduled proceedings, such as those in arbitration, are not conducted in litigation.

1. Inquisitorial nature of procedure

(a) Court proceedings proceed under the initiative of the court on an ex officio basis. Article 147-3 of the CCP requires that a procedural plan be drawn up when certain requirements are met, but the subject that is obliged to do so is the court, and according to the text of the said Article, the consultation with both parties shall be required only if the court decides that, "… due to the complexities of a case, such as the large number of particulars that shall be examined or complications involving the same, or if due to any other circumstances, it is found to be necessary in order for the court to hold fair and speedy proceedings". However, the main ground for the need to formulate a procedural plan, i.e., "the complexities of a case, such as the large number of particulars that shall be examined or complications involving the same," is usually not clear to the court, at least at the beginning of the proceedings. Even if it is found later that such circumstances exist, the proceedings are usually already well underway at that time, and it is not practical to make a procedural plan then. For these reasons, the requirements of this Article are rarely fulfilled in practice.

(b) On the other hand, since the arbitration procedure proceeds under the initiative of the arbitral tribunal, it is the same as court proceedings in that respect. However, in arbitration, since the parties can agree on procedural details, the arbitral tribunal often consults with the parties at an early stage about the procedure. In the process of such consultation, the parties discuss such matters as what issues are expected, the number of opportunities for making arguments and proof required for the proceedings, and the period of time required to secure such opportunities, which form the basis of the procedural schedule. As described above, in arbitration, the degree of active involvement of the parties in the proceedings is stronger than in litigation, and the inquisitorial nature of the proceedings has declined accordingly. As a result, in the case of arbitration, the information necessary for making a procedural schedule is usually shared at an early stage between the arbitral tribunal and the parties.

2. Existence or absence of a party representative

(a) In order to establish an appropriate procedural plan, it is necessary to consider, among others, what issues are expected, and the number of opportunities and period of time required for making arguments and proving the case. However, since the parties themselves usually lack

6) E.g., the Practice Committee of the Tokyo District Court "Practices for Scheduled Proceedings" (Hanrei Times, 2004).

legal knowledge, it is difficult to accurately grasp the issues in the dispute and foresee what kind of arguments and proof should be made about the issues. In order to grasp and foresee such matters, it is essential that an attorney who is a legal expert familiar with judicial practice act as a counsel for a party. However, in Japanese court proceedings, the ratio of cases in which the parties themselves conduct proceedings without a representative is high[7)]. For this reason, it is difficult to establish a procedural plan in a high proportion of cases in Japan, and accordingly, it is also difficult to establish the practice of proceeding therewith.
(b) On the other hand, in arbitration proceedings, at least in commercial arbitration cases, it is normal for both parties to have representatives who are attorneys. Therefore, in almost all cases, there is no lack of legal knowledge on the part of the parties necessary to develop a procedural schedule and proceed therewith.

3. Whether to plan the proceedings based on regular scheduled hearing dates

(a) In Japanese court proceedings, it is common that a hearing date for oral arguments in a court room open to the public or for preparatory proceedings in a court room closed to the public is regularly scheduled approximately once a month, and on such date, the judge and the parties themselves or their representatives meet and proceed with the determination of issues through oral consultation. However, if a party does not submit a written argument in a timely manner in advance (due to the absence of counsel or other reasons), the scheduled hearing date may become impossible to proceed with or lose its practical meaning, and the material resources of the court, such as the time of the judges and the court rooms, which have been set aside for that date, may be wasted, resulting in a delay in the subsequent hearings. Therefore, it is normal to schedule a specific date, time, and place for the next hearing only, and not for any subsequent hearings. This means that the date for the proceedings will typically be set about one month ahead only.
(b) On the other hand, in many arbitration cases, a method is adopted in which each party plans in advance the number of times and the due dates for the submission of written arguments and documentary evidence, and during the period for such submission, a hearing is not held on any particular date, and even if a request for explanation by the arbitral tribunal is necessary to determine the issues, the matter is settled by e-mail (if verbal discussion is necessary, a telephone or web conference may be held as appropriate). By not using regularly scheduled hearing dates as the base for planning the proceedings, the burden of arranging the schedule of the parties concerned and securing the place for holding the hearings can be largely avoided, and accordingly, it is possible to make a procedural schedule for several months to a year ahead[8)] .

