

Japanese arbitration – much work done; much still to do¹

February 2012

This year will mark the 13th year since I first advised a Japanese party in arbitration. In that time, Japanese arbitration has come a long way - from an antiquated arbitration law² and lack of knowledge of its merits to a modern arbitration law based on the UNCITRAL model law³ and an increasingly sophisticated understanding of international arbitration in major Japanese corporates. However, there remains much work to do in order to make Japan a significant jurisdiction for international arbitration.

In this article, I focus on the Japan Commercial Arbitration Association (JCAA), the country's premier domestic arbitral institution – first, examining some recent statistics⁴ and secondly, expressing some personal views as to how the JCAA (and Japan more widely) can build on a modest trend of increase in international arbitration.

Below are two tables. The first is a table of arbitration statistics received from the JCAA, covering arbitrations in the years 2006 to 2010 and dividing these between domestic arbitrations and international arbitrations. This is based on the JCAA's definition which categorise an arbitration as "international" if at least one of the parties is non-Japanese and "domestic" if both parties are Japanese. Of course, "domestic" arbitrations between two Japanese parties may still potentially involve some international elements such as foreign subject matter or foreign governing law (and, indeed, to the author's knowledge, there has been one such major arbitration in the period below). The second table identifies

the nationality of the law firms involved in JCAA arbitrations over the same period.

Year	International	Domestic
2006	11	0
2007	12	3
2008	12	0
2009	17	1
2010	21	6

Year	The nationality of the law firms representing the parties in JCAA arbitration
2006	Japan:14, USA:4, Korea:1
2007	Japan:19, USA:3, UK:2, China:1
2008	Japan:17, USA:5, Taiwan:1
2009	Japan:22, USA:3, France:2, UK:1, China:1, Korea:1
2010	Japan:38, USA:6, UK:1, France:1, Singapore:1, Mongol:1

Even if one ignores the fact that some domestic arbitrations may have international elements, the figures above are striking. It is clear that domestic arbitrations are at very low level indeed with two years recording no arbitrations at all. The statistics for international arbitration are looking more healthy and there has also been a significant increase over the last three years.

In broad terms, this is not surprising (although the figures are perhaps even more dramatic than anticipated). There has never been a strong arbitration culture in Japan and two Japanese parties signing a contract often do not see the likelihood of a dispute.



Mark Goodrich*
Partner

This article was published in a slightly different form in the January 2012 issue of *The Japan Commercial Arbitration Association Newsletter*

* Partner, White & Case LLP, London

1 I would like to acknowledge the assistance of Jake Baccari, Hiroshi Naito and Stefan Mrozinski in the preparation of this article.

2 See Tatsuya Nakamura, "Salient Features of the New Japanese Arbitration Law Based Upon the UNCITRAL Model Law on International Commercial Arbitration," JCAA Newsletter, Number 17 (April 2004), Shunichiro Nakano, Professor of Law, Graduate School of Law, Kobe University, "International Commercial Arbitration Under The New Arbitration Law Of Japan", and David E. Wagoner, "Japan Becomes a Friendly Place for International Arbitration," Dispute Resolution Journal (February-April 2006).

3 See Mark Goodrich and Joel Greer, "The Modernization Of Japan's International Arbitration Infrastructure," Mealey's International Arbitration Report, Vol. 25, #12 (December 2010), and Gerald McAlinn & Luke Nottage, "Changing the (JCAA) Rules: Improving International Commercial Arbitration in Japan," ZJAPANR / J.JAPAN.L, pp. 23-36.

4 I acknowledge with great thanks the assistance of Toshiyuki Nishimura from the JCAA in providing these useful statistics.

Japanese arbitration – much work done; much still to do

In the event that a dispute arises, Japanese parties see no need to go outside of the efficient and cost-effective court system. There is no reason to expect this to change significantly in the future.

