Developing Japan as a Regional Hub for International Dispute Resolution

Dream Come True or Daydream?

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I. Introduction: Revisiting "Reluctant Claimants" in Japan

Japan's comparatively low per capita civil litigation rate has been a persistent source of fascination among observers particularly from abroad.[1] They have long argued over whether the main reason for few court filings lies mainly in (a) traditional (non-confrontational) culture, (b) institutional barriers (to adversarial court procedures), (c) elite management (maintaining those barriers, but sometimes by diverting threatening cases into mediation schemes – where complainants may get some partial redress but socio-economic order is largely preserved), (d) relative predictability of court outcomes (certainty in law and/or fact determinations),[2] or (e) various combinations of these elements depending on the area of law or period in legal history.[3]

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1 E. Feldman, Law, Culture, and Conflict: Dispute Resolution in Postwar Japan, in: U. of Penn. Law School Public Law Research Paper 07-16 (2007), *https://ssrn.com/abstract=980326*.

2 For a critical review of the recent restatement of this thesis in J. Mark Ramseyer, Second-Best Justice: The Virtues of Japanese Private Law (Chicago/London 2015) see M. Dernauer, Review, ZJapanR/J.Japan.L. 42 (2016) 283.

Similar[3] arguments have been developed to explain the limited known filings of arbitration by Japanese firms.[4] A persistent pattern of "reluctant claimants" is perceived firstly for arbitration of domestic business-to-business disputes, arguably due to strong "competition" from reliable courts and court-annexed or other mediation schemes. It also seems evident, secondly, regarding the use of international commercial arbitration (ICA) by Japanese firms. This is more surprising because ICA is the preferred mechanism for international commercial DR,[5] as it is often difficult to agree on one side's local courts as the forum (due to fear of conceding a "home court advantage") or even courts of a neutral third country (due to greater difficulties in enforcing judgments worldwide, compared to enforcement of arbitral awards under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards).

Thirdly, Japanese firms appear to remain "reluctant claimants" in the burgeoning field of treaty-based investor-state dispute settlement (ISDS) arbitration. Few claims have been formally filed by Japanese investors under international investment treaties,[6] against host states for expropriating or otherwise illegally interfering with their investments. The main venue selected for investor-state arbitration (ISA) is the International Centre for the Settlement of Investment Disputes (ICSID), which has attracted 676 claims as of 30 June 2018.[7] Yet its public database lists only three ICSID arbitration cases filed by Japanese investors, all since 2015 under the Energy Charter Treaty and against Spain.[8] However, at least one case (based on

3 L. NOTTAGE, Translating Tanase: Challenging Paradigms of Japanese Law and Society, in: Victoria University of Wellington Law Review 39 (2009) 755 *https://ssrn.com/abstract=921932*.

4 Various views are discussed in T. NAKAMURA/L. NOTTAGE, Arbitration in Japan, in: Ali/Ginsburg (eds.), Arbitration in Asia (3rd ed., New York 2013) 223 *https://ssrn.com/abstract=2070447*.

5 2018 International Arbitration Survey: The Evolution of International Arbitration, School of International Arbitration, Queen Mary University of London (2018 Queen Mary Survey).

6 See generally L. NOTTAGE/R. WEERAMANTRY, Investment Arbitration for Japan and Asia: Five Perspectives on Law and Practice, in: Bath/Nottage (eds.), Foreign Investment and Dispute Resolution Law and Practice in Asia (London 2011) 25 *https://ssrn.com/abstract=2041686*.

7 The ICSID Caseload – Statistics (Issue 2018-2), *https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-2%20(English).pdf*.

8 JGC Corporation v. Kingdom of Spain (ICSID Case No. ARB/15/27); Eurus Energy Holdings Corporation v. Kingdom of Spain (ICSID Case No. ARB/16/4); and Itochu Corporation v. Kingdom of Spain (ICSID Case No. ARB/18/25). These no doubt related to Spain's abrupt policy shift on renewable energy, which have generated extensive treaty-based arbitration claims: see generally Y. SELIVANOVA,

a one-off investment contract rather than a treaty) has been settled after the Japanese investors threatened to commence arbitration administered by ICSID.[9] There have probably been other such settlements "in the shadow" of investor-state arbitration. Japanese investors have also initiated treaty-based ISA claims through their subsidiaries in third countries (such as an ICSID claim by a Nomura subsidiary in the United Kingdom against the Czech Republic, and recently Bridgestone in the USA against Panama).[10] There have also been claims formally filed by Japanese investors under United Nations Commission on International Trade Law (UNCITRAL) or other non-ICSID Arbitration Rules.[11] Those have traditionally involved less transparency, although more and more proceedings tend to become public nowadays,[12] especially under Japan's newer treaties.[13]

Changes in Renewables Support Policy and Investment Protection under the Energy Charter Treaty: Analysis of Jurisprudence and Outlook for the Current Arbitration Cases, ICSID Review 33 (2018) 433.

9 See e.g. M. SMITH/L. BROWNING, Indonesia and Nippon Asahan Aluminium Consortium Reach Settlement, Dispute Resolution Newsflash, 1 February 2014, *https://www.ashurst.com/en/news-and-insights/legal-updates/indonesia-and-nippon-asahan-aluminium-consortium-reach-settlement/.*

10 Saluka Investments BV (The Netherlands) v. The Czech Republic, UNCITRAL, Partial Award (17 March 2006); Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama (ICSID Case No. ARB/16/34). See also D. CHARLOTIN, Updated With Full Analysis: Many Of Panama's Expedited Objections Are Dismissed in Bridgestone Trademark Case, but Arbitrators Won't Let Claimants Claim for Losses Incurred Outside of Panama, Investment Arbitration Reporter, 8 January 2018, *https://www.iareporter.com/articles/many-of-panamas-expedited-objections-are-dismissed-in-bridgestone-trademark-case-but-arbitrators-wont-let-claimants-claim-for-losses-incurred-outside-of-panama/.*

11 See e.g. Nissan Motor v. India (2017), *http://investmentpolicyhub.unctad.org/ISDS/Details/828.* See also J. HEPBURN, An Update on Investment Treaty Disputes Involving the Government of India, Investment Arbitration Reporter, 23 August 2018, *http://tinyurl.com/yahejr8c,* where it was reported that: "under a proposed settlement deal, Nissan would receive a payout of around US$292 million in unpaid incentives offered by the Tamil Nadu state government to locate a manufacturing plant in the state. […] Tamil Nadu Industries Minister MC Sampath was quoted by Reuters news service as saying that a final decision on the settlement would be taken soon, and that the parties were working in a 'conducive environment'. […] Similar to the Vodafone [ISDS] cases, Tamil Nadu had sought an order from the Madras High Court seeking to restrain Nissan's case from proceeding to arbitration".

12 See generally L. NOTTAGE/A. UBILAVA, Costs, Outcomes and Transparency in ISDS Arbitrations: Evidence for an Investment Treaty Parliamentary Inquiry, International Arbitration Law Review 21 (2018) 111, *https://ssrn.com/abstract=3227401.*

13 T. ISHIKAWA, A Japanese Perspective on International Investment Agreements: Recent Developments, in: Chaisse/Nottage (eds.), International Investment Treaties and Arbitration Across Asia (Leiden 2017) 513.

