RECHTSPOLITIK / LEGAL POLICY

How Can International Arbitration in Japan Take Flight?

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I. INTRODUCTION

Many jurisdictions promote themselves as international or regional hubs for international dispute resolution services by improving their arbitration infrastructure and adopting arbitration-friendly policies.[1] Japan is no excep-

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1 In 2020, for instance, Singapore and Switzerland amended their arbitration laws to enhance their status as an international dispute resolution hub and preferred seat of arbitration. Singapore strengthened its legal framework by, for example, introducing a default mode for appointing arbitrators in multiparty proceedings where the underlying agreement does not specify a procedure to do so. See, e.g, J. CHAISSE / A. SOLANKI, Singapore's Amendment to Its International Arbitration Act Pledges Its Leadership in the Asia-Pacific Region, *http://arbitrationblog.kluwerarbitration.com/2020/10/18/singapores-amendment-to-its-international-arbitration-act-pledges-its-leadership-in-the-asia-pacific-region/*. An interesting recent development in Switzerland is that an application for the setting aside of arbitral awards may now be

tion. To this end, Japan's government has been carrying out several initiatives, including the establishment of a dispute resolution complex and the improvement of relevant laws. However, will these projects be good enough to attract the attention of arbitration stakeholders and energise international arbitration in Japan? At the moment it is too early to tell. This paper first provides an overview of the current state of international arbitration and describes ongoing initiatives in Japan. It then suggests some measures in terms of the legal infrastructure that should make international arbitration in Japan more accessible and attractive for potential users, especially those outside Japan.

II. CURRENT STATE OF INTERNATIONAL ARBITRATION IN JAPAN

1. Legal Sources

The primary source for Japanese law on arbitration is the 仲裁法 (*Chūsai-hō*, Arbitration Act, hereinafter: AA),[2] which is modelled on the 1985 UNCITRAL Model Law on International Commercial Arbitration with a few modifications to suit the Japanese legal system.[3] As for the recognition and enforcement of arbitral awards, Japan is party to three international conventions: (1) the Geneva Protocol,[4] (2) the Geneva Convention,[5] and (3)

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submitted in English to the Swiss Supreme Court. In the past, the application had to be in one of the country's official languages (German, French, Italian, or Romansh). For details, see, e.g, S. NESSI, New Law Maintains Switzerland at the Forefront of International Arbitration, *http://arbitrationblog.kluwerarbitration.com/2020/08/22/new-law-maintains-switzerland-at-the-forefront-of-international-arbitration/*.

2 Law No. 138/2003. For an overview of the AA, see S. NAKANO, International Commercial Arbitration under the New Arbitration Law of Japan, Japanese Annual of International Law 47 (2004), 96; T. NAKAMURA / L. NOTTAGE, Arbitration in Japan, in: Ali / Ginsburg (eds.), International Commercial Arbitration in Asia (3rd ed., 2013) 223; K. NISHIOKA / Y. NISHITANI, Japanese Private International Law (2021); T. KOJIMA [小島武司] / T. INOMATA [猪股孝史], 仲裁法 [Arbitration Law] (2014); Y. TANIGUCHI [谷口安平] / I. SUZUKI [鈴木五十三], 国際商事仲裁の法と実務 [Law and Practice of International Commercial Arbitration] (2016).

3 For a comparative examination of the AA and the UNCITRAL Model Law, see H. HARATA, Japanese Arbitration Law and UNCITRAL Model Law, in: Bell (ed.), The UNCITRAL Model Law and Asian Arbitrations Laws: Implementation and Comparisons (2018) 69.

4 Protocol on Arbitration Clauses of 24 September 1923. This instrument deals with the obligation of each of the Contracting States to recognise the validity of an arbitration agreement and does not directly regulate the recognition and enforcement of a foreign arbitral award. Article 3 simply provides that "[e]ach Contracting State undertakes to ensure the execution by its authorities and in accordance with the provisions of its national laws of arbitral awards made in its own territory under the preceding articles."

the New York Convention.[6] Japan has concluded a number of bilateral agreements with other states that contain provisions on the reciprocal recognition and enforcement of arbitral awards. An example is the Treaty of Friendship, Commerce and Navigation between Japan and the US.[7]

2. Arbitral Institutions

There are several arbitral institutions in Japan.[8] For instance, there are 日本商事仲裁協会 *Nihon shōji chūsai kyōkai* (the Japanese Commercial Arbitration Association (JCAA)),[9] 日本海運集会所海事仲裁委員会 *Nihon kaiun shūkai-jō kaiji chūsai i'inkai* (the Tokyo Maritime Arbitration Commission (TOMAC) of the Tokyo Shipping Exchange),[10] 日本知的財産仲裁センター *Nihon chiteki zaisan chūsai sentā* (the Japan Intellectual Property Arbitration Center (JIPAC)),[11] 東京国際知的財産仲裁センター *Tōkyō kokusai chiteki zaisan chūsai sentā* (the International Arbitration Centre in Tokyo (IACT)),[12] and 日本スポーツ仲裁機構 *Nihon supōtsu chūsai kikō* (the Japan Sports Arbitration Agency (JSAA)).[13] There is also the recently established dispute resolution complex, 日本国際紛争解決センター *Nihon kokusai funsō kaiketsu sentā* (the Japan International Dispute Resolution Center (JIDRC)), with facilities in Tōkyō and Ōsaka.[14] The JCAA is the most prestigious institution administering commercial arbitration in Japan. However, the

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5 Convention on the Execution of Foreign Arbitral Awards of 26 September 1927.