A related question is what lies behind the trend of increasing international arbitration (albeit modest). Without firm academic research, it is difficult to know but, from my experience, I would attribute much of the growth to the education efforts of the JCAA itself and the increasing number of *bengoshi* and foreign law firms with deep routes in the local market and an understanding of international arbitration. The clear message which has been going out for a number of years is that for international contracts, it makes little sense to refer the matter to Japanese courts (even if the foreign party will accept it) because of the difficulties in enforcing any judgment obtained outside of Japan. Indeed, my recent experience is that many Japanese corporates now include JCAA arbitration in their standard contract terms. Obviously, it takes some time for changes in dispute resolution clauses to be reflected in actual cases but it appears that this is finally starting to have an effect in feeding through into increases in JCAA arbitration.

From the statistics, we can conclude that if the recent increase in JCAA arbitration is to be maintained and further developed, the growth will need to come from international arbitration. Furthermore, I would suggest that much of the recent growth may be driven by the increasing tendency of Japanese corporates to recognise the advantages of arbitration in international arbitration but try to maintain some “home advantage” by providing for JCAA arbitration. The overwhelming presence of Japanese law firms in the JCAA caseload set out above suggests that Japanese law is frequently the governing law in such disputes, supporting the suggestion that it is those cases in which the Japanese party is in a strong bargaining position which tend to see JCAA arbitration clauses. There is no reason to expect this trend to change and it should be a continuing support for JCAA arbitration.

However, if it is the standard terms of Japanese corporates which are the main source of new JCAA arbitration cases, it suggests that the JCAA has done better at persuading Japanese companies of the merits of JCAA arbitration than it has done with foreign companies. In the author’s experience, many foreign companies are still sceptical of JCAA arbitration. In this sense, there needs to be a further internationalisation of the efforts of the JCAA and others in order to persuade foreign parties that the JCAA is a suitable “level playing field” to which disputes can be submitted.

Government support

It remains a sad fact that the Japanese government does not seem to appreciate the value of making Tokyo a viable centre for arbitration. This is in stark contrast to the governments of Hong Kong and Singapore who have taken considerable steps to promote their jurisdictions as the seat for arbitrations. I would particularly draw attention to the Singapore government’s role⁵ in the recent development of Maxwell Chambers which was officially opened on 21 January 2010 after a soft launch in July 2009. Maxwell Chambers is a purpose-built facility aimed at making Singapore the natural choice for arbitration in Asia. The complex houses modern hearing facilities with wireless internet and the necessary technology to enable simultaneous translation and transcription of proceedings. Document storage space is available as are video-conferencing rooms and various administrative support services. With such impressive and streamlined infrastructure it is no surprise that Maxwell Chambers is marketed as a “one-stop, full shop experience.”⁶ Imagine how Japan’s image on the international arbitration scene would be transformed if similar facilities opened here.

In addition to facilities, Japan also needs to burnish its image as a pro-arbitration jurisdiction. Although there have been limited reported decisions since the new Arbitration Law came into force, the overall trend has been pro-arbitration. Having said that, I am aware that there is a yet unreported first instance decision in which an arbitration award has been overturned by the courts in circumstances which are certainly open to criticism. It is to be hoped that this is an isolated incident and is either overturned on appeal and/or the courts quickly re-establish their reputation as being strongly supportive of the arbitration process.

Furthermore, a recurring feature is that court decisions relating to arbitration have not been rendered as quickly as might be desired especially given that the Japanese courts generally have a good reputation for delivering timely results. In a recent case,⁷ the application to set aside was made on 14 October 2008 with the Tokyo District Court handing down judgment on 28 July 2009 and the Tokyo High Court then dismissing an appeal on 26 February 2010. The set aside application in the recent unreported case mentioned above took even longer to reach a first instance decision. One approach which has worked in other jurisdictions is to have a specialist division of the courts to handle arbitration cases – this may well be a good idea for Japan as well. Because the number of cases reaching the courts is small, it is difficult to build up expertise. Accordingly, focusing arbitration cases on a more limited group of judges may lead to a higher level of expertise, more understanding of the international nature of arbitration and help speed up decision-making.

⁵ Maxwell Chambers is leased from the Singapore Land Authority and was set up with the assistance of seed money provided by the government of Singapore.