Nonetheless, the relative paucity of formal ISDS filings by Japanese investors[14] probably helps to explain why Japan has traditionally adopted a somewhat belated and flexible approach towards pressing for and securing ISDS-backed protections in Japan's investment treaties.[15] More recently, however, Japan has been "catching up" with Korea by concluding more bilateral investment treaties (BITs).[16] Notably under the Abe Government, Japan has also been playing an active role in pressing for conclusion of free trade agreements (FTAs) incorporating investment chapters to liberalise and protect cross-border investments. These include the Trans-Pacific Partnership (TPP),[17] and its reincarnation at the "Comprehensive and Progressive Agreement for TPP" re-signed in 2017 (after the Trump Administration withdrew signature by the United States of America) with minimal changes to the investment chapter.[18] Japan has also expressed somewhat surprisingly strong support for more conventional ISDS procedures in current UNCITRAL deliberations into possible reforms of investor-state arbitration.[19]

These developments suggest difficulties for a predominantly "cultural" explanation for relatively few formal filings or corporate interest in investor-state arbitration on the part of firms from Japan. Diminishing "institu-

14 Compare generally L. NOTTAGE, Are US Investors Exceptionally Litigious with ISDS Claims?, Kluwer Arbitration Blog, 14 November 2016, *http://arbitrationblog.kluwerarbitration.com/2016/11/14/are-us-investors-exceptionally-litigious-with-isds-claims/*.

15 See generally e.g. S. HAMAMOTO/L. NOTTAGE, Foreign Investment In and Out of Japan: Economic Backdrop, Domestic Law, and International Treaty-Based Investor-State Dispute Resolution, Transnational Dispute Management 5 (2011), *https://ssrn.com/abstract=1724999*; and Mapping BITs, Japan, *http://mappinginvestmenttreaties.com/country?iso=JPN*.

16 Compare *http://investmentpolicyhub.unctad.org/IIA/CountryBits/105#iiaInnerMenu* and *http://investmentpolicyhub.unctad.org/IIA/CountryBits/111#iiaInnerMenu*; and recently *http://www.meti.go.jp/english/policy/external_economy/trade/FTA_EPA/index.html*.

17 L. NOTTAGE, The TPP Investment Chapter and Investor-State Arbitration in Asia and Oceania: Assessing Prospects for Ratification, Melbourne Journal of International Law 17 (2016) 1, *https://ssrn.com/abstract=2767996*.

18 See generally A. KAWHARU/L. NOTTAGE, Renouncing Investor-State Dispute Settlement in Australia, Then New Zealand: Déjà Vu, Sydney Law School Research Paper 18/03 (2018), *https://ssrn.com/abstract=3116526*. After Australia became the sixth of 11 states (with Japan) to complete ratification, the revamped agreement came into force among the (so far six) member states from 1 January 2019: see *https://www.beehive.govt.nz/release/cptpp-underway-%E2%80%93-tariff-cuts-our-exporters-december-30*.

19 A. ROBERTS, Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration, American Journal of International Law 112 (2018) 410, *https://ssrn.com/abstract=3189984*.

tional barriers" appear more important,[20] although Korean investors seem to be taking advantage of those more aggressively.[21] Similarly, general or even legal "culture" is hard to posit as the main explanation for comparatively few international commercial arbitration (ICA) filings by Japanese companies.[22] After all, they have had a (longstanding) willingness to pursue arbitrations abroad, originally in core Western venues, like the UK and the US. Japanese firms also now engage increasingly in ICA in major regional hubs, like Singapore and Hong Kong, which have benefitted from the overall expansion in economic activity and arbitration work in the region,[23] particularly over the last decade.[24]

Admittedly, even allowing for the tendency to pursue ICA abroad and the greater confidentiality obligations compared to ISDS proceedings, numbers still seem quite low, compared for example to filings by Korean firms.[25] Yet that very difference suggests we should be cautious about attributing few filings to broad notions of traditionally non-confrontational "Asian culture". Rather, Japanese behaviour may be partly due to more specific psychological or organizational factors impacting on cost-benefit assessments. One may be a tendency to consider formal dispute resolution as 'throwing good money after bad', as the costs are immediate whereas a win is uncertain. This may reflect a "costs on-screen, benefits off-screen" problem, noted in other na-

20 NOTTAGE/WEERAMANTRY, *supra* note 6.

21 J. KIM, Korea's International Investment Agreements: Policy at the Contours, in: Chaisse/Nottage (eds.), International Investment Treaties and Arbitration Across Asia (Leiden 2017) 486.

22 Cf e.g. T. COLE, Commercial Arbitration in Japan: Contributions to the Debate on Japanese 'Non-Litigiousness', in: New York University Journal of International Law and Politics 40 (2007) 29 *https://ssrn.com/abstract=1083371.*

23 L. NOTTAGE, In/Formalisation and Glocalisation of International Commercial Arbitration and Investment Treaty Arbitration in Asia, in: Zekoll/Bälz/Amelung, (eds.), Formalisation and Flexibilisation in Dispute Resolution (Leiden 2014) 111 *https://ssrn.com/abstract=2987674.*

24 SIAC recorded 452 new arbitration cases in 2017; see SIAC, Annual Report 2017, 11, *http://siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2017.pdf.* There were 262 new arbitration cases for HKIAC in 2016, see HKIAC, Annual Report, 2016 Reflections, 10, *http://www.hkiac.org/sites/default/files/annual_report/annual%20report%202016%20%28low%20resolution%29%20v2.pdf*; and 79 new cases seated in South and East Asia for ICC in 2017; see 2017 ICC Dispute Resolution Statistics, *http://library.iccwbo.org/content/dr/STATISTICAL_REPORTS/SR_0040.htm?l1=Statistical+Reports&AUTH=USR_1179&Timeframe=gJn0Fh/C3SJ9wkVUctx9XPHg8IEaixBS9IQv6cwryitUewGAqCJpuw==&AGENT=ICC_HQ.*

25 In 2017, 59 South Korean parties were involved in ICC arbitration, in contrast to 29 parties from Japan. See 2017 ICC Dispute Resolution Statistics, *supra* note 24.

tional settings.[26] But it might be exacerbated by possibly greater risk averseness among the Japanese, although that is difficult to pinpoint empirically and to apply in contemporary settings.[27] Such risk averseness, combined with a broader "status quo bias", may also drive a persistent preference for Japanese companies to choose arbitral venues abroad that have a critical mass of annual filings and therefore proven track records.

Commentators have also pointed to various specific institutional barriers that may also continue to make Japan relatively less attractive as the seat for ICA filings. As well as some geographical inconvenience, impediments include access to:

– up-to-date commentaries and especially case law,[28] in English (the lingua franca of ICA),[29] on Japan's legislative regime (although at least since 2003 that is based around the now-familiar 1985 UNCITRAL Model Law on ICA);

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26 See generally C. SUNSTEIN, Cognition and Cost-Benefit Analysis, University of Chicago Law School, John M. Olin Law & Economics Working Paper 85 (1999) *https://ssrn.com/abstract=186669*.