6 Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958.

7 Treaty No. 27 of 28 October 1953. Apart from this, there are many bilateral agreements, for instance with the UK, the People's Republic of China, Pakistan, Peru, El Salvador, Argentina, Romania, Poland, Bulgaria, Hungary, the former Yugoslavia, and the former Soviet Union.

8 For details on Japanese arbitration institutions and for detailed rules on arbitration proceeding under Japanese law, see, e.g, Y. OHARA / S. YANASE, Japan, in: Moser / Choong (eds.), Asia Arbitration Handbook (2011) 3; N. TERAMURA / L. NOTTAGE, Arbitration Reform in Japan: Reluctant Legislature and Institutional Challenges, in: Reyes / Gu (eds.), The Developing World of Arbitration: A Comparative Study of Arbitration Reform in the Asia Pacific (2018) 83; KOJIMA / INOMATA, *supra* note 2, 22–31; Y. HAYAKAWA [早川吉尚], 概観 [Overview], in: Taniguchi / Suzuki (eds.), *supra* note 2, 71.

9 See *https://www.jcaa.or.jp/en/*. For the new JCAA arbitration rules, D. K. FREEMAN, The New JCAA Arbitration Rules – Japan's Attempt in Innovative Dispute Resolution, Japan Commercial Arbitration Journal 1 (2020) 4.

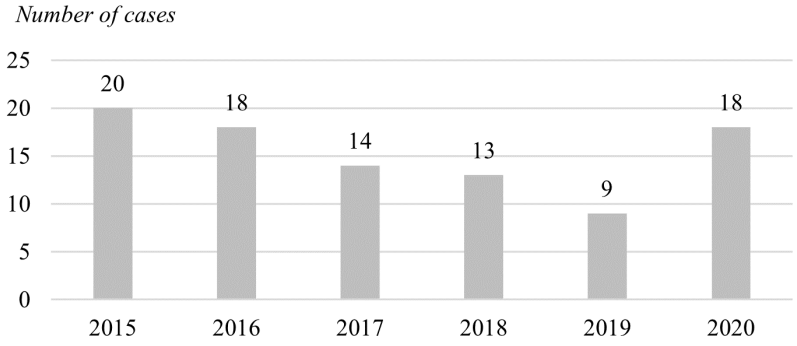
10 See *http://www.jseinc.org/en/tomac/index.html*.

11 See *https://www.ip-adr.gr.jp/eng/*.

12 See *https://www.iactokyo.com*.

13 See *http://www.jsaa.jp*.

JCAA's caseload remains low, despite its 60-year history.[15] According to the JCAA's statistics, 86% of the total number of arbitration cases filed with it from 2016 to 2020 were international in nature, that is, at least one party was a foreign individual or entity.[16]



Source: JCAA statistics, *infra* note 16

3. Objective Evaluation

The arbitration infrastructure in Japan is not "antique". However, while the infrastructure is sufficient to provide international arbitration services at an acceptable level, it plainly needs updating and improvement. In a comparative study of Asia-Pacific jurisdictions, Reyes and Gu identified four stages of arbitration development and suggested that Japan was in transition from Stage 2 to 3. This means that Japan has to work on (1) amending its legislation to bring it in line with the 2006 revisions to the Model Law, (2) establishing a regional or international reputation for having a judiciary that is supportive of arbitration, and (3) offering more innovative services, not just mimicking the rules and practices of rival jurisdictions.[17]

There is no doubt that Japan must deal with these points to establish itself as a regional or international hub for international dispute resolution. Among other steps, it is vital to build up trust in Japan's judiciary being supportive

14 See *http://idrc.jp/en/*. For details, see Y. HAYAKAWA, An Introduction to Japan International Dispute Resolution Center, Japan Commercial Arbitration Journal 1 (2020) 79.

