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Current International Arbitration Practice and Challenges for Japanese Corporations

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I. Introduction

The Japan Institute for Overseas Investment and Paul Hastings LLP co-hosted a webinar entitled "Current International Arbitration Practice and Future Challenges for Japanese Corporations" (a two-session series held on March 3, 2021 and April 21, 2021).[1] Based on the content of the webinar, this article discusses (1) the current situation in which Japanese companies have not used international arbitration as frequently as their foreign counterparts, (2) the effectiveness of international arbitration as a means of dispute resolution for Japanese companies, and (3) some of the challenges that Japanese companies tend to face when they use international arbitration.

II. Japanese Companies Have Not Used International Arbitration As Frequently as Their Foreign Counterparts

International arbitration, as opposed to litigation, originally developed as a mechanism for resolving cross-border disputes. Japanese companies doing business internationally face disputes from time to time, but they have not used international arbitration to resolve such disputes as often as their comparably-situated foreign counterparts.

The following table shows the nationality of the companies listed in the Global Fortune 500 for the top six GDP countries (among others), including Japan. This shows that Japanese companies are actively doing business around the world.

Country	GDP	Number of Fortune Global 500 Companies[2]	Number of ICC cases[3]	Number of SIAC cases[4]
U.S.	1st	121	196	39
China	2nd	124	105	67
Japan	3rd	56	28	15
Germany	4th	27	97	5
U.K.	5th	32	78	14
India	6th	7	147	429
S. Korea	10th	14	57	20

The two columns on the right side of the table show the number of international arbitration cases involving companies from each country that were filed with the ICC and SIAC in 2019. The total number of cases filed with the ICC in 2019 was 869. Among those 869 cases, companies originating in the United

States and China were parties in 196 and 105 cases respectively, while companies originating in Japan were parties in only 28 cases.[5] The total number of cases filed with the SIAC in 2019 was 479. Among those 479 cases, companies originating in the United States and China were parties in 39 and 67 cases respectively, while companies originating in Japan were parties in only 15 cases.[6]

Compared to how frequently companies in Asia, such as India, China, and South Korea use international arbitration, Japanese companies use international arbitration much less frequently than their foreign counterparts.[7]This does not mean that Japanese companies are arbitrating in Japan, either. The JCAA has a long history (having been established in 1950), but during the five-year period from 2016 to 2020, the total number of cases filed with the JCAA was 72.[8] The number of cases filed in a typical year is only 10 to 20.

Given the JCAA's ability to hear international arbitration cases, Japanese companies could use the JCAA's resources more. The nationalities of the parties to the cases heard by the JCAA to date have been as diverse as 22 countries and regions; excluding Japan, the most common geographical origins of the parties were China, South Korea, Taiwan, the United States, and Thailand.[9] Half of the nationalities of the arbitrators in cases heard by the JCAA have been non-Japanese, and more than half of the cases have been heard in English.[10] These statistics show that there is a place for conducting international arbitration in Japan, but that it could be much more frequently used as a method for international dispute resolution.

Tokyo should attract more attention as a seat of arbitration, too. Tokyo could be more accessible than Singapore for arbitrators, attorneys, parties, and witnesses from the United States and Europe. Tokyo is exceptionally safe from terrorism and demonstrations. Yet, Tokyo still has a long way to join the group of cities (New York, Paris, London, Geneva, Singapore, Hong Kong) that are frequently chosen as a seat for international arbitration.[11]

III. Why Japanese Companies Are Not Using International Arbitration As Frequently as Their Foreign Counterparts

This raises the question of how Japanese companies are resolving cross-border disputes without using international arbitration. In light of the fact that Japanese companies are actively conducting business around the world, it would be far-fetched to believe that Japanese companies are involved in cross-border disputes much less frequently than their foreign counterparts.

There are two possible reasons for this. First, contracts may not include an arbitration clause in the first place, and in that case, a dispute resolution mechanism is naturally limited to litigation. Unsurprisingly, attorneys representing Japanese companies may not be motivated to recommend international arbitration as a dispute resolution mechanism because international arbitration is not even mentioned in courses taught at undergraduate schools of law or law schools in Japan. If Japanese parties do not consider including international arbitration clauses when drafting contracts without properly appreciating the effectiveness of arbitration as compared to litigation, they should.

Second, even if international arbitration clauses are included in contracts, Japanese parties may be reluctant to resolve disputes through international arbitration. We do not have the statistics, but there might be a possibility that Japanese parties tend to continue negotiations to avoid taking formal legal action. Avoiding formal legal action may make sense sometimes, but directors should make such an important business decision based at least on the understanding of the differences between litigation and international arbitration as well as considering the effectiveness of international arbitration as a

method of dispute resolution. In order for that to happen, principals of companies need to know specifically what it means to resolve a dispute through international arbitration.