27 For example, on one widely-known scale, individuals in Japan have a higher score (92) for "uncertainty avoidance" compared to those in Korea (85), let alone e.g. Australia (51): *https://www.hofstede-insights.com/product/compare-countries/*. Some have argued that higher uncertainty avoidance impacts significantly on comparative corporate behaviour (such as CEOs requiring higher takeover premiums and undertaking fewer cross-industry and cross-country takeovers): see e.g. B. FRIJNS/A. GILBERT/T. LEHNERT/A. TOURANI-RAD, Uncertainty Avoidance, Risk Tolerance and Corporate Takeover Decisions, Journal of Banking & Finance 37 (2013) 245. However, significant differences over time have been found in other comparative research assuming – admittedly quite ambitiously – that factors found to influence individuals' risk averseness (such as income/wealth and age) map onto nation-wide differences in a composite index of propensity towards risk-taking. Specifically, for example, although the US still displays the lowest level of risk averseness among developed countries, this has been growing somewhat over 1995-2009, while diminishing more dramatically from a higher level in Japan over the same period. See A. SCORBUREANU/A. HOLZHAUSEN, The Composite Index of Propensity to Risk – CIPR, Allianz Economic Research & Corporate Development Working Paper 147 (2011), *https://www.allianz.com/en_GB/economic_research/publications/working_papers/commodity_markets/cpre.htm,* 13–18.

28 For example, a recent UNCITRAL-supported public resource on the New York Convention lacks a jurisdictional report or any case law related to Japan: see *http://newyorkconvention1958.org/*

29 According to 2017 ICC Dispute Resolution Statistics (Language of awards): 'Awards approved in 2017 were drafted in a total of 13 languages. English remains the predominant language (for 77% of the awards)', ICC Dispute Resolution Bulletin 2 (2018) 51.

– other potential indicia of a pro-arbitration attitude by judges (as its European-style career judiciary does not encourage judges to give extra-judicial speeches to the same degree as in the common law tradition);
– multi-lingual and expert international arbitrators and counsel; and
– suitable venues for hearings.[30]

In 2017, however, politicians in the ruling Liberal Democratic Party (LDP) began pushing bureaucrats and others to develop measures for Japan to become a more attractive regional hub for (potentially lucrative) ICA and international dispute resolution services more generally.[31] In 2018, a working group comprising 14 academics, lawyers and in-house counsel identified seven proposals to improve international arbitration services in Japan.[32] They include:

– strengthening the Japan Commercial Arbitration Association (JCAA), the leading national centre for international arbitration;
– encouraging increased presence of outside dispute-resolution institutions in Japan;
– holding seminars and trainings for Japanese businesses (perhaps in cooperation with the Japan International Cooperation Agency and the Japan External Trade Organization);
– emphasizing marketing abroad;
– attracting international arbitration counsel and arbitrators to Japan (perhaps through tax incentives and greater ease in obtaining visas); and
– the possible establishment of an umbrella organization to manage international arbitration initiatives.

A final proposal made by this new working group is to bring Japanese facilities and laws bearing on international arbitration in line with standards common in arbitration-friendly jurisdictions. Cost-effective venues have recently become available in Ōsaka, housed in Ministry of Justice facilities, and are apparently on the way in Tōkyō.[33] As to the legal framework, although views

30 See generally N. TERAMURA/L. NOTTAGE, Arbitration Reform in Japan: Reluctant Legislature and Institutional Challenges, in: Reyes/Gu (eds.), The Developing World of Arbitration (Oxford 2018) 83, *https://ssrn.com/abstract=3252270.*

31 See L. NOTTAGE/J. CLAXTON, "Japan is Back" – for International Dispute Resolution Services?, Kluwer Arbitration Blog, 29 January 2018, *http://arbitrationblog.kluwerarbitration.com/2018/01/29/japan-back-international-dispute-resolution-services/.*

32 Nihon Keizai Shinbun, *Nihon de kokusai chūsai 2-wari-jaku* [Less than 20% of Japanese Companies Seat Their International Arbitrations in Japan], Nihon Keizai Shinbun (23 July 2018) (citing the work of the group chaired by University of Tōkyō Emeritus Professor Noboru Kashiwagi).

33 The Japan International Dispute Resolution Center, *http://www.idrc.jp/index_en.html.*

may differ,[34] it has recently been observed that doubts remain, in text if not in practice, about the legality of those who are not registered lawyers in Japan acting as arbitrators and counsel in certain international arbitrations.[35]

Tracking how such initiatives unfold will be useful for both theoretical and practical reasons. For scholars, the analysis can offer new insights into what really drives law-related behaviour in contemporary Japan. For practitioners, it can identify and assess Japan as a possibly attractive new option for parties considering fora to resolve commercial disputes outside regular court proceedings, particularly in the economically vibrant Asian region. Accordingly, the rest of this article first assesses attempts to promote ICA, including through existing advertising material from the JCAA.[36] Part III then provides an up-to-date report on the establishment of a new Japan International Mediation Centre-Kyoto (JIMC-Kyoto).[37] That might become an attractive complement to ICA in Japan, given the common practice of parties including multi-tiered dispute resolution clauses in cross-border contracts (requiring mediation attempts before arbitration).[38] The challenge in both respects is renewed regional competition from other jurisdictions, including some new contenders such as Australia.[39]

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34 NAKAMURA and NOTTAGE, *supra* note 4.

35 Y. FURUTA/T. ANDRIOTIS/Y. SAKIOKA/M. MROCZEK, Thoughts on Necessary Change in Japan, in: Global Arbitration Review, 23 May 2018, *https://globalarbitrationreview.com/article/1169880/thoughts-on-necessary-change-in-japan.*

36 Part II mostly elaborates N. TERAMURA/L. NOTTAGE, Japan's (In)Capacity in International Commercial Arbitration, Kluwer Arbitration Blog, 17 November 2018, *http://arbitrationblog.kluwerarbitration.com/2018/11/17/japans-incapacity-international-commercial-arbitration/.*

37 Part III elaborates J. CLAXTON/L. NOTTAGE, Getting Into Gear: The Japan International Mediation Centre – Kyoto, Kluwer Mediation Blog, 17 September 2018, *http://mediationblog.kluwerarbitration.com/2018/09/17/getting-gear-japan-international-mediation-centre-kyoto/.* For further background to JIMC-Kyoto, see J. CLAXTON/L. NOTTAGE, *Wa* and the Japan International Mediation Centre – Kyoto, 1 February 2018, *http://mediationblog.kluwerarbitration.com/2018/02/01/wa-and-the-japanese-international-mediation-centre/.*

38 See e.g. 2018 Queen Mary Survey, *supra* note 5, finding a preference increase from 34% to 50% for combining alternative dispute resolution with international arbitration since 2015 (p. 5), and Global Data Trends and Regional Differences, Global Pound Conference Series (2017), reporting that 51% of those surveyed identified preventative pre-dispute or pre-escalation processes as central to the future of commercial dispute resolution (p. 13).