15 For the situation up to 2017, see Y. OHARA, Arbitration in Japan, Asian Dispute Review 19-4 (2017) 197.

16 *https://www.jcaa.or.jp/arbitration/statistics.html.*

17 A. REYES / W. GU, Conclusion: An Asia Pacific Model of Arbitration Reform, in: Reyes / Gu (eds.), The Developing World of Arbitration: A Comparative Study of Arbitration Reform in the Asia Pacific (2018) 286–287.

of arbitration. This is because national courts supervise arbitrations seated or taking place in a particular jurisdiction. Parties designate a country as the seat of arbitration because they believe that the judiciary of that country will ensure that arbitrations take place in a fair, time-efficient, and cost-effective manner and that awards will not be readily set aside. Without trust or transparency in Japan's judiciary, potential arbitration users will be hesitant or unwilling to choose Japan as the seat of arbitration and would instead prefer to go to a rival Asian jurisdiction (such as South Korea, Hong Kong, Singapore, or Malaysia). Consequently, the judiciary's capacity to handle arbitration-related cases in accordance with international best practice and the judiciary's attitude towards the use of arbitration as a means of alternative dispute resolution are critical factors in prompting commercial parties to opt for arbitration in Japan as the means for dealing with their differences.[18]

4. Ongoing Initiatives

Since 2017, with a view to a breakthrough in the development of Japan as a regional hub for international dispute resolution services, the Japanese government has been undertaking several initiatives, including the establishment of the JIDRC, the amendment of the Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers (informally known as the *Gaiben-hō*, 外弁法),[19] and the amendment of the AA to reflect recent developments in international arbitration.[20] The projects cover not only in-

18 There are many more factors. For instance, the 2021 International Arbitration Survey: Adapting arbitration to a changing world, authored by the Queen Mary University of London and White and Case, mentions neutrality and impartiality of the local legal system, a better track record for enforcing agreements to arbitrate and arbitral awards, the ability to enforce decisions of emergency arbitrators or interim measures ordered by arbitral tribunals, the ability for local courts to deal remotely with arbitration-related matters, the political stability of the jurisdiction, allowing awards to be signed electronically, and the permissibility of third-party funding (non-recourse) in the jurisdiction *http://www.arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf*.

19 外国弁護士による法律事務の取扱いに関する特別措置法 *Gaikoku bengo-shi ni yoru hōritsu jimu no toriatsukai ni kansuru tokubetsu sochi-hō* [Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers], Law No. 66/1986. This amendment expanded the scope of representation by foreign lawyers in international arbitration and mediation cases and relaxes the relevant requirement for establishing a joint corporation consisting of attorneys at law and registered foreign lawyers. For details, see: *http://www.japaneselawtranslation.go.jp/common/data/outline/200522151124_200522.pdf*.

20 From a foreign lawyer's perspective on the recent developments, see, e.g, P. HARRIS, Growing New Wings: The Rise of International Arbitration in Japan, Asian International Arbitration Journal 17-1 (2021) 29.

ternational commercial arbitration but also international mediation and international sports arbitration. In conjunction with these efforts, Japan's government and relevant organisations (such as スポーツ庁 *supōtsu-chō* (the Japan Sports Agency) and the Japan Sports Arbitration Agency) have urgently been boosting their capacity to carry our sports arbitration[21] in time to provide athletes with expert dispute resolution services during the Tokyo Olympic and Paralympic Games from late July to early September 2021.

III. FUTURE AMENDMENTS TO THE AA

1. Current Agenda of the AA Amendment Project

As mentioned earlier, Japan's government has been engaged in the amendment of relevant laws (mainly the AA).[22] The current agenda of the amendment project includes, for instance, (1) enabling the court to enforce interim measures ordered by an arbitral tribunal as well as settlement agreements mediated between parties,[23] (2) generally improving the provisions in the AA on interim measures by bringing them in line with the 2006 UNCITRAL Model Law, (3) relaxing the formality requirements for arbitration agreements, (4) implementing new rules on the conduct of online hearings in arbitration via video-link, (5) amending rules on the territorial jurisdiction of the local courts in arbitration and civil mediation cases, and (6) amending the AA to enable the parties to submit materials (especially documentary evidence) in foreign languages without a need for Japanese translation (subject to court permission).[24] The agenda goes a long

21 See, e.g, *https://www.mext.go.jp/sports/b_menu/sports/mcatetop10/list/1421974.htm.*

22 See *http://www.moj.go.jp/shingi1/shingi04900001_00032.html*.

23 Giving enforcement power to mediated settlements may become an innovative development under Japanese law. This is, in essence, being done to incorporate certain rules in the United Nations Convention on International Settlement Agreements Resulting from Mediation of 20 December 2018 ("the Singapore Convention") into the Japanese legal system. Under the current law, a mediated settlement is simply the parties' agreement and thereby carries no direct enforcement power. Therefore, the party wishing to enforce such an agreement needs to bring a case before a court to enforce it. In this light, the amendment on the enforceability of mediated settlements may have a huge impact on Japanese law.