7) According to judicial statistics in 2020, out of 122,749 ordinary cases which were completed in all district courts as the first instance, 54,625 cases involved lawyers representing both parties, accounting for approximately 44.5%. That is, in the remaining approximately 55.5% of cases, either or both parties were without legal counsel.

8) In order for such a procedural schedule in arbitration to function in practice, it is necessary for each party to voluntarily comply with the prescribed deadlines for the submission of written arguments and documentary evidence, and to carry out appropriate assertion and proof activities in order to effectively promote the determination of issues in dispute. As mentioned above, at least in commercial arbitration cases, it is normal for both parties to have representatives who are attorneys, and therefore such a voluntary response can be expected.

4. Existence or absence of a change in the decision-making body

(a) In Japan, judges who constitute the main body for making decisions are transferred from one court to another across the country through periodic personnel changes. This is important because it ensures that people have access to equal justice across the country. When a judge is transferred, he/she will hand over his/her cases to his/her successor at the place of his/her old assignment, and the cases of his/her predecessor at the place of his/her new assignment.

Such periodic changes often result in a change of the assigned judge(s) in a case, and it may be anticipated that the assigned judge(s) will change during the course of proceedings even when the proceedings have just commenced after the filing of a complaint. In such a case, the former judge's observations on the case would not necessarily be shared with the successor. Judges, therefore, may be reluctant to develop a medium- to long-term procedural plan in advance so as not to unreasonably restrict the direction of judgments by their successors.

(b) On the other hand, the arbitrator, who is selected by the agreement of the parties, is the one who will render the final arbitral award unless special circumstances arise such as the challenge or resignation of the arbitrator. Therefore, the arbitrator will not hesitate to develop a medium- to long-term procedural schedule with the assumption that the assigned arbitrator will not be replaced during the proceedings.

V. Implications of the Planned Nature of Arbitration for Litigation

1. Conditions for conducting scheduled proceedings in litigation

In view of the main reasons for the failure to conduct scheduled proceedings in litigation as described in Section IV, the following are possible conditions for conducting scheduled proceedings as far as possible under the current CCP.

(a) First, regardless of the concept that courts should lead proceedings on an ex officio basis, courts should provide the parties with an opportunity to express their desire or willingness to proceed with proceedings based on a procedural plan at an early stage of the proceedings, and if both parties express such desire or willingness, consult with the parties to formulate a procedural plan. This does not mean, as governed by Article 147-3 of the CCP, that a court shall consult with both parties to establish a procedural plan only "If…it is found to be necessary in order for the court to hold fair and speedy proceedings." Rather, the court should ask the parties about their desire or willingness to determine whether it would be useful to develop a procedural plan for fair and speedy proceedings and if both parties are willing to do so, develop the plan.

(b) Second, unless there are special circumstances[9], courts should explore the possibility of establishing a procedural plan only for cases in which both parties have counsel, so that the appropriate procedural plan will be formulated and the proceedings under the plan will not

9) An example of a special circumstance is where a party is a corporation and an in-house lawyer who is an officer or employee thereof acts as the person in charge of the case.

undermine the principles of fairness and justice. This is because, in the judicial practice in Japan where the proportion of cases in which one or both of the parties are not represented by counsel is high, if the possibility of making a procedural plan is explored in such cases, the adverse effects of making a procedural plan will become apparent, such as insufficient proceedings and undermining equity between the parties, which may result in the hindrance of the establishment of the practice of making a procedural plan.

(c) Third, courts should make active use of proceedings under which the determination of issues is not based on regularly scheduled hearing dates; in other words, written preparatory proceedings (Article 175 and subsequent articles of the CCP). Written preparatory proceedings were introduced into the Japanese CCP on the model of prior written proceedings in the German Code of Civil Procedure, and it seems that there was a view that they were appropriate for cases where the issues can be determined appropriately without holding regularly scheduled hearings. In practice, however, they have been used in Japan in cases in which a party involved is an inmate of a penal institution, which makes it impossible for them to appear in court, and in cases before small and medium-sized court branches which have difficulties in scheduling hearing dates. The idea suggested by this paper, however, is that, unlike any of these cases that have been seen under Japanese litigation practice, when both parties have counsel and are willing to proceed with the proceedings in a planned manner, a procedural plan based on the written preparatory proceedings should be established, and the issues should be determined by the exchange of documents and (if necessary) through verbal consultation by way of telephone or web conferences (Article 176(3) of the CCP)[10)].