⁶ Maxwell Chambers website: <http://www.maxwell-chambers.com/>

⁷ “Dismissing the Application for Setting Aside an Award, Tokyo District Court, July 28, 2009, 292 Hanrei Times 1304, JCAA Newsletter, Number 24(May 2010).

JCAA Rules Revision

The current JCAA rules date from 1 January 2008. However, they still broadly follow the structure and approach from a significant revision in 2004 to bring them into line with the new Arbitration Law passed at that time. The rules are generally satisfactory from an international perspective but they still somewhat reflect historical approaches to arbitration in Japan and have a number of provisions which are not commonly found in the rules of leading arbitral institutions worldwide. Given the statistics set out above, it is clear that the JCAA's primary focus should be on international arbitration rather than domestic arbitration. It is also the case that international arbitration does not stand still and many of the leading arbitration institutions have either recently revised their rules or are in the process of doing so.

In that context, I would urge the JCAA to consider revising their rules to bring them more into line with international norms – there are plenty of eminent lawyers and academics who would be keen to assist with such a project. If the JCAA is nervous of making the approach too “international” for the limited number of domestic arbitrations, an alternative approach would be to develop a separate set of international arbitration rules. This is the approach which was adopted by the Korean Commercial Arbitration Board (“KCAB”) first adopted in January 2007 with recent revisions to the KCAB International Rules coming into effect from 1 September 2011.⁸ It is submitted that the KCAB originally made a mistake in their approach by choosing to apply such rules only if specifically selected by the parties. Given the long time that it takes for arbitration clauses to feed through into actual arbitrations, this meant that the new international rules were hardly, if ever, used. A better approach which the JCAA could adopt would be to apply any such new international rules to any case which the JCAA would currently classify as “international”. This is essentially the approach that the KCAB has now adopted following the revision of the KCAB International Arbitration Rules last year.⁹

In addition to making the JCAA Rules more consistent with international practice and up to date with the latest issues, a rules revision process could also result in significant international publicity for the JCAA. Again, this would be welcome in boosting the profile of the JCAA in the wider arbitration community.

International outreach

It would also be extremely valuable to see further promotion of the JCAA internationally. As arbitration practitioners know, there is a near constant round of international conferences at which many of the leading institutions are actively involved in terms of either organising or providing speakers. It would be good to see more active promotion of the JCAA internationally at such conferences – this can be done both by the JCAA itself and the members of the arbitration community in Japan who wish for greater success in the international arbitration scene. Even if Singapore and Hong Kong cannot be regarded as truly comparable with Japan, the Korean experience is very notable. In addition to a significant case load at the KCAB, it is striking that Korean practitioners are very well represented at arbitration conferences in Asia and one or two of the leading Korean arbitration lawyers are now starting to receive a significant number of international arbitration appointments. Japan should look to follow the same path.

Japan has a similar and compelling story to tell. In addition to being extremely stable and modern, it can distinguish itself from many of the leading jurisdictions for arbitration in Asia by its civil law background. Not only is that attractive to parties which also come from that background but in my experience, it tends to lead to a quicker process with less disclosure. This could be a key selling point in an era when the most common complaint about the arbitration process amongst corporates is its excessive time and cost. In addition, I would also add that my experience (and those of others) is that the JCAA is also extremely efficient and helps keep arbitrations running smoothly and efficiently. This is especially beneficial in the early stages before the tribunal is appointed.

Japan has developed greatly as a jurisdiction for arbitration in the last decade and continues to make significant progress as described above. However, it could make further great strides if the government really understood and appreciated the advantages of a thriving arbitration scene. Sadly, waiting for the government of Japan to take action is rarely a successful approach so the JCAA will need to push on with its own efforts working with the increasing number of practitioners who want to see arbitration in Japan succeed internationally. Arbitration in Japan is here to stay – it is up to everyone involved in arbitration to put in further efforts to take it to the next level. It is my hope that the suggestions put forward in this article are some initial steps to assist with that aim.

⁸ See news release at www.kcab.or.kr.

⁹ KCAB International Arbitration Rules, Articles 2(d) and 3.