24 仲裁法等の改正に関する中間試案 *Chūsai-hō-tō no kaisei ni kansuru chūkan shian* [Interim Proposal for the Revision of the Arbitration Act, etc.], hereinafter: *Chūkan shian,* and 仲裁法等の改正に関する中間試案の補足説明 *Chūsai-hō-tō no kaisei ni kansuru chūkan shian no hosoku setsumei* [Supplementary Explanation of the Interim Proposal for the Revision of the Arbitration Act, etc.], hereinafter: *Hosoku setsumei*, are available at *http://www.moj.go.jp/shingi1/shingi04900001_00056.html* (only in Japanese).

way towards dealing with the first of Japan's tasks identified by Reyes and Gu. However, as is evident from the agenda items just listed, the primary objective of the amendment project is to catch up with the current global standard (that is, the legal infrastructure for international commercial arbitration that is already in place in popular dispute resolution jurisdictions (such as Singapore and Hong Hong)). The agenda will bring the AA in line with the 2006 UNCITRAL Model Law and now widely accepted global practice. But it will not do more than that. In other words, the amendment project is not intended to introduce innovations that will distinguish Japan from its competitors as an international dispute resolution centre.

2. Potential Impact of the Amendment Project – A Game-Changer?

Could the proposed amendments (that is, catching up with the current front-runners in terms of the legal infrastructure for international dispute resolution) be a game-changer and allow international arbitration in Japan to take flight? Undoubtedly, having a modern infrastructure will help Japan promote and establish itself as an international or regional hub for dispute resolution. But the on-going amendment project will only bring Japan to the starting line of the fiercely competitive race currently taking place among the existing pre-eminent centres for international arbitration (such as London, Paris, New York, Geneva, Stockholm, Singapore, and Hong Kong). Japan's reforms will not give Japan an edge insofar as achieving its ambitious goal of eventually rivalling its competitors and attracting users away from them. In fact, international commercial arbitration in Japan failed to "take off" 15 years ago despite having had a then world standard arbitration infrastructure based on the 1985 UNCITRAL Model Law. One can infer from this experience that an up-to-date legal infrastructure is a necessary – but not sufficient – condition towards establishing oneself as an international or regional hub. The lesson from past experience would therefore be that the current amendment project will not in itself be enough to bring about a breakthrough for international arbitration in Japan. The hard reality is that, starting from behind, Japan has to compete against other popular jurisdictions and attract users away from them. Considering that most of Japan's competitors (especially Singapore and Hong Kong) are constantly improving not just their infrastructure but

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A similar and interesting development can be seen in the recently revised Swiss international arbitration law. According to the new Article 77 2bis of the Swiss Supreme Court Act (Bundesgerichtsgesetz), the application for the setting aside of arbitral awards may now be submitted to the Swiss Supreme Court in English. In the past, the application had to be in one of the main languages (German, French, Italian, or Romansh). As a result, the parties do not need to translate materials into any of those languages and can avoid incurring extra costs.

also their support services for international arbitration, who will come to Japan for international arbitration if all that Japan can offer is the same global standard that its rivals have already had in place for several years, especially in the absence of a track record in the handling of international dispute resolution? Prospective users of international commercial arbitration will instead choose a jurisdiction that they are familiar with and believe to be reliable (most likely Hong Kong and Singapore in the Asia Pacific). They will hesitate to designate an unknown and untested jurisdiction as the seat in which their disputes should be arbitrated. It will therefore be a daunting challenging for Japan to take users away from the well-established arbitration centres in the Asia Pacific, let alone the rest of the world. One might suggest that, given these circumstances, Japan could at least encourage Japanese parties to designate Japan as the seat of arbitration in their international commercial contracts. This is in fact one of the objectives of Japan's current initiatives. The difficulty, however, is that in the course of negotiations over the terms of an international contract, the other (non-Japanese) party will typically insist on arbitration in a neutral state, having no connection with Japan or the country of the other party. Without dominant bargaining power (which cannot be assumed), a Japanese company is unlikely to persuade the other party to agree to Japan as the seat of arbitration. It follows that Japan cannot expect that its present initiatives will result in a dramatic boost in the number of arbitration cases involving Japanese companies.[25] What is instead necessary would be for Japan to take additional measures to distinguish itself from its competitors. Those extra measures would go beyond a mere updating of existing infrastructure and a corresponding public relations drive.

Consider, by way of illustration, a reform that the amendment project has been contemplating. Although still in the discussion stage, one proposal is to allow parties to submit materials in a foreign language (most likely English) in international arbitration-related cases before the Japanese court as the supervisory authority where Japan is the seat of arbitration. Most international arbitrations are conducted in English (sometimes in English and another language). This would be no different where non-Japanese

25 According to the 2021 International Arbitration Survey: Adapting arbitration to a changing world, Japan is not one of the ten most preferred arbitration seats. See *http://www.arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf.* In the near term, one may see an increase in the number of cases involving Japanese companies at the JCAA. But this is because, as the parties agreed to arbitration with the seat in Japan some time ago, they will simply be bringing to the JCAA a dispute that recently arose between them. Therefore, such an increase should not necessarily be regarded as a sign of vitalisation of international arbitration in Japan.