IV. International Arbitration—Its Effectiveness as Compared to Litigation

Comparing international arbitration with litigation, it makes sense that international arbitration originally developed as a means to resolve cross-border disputes. International arbitration is equipped with elements that are suitable for a company in country A and a company in country B to fight on equal terms and obtain a fair decision.

A. The Seat of Arbitration Is Fair for Both Parties

No one wants to fight on enemy soil. No matter how much Japanese companies trust the Japanese judicial system, foreign companies will rarely agree to litigate in Japan. Japanese companies, however, should not litigate in a country where the judicial system may be corrupt. Even if a particular judicial system may not be corrupt, Japanese companies need to overcome certain disadvantages to litigate in a foreign country. For example, in the United States, Japanese companies need to follow all kinds of procedures with which they are not familiar (such as large-scale discovery, a jury system consisting of ordinary citizens, etc.).

International arbitration makes it possible to avoid fighting in hostile territory and allows both parties to fight on neutral ground. If a dispute is between a Japanese company and a U.S. company, the seat of the arbitration could be Paris. If they arbitrate in Paris, both parties bear similar disadvantages regarding geographical conditions such as the time difference and the time required for travel.

In addition, by making English the language used for international arbitration procedures and hearings, Japanese companies can minimize the language barrier, regardless of where they choose to arbitrate.[12]

B. Less Bias Toward Common Law or Civil Law

Whether parties bring a lawsuit in a common law jurisdiction or a civil law jurisdiction also influences the proceedings. We do not want to overgeneralize, but in civil law jurisdictions, the focus is generally on the judges to form a mental impression through the course of reviewing facts and evidence. In common law jurisdictions, in contrast, the focus is more on the parties to present a compelling narrative in court through the course of presenting facts and evidence.

This difference may become most apparent in witness examinations. In civil law jurisdictions, such as Japan, witness examinations typically serve for judges to confirm their mental impressions that they have already formed and end rather uneventfully. On the other hand, in common law jurisdictions, such as the United States, attorneys present a compelling narrative in court through examining witnesses, and often times, critical moments that can greatly affect the outcome of the case occur during witness examinations. Attorneys typically consider witness examination as one of the most important parts of the case to exercise their skills as litigators.

With international arbitration, as we explain below, parties can choose between the common law and civil law approaches to be utilized, or not utilized, one way or the other depending on how they choose arbitration rules and arbitrators in accordance with the preferences of the parties.

C. Arbitration Rules Can Reflect the Parties' Intent

If parties litigate, they abide by the procedural rules of the jurisdiction in which the case is pending. If parties litigate in the United States, for example, extensive and large-scale discovery is inevitable, and

parties may need to cope with various other discovery procedures, such as depositions, interrogatories, physical inspections, and the like.

If parties arbitrate, they take the lead in deciding the procedures. If they wish, they can proceed on a completely *ad hoc* basis as well. They will decide at each stage of the process with their arbitrators on the next procedure (such as the selection of arbitrators, the number of written arguments to be submitted, how to conduct discovery, discovery period, witness examination schedule, witness examination procedures, etc.). That said, it takes time and effort for parties in dispute to make decisions on an *ad hoc* basis, and they often opt to adopt and comply with arbitration rules provided by an arbitration institution at the time they agree to an arbitration clause in an agreement.

The UNCITRAL Arbitration Rules, developed by the United Nations Commission on International Trade, have been designed to be easily adaptable in both civil and common law frameworks. The ICC Arbitration Rules are generally compatible with the UNCITRAL Arbitration Rules and reflect the latest international practices, providing detailed guidance on areas where disputes are likely to arise in practice. The Interactive Arbitration Rules developed by the JCAA are distinctive compared to other arbitration rules in the sense that they include elements that are more compatible with the civil law framework, while maintaining general consistency with the ICC Arbitration Rules.

D. Parties Can Choose Their Arbitrators for the Case

Judges decide cases, but they do not always have the expertise in the relevant fields for each case even if the case requires some expertise. Judges can be corrupt, too, if you look around the world. Parties, however, are unable to choose the judge for their case if they litigate.

Many cases actually require an adjudicative body to have some expertise to resolve disputes. Even if a dispute pertains to a breach of contract, the case requires expertise to understand the facts and analyze the legal issues if it involves trade secrets or intellectual property. In the United States, for example, parties cannot choose a judge, but rather, the jury, consisting of ordinary citizens, decides factual issues.

Further, if parties litigate in a common law jurisdiction, their judge will decide the case under common law, and Japanese companies who litigate in a common law jurisdiction have no choice but to follow common law principles that govern their case.