39 For a critical assessment of a comparable attempt recently to promote Australia as another regional hub for international arbitration, see L. NOTTAGE/N. TERAMURA, Australia's (In)Capacity in International Commercial Arbitration, Kluwer Arbitration Blog, 20 September 2018, *http://arbitrationblog.kluwerarbitration.com/2018/09/20/australias-incapacity-international-commercial-arbitration/.*

II. Assessing Japan's (In)Capacity in International Arbitration

Japan has a long-recorded history of seeking to avoid open confrontation and to resolve disputes amicably, but this has not yet translated into resolving many disputes out of court through binding decisions of arbitrators. In the early 7th century, Japan codified Confucian and Buddhist approaches to governing in Prince Shotoku's Constitution, whose first article provides that "[h]armony should be valued, and quarrels should be avoided".[40] From the 17th century, after lengthy political machinations and some bloody conflicts[41] to restore and maintain more centralised control over the country, the Tokugawa Shogunate implemented a "didactic" style of mediation that aimed to (re)educate all involved through agreed settlements.[42]

After modern Japan re-opened to the world in the mid-19th century, mediation schemes were introduced to resolve socio-economic and potentially politically controversial issues, such as farm tenancy claims that started to generate growing numbers of court filings from the early 20th century.[43] After World War II, government-supported mediation schemes were also introduced in the wake of litigation over environmental pollution and other major social issues.[44] Court-annexed mediation also endured for civil disputes more broadly,[45] following a more "evaluative" style as well, but with perhaps greater reference to legal norms by the mediators (including *bengoshi* lawyers or other legally-trained third-party neutrals, with career judges). An even more legalistic style of mediation, despite government funding, similarly characterises the scheme set up to mediate mass claims against the Tokyo Electric Power Company after the 2011 tsunami and consequent nuclear plant meltdown.[46]

These types of schemes, along with the growing efficiency of Japan's civil litigation system anyway, have hampered efforts to develop privately-supplied dispute resolution services. In particular, Japanese firms have not regarded international arbitration as an indispensable conflict resolution

40 H. Blocker/C. Starling, Japanese Philosophy (Albany 2001) 37.

41 See e.g. J. Dougill, In Search of Japan's Hidden Christians: A Story of Suppression, Secrecy and Survival (Clarendon 2015).

42 D. Henderson, Conciliation and Japanese Law: Tokugawa and Modern (Seattle 1965).

43 D. Vanoverbeke, Community and State in the Japanese Farm Village, Farm Tenancy Conciliation (1924–1938) (Leuven 2004).

44 F. Upham, Law and Social Change in Postwar Japan (Cambridge 1989).

45 S. Kakiuchi, Regulation of Dispute Resolution in Japan: Alternative Dispute Resolution and its Background, in: Steffek/Unberath (eds.), Regulating Dispute Resolution (Oxford 2013) 269.

46 J. Rheuben/L. Nottage, Now that the (Radioactive) Dust Has Settled: Resolution of Claims from the Fukushima Nuclear Disaster, Asian Dispute Review (2013) 126.

mechanism.[47] Their understanding of dispute resolution may be summarised as: first, negotiation; second, mediation (but court-annexed); third, litigation; and, fourth, arbitration (if the firms in question know it exists, but many business people and even some Japanese legal practitioners do not realise that arbitration is a viable choice).[48] In short, the use of ICA is still not salient in Japanese business and legal practice.

However, it is too hasty to conclude that the Japanese government has not promoted "Japanese" ICA in and out of the country. The Ministry of Economy, Trade and Industry (METI) has played a key role over many decades in trying to develop the Japanese arbitration industry.[49] The METI has long supported the JCAA, the dominant and leading arbitration institution in the country, notably by providing former senior officials to serve as JCAA Presidents.[50]

Unfortunately, the JCAA has largely missed out on the boom in ICA across the wider Asian region particularly over the last 10–15 years.[51] Despite modern Rules (updated in 2015, but more dramatically in 2019), fee structures and personnel, the JCAA has attracted only 12–27 new case filings annually over 2007–2018.[52] This caseload is very low compared to its counterparts in China, Hong Kong, Singapore[53] and even recently Malaysia

47 Y. HAYAKAWA, *Nihon ni okeru chūsai no rekishiteki isō* [Historical Aspects of Arbitration in Japan], Hōritsu Jihō 87 (2015) 19.

48 S. KISA/S. MIYAZAWA/T. SATŌ/S. KAWASHIMA/N. MIZUTANI/K. KAMIISHI, *Tekisuto-bukku gendai shihō* [A textbook on the Present-Day Judiciary] (6th ed., Tōkyō 2015) 40.

49 Its jurisdiction ranges from sectors where Japanese firms have long become globally competitive (such as the automotive and electronics industries) to sectors dominated by small- and medium-sized enterprises (SMEs). See METI Agencies, *http://www.meti.go.jp/english/aboutmeti/agencies/index.html.*

50 Y. TANIGUCHI, *Intabyū: Shinsetsu sareta shingapōru kokusai shōji saiban-sho hanji ni erabareta sono haikei* [Interview: The Background of being Appointed as a Judge of the Newly Established Singapore International Commercial Court], The Lawyers (March 2015) 22.

51 T. YOKOYAMA, Arbitration in Japan: Next Chapter, International Law Quarterly (XXXIV) 2 (2018) 18; H. TEZUKA/Y. MAEDA, *Ajia chūsai no tenkai to nihon* [Development of Arbitration in Asia, and Japan], Hōritsu Jihō 87(4) (2015) 13–18.

52 Based on statistics provided by the JCAA to the authors. For JCAA's Arbitration Rules, see *http://www.jcaa.or.jp/e/arbitration/rules.html.* The three sets of Rules available since 2019, especially the innovative new "Integrative Rules" aimed at controlling arbitration costs, appear to be a response to the LDP policy push mentioned in Part I and subsequent developments outlined below. See generally D. GILMORE/J. RIBEIRO/S. BEER/B. JOLLEY, New 2019 JCAA Rules: Is Three a Crowd? *http://arbitrationblog.kluwerarbitration.com/2019/02/08/new-2019-jcaa-rules-is-three-a-crowd/.*

53 2018 Queen Mary Survey, *supra* note 5, 13.

(AIAC)[54] and Korea (KCAB).[55] The JCAA's limited visibility in the global arbitration market is attributable to its (so far largely) fruitless struggle to shake off a reputation abroad as being Japan-focused that partly derives from the fact that almost all its cases involve at least one Japanese party[56] but also the nature of the appointment of its Presidents.[57] Another cause of the limited visibility is the fact that the JCAA lacks credibility for Japanese SMEs and even large Japanese companies seeking to include it in cross-border contracts as the arbitral venue.[58] To put it bluntly, the "Japanese" ICA business has failed to gain not only international but also domestic users.

Given such circumstances, it is understandable that the Japanese government embarked on a new program to shore up the flagging Japanese arbitration scene. In June 2017, the Cabinet of Japan approved the 'Basic Policy on Economic and Fiscal Management and Reform 2017'.[59] This has led to the establishment of the Japan International Dispute Resolution Center Osaka (JIDRC-Osaka)[60] on 1 May 2018, and the opening of the International Arbitration Center in Tōkyō (IACT)[61] on 1 September 2018. The former does not provide arbitration services but offers reasonably-priced and conveniently-located specialist facilities for international arbitration hearings and other forms of ADR.[62] The latter is the first Asian international arbitration body specialised in intellectual property disputes.[63]

Those new attempts are part of an inter-ministerial initiative to enhance Japan's status as an international dispute resolution centre. The Justice,

54 AIAC, CIPAA Conference 2018 – Sharing Solutions (7 May 2018) 11–12, *https://www.aiac.world/wp-content/uploads/2018/CIPAA%20Report%202018.pdf.*

55 S. Y. KIM/A. WHITE, Arbitration Procedures and Practice in South Korea: Overview, 1, *https://uk.practicallaw.thomsonreuters.com/8-381-2907?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1.*

56 TEZUKA/MAEDA, *supra* note 51, 13.

57 See generally C. JONES, The Influence of Amakudari on the Japanese Legal System, ZJapanR/J.Japan.L. 40 (2015) 1.

58 T. NAKAMURA, *Nihon no chūsai no kore kara* [Future of International Arbitration in Japan], in: Miki/Tezuka/Hironaka (eds.), *Kokusai chūsai to kigyō senryaku* [International Arbitration and Corporate Strategy], (Tōkyō 2014) 492.