(d) Finally, there is the issue of the replacement of judges through periodic personnel changes, which cannot be easily eliminated or avoided because it is a matter of the organizational personnel of the national courts as a whole. In this regard, one possible condition for the time being is that both the court and the parties explicitly confirm in advance at the stage of formulating a procedural plan that a review of the plan may naturally be required due to a replacement of the judge in charge[11)].

2. Possible practices in litigation to conduct scheduled proceedings

Based on the conditions described above, the following are possible practices in litigation to

10) Provided, however, that the verbal consultation in the written preparatory proceedings should not be treated the same as a proceeding conducted via a hearing and it should not be mandatory to make a recording of the consultation. It should therefore be noted that matters discussed and orally confirmed in such consultation should be reconfirmed in the brief to be subsequently submitted by the parties.

11) A bolder suggestion is that even if there is a personnel change, a judge should not change his or her position in a case until the case is finally settled. This would require a number of judges working in courts far away from each other to meet on a daily basis through web conferences or other means, and would also make it difficult for the courts to conduct personnel evaluations of judges. However, from the perspective of users of the judicial system, it is generally not desirable for judges to be replaced in the middle of proceedings, as this would delay proceedings and undermine the predictability of judgments based on the accumulated progress of the proceedings. In line with the introduction of IT into court proceedings, which will be discussed later in this paper, it is expected over the medium to long term that the use of IT in judges' work will lead to a review of firmly established practices that have previously been considered common sense.

conduct scheduled proceedings as much as possible under the current CCP.
(a) In the case where both parties have counsel, at the stage where the complaint and the written answer are filed and the defendant has indicated its intention to substantially contest the plaintiff's claim, the court should, as far as possible prior to the first hearing for oral arguments, make a clerical communication to each party's counsel to inquire whether it has any desire or willingness to proceed based on a procedural plan[12)].
(b) If counsel for both parties indicates that they are willing to formulate a procedural plan, the court should hold a scheduling conference (by telephone or web conference, as appropriate) immediately after the first hearing for oral arguments or without delay thereafter and consult with both parties to formulate a procedural plan on the date of the scheduling conference.
(c) Since the cooperation of both parties is necessary for the implementation of the procedural plan, if it is difficult to make a procedural plan that both parties can agree on, the court should not force them to do so.
(d) When formulating a procedural plan, all parties including the court should share the common understanding that the procedural plan may be revised due to circumstances such as the appearance of new facts or materials, the emergence of new issues, and the replacement of counsel or the assigned judge, which may occur during the course of the proceedings. However, unless the plan is so revised, each counsel and assigned judge should endeavor to proceed in accordance therewith.
(e) The procedural plan should specify the number of times each party has the opportunity to submit arguments and evidence, the respective deadlines for such submissions, and the approximate timeframe in which the determination of issues should be completed and the witness examination should be conducted, with the assumption that the plan may be reviewed later.
(f) The court should not hesitate to consider using written preparatory proceedings where counsel for both parties have indicated that regularly scheduled hearings are not necessary.

Ⅵ. Possible Impacts of the Act to Amend the CCP

As described above, this paper has examined the potential practices for making it possible

12) From the court's point of view, it may raise the question whether it would be appropriate to seek a procedural plan only in cases where both parties have counsel, in light of the current CCP, which does not mandate counsel representation. In other words, since the CCP permits litigation without counsel, courts should treat parties with counsel equally with those without counsel, and the de facto refusal to allow the latter to proceed under a procedural plan is not in line with such equal treatment. However, I believe that such equal treatment should essentially be achieved between the parties in individual cases, and that it is inappropriate to seek the possibility of making a procedural plan in cases where only one party has a counsel, as this may lead to inequality. Furthermore, in cases in which none of the parties has appointed counsel, there is no inequality between the parties involved in such individual cases. However, as there is a risk that the proceedings will be concluded without the parties being able to make sufficient arguments and proof, the court should not look into the possibility of making a procedural plan from the perspective of due process, which is an appropriate method in line with the principles of the CCP.

to conduct civil litigation proceedings in a more planned manner, in light of the scheduling practices in commercial arbitration. All of these practices are operational devices possible under the current CCP.