International arbitration, on the other hand, allows parties to choose from arbitrators around the world, who are suitable for their case, based on their respective backgrounds. Parties can proactively avoid receiving a decision from someone who has no relevant expertise. If each party choses one arbitrator, even if the adversary is from a common law jurisdiction, a Japanese company can choose an arbitrator with a background in civil law to ensure fairness between the parties.

E. Enforceability

Even if a party wins a case in litigation, there is no guarantee that the decision is enforceable. If the losing party does not have sufficient assets in the country in which the winning party obtained the decision, the winning party must enforce the decision in another country, but the winning party then must have a judge in the other country recognize the decision in a court of that country. The problem is, for instance, that decisions made in Japanese courts may not be enforced in China.[13]

On the other hand, arbitral awards have a similar effect as a final judgement in a lawsuit, and the New York Convention ensures that they are enforceable in all of the 168 countries that have signed the Convention.[14] The New York Convention also specifies exceptional circumstances in which an arbitral

award may not be recognized or enforced. Further, such exceptional circumstances are limited to where the fairness of an arbitration procedure or the substance was seriously undermined or where there was a violation of public policy. In any country, if the country is a member of the New York Convention, arbitral awards are enforceable so long as they do not fall into one of those exceptional circumstances. International arbitration thus provides generally parties with greater predictability for enforceability as compared to litigation.

F. Parties Can Arbitrate Privately

In principle, national court proceedings are generally open to the public. This is to ensure fairness of the proceedings and the public's trust in the exercise of judicial power. Even if a sensitive trade secret or intellectual property is at stake, court proceedings are generally public unless parties meet exceptional requirements.

The larger the dispute, however, the more likely that a company may desire to keep the existence of a dispute confidential from its other business partners and the market.

International arbitration allows the parties to resolve their disputes privately. Arbitrators, meanwhile, will do their best to ensure that the arbitral awards that they issue could never possibly trigger one of the exceptions in the New York Convention so that they will be enforceable. Arbitrators thus place the utmost importance on neutrality and impartiality of the proceedings even though they are conducted privately.

G. The Governing Law and the Procedural Law Are Different

In well-drafted international contracts, parties choose a governing law that governs the substance of their disputes. Whether parties litigate or arbitrate, the governing law is the law chosen by the parties if the parties have an agreement. In the absence of a choice of law clause, whether parties litigate or arbitrate, substantive laws that are suitable for the case will apply. On the other hand, procedural rules of the jurisdiction in which a case is pending apply in litigation; in arbitration, procedural rules of the seat of an arbitration do not apply, and the arbitration law of that jurisdiction applies.[15] The arbitration law of a particular country generally does not provide for detailed procedures. That is precisely why parties agree to use the arbitration rules discussed above.

H. No General Right to Appeal

If parties litigate and they are not satisfied with the decision rendered in the first instance, they can appeal, and if they do not appeal, the decision will become final. If parties arbitrate, an arbitral award is final when it is issued, and parties cannot generally appeal.[16] Compared to litigation, however, by the time the tribunal issues an arbitral award, parties can reflect their respective preferences to the procedures and substance of their case, as discussed above. Arbitrators also put their best effort to ensure fairness between the parties and reasonableness of the outcome to decide the case. Parties are usually satisfied, and arbitral awards are voluntarily executed at a very high rate exceeding 90%.[17]

V. Challenges for Japanese Corporations When They Use International Arbitration to Resolve International Disputes

Japanese corporations may be more likely to face challenges depending on the case in terms of their knowledge and experience with the legal system and culture of document exchange and witness examination.

A. Document Exchange

As explained above, many international arbitration rules fall somewhere between common law and civil law, but because such arbitration rules are sometimes very compatible with the common law framework, Japanese companies may not be familiar with certain procedures. The U.S. "discovery" process, for example, is very extensive and lengthy even among common law countries. Although it may be limited in scope and duration compared to the U.S. discovery process, international arbitration has a document exchange process, which can be more extensive than the Japanese document exchange process.

In order to respond to a document exchange request, companies need to issue a legal hold to preserve evidence at an early stage. Companies abroad tend to have a system in place that allows them to preserve data all at once to accommodate document exchange requests at any given time. Japanese companies, in contrast, seldom have document retention rules that contemplate a situation where they need to preserve data for purposes of legal proceedings. Japanese companies therefore frequently face challenges when they need to respond to a document exchange request.

Attorneys often review a substantial amount of data when parties decide the scope of document disclosure. Parties often use a third party vendor who can assist the attorneys with reviewing a large volume of documents. Japanese companies' data includes a number of documents that are in Japanese. Japanese companies therefore must translate them into English for the purpose of having their outside counsel, adversaries, and tribunal members (if they are not Japanese) understand, and this takes cost and time.