59 *https://www.cas.go.jp/jp/seisaku/kokusai_chusai/kanjikai/dai1/gijisidai.pdf.*

60 *http://www.idrc.jp/index_en.html.*

61 *https://www.iactokyo.com/.*

62 T. ETO, Japan Plays Catch-up in the International Arbitration Market, Nikkei Asian Review, 9 November 2018, *https://asia.nikkei.com/Business/Business-Trends/Japan-plays-catch-up-in-the-international-arbitration-market2?fbclid=IwAR3YedGwTWZeFlSqruIIGionfFNQLk4GTTiMY6iJzG4Sc1AD2OzjNwsF9N0.*

63 Asia's First Patent Arbitration Hub to Open in Tokyo, Nikkei Asian Review, 28 June 2018, *https://asia.nikkei.com/Business/Business-Trends/Asia-s-first-patent-arbitration-hub-to-open-in-Tokyo.*

Sports, Trade and Transportation ministries in Japan are discussing how they should promote Japan in English as a seat for ICA.[64] Although their main plan is to strategically advertise Japanese ICA to the country and the rest of the world,[65] it is unclear whether they have adequate knowledge about the current position of Japan in the global ICA market. Without sufficient understanding, the government will not be able to promote Japan as an arbitration hub effectively. While their idea is to promote the country as a new attractive venue, can Japan still catch up with other competitors, or are they being too optimistic? A preliminary assessment can be attempted by explaining how the JCAA, as a core part of Japan's arbitration scene, has perceived and projected Japan as a viable seat for ICA. Hence, it is worth evaluating the JCAA's perception of ICA in Japan.

1. Japan's ICA Capacity

The JCAA earlier published a pamphlet entitled "Responding to the needs of international business: A guide to international commercial arbitration in Japan" ("JCAA pamphlet").[66] It argues for Japan as a compelling arbitration forum mainly because of a revised Japanese Arbitration Law and a modern Japan that is "energetic yet refined, fully wired but also enticing: […] where fast-paced international business mixes seamlessly with a cultural yearning to seek consensus amid traditional notions of fair play".[67]

Regarding arbitration law, the JCAA pamphlet mentions:

- a global standard (the Japanese Arbitration Law was introduced in 2004 based on the 1985 UNCITRAL Model Law);
- party autonomy;
- court assistance and minimal interference;[68]
- representation by foreign legal counsel (registration is unnecessary to represent clients in ICA cases seated in Japan);
- the New York Convention (Japan was an early signatory and the Arbitration Law is in line with the treaty).

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64 CABINET SECRETARIAT, *Kokusai chūsai no kasseika ni mukete kangaerareru seisaku (chūkan torimatome)* [Policy Proposals for Promoting International Commercial Arbitration (Interim Report] (2018) *https://www.cas.go.jp/jp/seisaku/kokusai_chusai/pdf/honbun.pdf.*

65 CABINET SECRETARIAT, *supra* note 64, 5–7.

66 Available at *http://www.jcaa.or.jp/e/arbitration/docs/brochure.pdf.*

67 JCAA Pamphlet, *supra* note 66, 1.

68 JCAA Pamphlet, *supra* note 66, 2 ("Court intervention in arbitral proceedings is prohibited under the […] Arbitration Law except in specifically defined circumstances. Instead, courts play a supporting role, rendering valuable assistance by appointing arbitrators, serving notice or taking evidence").

The first point might surprise some readers as a selling point because Japan was quite late in Asia to adopt the 1985 Model Law, and the Japanese Arbitration Law has still not officially adopted any of the 2006 amendments to the Model Law. However, most Model Law jurisdictions have not adhered to the amendments either,[69] so it could be argued that they do not yet constitute a "global standard". Moreover, the Japanese Arbitration Law is partly based on UNCITRAL's deliberations resulting in the 2006 amendments.[70]

As for the attraction of a "modern" Japan, the JCAA pamphlet claims:

- an advanced nation ("Japan possesses all the facets necessary for reliable and effective resolution of commercial disputes by arbitration"[71]);
- good communications and transport connections;
- a business and financial hub (especially around Tōkyō); and
- cultural benefits ("equality before the law and fair play are highly valued norms of Japan's democratic society"[72]).

The pamphlet's authors may have been too modest, an enduring trait of Japanese culture, as there are further advantages for choosing Japan as the seat for ICA. Parties can now find Japanese and non-Japanese expert arbitrators based in Tōkyō (and even Ōsaka or Seoul, both not far away), as well as some ICA specialisation among law firms and lawyers (*bengo-shi* and *gaikoku jimu bengo-shi*).[73] Japanese arbitration institutions also have strong connections with internationally well-known arbitrators from various jurisdictions.[74] In addition, as introduced above, the country has new arbitration centres and support facilities established under the Japanese government's recent pro-arbitration policy. Finally, Japan lies in Asia, although Japan is no longer "the largest economy in the world's most dynamic re-

69 UNCITRAL, Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, *http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.*

70 K. MIKI/K. YAMAMOTO, *Shin chūsai-hō no riron to jitsumu* [Theory and Practice of the New Arbitration Act] (Tōkyō 2006) 10; TERAMURA/NOTTAGE, *supra* note 30, 90.

71 JCAA Pamphlet, *supra* note 66, 8.

72 JCAA Pamphlet, *supra* note 66, 9.

73 See, for example, Who's Who Legal, *http://whoswholegal.com/search/results/?bSubmitted=true&sFirstName=&sLastName=&sFirmName=&nSearchArea=20&bHasEditions=true&nSubEdition=0&bHasTypes=true&nWebType=0&nSearchCountry=300&ncountrytotal=94&searchsubmit.*

74 JCAA, List of Arbitrators and Mediators (Non-Japanese) Who Have Conducted JCAA Arbitration and/or Mediation Cases Filed Since 1 January 1998, *http://www.jcaa.or.jp/arbitration/0f72fa02e07016f1f51376a89f50cecb8fc406ad.xlsx.*

gion".[75] Japan's political and economic environment has also been stable particularly in recent years, although it is necessary to monitor the Trump government's unpredictable trade and diplomatic strategies.[76]

2. Japan's ICA Incapacity

Nonetheless, such advantages need to be weighed against some downsides. The most serious immediate challenge for promoting Japanese ICA is probably still a relative paucity of arbitrators based in Japan who are able to confidently handle arbitration cases in English.[77] Although the Japanese arbitration community has maintained a pool of good-quality arbitrators and attorneys who are fluent in the language, their total numbers remain low.

