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ARBITRATION IN JAPAN: GRASPING THE NETTLE?

International arbitration remains a boon for Asia, and far from resting on its laurels, the region has responded impressively by effecting myriad measures that will ensure the strong momentum is maintained for the foreseeable future.

In promoting Asian arbitration as a reliable, user-friendly, and cost-efficient dispute resolution vehicle, the last few years have heralded innovative activities across the region collectively enhancing the quality and reach of Asia's arbitral infrastructure. Activities include the opening of world-class hearing facilities underpinned by cutting-edge technology, streamlined legislative amendments to better support the arbitral procedure, harmonised domestic and international arbitral regimes, fine-tuning of institutional rules, and regular hosting of global superconferences on arbitration and international trade. Initiatives of this nature have not only drawn in the arbitral end-users but also the wider legal community. Although many of the world's elite law firms have historically had firm roots in the region, it has been interesting to observe some of London's top commercial barristers chambers also decanting specialist practitioners to set up shop in Hong Kong, Singapore, and now Kuala Lumpur.

Both Singapore and Hong Kong remain the vanguard for Asian arbitration, and ever on the front foot, neither state has relented in its pursuit to remain firmly seated at the global arbitration top table. Not least, in Singapore, SIAC's new rules came into force in 2013 primarily to accommodate the new SIAC Court of Arbitration, while in Hong Kong relatively recent revisions to the Arbitration Ordinance unified its domestic and international arbitration regimes. Both states have spotted that opportunities exist beyond their home territories, with SIAC and HKIAC each launching overseas operations in Mumbai and Seoul respectively. However, there have been striking changes across some of the region's other leading arbitration centres, demonstrating that they too are no slouches in seizing the opportunities that exist.

South Korea, for instance, itself a long-time arbitration-friendly state, is rapidly emerging as a highly competitive regional venue. Recent activities have included helpful revisions to the KCAB International

Rules, and the Seoul International Dispute Resolution Centre has opened for business. Malaysia's KLRCA modernized its arbitral rules and also launched its i-Arbitration Rules. China has refined parts of its Civil Procedure Law to better reflect the needs of its arbitral users, and CIETAC has opened in Hong Kong. Cambodia has launched its National Arbitration Centre, and Myanmar has recently acceded to the New York Convention ("Convention"). Meanwhile, the region has witnessed a rising number of investment arbitrations resulting from its overall BIT and FTA portfolio growth, and with cross-border (including interregional) investment into Asia's emerging markets still on the rise, there's no apparent reason to suggest that its thriving arbitration scene will abate anytime soon.

What, then, of Japan?

Japan is a stable, modern, sophisticated democracy and the world's third largest economy, a leader in automotive and electronics manufacturing, and globally prominent in the construction and communications sectors. However, belying that global economic powerhouse stature, Japan is not yet rubbing shoulders among Asia's more elite arbitral seats and does not appear to have embraced arbitration quite as readily as some of its regional neighbors.

JAPAN'S ARBITRAL INFRASTRUCTURE

Japan's arbitration legislation spans almost 125 years. Its Arbitration Law (No. 138 of 2003) ("Arbitration Law") is based on, and mostly conforms with, the UNCITRAL Model Law. Japan has also been a party to the Convention since 1961 and, complemented by a host of investment treaties and conventions leading to the recognition and enforcement of arbitral awards, boasts a very strong enforcement record.[1]

As an arbitral seat, Japan has many draws.

Notably, Japan's Arbitration Law:

- Contemplates that both domestic and international arbitral awards shall have the same effect as a final and conclusive judgment.[2]
- Safeguards the enforceability of arbitral awards.[3]
- Does not require reciprocity, in principle enabling enforcement in Japan even if the arbitral award was granted outside a Convention signatory state.
- Makes no provision for appeals from arbitral awards.
- Provides that arbitral awards may be set aside on limited grounds almost identical to those contemplated by the UNCITRAL Model Law and the Convention.[4]

Impressively, Japan's courts:

- Have consistently demonstrated a pro-arbitration attitude.
- Exercise minimal curial intervention, in full chime with Model Law objectives.
- Are able to grant relief before or during proceedings and to order interim protection measures.
- Will give effect to a valid arbitration agreement.

As a civil law country, Japan also represents a viable alternative for many European and South American parties preferring to eschew common law regimes in favour of having their disputes heard in more familiar civil code surroundings. Depending on the composition of the tribunal, the potential benefits that a civil law arbitral seat brings to bear include limited discovery, little or no written factual evidence for the merits hearing, and less adversarial proceedings that are usually more efficient and shorter.

