The Asia-Pacific Arbitration Review

2019

Japan

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Global Arbitration Review is delighted to publish The Asia-Pacific Arbitration Review 2019, one of a series of special reports that deliver business-focused intelligence and analysis designed to help general counsel, arbitrators and private practitioners to avoid the pitfalls and seize the opportunities of international arbitration.

GAR Global Arbitration Review

Japan

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Summary

THE JAPAN INTERNATIONAL DISPUTE RESOLUTION CENTRE

On 28 February, the Japan International Dispute Resolution Centre (JIDRC), a body whose purpose is to operate a hearing facility in Japan, was established. Being organised with five individuals, it made a humble start with a big dream of serving as a catalyst to attract more arbitration to Japan and eventually to become a hub of arbitration in Asia. While Japan enacted an Arbitration Act consistent with the UNCITRAL Model law on 1 March 2004 – even before Hong Kong (2010), Korea (2016) and Malaysia (2005), which have enjoyed caseloads-1far outnumbering that of Japan – and the Japanese courts have a good track record of being deferential to the decisions of arbitral tribunals (with a few exceptions that I introduced in the 2018 edition of the GAR Asia Pacific Arbitration Review, which was overruled by the Supreme Court that I will highlight later in this article), the Japan Commercial Arbitration Association (JCAA), the most prominent arbitration institution in Japan, has suffered from a consistently low caseload: around 20 per year for the past 10 years. This trend is consistent with the International Chamber of Commerce (ICC) statistics showing not more than five arbitration cases seated in Japan every year for the past 10 years. The number of arbitration cases involving Japanese parties, however, has been gradually increasing. The Singapore International Arbitration Centre (SIAC), which enjoyed yet another record high caseload in 2017, revealed that the number of Japanese parties doubled from 1322 to 273 in 2017 and that the total disputed amount involving Japanese parties in 2017 was close to US$1 billion. While the dispute-averse tradition in Japan remains unchanged and a conciliatory approach to disputes when they arise still permeates, Japanese companies have become less hesitant to engage in arbitration in cross-border disputes, owing to higher demand for accountability in their corporate governance.

Then why is the number of arbitrations seated in Japan still so small? Among the key factors that contribute to popular arbitration seats,4 a factor that is conspicuously missing in Japan is a hearing facility. Maxwell Chambers in Singapore, the hearing facility at the Hong Kong International Arbitration Centre in Hong Kong (HKIAC), the Seoul International Dispute Resolution Centre (SIDRC) in Seoul and Bangunan Sulaiman housing the Asian International Arbitration Centre (AIAC) in Kuala Lumpur have been playing a key role in each jurisdiction not only in offering hearing venues but also in housing offices of local as well as international arbitration institutions, and most importantly serving as a source of intelligence for arbitration in the region by offering conferences and trainings, and a space for arbitration practitioners to gather. The Japan International Dispute Resolution Centre was created to serve as a catalyst for promoting Japan as the seat of arbitration.

JAPAN'S BASIC ECONOMIC POLICY: PROMOTE INTERNATIONAL ARBITRATION IN JAPAN

The JIDRC, although small, has full support from the government and its ruling party. The Liberal Democratic Party issued 'The Cornerstones of Diplomacy based on the Japanese Judicial system'5 in June 2017, placing the highest priority on the establishment of Asia's number one arbitration center in Japan under the leadership of Ms Yoko Kamikawa, the incumbent minister of Justice. The Abe administration, in line with its ruling party's policy, adopted the 'Basic Policy on Economic and Fiscal Management and Reform in 20176 (Basic Policy) in June 2017. Although reference to international arbitration is very brief and lacks clarity, the Japanese government's official recognition of the importance of international arbitration for the first time, and its expression of its commitment to capacity building in

international arbitration in Japan, marks an important step. In fact, the inception of the JIDRC can be traced back to 1999, when the international arbitration council, formed by the public and private sectors, issued a proposal to establish a new arbitration centre in Japan, well before the official launch of Maxwell Chambers in 2010. The proposal has two prongs: modernisation of the Arbitration Act and the establishment of an arbitration hearing facility in Japan. The first prong of the proposal was realised in 2004 when an arbitration act consistent with the UNCITRAL Model Law was enacted; however, there was no follow-through on the second prong until the JIDRC was belatedly established in 2018.