While the Japanese government and legal profession are aware of this situation and have tried to improve it,[78] their commitment has sometimes come into question. A recent example is the "Opening Ceremony for JIDRC-Osaka", billed as "The Future of International Arbitration in Japan" but conducted in Japanese instead of English.[79] To really establish Japan as a new international ADR hub,[80] it seems important to create opportunities to expose local practitioners to legal English and to engage in the lingua franca of contemporary ICA.[81]

Another challenge for seating ICA in Japan is the country's geographical inconvenience. Although certainly not as remote as Australia, for example,[82] Japan is on the outskirts of Asia. Tōkyō is one of the world's leading megalopolises, but the city itself is distant from other major Asian economic centres: seven hours from Singapore; four hours from Hong Kong; three hours from Taipei, Shanghai and Beijing. Tōkyō might be an appealing arbitration venue for companies doing business in the city itself or around Japan. But other parties, especially Asian corporations with no strong business interests there, will probably continue to favour the very popular regional arbitration venues like Singapore and Hong Kong.[83]

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75 JCAA Pamphlet, *supra* note 66, 1.

76 See further N. TERAMURA, Australian Perspectives on International Commercial Dispute Resolution for the 21st Century: A Symposium, ACICA Review (June 2018) 38.

77 TANIGUCHI, *supra* note 50, 22.

78 CABINET SECRETARIAT, *supra* note 64, 2–3.

79 *http://arbitrators.jp/wp-content/uploads/180426_openingceremony.pdf.*

80 N. TERAMURA, Japan – The Next Arbitration Shangri-La?, Japanese Law and the Asia-Pacific, 5 October 2017, *http://blogs.usyd.edu.au/japaneselaw/2017/10/guest_blog_japan_shangrila.html.*

81 ICC Statistical Report (Language of Awards), *supra* note 29.

82 NOTTAGE/TERAMURA, *supra* note 39.

83 2018 Queen Mary Survey, *supra* note 5, 9.

One way to overcome the geographical disadvantage is to develop a niche marketing approach. The establishment of the IACT is a promising experiment, although there is a risk of impeding a critical mass in ICA caseload and the development of a consistent "Japan" brand. (The caseload is already split between the JCAA and TOMAC, and a "JIDRC-Tokyo" facility is also envisaged "in the very near future".[84]) There is also still scope to focus on disputes between parties in the Americas or along the "Belt and Road" where Chinese investors are involved in multi-national consortia. Moreover, e-arbitrations would be helpful to combat geographical inconvenience. Yet few Japanese arbitration institutions (even IACT) seem to be interested in developing online arbitration platforms yet.

A final difficulty relates to the putative "cultural yearning to seek consensus".[85] Given world-wide concerns about the costs, delays and over-formalisation of ICA, can this be niche-marketed as a positive? This might be done for example by emphasising the Arbitration Law's nod to Arb-Med, its practice notably in JCAA arbitrations, and the JCAA's novel "Interactive Arbitration Rules" added in 2019.[86] Or does the persistence of such concerns show that it is implausible to compete on price, given the information asymmetries in the ICA "market" (on the demand side) and the growth of large law firms even in Asia (on the supply side)?[87] Is the attraction of consensus even cultural (as opposed to economic), or changing (alongside at least some aspects of Japan's wider legal order)? Or is it something best addressed in separate international mediation proceedings and institutions, like the JIMC-Kyoto?

III. The Japan International Mediation Centre in Kyōto

As mentioned at the outset of Part II above, the long tradition of court-annexed and government-supported mediation schemes coupled with the general efficiency of Japanese court proceedings has hampered the emer-

84 *http://www.idrc.jp/index_en.html.*

85 JCAA Pamphlet, *supra* note 66, 1.

86 Articles 48 and 56 of the JCAA's Interactive Rules require the tribunal to summarise key issues and party submissions, and later give its preliminary views before deciding whether to hold hearings to examine witnesses, in writing to all parties: see Gilmore et al*,* supra n. 52. On earlier empirical data regarding instead ex parte or caucus-style Arb-Med practice in the JCAA, engaging with statistics analysed by Prof. Tetsuya Nakamura, see L. NOTTAGE, Arb-Med and New International Commercial Mediation Rules in Japan, Japanese Law and the Asia-Pacific, 24 July 2009, *http://blogs.usyd.edu.au/japaneselaw/2009/07/arbmed_and_new_internation al_c_1.html,*

87 NOTTAGE, *supra* note 23.

gence of privately-supported dispute resolution services. This is true of mediation as well as arbitration services. Mediation by commercial suppliers has not grown as strongly as in countries like Australia,[88] where developments have often run the other way: the popularity of privately-supplied mediation has tended to prompt reforms to court-annexed mediation.[89] Privately-supplied mediation services have not expanded much despite for example an enactment in 2004 offering advantages for mediation bodies that obtain government certification.[90] Nonetheless, the LDP initiative in mid-2017 created momentum to develop the JIMC-Kyoto, which formally commenced operations from November 2018.

Interestingly, the original idea can be traced back to a mediation seminar held already in 2015, where discussants had considered the importance of an attractive location and other environmental influences on achieving successful settlements. Participants had agreed that Kyōto would be a particularly attractive place for international mediation. The capital of Japan for more than a millennium, Kyōto remains known for its traditional architecture and peaceful atmosphere including religious monuments, teahouses, and gardens. Logistically speaking, as a popular tourist destination, the city also has reliable transportation (lying two hours by bullet train from Tōkyō), hotels and other services.

The JIMC-Kyoto will also begin operations at a time when international commercial mediation is receiving greater attention and support.[91] This includes reported increases in demand for international mediation[92] and the

88 See e.g. L. BOULLE/R. FIELD, Mediation in Australia (Sydney 2018).

89 See generally S. ALI, Court Mediation Reform: Efficiency, Confidence and Perceptions of Justice (Cheltenham 2018).

90 A. YAMADA, ADR in Japan: Does The New Law Liberalize ADR From Historical Shackles or Legalize It?, Contemporary Asia Arbitration Journal 2 (2009) 1. Many bodies have registered but few seem to have significant or strongly growing caseloads. The total number of mediation case filings across all certified ADR organisations in Japan has stabilised around 1000 cases each year since 2010, see *http://www.moj.go.jp/KANBOU/ADR/images/kensu.pdf*. We thank Prof. Moritz Bälz for this reference.

91 See e.g. E. CHUA, Feel the Earth Move – Shifts in the International Dispute Resolution Landscape, Kluwer Mediation Blog, 14 August 2018, *http://mediationblog.kluwerarbitration.com/2018/08/14/feel-earth-move-shifts-international-dispute-resolution-landscape* detailing a United Nations Commission on International Trade Law (UNCITRAL) conference dedicated, in part, to the rise in mediation.

