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International Arbitration

Japan: Trends & Developments

Aoi Inoue and Masataka Sato
Anderson Mōri & Tomotsune

chambers.com

2020

Trends and Developments

Contributed by:
Aoi Inoue and Masataka Sato
Anderson Mōri & Tomotsune see p.6

Introduction
As a general trend, in recent years, arbitration has gained increased importance globally as well as in Japan as a cross-border dispute resolution mechanism. As a result of this increased importance, there have been noteworthy progresses in the environment for international arbitration in Japan. The main advancements are introduced below.

Creation of the JIDRC
As background, in June 2017, the Cabinet of Japan published the "Basic Policy on Economics and Fiscal Management and Reform", which declared (among other things) that the Japanese government aims to "lay the foundation for promoting international arbitration". Following this declaration, the Japanese government established the Liaison Conference of Relevant Ministries and Agencies in September 2017, where a number of items have been discussed to date. The interim summaries of the Conference published in April 2018 named a number of urgent action items to be addressed through public-private collaborations. These items include the fostering of specialised professionals for arbitration, publicity efforts toward domestic and international businesses, and revision of the legal system for arbitration, and, importantly, securing advanced facilities for arbitration proceedings.

These developments led to the founding of the Japan International Dispute Resolution Center (JIDRC) in February 2018. The JIDRC led the efforts to create JIDRC-Osaka in Nakanoshima, Osaka, the first dedicated facility in Japan for international arbitration and alternative dispute resolution (ADR). JIDRC-Tokyo, a world-leading specialised facility for international arbitration and alternative dispute resolution, was opened in March 2020 in Toranomon, Tokyo. These facilities are available for conducting arbitration proceedings of various institutional arbitrations (eg, arbitrations under the rules of the ICC, the JCAA, the SIAC, the AAA/ICDR, the HKIAC, the LCIA, the KCAB and the ICSID) or ad hoc arbitrations, charging relatively inexpensive fees.

The JIDRC facilities are also equipped with all of the necessary hardware for arbitration hearings, such as wireless internet, video conference systems, simultaneous interpretation facilities, and real-time transcription capabilities.

Further, even though the COVID-19 pandemic makes it difficult to travel to hearing venues, JIDRC-Tokyo and JIDRC-Osaka have enabled virtual hearing (online hearing) services that connect the tribunal and parties by video conference systems. Parties and tribunal may also connect to either or both of JIDRC-Tokyo and JIDRC-Osaka's Hearing Room or Breakout Room in order to avoid close contact among persons while conducting the hearing.

Amendment of the Foreign Lawyers Act
On 29 May 2020, the Amended Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers (Act No 66 of 1986, "Foreign Lawyers Act") was promulgated. This Amendment, among other things, broadens the definition of an "International Arbitration Case" for purposes of foreign attorneys' practice in Japan.

Registered Foreign Lawyers are allowed to represent their client in proceedings of the International Arbitration Case in Japan as defined in Article 2 of the Foreign Lawyers Act. "Registered Foreign Lawyer" means a person who has obtained approval from the Minister of Justice and has obtained registration in the Roll of Registered Foreign Lawyers. Further, a Foreign Lawyer who is not a "Registered Foreign Lawyer" but practises law in a foreign country based on qualifications in that foreign country (except where the lawyer is employed and provides services in Japan based on their knowledge concerning foreign laws) may represent a client in an International Arbitration Case if the attorney has been requested to undertake or undertook that arbitration case in the foreign jurisdiction. Foreign Lawyer means a person whose professional duties are to provide legal services as a professional practitioner in a foreign jurisdiction and who is equivalent to an attorney at law under the provisions of the Japanese Attorney Act (Act No 205 of 1949).

Before the amendment, Article 2 of the Foreign Lawyers Act defines "International Arbitration Case" as "a civil arbitration case which is conducted in Japan and in which all or some of the parties are persons who have an address or a principal office or head office in a foreign jurisdiction". This definition has been criticised for years as overly narrow. For example, where an arbitration is pending in Japan between wholly owned Japanese subsidiaries of foreign parent corporations, it does not fall under an "International Arbitration Case" under Article 2 because none of the parties has an address or a principal or head office in a foreign jurisdiction. This means that Registered Foreign Lawyers and Foreign Lawyers cannot act as counsel in Japan, and parties are required to retain Japanese lawyers as local counsel instead.