KANSAI AREA (OSAKA AND KYOTO) GALVANISED

The JIDRC will open its first hearing facility in Nakanoshima in Osaka in May 2018. Osaka was historically a centre of business in Japan, with a number of rivers and canals; and Nakanoshima (which literally means 'central island'), a sandbar along the Yodo River, is the centre of Osaka, where the city hall, a convention centre, concert hall, library, museums, a beautiful park and the Kansai-HQ of many Japanese companies are located. But why Osaka instead of Tokyo? It was a matter of coincidence and luck. Since some of the Ministry of Justice's office space in Nakanoshima will become vacant in May 2018, the ministry offered this office space together with an international conference facility on the same floor for use as a hearing venue. Because it was originally built as an international conference facility, it is equipped with microphones, a booth for interpreters and other facilities to be utilised for arbitration hearings, although it might be too grand for a small case.

Coincidentally, 2017 was the year the Kansai area attracted the most attention in international dispute resolution in Japan.[7] The Japan Association of Arbitrators (JAA) entered into a memorandum of understanding with Doshisha University[8] (in Kyoto and founded more than 140 years ago by Jo Niijima, a graduate of Phillips Academy and Amherst College) to establish the Japan International Mediation Centre – Kyoto, on the main campus of Doshisha University, adjacent to the north side of the Kyoto Imperial Palace. Japan has a long tradition of amicable settlement of disputes. The Japan International Mediation Centre – Kyoto hopes to facilitate efficient and effective amicable settlement by offering both institutional mediation and ad hoc mediation. It has been working closely with the Singapore International Mediation Centre in selecting a panel of international mediators and offering training to mediator candidates.[9] The Japan International Mediation Centre is now finalising its panel of mediators, rules and its fee schedule, all of which is currently under the review of the Cabinet Office in accordance with the Public Interest Corporation Act10 and should be ready to be publicised soon.

TOKYO HEARING FACILITY YET 'UNDER CONSTRUCTION'

What about a hearing facility in Tokyo? A hearing facility in Tokyo is still under discussion by the committee organised by the Cabinet Secretariat in response to the Basic Policy adopted by the Abe administration (the Committee). The Committee, chaired by the assistant cabinet secretary, consists of the Cabinet Secretariat, the Ministry of Justice, the Ministry of Foreign Affairs, the Ministry of Economy Trade and Industry, the Japan Sports Agency, and the Ministry of Land, Infrastructure, Transport and Tourism, forming strategies to promote international arbitration in Japan. The Japan Federation of Bar Associations, the Japan Association of Arbitrators, the Supreme Court, Tokyo Metropolitan Government, Osaka Prefectural Government, the JCAA, and the Japan Shipping Exchange Inc – which primarily administers maritime arbitration in Japan – also participate in this committee as observers. The Committee is expected to issue an interim report sometime in April 2018. Unlike the

Osaka facility which is readily available, the Tokyo facility needs to be newly built and hence requires a budget, and it will take time before a plan is realised. Details of the Tokyo hearing facility are yet to be seen. Some say that it is likely to be located in an area close to the 2020 Olympics venue on the waterfront, since one of the driving forces behind this Basic Policy is to offer services in Tokyo to resolve sports-related disputes during the 2020 Olympics.

TOKYO IS AN ARBITRATION-FRIENDLY SEAT11

The Tokyo District Court, which has jurisdiction to hear matters related to arbitration seated in Tokyo, has a particularly good track record as an arbitration-friendly court. The Tokyo District Court heard, from the enactment of the Arbitration Act consistent with the UNCITRAL Model Law on 1 March 2004 until 31 December 2016, approximately 50 per cent of all cases involving arbitration handled by all Japanese courts as a first instance court. The statistics for the Tokyo District Court decisions in relation to arbitration demonstrate that the Tokyo District Court enforced, and dismissed challenges, to virtually every arbitral award presented before it since the enactment of the Arbitration Act on 1 March 2004. The arbitration-friendly Tokyo District Court together with a state-of-the-art hearing facility in Tokyo will without doubt boost Tokyo as a seat for international arbitration.

BUILDING SOFT INFRASTRUCTURE

A hearing facility alone is not enough to promote international arbitration in Japan. The Queen Mary University survey in 2015 reveals that the top four factors that make a seat attractive to users are:

- neutrality and impartiality of the local legal system;
- national arbitration law;
- track record of enforcing arbitration agreements and arbitral awards; and
- availability of quality arbitrators familiar with the seat.