92 International Mediation & ADR Survey, Census of Conflict Management and Stakeholder Trends, International Mediation Institute (IMI) (2016) 5, found that across the globe the interest in international mediation is growing and business advisors, and that potential users understand mediation better.

use of mediation,[93] as well as initiatives to promote mediation to greater effect in certain sectors (such as investor-state mediation).[94]

Meanwhile, there is some progress towards closing the enforcement gap between international mediation and international arbitration. UNCITRAL has finalized the 'Singapore Mediation Convention' for the enforcement of international commercial settlement agreements resulting from mediation,[95] as well as related amendments to its Model Law on International Commercial Conciliation.[96]

1. Establishment and Structure of the JIMC-Kyoto

The JIMC-Kyoto initiative is closely linked with the Japan Association of Arbitrators (JAA), a non-profit organization originally established to provide training to arbitrators and to promote alternative dispute resolution. A working group of 10 to 15 JAA members comprising academics, lawyers, in-house counsel, and businesses leaders began meeting in 2017 to iron out the details. The majority of the participants are Japanese, but a few foreigners have been attending the sessions. The committee has plans for the Centre to offer various support services to international commercial mediations including proposing and appointing mediators, providing facilities for ad hoc mediations, and administering mediations under the JIMC-Kyoto mediation rules.

a) The JIMC-Kyoto Secretariat

The JIMC-Kyoto Secretariat will comprise a small number of lawyers and assistants employed part time who will coordinate their hours with the case flow. Daily operations will be managed by a Secretary-General who will be

93 See e.g. The Eighth Mediation Audit, Centre for Effective Dispute Resolution (CEDR) (2018), reporting a 20% increase in commercial mediation in the United Kingdom since 2016 (at 3).

94 ICSID has proposed draft mediation rules as a new option under its Additional Facility Rules. For a preliminary assessment, see A. UBILAVA/L. NOTTAGE, ICSID's New Mediation Rules: A Small but Positive Step Forward, Erga Omnes – The SCIL Blog, 11 September 2018, *http://blogs.usyd.edu.au/erga-omnes/2018/09/icsids_new_mediation_rules.html* . ICSID, together with CEDR, the IMI and the International Energy Charter secretariat, has also been offering investor-state mediation training sessions globally.

95 T. SCHNABEL, The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements (18 September 2018), *https://ssrn.com/abstract=3239527*.

96 Settlement of commercial disputes, International commercial mediation: draft model law on international commercial mediation and international settlement agreements resulting from mediation, Note by the Secretariat UN Doc A/CN.9/943 (2 March 2018) 9–13, *http://undocs.org/A/CN.9/943*.

assisted by a committee whose members will be subdivided into smaller working groups having responsibility for different spheres of operations including panel membership, marketing, and education.

The JIMC-Kyoto's operations will be based in the peaceful main campus of Dōshisha University in central Kyōto. Its postgraduate Law School, established in 2004 as another aspect of justice system reforms in Japan,[97] will provide facilities including rooms for the parties and mediation proceedings, equipped with interpretation booths. The fees for the use of these facilities will be included in a lodging or administration fee paid to the centre by parties to mediations.

b) The JIMC-Kyoto Mediation Rules

The working group has prepared draft mediation rules, not yet public, that have familiar modern features. They provide, for example, that mediation may be instituted either with or without prior party agreement,[98] that the Centre will appoint mediators for parties on request,[99] and that the choice of mediator is not limited to the JIMC-Kyoto panel of mediators.

While the rules also clarify how mediation will relate to parallel dispute proceedings, they stop short of providing for hybrid procedures,[100] and they do not provide for mediators acting as arbitrators.[101] Similarly, the rules do not prescribe any default style of mediation, which marks a departure from the evaluative style of mediation that is pervasive in most mediations in Japan.

c) The JIMC-Kyoto Panel of Mediators

The organizing committee is compiling a panel of mediators with input from the Singapore International Mediation Centre (SIMC), regular counsel to the

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97 See generally e.g. L. NOTTAGE, Build Postgraduate Law Schools in Kyōto, and Will They Come – Sooner *and* Later?, Australian Journal of Asian Law 7 (2005) 241 *https://ssrn.com/abstract=986529*.

98 See e.g. International Chamber of Commerce Mediation Rules (2014) (ICC Rules), Art. 3 and Singapore International Mediation Centre Rules, Rule 3.

99 ICC Rules, Art. 5(2), (4)–(5).

100 See e.g. the protocol between the Singapore International Mediation Centre Rules and the Singapore International Arbitration Centre (SIAC) entitled 'SIAC-SIMC Arb-Med-Arb Protocol' *http://simc.com.sg/siac-simc-arb-med-arb-protocol.*

101 As mentioned (NOTTAGE, *supra* note 86) the 'arb-med' procedure remains quite common in Japan and a few other Asian jurisdictions. See further JCAA Commercial Arbitration Rules (2015), Rule 55, JCAA Commercial Arbitration Rules (2019) Rule 59 and JCAA International Commercial Mediation Rules (2009) Rule 8. The 2018 UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (Model Law) (Art. 13) likewise allows parties to agree to the mediator acting as an arbitrator in the same dispute.

committee, and the Hong Kong Mediation Centre. The committee intends to include experienced mediators of various nationalities, backgrounds, and areas of specialization on the list. Details about the panel members and their qualifications will be available on the JIMC-Kyoto website.

2. Prospects for the JIMC-Kyoto

There are several elements that should work in favour of this new initiative in Kyōto. Japan is quite well placed geographically for disputes between parties from the Americas and Asia, or between some parties within Asia (such as Korea and China). There are no other dedicated mediation centres in the Asia-Pacific, apart from SIMC, and Japan may be perceived as neutral place to mediate with reliable and distinctive services to support the process.

There are also growing opportunities for mediation services in the region. These include, for example, disputes arising out of the 2020 Tōkyō Olympic Games and China's Belt and Road Initiative.[102]

Meanwhile, the committee is considering how to make the Centre's services distinctive and reflective of its Japanese roots. In time, this might include industry specialisations[103] or optional venues outside of the standing facilities – possibly drawing on the plentiful temples and shrines in the local area.

Nonetheless, can the JIMC-Kyoto emerge as a leading centre for international mediation services? While the JCAA is accredited to offer international commercial mediation services, it has struggled to attract mediation (as well as arbitration) cases despite Japan's large economy.[104] As it looks ahead, the JIMC-Kyoto committee has in mind the experience of the JCAA and the initiatives that have led other institutions in the region to flourish. Discussions have considered the following issues.

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102 The SIMC, for its part, has already announced that it will collaborate with the Mediation Center of the China Council for the Promotion of International Trade / China Chamber of International Commerce to facilitate the mediation of disputes that arise out of Belt and Road transactions. See, e.g., 'SIMC and CCPIT Mediation Center establish international mediator panel to resolve BRI-related disputes' 25 January 2019', *http://simc.com.sg/2019/01/25/simc-and-ccpit-mediation-center-establish-international-mediator-panel-to-resolve-bri-related-disputes/*.

103 As a forerunner, the International Arbitration Center Tokyo (at *https://www.iac tokyo.com*) began operations in September 2018 as Asia's first patent-focused arbitration centre.