parties agree to Japan as the seat of arbitration.[26] Currently, if (say) a non-Japanese party would like to apply to the Japanese court for some sort of relief (for instance, an interim measure or recourse against an award), the party has to translate all documents adduced before the court (including any transcript of the arbitration proceedings) from English into Japanese. This is because only the Japanese language can be used in Japan's courts under Article 74 of 裁判所法 (*Saibansho-hō*, Court Act).[27] In terms of costs and time, translation will obviously be cumbersome. The possibility of such expense and inconvenience is likely to deter non-Japanese parties from choosing Japan as the seat of arbitration. Consequently, an amendment to the language rule so as to enable parties in international arbitration cases to submit documents in English without need for translation would in a single stroke make Japan more accessible as the seat of arbitration. However, in rival jurisdictions such as Singapore and Hong Kong, the submission of court documents in English is a matter of course in commercial matters. Moreover, when international arbitration-related cases are brought before them, the courts in Singapore and Hong Kong also hear oral submissions and issue their official judgments in English. Thus, while relaxing the language requirement to allow documents to be submitted in English alone would represent a big step towards making Japan more accessible as a seat of arbitration, it will not offer anything more than Japan's leading competitors have been doing for years. Indeed, in hearing cases and publishing their judgments in English, Singapore and Hong Kong offer far more in terms of the parties' convenience than Japan. On that basis, the business people who are accustomed to going to Hong Kong or Singapore for resolution of their disputes are unlikely without considerably more to change their practice and opt for Japan instead.

The foregoing does mean that, as compared to Singapore or Hong Kong, there is a dearth of factors that could lead potential users to designate Japan as a seat. For instance, users from neighbouring countries (such as the PRC and the Republic of Korea) as well as from Europe and North America may indeed find Japan to be in a better geographical location than other Asian

26 According to JCAA statistics, 57% of the international cases heard from 2016 to 2020 at the JCAA were conducted in English, 35% in Japanese. See *https://www.jcaa.or.jp/arbitration/statistics.html.*

27 裁判所法 *Saibansho-hō* [Court Act], Law No. 19/1947. Article 74 of the Court Act stipulates that "[i]n the court, the Japanese language shall be used." According to the Ministry of Justice, this language requirement is intended to (1) avoid miscommunication and misunderstandings between the parties to court proceedings and (2) meet the demand for an open trial. Furthermore, if the parties were allowed to communicate with each other in different languages, court spectators might not be able to follow court hearings. See *Hosoku setsumei, supra* note 24, 33.

jurisdictions (especially Singapore). But let us assume that Japan is not so ideally suited geographically. As a result of the COVID-19 pandemic, many arbitrations and court hearings around the world are now being conducted using remote technology.[28] This has lowered the expense and carbon footprint of cross-border dispute resolution. Now suppose that the use of remote technology remains the "new normal" after the pandemic or that the jurisdictions pioneer the use of remote technology as a means of bringing down the prohibitive cost of international arbitration and as being more convenient and environmentally friendly.[29] In that case, international dispute resolution would in effect be 'de-localised', and geographical convenience will no longer play a major role in the parties' choice of seat. Parties would no longer need to fly to the country where the seat of arbitration is located to seek support from the national court there. They could instead attend proceedings from their home jurisdiction via video-link. Thus, virtual arbitration before Japanese tribunals could remain attractive even if Japan were seen as geographically inconvenient.

A second attraction is that, in contrast to Singapore and Hong Kong, Japan is a civil law country. Given that there are many more civil law countries in Asia and users from those jurisdictions would presumably be more comfortable with civil law (as opposed to common law) style court proceedings, Japan could be an attractive candidate as a seat of arbitration for such users. While Singapore may have International Judges (IJs) from civil law jurisdictions sitting in the Singapore International Commercial Court (SICC),[30] where such IJs have sat, the presiding judge has, to date, been a Singaporean judge and the proceedings have closely followed the Rules of Court of the Singapore High Court, of which the SICC is a division.[31] In this light, Japan will remain one of the attractive destinations for users from civil law countries.

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28 This is true, for instance, in Singapore (*https://www.statecourts.gov.sg/cws/Resources/Documents/Message%20from%20CJ%20on%20COVID-19.pdf*) and Hong Kong (*https://www.judiciary.hk/en/court_services_facilities/gap_remote_hearing.html*). In Japan, according to Article 170(3) of the 民事訴訟法 *Minji soshō-hō* [Code of Civil Procedure], Law No. 109/1996, "[i]f a party resides in a distant location or the court finds it to be appropriate for any other reason, after hearing the opinions of the parties, the court, as provided by the Rules of the Supreme Court, may conduct the proceedings on a date for preparatory proceedings in a way that enables the court and both parties to communicate with one another at the same time, through audio transmissions; provided, however, that this applies only if one of the parties appears on that date."

29 Since 2018 (even before the COVID-19 pandemic) the introduction of information technology into civil court proceedings has been on the agenda for a vitalisation of Japan's economy. See *https://www.kantei.go.jp/jp/singi/keizaisaisei/saiban/index.html.*

30 The list of judges is available at *https://www.sicc.gov.sg/about-the-sicc/judges.*

31 See *https://www.sicc.gov.sg/hearings-judgments/judgments* and *https://www.sicc.gov.sg/guide-to-the-sicc.*

The two just highlighted factors, if exploited upon by the on-going amendment project, may enable Japan to establish itself as an international or regional dispute resolution hub in the Asia Pacific. However, if nothing further is done, the project will probably not be a game-changer. It is submitted that Japan needs to take more drastic action if there is to be a real breakthrough. In other words, without something more, Japan will have little to draw newcomers to its dispute resolution services. In that case, what other measures can enhance Japan's attractiveness and its advantages as a seat of arbitration?