The Committee has been working on building not only hard infrastructure such as hearing facilities but also soft infrastructure, and is currently reviewing the Arbitration Act, the law concerning the practicing of foreign lawyers in Japan, arbitration-related court practice and arbitration institutions and arbitration training programmes currently available in Japan, to see how they can be improved. International arbitration institutions such as the ICC or institutions for arbitrators such as the Chartered Institute of Arbitrators and the Singapore Institute of Arbitrators will play an active role in offering arbitration training programmes that meet international standards.

SUPREME COURT DECISION: ADVANCE WAIVER AND CONSEQUENCE OF FAILURE TO DISCLOSE A POTENTIAL CONFLICT

In the 2017 and 2018 editions of the Asia-Pacific Arbitration Review, the author highlighted decisions of the Osaka District Court12 and Osaka High Court 13 in which the losing party challenged an arbitral award on the basis of the presiding arbitrator's failure to disclose a Potential Conflict of interest in a JCAA case seated in Osaka. The Osaka District Court dismissed the challenge, finding the failure to disclose to be a minor breach of arbitral proceedings; while the Osaka High Court reversed, and upheld the challenge, finding the failure to disclose to be a fundamental breach of due process. The Supreme Court14has now overruled the Osaka High Court decision and has remanded the case to the Osaka High Court.

FACTS

The JCAA arbitration involves disputes arising out of a sales contract (contract) entered into in October 2002 between Sanyo affiliates (Japanese and Singapore entities) and Prem Warehouse LLC (US) (Purchaser).15 The contract was assumed by Sanyo and another affiliate of Sanyo which later became a wholly owned subsidiary of Panasonic in April 2011. In June 2011, Sanyo filed a request for arbitration against the purchaser and its affiliate seeking declaratory relief that Sanyo and its affiliate did not breach the contract. An arbitrator from the Singapore office of King & Spalding (K&S) was appointed as chair arbitrator on 20 September 2011. The chair arbitrator submitted a statement (advance waiver) to JCAA on 20 September 2011 declaring that:

- K&S lawyers might advise and represent their clients in the future in a matter unrelated to this arbitration in which their clients' interests were in conflict with those of a party to this arbitration or its affiliates; and
- K&S lawyers might advise and represent a party to this arbitration or its affiliates in the future in a matter unrelated to this arbitration.

The tribunal issued an award on 11 August 2014. The presiding arbitrator failed to disclose the fact that a K&S lawyer who was found to have been with K&S San Francisco office on 20 February 2013 at the latest represented Sanyo's sister company, Panasonic Corporation of North America in a litigation pending at the United States District Court for the Northern District of California (the potential conflict). The purchaser moved to challenge the arbitral award on the ground that the presiding arbitrator failed to disclose circumstances likely to give rise to justifiable doubts as to impartiality and independence of the presiding arbitrator.

RULING

The Supreme Court reversed the Osaka High Court decision and remanded to the Osaka High Court. The Supreme Court concurred with the Osaka High Court decision in that the advance waiver did not constitute disclosure of circumstances likely to give rise to justifiable doubts as to impartiality and independence of the presiding arbitrator, because circumstances to be disclosed by an arbitrator must be concrete enough to allow a party to challenge an arbitrator in an appropriate manner, and disclosure of a potential conflict of interest in an abstract manner, as being made by the presiding arbitrator in the instant case, did not discharge an arbitrator's obligation under the Japanese Arbitration Act to continuously disclose circumstances likely to give rise to justifiable doubts as to impartiality and independence of the presiding arbitrator during the arbitration proceedings. On the other hand, the Supreme Court disagreed with the Osaka High Court's finding that the arbitrator breached its disclosure obligation because K&S could have discovered the Potential Conflict without any difficulty. The Supreme Court found that it was not clear from the record of this case whether the arbitrator or K&S was aware of the potential conflict and whether K&S could have discovered the potential conflict in the ordinary course of business. As a result, the Supreme Court held that the Osaka High Court erred in its finding of a breach of the presiding arbitrator's disclosure obligation without finding the above facts that would affect the outcome of the case, and remanded the case to the Osaka High Court to try those facts.

ANALYSIS

While the conclusion of the Supreme Court decision in reversing the Osaka High Court decision relieved many arbitration practitioners in Japan, the Supreme Court decision still left a number of questions unanswered. As an initial matter, the question arises of which standard the Supreme Court applied in finding an arbitrator's obligation to disclose the potential conflict:

- the IBA Guidelines on Conflict of Interests of Arbitrators in International Arbitration (the IBA Guidelines);
- the domestic code of conduct for Japanese bar members adopted by the Japan Federation of Bar Associations; or
- a sui generis obligation upon arbitrators.