After the amendment, the definition of an "International Arbitration Case" was broadened to include a civil arbitration case in which:

- all or some of the parties have an address or a principal or head office in a foreign jurisdiction, or more than 50% of all or some of the parties' equity interest is held by persons who have an address or a principal office or head office in a foreign jurisdiction;
- the law which the Arbitral Tribunal should apply in making the Arbitral Award (ie, the substantive law applicable to the merits) is a law other than Japanese law; or
- the seat of the arbitration is in a foreign jurisdiction.

Accordingly, Registered Foreign Lawyers and Foreign Lawyers will be able to act as arbitration counsel in Japan where (i) all or some of the parties are foreign entities (including Japanese subsidiaries of foreign parent corporations); (ii) the applicable law on the merits is foreign law; or (iii) the seat of arbitration is in a foreign jurisdiction.

These amendments are scheduled to come into effect on 29 August 2020, and from that day, Registered Foreign Lawyers and Foreign Lawyers may handle a broader range of arbitrations in Japan.

Amendment of JCAA Rules

On 1 January 2019, the Japan Commercial Arbitration Association (JCAA) revised two of its existing sets of rules, namely, its Commercial Arbitration Rules and Administrative Rules for UNCITRAL Arbitration, and promulgated a new set of rules, Interactive Arbitration Rules. There are no substantive changes to the Administrative Rules for UNCITRAL Arbitration, and therefore only Commercial Arbitration Rules and Interactive Arbitration Rules are discussed here.

Commercial Arbitration Rules

These are the rules most often adopted when parties agree to JCAA arbitration. The Commercial Arbitration Rules were amended to provide rules with attention to detail and to achieve the objective of a smooth resolution of disputes. For example, the following revisions were made.

Amendment of the Expedited Procedures: under the amended rules, when the amount of a claim is less than JPY50 million, in principle the arbitration will be conducted based on written submissions without a hearing under Expedited Procedures. However, if parties agree on a three-arbitrator tribunal or if parties inform the JCAA within the prescribed period of time that they do not wish to proceed with the Expedited Procedures, the arbitration will proceed under the regular procedures. (See Articles 84 and 88.)

Revision of rules regarding arbitrators' fees:

- the previous rules provide that the JCAA shall decide the hourly rate of arbitrators within a range of JPY30,000 per hour to JPY80,000 per hour, while the amended rules provide for a uniform compensation of JPY50,000 per hour. (Article 93(2));
- under previous rules, the basic form of compensation for arbitrators is hourly charges subject to caps determined by the amount of claims. Under the amended rules, the cap is set for arbitrators individually, with the party-appointed arbitrator's cap being 80% of the sole arbitrator, and the presiding arbitrator's cap being 120% of the sole arbitrator. (Article 94(3).) The sole arbitrator's compensation is capped at JPY30 million, while, in a three-arbitrator panel, a party-appointed arbitrator's compensation is capped at JPY24 million and that of the presiding arbitrator is capped at JPY36 million. (Article 94(1) and (3).)

The amended rules maintained the system where the arbitrators' compensation is regressively structured so that the hourly rate is reduced by 10% increments for every 50 hours (total reduction up to 50%) when the hours billed exceed the initial threshold; however, the initial threshold was increased from 60 hours to 150 hours. (Article 95.)

Interactive Arbitration Rules

To avoid the lengthiness and costs caused by unproductive exercises under a purely adversarial system, the Interactive Arbitration Rules were adopted to make it obligatory for the tribunal to engage in a "dialogue" with parties. Examples are explained below.

The Arbitral Tribunal's Active Role in Clarifying Parties' Positions and Ascertaining Issues: as early in the process as possible, the tribunal is required to inform the parties in writing of the tribunal's summary of parties' positions and to provide the parties with a provisional list of issues in controversy. (Article 48(1).) Within a time limit fixed by the arbitral tribunal, Parties can provide their input to the summary and issues above. (Article 48(2).)

Expressing Arbitral Tribunal's Preliminary Views: before deciding whether to have a witness examination, the tribunal is required to summarise issues that it believes to be important and to provide the tribunal's preliminary views on such issues. (Article 56(1).) Within a time limit fixed by the arbitral tribunal, parties can provide their input to these issues and the tribunal views (including whether or not a witness examination should be conducted). (Article 56(2) and (3).)