IV. Towards an Energised International Arbitration in Japan

1. Securing Access to Japanese Courts in English: Establishment of a Special Chamber Specialising in International Arbitration and the Conducting of Hearings in English?

It is submitted that, as a further measure, securing access to Japanese courts in English should be regarded as a priority. This can be achieved in a number of ways. The ideal would be to set up a special chamber that is specialised in international arbitration and able to conduct hearings and render decisions or judgments in English. In that case, the parties and counsel (including non-Japanese speakers) could directly observe proceedings before the Japanese court (if oral hearings take place)[32] and understand the court's conclusions and reasoning. This idea may be regarded as unfeasible. As mentioned, according to Article 74 of the Court Act, the Japanese language must be used in court. Therefore, Japan would need to amend that provision, which may not be so readily accomplished. This would, however, be a "must do" if Japan is to have any chance of becoming an international or regional hub for arbitration and draw potential users away from Japan's leading competitors. In terms of resources within the Japanese judiciary, it should be possible to create a core group of judges with rich international experience and knowledge of international arbitration. A second-best option would be, as discussed in the legislative council and as adopted in the interim draft, to allow that documents submitted to the court in international arbitration-related cases be in English.[33] There would remain the problem of foreign parties following oral submissions in court and reading any resulting judgment in connection with their case. But this diffi-

32 Article 6 of the AA stipulates that "[A] judicial decision on a proceeding carried out by a court pursuant to the provisions of this Act may be made without holding oral arguments."

33 *Chūkan shian, supra* note 24, 8; *Hosoku setsumei, supra* note 24, 32–35.

culty can be mitigated by the court's publishing a summary and an official or unofficial English translation of its decisions and judgments.[34] Such a system would provide non-Japanese users with a clearer understanding of the progress of their case through the judiciary. It will enhance the Japanese judiciary's credibility and reputation for dealing with international arbitration-related cases in an impartial, expert, time-efficient and cost-effective manner. As pointed out above, to promote Japan as a seat of arbitration, it is essential to bring home the message to potential users that Japan's judiciary is arbitration friendly.

2. Allowing the Parties to Exclude or Expand the Grounds for Setting Aside Arbitral Awards

By way of a second further measure and as a way of setting Japan apart from its competitors, it is suggested that the AA be amended to allow parties – by agreement – to expand or exclude the grounds of recourse against an award. This would enable the parties to arbitration proceedings to tailor to their needs the manner in which arbitral awards are reviewed. They could, for instance, opt to exclude or limit their right to set aside an award with a view to obtaining a final and conclusive award as quickly as possible and reducing the costs and length of their dispute resolution process.[35] On the other hand, parties may wish to have additional grounds for setting aside arbitral awards.[36] For instance, the parties may wish to clarify a point of law having

34 There is no official English translation of judgments and decisions. At the moment, English translations of decisions and judgments are available at the Supreme Court's website (*https://www.courts.go.jp/english/index.html*) and in the Japanese Yearbook of International Law. But the former covers only Supreme Court decisions (tentative translations), and the latter covers some important decisions as identified solely from an editor's perspective (unofficial translations).

35 On this, see, e.g, G. B. BORN, International Commercial Arbitration (3rd ed., 2020) 3660–3675.

36 For instance, Section 4 of Schedule 2 of the Hong Kong Arbitration Ordinance provides as follows:

"(1) A party to arbitral proceedings may apply to the Court challenging an award in the arbitral proceedings on the ground of serious irregularity affecting the tribunal, the arbitral proceedings or the award.

(2) Serious irregularity means an irregularity of one or more of the following kinds which the Court considers has caused or will cause substantial injustice to the applicant—

(a) failure by the arbitral tribunal to comply with section 46;

(b) the arbitral tribunal exceeding its powers (otherwise than by exceeding its jurisdiction);

(c) failure by the arbitral tribunal to conduct the arbitral proceedings in accordance with the procedure agreed by the parties;

ramifications for a particular commercial sector (for instance, to clarify the meaning of a standard provision in an insurance contract or a bill of lading).

Under the current arbitration law in Japan, it is unclear whether parties can exclude or add to the provisions on the setting aside of arbitral awards. This is because the provisions on setting aside may be regarded as a body of mandatory rules from which the parties cannot derogate by agreement.[37] In favour of such interpretation, Article 3(1) AA stipulates that "[t]he provisions of the following Chapter to Chapter VII, and Chapters IX and X, except for the matters provided for in the following paragraph and Article 8, shall apply to the case where the place of arbitration is in Japan". However, some commentators and legal practitioners are of the view that the parties may exclude or add additional grounds by reason of party autonomy.[38] Although it remains an open question whether the parties can do so by agreement, it is possible to get around this hurdle by inserting into the AA an additional provision adopting an arbitration-friendly policy perspective.