104 Y. OHARA, Japan, in: Global Arbitration Review, The Asia-Pacific Arbitration Review (2018) 54.

a) International "In-reach"

Arbitration institutions in Asia that have risen to global prominence include leading international arbitration figures as executives, in management, and as consultants on advisory boards. Working with experts from abroad benefits an institution at the level of operations while reassuring the international community of the capacity and international orientation of the institution.[105]

b) International Outreach

Dispute resolution institutions with international aspirations take marketing seriously. This includes less frontal measures like underwriting events and trainings, supporting student competitions, hosting foreign interns, and maintaining an up-to-date and informative website in English.

c) Cooperation

The success of dispute resolution institutions in Asia has been propelled by coordination among stakeholders, perhaps most visibly in the case of Singapore. Its government, courts, dispute resolution institutions and legal community collaborate and present a unified front to the public. This has contributed to Singapore's reputation as a hub for international dispute resolution in Asia[106] and beyond.[107]

d) Transparency

The trend toward greater transparency among dispute resolution institutions has made it easier to find information about the leaders, governance structure, case statistics, and lists of arbitrators and mediators of institutions, normally available online. This is likely to continue, and for institutions

105 The SIAC Board of Directors, Court of Arbitration, and Secretariat each comprise members of various nationalities. They include American, Australian, Belgian, Canadian, Chinese, Dutch, German, French, Indian, Indonesian, Japanese, Korean, Malaysian, Russian, Singaporean and Swedish members.

106 2018 Queen Mary Survey, *supra* note 5, 10, identifying Singapore as the second most-preferred seat for arbitration (after London) among respondents in the Asia Pacific.

107 2018 Queen Mary Survey, *supra* note 5, 10, identifying Singapore as the third most-preferred seat for arbitration globally as well as fourth among respondents in Europe, fourth among respondents in North America, fourth among respondents in Africa, and third among respondents in the Middle East.

entering the market without established reputations it is especially important not to leave potential users in doubt.[108]

IV. Conclusions

The promotion of Japan as a hub for international disputes has both practical and theoretical resonance. From the standpoint of legal and commercial practice, Japan is well behind Hong Kong and Singapore, now part of the global arbitration lexicon, but also Seoul and Kuala Lumpur, which have a decade-long head start on promotion and development that is now generating growing ICA caseloads. Japan is meanwhile not the only jurisdiction in the Pacific region with hopes to emerge from the shadows, as Australia for example renews its promotional activities. To gain traction in these conditions will require a coordinated and ambitious effort as well as perseverance.[109] Even if Japan and its institutions do earn the trust of potential users, the seeds sown in dispute resolution clauses may not bear significant fruit for a decade or more.

Faced with this reality, Japan would do well to go beyond a general provision of services, to enhance specialisation or targeted marketing. Japan's location at the margin of Northeast Asia might make it a convenient seat for parties distant from Hong Kong and Singapore, such as Korean companies that fail to secure Korea as the place of arbitration.[110] Likewise, Japan's historical ties with the United States might make it an attractive and geographically-convenient seat for American companies with contracting partners in Asia and the Pacific Rim. Belt-and-Road disputes may present another opportunity, again for reasons of geography and for parties to contracts with a Chinese element that want to avoid in Hong Kong.

The emergence of the JIMC-Kyoto strikes a new posture for Japan out in front of a potential market for international mediation services rather than running from behind to catch up, as with arbitration. The capacity of the Centre could be amplified by integration into the broader international dispute-resolution ecosystem in Japan and by synergies with arbitration services through multi-tiered dispute resolution clauses. Prospects might also be buoyed by prompt ratification of the Singapore Mediation Convention.

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108 T. Garcia-Reyes/M. McIlwrath, Arbitration Institutions: Five Things Your Website Must Do To Attract Cases, Kluwer Arbitration Blog, 17 January 2018, *http://arbitrationblog.kluwerarbitration.com/2018/01/17/mike.*

109 This might include the appointment of non-native English speakers as institutional leaders or the creation of an independent umbrella organisation: see Nottage/Claxton, *supra* note 31.

110 J. Kang, A Case for Tokyo, Asian Legal Business (December 2017) 30–31, *https://www.legalbusinessonline.com/features/case-tokyo/75228.*

From a theoretical standpoint, the present attempts to establish Japan as a centre for international disputes raise the perennial issue of reluctant claimants and Japanese attitudes towards dispute resolution. In the case of the JIMC, cultural drivers such as affinity for mediation and a tradition of mediation would not seem enough to sustain the centre even if, as is likely, most early cases will include Japanese parties. Those involved with the project seem to appreciate this constraint and are determined to define the Centre by international rather than Japanese standards. This is demonstrated by the emphasis on international outreach in marketing and international "in-reach" into management. The internationalist approach is also evident through mediator training sessions running in parallel with the establishment of the Centre, which have focused on facilitative techniques despite the prevalence of evaluative mediation in domestic proceedings.

The JIMC initiative did not originate with the government or business elite, but rather with key individuals who are now looking to leverage from subsequent government initiatives. The project was largely conceived and implemented by Japanese lawyers whose experience with mediation convinced them of the potential benefit of a dedicated mediation facility in Japan, and the government came on board only after the project was in motion. This offers an alternative narrative to the view shared by some that Japanese dispute-resolution culture is top-down and shaped by institutional barriers and/or case management by governmental and big business elites.

Whether Japanese companies will become more willing to favour Japan and Japanese institutions will be an indicator of how much the pull of (corporate) culture remains in play. The present initiatives offer renewed possibility of persuading Japanese companies to press their contracting counterparties to seat arbitrations in Japan rather than abroad, as South Korea has been able to do effectively to its benefit.[111] If reluctant Japanese claimants and respondents can at least agree on this point it will mark an important step towards turning the Japanese dream into a reality.

SUMMARY

The Japanese government, supported by various stakeholders, has recently been attempting to develop Japan as another regional hub for international business dispute resolution services. Tracking this development is important for both theoretical and practical reasons. How it unfolds should reveal which of various theories for explaining Japanese law-related behaviour have more traction nowadays. Assessing the new initiatives is also important for legal

111 Id. at 31.

practitioners and others interested in the practical question of where to arbitrate or mediate cross-border business disputes. This paper therefore reports on current attempts to promote existing and new international arbitration centres in Japan as well as the recent establishment of the Japan International Mediation Center – Kyoto, in the context of intensifying competition from other regional venues for dispute resolution services.

ZUSAMMENFASSUNG

Mit Unterstützung interessierter Kreise hat die japanische Regierung jüngst versucht, Japan als einen weiteren regionalen Schwerpunkt für Dienstleistungen im Rahmen der Beilegung kommerzieller Streitigkeiten zu etablieren. Aus theoretischen wie praktischen Gründen ist es wichtig, diese Entwicklung zu untersuchen. So sollte letztere Anhaltspunkte dafür geben, welche der verschiedenen Theorien über das Verhältnis der Japaner zu ihrem Recht heute die größte Bedeutung haben. Eine Evaluierung der neuen Initiative ist zudem für juristische Praktiker und andere Personen von Bedeutung, die ein Interesse an der praxisrelevanten Frage haben, an erlchem Ort grenzüberschreitende kommerzielle Streitigkeiten einem Schiedsverfahren oder eine Mediation zugeführt werden sollten. Entsprechend berichtet der Beitrag über die Versuche, vor dem Hintergrund eines sich verschärfenden Wettbewerbs um Konfliktbeilegungsdienstleistungen bestehende und neu etablierte Institutionen der internationalen Schiedsgerichtsbarkeit zu fördern, wie auch über die kürzlich erfolgte Gründung des Japan International Mediation Center – Kyoto.

(Die Redaktion)