On the other hand, as is well known, the Act for Partial Amendment to the Code of Civil Procedure and Other Acts (Act No. 48 of 2022) was enacted in May 2022, in order to promote, among others, the use of IT in court proceedings. Three of the amendments made by this Act are related to the practices in litigation discussed above.

First, with regard to the preparatory proceedings (Article 168 and subsequent articles of the CCP) that are premised on the holding of regularly scheduled hearings, the CCP before the amendment allowed hearings to be held by means of telephone or web conferences, but only if one of the parties appeared at the hearing in person. The amendment makes it possible for both parties to participate in the hearings by means of telephone or web conference, thereby enabling the hearings to be held more flexibly than before. With this amendment, it is conceivable that a procedural plan could be formulated to schedule the hearing dates of preparatory proceedings for several months in advance, rather than through written preparatory proceedings, on the assumption that the dates can be revoked and redesignated flexibly. However, it is also conceivable to devise a procedural plan based on written preparatory proceedings, on the assumption that it is sufficient to switch to preparatory proceedings when a hearing is required.

Second, a new case management system will be constructed that allows litigants to view case records at any time on computers outside the court using the Internet, through which court documents will be served and sent. This system would also allow for electronic communication between the court and the parties, potentially making it easier for a judge to make a request for explanation outside of the scheduled hearing dates (Article 149 of the CCP). If this is the case, the need to hold hearings will be relatively reduced due to more frequent requests for explanation outside of hearings than in the past, which may make it more realistic to formulate a procedural plan using written preparatory proceedings.

Thirdly, a "special procedure with statutory proceeding periods" will be introduced as a new legal procedure. The outline thereof is as follows. If both parties agree to use this procedure, the court and the parties shall consult and designate in advance a date for concluding oral arguments within six months and a date for rendering judgment within one month thereafter. Actions concerning consumer contracts and individual labor relations civil disputes are naturally excluded from this procedure, and it is also not available when there is a risk of lack of equity or due process between the parties if this procedure is used. While it is considered essential that both parties have legal counsel, strictly speaking, that is not a legal requirement as it is not stipulated in the text of the relevant provisions of the amended CCP. Each party has the right to return to using the normal procedure at any time. The issues to be resolved in the reasons of a judgment shall only be those confirmed by the court in advance with both parties, and the method of filing an appeal against the judgment is an objection to the same court seeking resumption of proceedings.

This procedure has been introduced under the awareness of practical issues similar to those

I have experienced, but the cases that are suitable for the use of this procedure and for which this procedure are actually used are considered to be limited. However, it seems likely that this will serve as an opportunity to expand the practice of establishing flexible procedural plans for cases that are not subject to this procedure, such as cases that clearly require a procedural period that is longer than six months. In addition, the litigation practice shown in this paper is merely an operational device and requires the voluntary willingness of both the court and the parties. However, if the contents of the new special procedure described above are reviewed in the future and the contents similar to the litigation practice shown in this paper are introduced as a stipulated procedure, it can be expected that scheduled proceedings will be more easily carried out in litigation. I hope that this paper will in some way help to make such future progress.

A Message from JCAA

President
Shinsuke Kitagawa

It is our pleasure to publish the fourth 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 working together to increase the usage of international arbitration in Japan. For example, the work on amending the Arbitration Act was complete and the revised Arbitration Act is expected to come into force next April. As a side event of ASEAN-Japan Special Meeting of Justice Ministers in 7th and 8th of July, Ministry of Justice, The Japan International Dispute Resolution Center (JIDRC) and the JCAA Jointly exhibited a booth to promote arbitration in Japan.

In early 2023, the JCAA actively exchanged with arbitration communities beyond Japan, including Hong Kong and Washington, D.C., where in-person international arbitration events were held. As a speaker and panelist, the JCAA explored the key features of its arbitration services. The JCAA is delighted to witness a growing number of opportunities for face-to-face interactions with foreign practitioners within and outside Japan.

Lastly, the year of 2023 is memorial to the JCAA, the 70th anniversary. Special events for celebration are planned to be held in November, so please stay tuned for more information from the JCAA.

The JCAA will continue to do its utmost to provide you with services that will satisfy you. We sincerely appreciate your continued support of the JCAA.

Japan Commercial Arbitration Journal VOL.4 [2023]　ISSN 2435-9726

The Japan Commercial Arbitration Association (JCAA)

www.jcaa.or.jp