In fact, to promote international arbitration, some jurisdictions (for instance, Switzerland,[39] France,[40] Belgium,[41] Sweden,[42] and Tunisia[43]) have,

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(d) failure by the arbitral tribunal to deal with all the issues that were put to it;
(e) any arbitral or other institution or person vested by the parties with powers in relation to the arbitral proceedings or the award exceeding its powers;
(f) failure by the arbitral tribunal to give, under section 69, an interpretation of the award the effect of which is uncertain or ambiguous;
(g) the award being obtained by fraud, or the award or the way in which it was procured being contrary to public policy;
(h) failure to comply with the requirements as to the form of the award; or
(i) any irregularity in the conduct of the arbitral proceedings, or in the award which is admitted by the arbitral tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the arbitral proceedings or the award."

37 For the expansion of the grounds for setting aside arbitral awards, K. MIKI [三木浩一] / K. YAMAMOTO [山本和彦], 新仲裁法の理論と実務 [The Theory and Practice of the New Arbitration Act] (2006) 217 [Comments by M. KONDO [近藤昌昭]].

38 Eg, Y. TANIGUCHI [谷口安平], 仲裁判断の取消し [The Setting Aside of Arbitral Awards], in: Kojima [小島] / Takakuwa [高桑] (eds.), 注釈と論点　仲裁法 [Explanatory Notes and Points at Issue – Arbitration Act] (2007) 192 and 246–247.

39 Swiss Private International Law Article 192 reads as follows: "(1) If none of the parties has its domicile, habitual residence, or seat in Switzerland, the parties may, either in the arbitration agreement or in a subsequent agreement, exclude in whole or in part recourse against arbitral awards; the right to revision under Article 190a(1)(b) cannot be waived. The agreement shall meet the conditions as to form set out in Article 178 (1)." An unofficial translation is available at *https://www.swissarbitration.org/files/899/Laws/20201231%20Chapter%2012%20PILA_English%20Translation_final.pdf*.

40 French Code of Civil Procedure Article 1522 reads as follows: "By way of a specific agreement the parties may, at any time, expressly waive their right to bring an ac-

by legislation, allowed parties to arbitration proceedings seated in their territory to exclude setting aside proceedings, subject to strict requirements. The requirements are more or less identical and consist of two elements. The first is that the parties have expressly agreed to waive the right of recourse against an arbitral award (that is, to exclude the setting aside proceedings). The second is that the parties are not nationals of the territory of the jurisdiction and have no domicile, registered office, or principal business there. In other words, such waiver or exclusion is available only in off-shore cases.

The measure will not necessarily enable Japan to attract and take non-Japanese users away from its rivals, but, within the Asia, no jurisdiction has introduced anything like this. Consequently, the measure would distinguish Japan from other jurisdictions. When the parties agree to waive a right to set aside arbitral awards before Japanese courts, they will not need to proceed with court proceedings in Japanese. As a result, they will not incur extra costs for court proceedings and for the translation of relevant materials. The possibility of excluding recourse against arbitral awards altogether may thus be regarded by users as a cost-effective plus associated with Japanese arbitration. It is conceivable that a losing party might have to appear in multiple enforcement proceedings in different jurisdictions to resist enforcement, instead of appearing in just one setting aside proceeding. However, this is unlikely since a decision of one enforcing court on the validity of a ground for resisting recognition or enforcement is likely to give rise to an issue of estoppel and thus forestall the raising of similar claims in other jurisdictions.

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tion to set aside." An unofficial translation is available at L. BOSMAN (ed.), ICCA International Handbook on Commercial Arbitration (2020).

41 Belgium Judicial Code Article 1718 stipulates as follows: "By an explicit declaration in the arbitration agreement or by a later agreement, the parties may exclude any application for the setting aside of an arbitral award, where none of them is a natural person of Belgian nationality or a natural person having his domicile or normal residence in Belgium or a legal person having its registered office, its main place of business or a branch office in Belgium." An unofficial translation is available at BOSMAN (ed.), *supra* note 40.

42 Swedish Arbitration Act Section 51 stipulates as follows: "If none of the parties is domiciled or has its place of business in Sweden, such parties may in a commercial relationship through an express written agreement exclude or limit the application of the grounds for setting aside an award as are set forth in Section 34." An unofficial translation is available at BOSMAN (ed.), *supra* note 40.

43 Tunisian Arbitration Code Article 78(6) reads as follows: "The parties who have neither domicile, principal residence, nor business establishment in Tunisia, may expressly agree to exclude totally or partially all recourse against an arbitral award." An unofficial translation is available at BOSMAN (ed.), *supra* note 40.