The second question is whether the Supreme Court has taken a position that a breach of an arbitrator's disclosure obligation, if found, automatically leads to annulment of an arbitral award due to a breach of due process. If the answer to the second question is no, under what circumstances will the Supreme Court find that a breach of an arbitrator's disclosure obligation entails the annulment of an arbitral award? Another question is whether such a conflict as leads to the disqualification of an arbitrator only annuls an arbitral award, and, if so, whether the Supreme Court found that the potential conflict disqualified the arbitrator and under what standard. If the Supreme Court has taken a position that a breach of an arbitrator's obligation to disclose alone annuls an arbitral award, how does the Supreme Court reconcile that with the approach taken by the IBA Guidelines that a failure to disclose does not automatically disqualify an arbitrator?16

It is possible that the Supreme Court took the position that a breach of the presiding arbitrator's disclosure obligation, if found, was sufficient to annul this arbitral award, because the Supreme Court appears to consider that such facts as support a breach of the presiding arbitrator's disclosure obligation17 could affect the outcome of this case, which implies the Supreme Court takes the view that whether a breach is found is dispositive of the challenge to the arbitral award.

It can only be hoped that in the subsequent court proceedings the above questions will be answered and the Japanese court will clarify its standard as regards an arbitrator's disclosure obligation and the consequence of a failure to disclose in the context of a challenge to an arbitral award.

The fact that one major Japanese electronics company, Sanyo, was acquired by Panasonic, another major Japanese electronics company, is common knowledge in Japan. However, this may not be a case for an arbitrator and law firms primarily practising outside Japan, and accordingly it makes sense to overrule the Osaka High Court decision, which assumed, without any supporting facts, that K&S could have discovered the potential conflict without any difficulty.

At the same time, arbitration practitioners should recognise that demand for reasonable investigation and disclosure of potential conflicts on the part of prospective and appointed arbitrators has been heightened in light of the integrity of arbitration proceedings.

GAR on 29 March 2018 revealed yet another court decision that set aside an award based on an arbitrator's failure to disclose a Potential Conflict. According to the GAR, the Paris Court of Appeal annulled an award dismissing claims worth US$150 million that the Middle Eastern branch of Audi Volkswagen won against its Qatari vehicle distributor Saad Buzwair

Automotive Co (SBA) on the ground that one of the tribunal members failed to disclose work that was carried out by his law firm for Porsche, a Volkswagen Group company, during the course of arbitration, creating reasonable doubt as to his independence and impartiality.-25 The French Court, in finding reasonable doubt as to this arbitrator's independence and impartiality, appears to have taken into account not only the arbitrator's firm's disclosure of their work for Porsche in their list of top five cases in JUVE, the German directory, but also the arbitrator's failure to disclose at the time of his appointment another matter that his firm worked on for another Volkswagen Group company, despite such fact having been published in an earlier edition of JUVE. The arbitrator appears to have admitted such matterafter he was questioned by SBA in reference to the firm's statement in JUVE regarding the matter. This suggests an arbitrator's failure to disclose potential conflicts has consequences particularly when coupled with other factors.

NUMBER OF CASES RELATING TO ARBITRATION HANDLED BY THE TOKYO DISTRICT COURT BETWEEN 1 MARCH 2004 AND 31 DECEMBER 201618

Categories of applications	Conclusion						Pending	Total
	Granted	Dismissed on the merits	Dismissed not on the merits (without prejudice)	Settlement	Withdrawal	Other		
Service of process by the court-19	2				1			3
Designation of the number of arbitrators20								0
Appointment	3		1					4

of arbitrators[21]								
Challenge to arbitrators[22]								0
Dismissal of arbitrators[23]								0
Challenge to arbitral tribunal's jurisdiction-[24]	1	1	3		2			7

CONCLUSION

The author has been working with the Committee to help form effective strategies to build soft and hard infrastructure for international arbitration in Japan. While public support is pivotal to turbo-boosting international arbitration in Japan, it inevitably involves political complications. Among various initiatives to promote arbitration in Japan, the author hopes that the judiciary will take a more active role in promoting international arbitration in Japan by way of publicising their arbitration-friendly track record to the international arbitration community and clarifying their rules and standards applicable to arbitration-related cases, to provide greater reassurance as to potential uses of Japan as a seat of arbitration. The author hopes to provide a further update on the situation in Japan in the next edition.

Endnotes

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