Reduction of fees and flat-fee structure: the arbitrator's fees under the Interactive Arbitration Rules are flat fees set in accordance with the claim amount in an attempt to reduce the fees. No matter how high the amount of claim is, in a single-arbitrator scenario, the upper limit of the fees is set at JPY5 million (Article 94), in a three-arbitrator scenario, the upper limit of the fees for a party-appointed arbitrator is JPY4 million and for the presiding arbitrator it is JPY6 million. (Article 95)

Investment Treaty Arbitrations

Recently, the Japanese government has been very active in promoting signing bilateral investment treaties (BITs), economic partnership agreements (EPAs) and free-trade agreements (FTAs), and is now engaged in negotiations with several countries. As of 1 July 2020, Japan has signed bilateral investment treaties (BIT) with 35 countries. Further, Japan has entered into the 12 economic partnership (EPA) agreements and free-trade agreements (FTAs) that have sections addressing investment. Additionally, 12 Pacific Rim countries, including Japan, signed the Trans-Pacific Strategy Economic Partnership Agreement (TPP) on 4 February 2016. Although the United States withdrew its participation, the other signatories agreed in May 2017 to revive it and reached agreement in January 2018. In March 2018, the remaining 11 countries signed the revised version of the agreement, called the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which is also known as TPP11. The CPTPP entered into force on 30 December 2018.

To date, Japanese businesses have initiated very few investment treaty arbitrations. It is expected, however, that as the number of BITs and FTAs (EPAs) involving Japan increases, Japanese companies will become increasingly involved in cases regarding investment treaty arbitration.

Recent Court Decisions on Arbitrators' Duty to Disclose

Article 18(4) of the Arbitration Act of Japan (Act No 138 of 2003) provides that "[d]uring the course of the arbitration procedure, an arbitrator shall, without delay, disclose to the parties all the facts that would be likely to give rise to doubts as to his/her impartiality or independence (excluding those which have already been disclosed)." A recent decision (Osaka High Court Decision 11 March 2019) sheds light on the perennial disputes surrounding violation of this provision and related issues of vacating arbitral awards based on such a provision.

Summary of the proceedings

The matter was a JCAA arbitration between American entities X1, X2 and Japanese entity Y1 (which is a wholly owned subsidiary of Japanese company C) and Singaporean entity Y2, with an award rendered by a three-arbitrator panel. X1 and X2 challenged the award, pursuant to the grounds for vacating the award under Articles 44(1)(iv), 44(1)(vi) and 44(1)(viii) of the Arbitration Act, on the basis that one of the arbitrators, A, did not disclose that A was from the same law firm that had another attorney B representing an affiliate of a party to the arbitration procedure, in a US class action case.

Main issues in controversy

One of the arbitrators, A, was an attorney in the law firm D's Singapore office, and another attorney of the law firm, B, was an attorney in the same firm's San Francisco office and represented company E in a class action in a US federal district court. Like Y1, E is also a wholly owned subsidiary of Japanese company C. The question is firstly whether A should have disclosed the above fact under Article 18(4) of the Arbitration Act, and, if so, secondly whether A has violated the duty to disclose.

Decisions

Court of First Instance: Osaka District Court's decision on 17 March 2015 (Supreme Court Civil Case Decisions Vol 71, No 10, Page 2146) held that, even if the failure to disclose is a violation of duty to disclose (Article 18(4) of the Arbitration Act), the defect is minimal, and therefore the arbitration award is maintained.

Court of Appeal: on appeal, Osaka High Court's decision on 28 June 2016 (Supreme Court Civil Case Decisions Vol 71, No 10, Page 2166) held that, because there were factual circumstances raising doubts about the impartiality and independence of the arbitrator A, disclosure is required under Article 18(4) of the Arbitration Act and Article 28(4) of the JCAA Commercial Arbitration Rules. The court noted that it is not difficult to conduct investigations through a conflict check within law firm D. Although whether such a conflict check had been conducted was not evident, regardless of whether the conflict check was actually conducted, the lack of disclosure of such circumstances that constitute a conflict of interest is a breach of the duty of the arbitrator A to disclose. Accordingly, the court vacated the arbitral award.

Supreme Court: the Supreme Court's decision on 12 December 2017 (Civil Vol 71, No 10, Page 2106) held that, regarding a determination that an arbitrator has violated the duty to disclose facts relevant to Article 18(4) of the Arbitration Act by failing to disclose the conflict, it is necessary to find the facts, firstly that the arbitrator was aware of the conflict during the course of the arbitration, or secondly that the arbitrator could know of the conflict during the course of the arbitration based on reasonable investigation. Therefore, the Supreme Court remanded the case to determine whether:

- the arbitrator A was aware of the conflict during the course of the arbitration;

- whether law firm D was aware of the conflict;
- what the situation was within law firm D for determination of conflicts among its attorneys; and
- whether the conflict could have been ordinarily discovered by the arbitrator A through reasonable investigations.