V. Conclusion

This paper has provided an overview of the current state of international arbitration and ongoing projects in Japan and subsequently proposed two measures that could make international arbitration in Japan more accessible and attractive for non-Japanese users. The first measure is to secure access to Japanese courts in English (for instance, the establishment of a special chamber that specialises in international arbitration and that is able to conduct hearings in English, and the provision by the judiciary of an official or unofficial English translation of its decisions or judgments). The second measure is to allow the parties to exclude, limit or expand the grounds for setting aside arbitral awards, subject to a few strict requirements. Given the reality that international arbitration is often conducted in English, it follows that the first measure is essential to promote and establish Japan as an international or regional hub for arbitration. The second measure will provide more flexibility and give arbitration-users an incentive to choose Japan as the seat of arbitration. It must, however, be emphasised that a well-developed legal infrastructure is a necessary but not sufficient condition for establishing Japan as an international or regional hub for dispute resolution. In parallel with the ongoing development of its legal infrastructure, Japan needs to carry out public relations actively (with business or arbitration organisations) to show Japan's capacity, this being in addition to actually building up Japan's arbitration capacity.[44] An international or regional hub for dispute resolution is not built in a day. But if Japan can dream it, Japan can do it.

Summary

Since 2017, with a view to a breakthrough in the development of Japan as an international or regional hub for international dispute resolution, the Japanese government has been carrying out several initiatives. These include establishing a dispute resolution complex, 日本国際紛争解決センター Nihon kokusai funsō kaiketsu sentā (the Japan International Dispute Resolution Center (JIDRC)), with Tōkyō and Ōsaka facilities and the liberalisation of relevant laws. However, will these projects be enough to attract attention from arbitration stake-

44 Reyes / Gu, *supra* note 17, 286–287; Y. Hayakawa [早川吉尚], 国際仲裁に関するわが国の新たな取組みー日本国際紛争解決センターについてー [Japan's New Approaches to International Arbitration – The Japan International Dispute Resolution Center], 法の支配 Hō no Shihai 201 (2021) 81, 87–90. In fact, the Ministry of Justice and other arbitration-related organisations, such as the JIDRC and the JCAA, have actively held seminars and conferences to promote international arbitration in Japan. See, e.g, *http://www.moj.go.jp/kokusai/kokusai03_00003.html* and *https://idrc.jp*.

holders and eventually revitalise international arbitration in Japan? This paper examines the current state of international arbitration and ongoing projects in Japan. It puts forward some measures in terms of the legal infrastructure that may make international arbitration in Japan more accessible and attractive for potential users (in particular non-Japanese users). It must, however, be emphasised that a well-developed legal infrastructure is a necessary but not sufficient condition for establishing Japan as an international or regional hub for dispute resolution. In parallel with the continual development of its legal infrastructure, Japan needs to carry out public relations actively (with business or arbitration organisations) to show Japan's capacity, in addition to building up Japan's arbitration capacity). An international or regional hub for dispute resolution is not built in a day. But if Japan can dream it, Japan can do it.

ZUSAMMENFASSUNG

Seit 2017 hat die japanische Regierung im Hinblick auf einen Durchbruch bei der Entwicklung Japans als internationaler oder lokaler Mittelpunkt internationaler Streitbeilegung mehrere Initiativen durchgeführt. Zu diesen gehören die Einrichtung eines Zentrums für Streitbeilegung, 日本国際紛争解決センター Nihon kokusai funsō kaiketsu sentā (das Japan International Dispute Resolution Center (JIDRC)), mit Standorten in Tōkyō und Ōsaka sowie die Liberalisierung der einschlägigen Gesetze. Werden diese Projekte jedoch ausreichen, um die Aufmerksamkeit der Akteure im Bereich der Schiedsgerichtsbarkeit auf sich zu ziehen und schließlich die internationale Streitbeilegung in Japan wiederzubeleben? Der Beitrag untersucht den gegenwärtigen Stand der internationalen Schiedsgerichtsbarkeit und laufende Projekte in Japan. Er schlägt einige Maßnahmen hinsichtlich der rechtlichen Infrastruktur vor, welche die internationale Streitbeilegung in Japan für potentielle Nutzer (insbesondere nicht-japanische Nutzer) zugänglicher und attraktiver machen könnten. Allerdings ist eine gut entwickelte rechtliche Infrastruktur dabei zwar eine notwendige, nicht aber bereits eine hinreichende Bedingung für Etablierung Japans als internationaler oder lokaler Mittelpunkt der Schiedsgerichtsbarkeit. In Parallele zur fortlaufenden Entwicklung seiner rechtlichen Infrastruktur muss Japan daher auch seine Öffentlichkeitsbeziehungen (mit Unternehmen und Schiedsgerichtsorganisationen) proaktiv fördern, um Japans Potential nicht nur auszubauen, sondern auch zu zeigen. Ein internationaler oder lokaler Mittelpunkt der Schiedsgerichtsbarkeit wird nicht an einem Tag errichtet. Kann Japan aber von solch einem Mittelpunkt träumen, wird Japan letztlich auch solch einen Mittelpunkt errichten können.

(Die Redaktion)