The doctrine of attorney-client privilege frequently becomes a highly disputed issue because it determines the scope of disclosure when parties from a common law jurisdiction are involved in the case. The doctrine of attorney-client privilege originally developed in common law jurisdictions, and Japanese law, in particular, does not recognize an equivalent doctrine. Parties and tribunals must decide what attorney-client privilege doctrine should apply, which often can be a difficult issue when one party is from a common law country and the other party is from Japan.

Nevertheless, parties almost never take depositions (as compared to how frequently they take them in U.S. lawsuits) and very rarely use interrogatories or requests for admission in international arbitration. International arbitration is thus much more acceptable to parties from civil law jurisdictions in that regard.

B. Witness Examination

Witness examination plays an important role in common law proceedings, and witness examinations in international arbitration tend to play an equally important role because parties from common law countries historically have more extensively used international arbitration. As discussed above, witness examinations in Japanese proceedings tend to end quickly because they typically serve for judges to confirm their mental impressions. Parties in Japanese civil proceedings seldom expect that a witness examination will materially affect the outcome of the case.

In contrast, during witness examinations in common law proceedings, attorneys often present a compelling narrative regarding the issues in dispute. Witness examinations tend to take time, and may materially affect the outcome of the case. Japanese companies should know that almost all questions are leading questions in those witness examinations, but more importantly, they should not underestimate cultural barriers. The American culture has publicized witnesses, who respond to leading questions during examinations, extensively through novels, movies, and TV shows. Anyone can imagine

to some extent what it is like to testify as a witness if you are American, even if you have never testified as a witness. Further, good expert witnesses have often testified in a number of hearings in the U.S., a country where many lawsuits exist.

Japanese witnesses inevitably need to put in diligent effort to testify as a witness in an international arbitration hearing. They will find it effective to practice in mock cross-examinations to mentally prepare themselves and to acquire the skills to answer leading questions. Leading questions encourage a witness to answer just "yes" or "no," but entirely following the opposing counsel's leading questions will allow the questioner to present the adversary's narrative. It takes practice to acquire the skills that enable a witness to provide appropriate context as he or she responds to leading questions.

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[1] Masato Dogauchi, Professor of Law at the Waseda University Law School (and Chief Arbitration and Mediation Officer of the Japan Commercial Arbitration Association (JCAA)) also participated in this webinar as a guest speaker.

[2] According to the Fortune Global 500 2020 survey released annually by Fortune.

[3] International Chamber of Commerce (ICC), Dispute Resolution 2019 Statistics (2020), at page 21.

[4] Singapore International Arbitration Centre, Where the World Arbitrates (Annual Report 2019) (2020), "Geographical Origin of Parties for New Cases Handled in 2019," at page 17.

[5] International Chamber of Commerce (ICC), Dispute Resolution 2019 Statistics (2020), at pages 9 and 21.

[6] *See* footnote 4 above, at pages 16 and 17.

[7] Since the Hong Kong International Arbitration Centre does not publish the same data as the ICC and SIAC, it is not compared in this paper.

[8] Japan Commercial Arbitration Association, "Arbitration, Basic Information and Achievements," https://www.jcaa.or.jp/arbitration/statistics.html (refer to 2021-05-31).

[9] Ibid.

[10] Ibid.

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[11] *See* footnote 5 above, at page 28.

[12] According to the ICC's statistics, of the 586 arbitral awards handed down in 2019, 79% were rendered in English, with the rest rendered in French, Spanish, Portuguese, German, and other languages. *See* footnote 5 above, at page 16.

[13] "In China, there is a judicial interpretation by the Supreme People's Court that stipulates that judgments by Japanese courts will not be recognized nor enforced, and there are court decisions to the same effect," and "Japanese judgments are not effective in China." ("The Supreme People's Court's Answer on whether a judgment by a Japanese court on a claim or debt should be approved and enforced," published June 26, 1995, [1995] Min et al. No. 17, Judgement of the Grand People's Court of November 5, 1994, *see* the Embassy of Japan in China's website "Civil Litigation in China" (December 1, 2018)).

[14] The New York Arbitration Convention, Contracting States, as of May 23, 2021.

[15] Born, International Arbitration: Law and Practice (Second Edition) (Nov. 2015), at pages 155-156.

[16] Ibid., at page 279.

[17] Ibid., citing van den Berg, *The New York Convention: Its Intended Effects, Its Interpretation, Salient Problem Areas*, in M. Blessing (ed.), *The New York Convention of 1958*, 25 (ASA Special Series No. 9, 1996) (in only 5% of the cases brought before national courts do the courts refuse enforcement or recognition of an award).