Given the quality of the economic and legislative arbitral infrastructure already at Japan's disposal, it is surprising that its arbitration system is one of the least utilised in Asia. In statistical perspective, its leading arbitral body, the Japan Commercial Arbitration Association ("JCAA"), carries a modest caseload amounting to less than 10 percent of the respective SIAC and HKIAC caseloads. Although Japan retains a large BIT portfolio, investment treaty arbitration invoked by Japanese entities also remains a relatively rare species.

Why that is so has become something of an arbitral chestnut in recent times and the subject of numerous learned articles[5] traversing myriad theories. Some commentators cite cultural factors such as Japan's reputation for being traditionally dispute-averse. Some advance the view that the high quality and efficiency of its domestic civil court system has fettered arbitration from making deeper imprints. Others point to the prohibitive expense of having a dispute heard in high-cost Tokyo. In truth, it is too simplistic to ascribe Japan's relative slow growth in arbitration to single point issues; arguably there are many contributing factors, albeit some weightier than others. There is, however, no singular compelling reason as to why Japan cannot, and ought not, take a bigger slice of the regional arbitral cake.

JCAA'S AMENDED RULES–SINGLE CURE?

On February 1, the JCAA unveiled amendments to its Commercial Arbitration Rules for the first time in a decade.[6] Of the more significant amendments, as a nod to similar rule revisions undertaken by leading arbitral institutions in other regional jurisdictions and to international developments further afield, the JCAA rules now:

- Make it possible for a third party to join the arbitration if certain requirements are satisfied.[7]

- Incorporate improved provisions for consolidation of the parties' various claims.[8]

- Contain new mediation rules enabling parties, by agreement, to refer their dispute to mediation any time during the arbitration.[9]

- Provide for emergency arbitrator provisions enabling a party, prior to the arbitral tribunal being constituted or when an arbitrator ceases to perform his or her duties, to seek appointment of an emergency arbitrator to grant interim measures.[10] The JCAA's new emergency arbitrator provisions mirror those successfully introduced by SIAC and HKIAC, although their respective rules require a notice of arbitration to have been filed before the emergency provisions can be invoked.

- Enable parties the option, within two weeks of the request for arbitration, to jointly submit their dispute to expedited procedures regardless of the amount of relief sought.[11]

These amendments ensure that JCAA's rules remain up-to-the-minute and will firmly consolidate their rightful place among the other gold-standard rules adopted by leading arbitral bodies. However, it is far less likely that the amended rules alone will propel Japan to the forefront of Asian arbitration. As mentioned above, just as there is no single impediment to Japan's growth in arbitration, there is no single cure. Moreover, it will take more work on a number of (united) fronts.

For example, Japan's own government must step out of the shadows and provide more support in promulgating the case for arbitration, as best exemplified by the high-profile roles taken by the governments of Singapore, Hong Kong, and, more recently, South Korea and Malaysia. Industry too can play its part. The number of Japanese companies involved globally in major international transactions, especially in construction and energy projects, continues to rise. With that comes the opportunity for those companies to press the case for Japanese substantive law to govern their commercial agreements or, at the very least, the arbitration clause contemplating a Japanese seat, particularly where the relative bargaining strength lies with the Japanese party. In that pursuit, further education in the drafting and negotiating of arbitration clauses, coupled with increased live exposure, will greatly assist Japanese industry in-house legal teams and their external counsel.

The relative growth in arbitration being enjoyed in other Asian jurisdictions suggests that when government, legislators, courts, industry, arbitral institutions, and the legal community closely collaborate (or at least act in general concord) to implement wide-ranging initiatives and general outreach programs, success tends to follow. However, in such a highly competitive region, there are no shortcut remedies. For a model of the considerable strides that can be taken in a relatively short time, Japan should look no further than its Northeast Asian neighbor, South Korea, itself a civil law jurisdiction. For Japanese arbitration to make similar inroads and better compete as a leading arbitral seat in the

Asian region, it will, in all likelihood, need to firmly grasp the nettle now. It is hoped that JCAA's amended rules will mark the first in a number of concerted steps in that journey.

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ENDNOTES

1 There are no reported cases of a Japanese court refusing to enforce an international arbitration award under the Arbitration Law.

2 Article 45, *Japan Arbitration Law*.

3 Article 46, *Japan Arbitration Law*.

4 Article 44, *Japan Arbitration Law*.

5 For instance, the excellent paper by Nakamura, T and Nottage, L, *Arbitration in Japa*n (May 2012), Sydney Law School Research Paper No. 12/39 (http://ssrn.com/abstract=2070447).

6 *Commercial Arbitration Rules*, 2014, JCAA.

7 Chapter IV Rule 52, *Commercial Arbitration Rules*.

8 Chapter IV Rule 53, *Commercial Arbitration Rules*.

9 Chapter IV Rule 54, *Commercial Arbitration Rules*.

10 Chapter V, *Commercial Arbitration Rules*.

11 Chapter VI, *Commercial Arbitration Rules*.