On Remand: on remand, Osaka High Court's decision of 11 March 2019 (Hanrei Taimuzu No 1468, Page 65) made the following conclusions regarding the relevant issues:

- after the attorney B joined law firm D in February 2013 and until the arbitration award was rendered on 11 August 2014, the fact that the law firm D was representing E in the US class action (ie, the conflict) is something that would raise doubts about the arbitrator's impartiality and independence in the eyes of parties in the arbitration, and therefore is subject to disclosure under Article 18(4) of the Arbitration Act;
- the law firm D has a conflict-check system that can be used to check whether there are conflicts among its attorneys, which is a standard system used by large American law firms and is consistent with ABA's Model Rules of Professional Conduct. When A was selected as the arbitrator, reasonable investigation was conducted using the conflict-check system. When A became the arbitrator in this matter, A was not aware of the conflict based on the results of the conflict-check system and there was no evidence that A was aware of the conflict during the course of the arbitration;
- further, regarding whether the conflict was ordinarily discoverable upon reasonable investigation, the court found that:
  - (a) the law firm D is a large-scale international law firm with about 1,100 attorneys, and it has a conflict-check system to keep track of potential conflict between its attorneys. The arbitrator A's use of the system would satisfy the requirement to conduct reasonable investigation;
  - (b) B's transfer to law firm D (and thereby creating a potential conflict) occurred after the arbitrator A's conflict check using the system. As the arbitrator A had entered the appellant's and Y1's names into the database for the system, other attorneys at law firm D would be able to detect potential conflicts when they considered whether to accept engagement in matters that may create a conflict with the arbitrator A, as long as the system functioned correctly;
  - (c) accordingly, the system can be deemed as a sufficient measure to ensure that facts casting doubt on arbitrator's impartiality and independence do not occur;
  - (d) the reason that the arbitral award was rendered without the arbitrator A being aware of the conflict was because the attorney B was involved in the class action when working at the previous firm and believed that the attorney B was no longer representing E after transferring to the law firm D, even though the attorney B had failed to file a notice of withdrawal and remained listed as an attorney in the class action case. Therefore, special circumstances existed in this matter because the relevant attorney B failed to inform the law firm D of the matter. As a result, the fact is difficult to discover by reasonable investigation, and the arbitrator A did not violate the duty to disclose under Article 18(4) of the Arbitration Act even though the arbitrator A did not disclose the conflict.

Conclusion

In this case, for purposes of determination of facts that should have been discovered by reasonable investigation, the court analysed, within the framework provided by the Supreme Court, the detailed factual circumstances surrounding the attorney B's failure to inform the law firm D's conflict-check system and found that special circumstances exist in this case because that failure was caused by the attorney B's failure to submit a notice of withdrawal in the US class action case. As such, the court held that there was no violation of duty to disclose, and reversed the decision vacating the arbitral award. This case has an impact on the determination of the arbitrator's duty to investigate and disclose potential conflicts.

Anderson Mōri & Tomotsune has a wide-ranging litigation, arbitration and dispute resolution practice that encompasses the many facets of business in Japan. The firm has extensive experience in areas that closely reflect the international nature of its client base and the international experience and diversity of its people. The firm is able to provide a complete dispute resolution service to clients, ranging from preliminary advice aimed at early resolution and prevention of disputes to the conduct of complex trials. The firm's attorneys have experience working in overseas jurisdictions and include among their ranks former judges, including a former Supreme Court Justice. In addition to engaging in the day-to-day conduct of dispute resolution, some of its attorneys are also actively involved in imparting their experience and expertise to the next generation of law students through university lecturing. With extensive experience in international arbitration, the firm has represented clients in arbitrations concerning capital and business alliances, joint ventures, M&A, construction projects, infrastructure projects and intellectual property transactions such as licences, distributorship/agency agreements and sales under the rules of major arbitral institutions. The firm also provides strategic advice for Japanese corporations on investment treaty arbitrations in accordance with investor-state dispute settlement (ISDS) clauses stipulated in investment treaties or investment chapters of economic partnership agreements (EPA).

Authors

Aoi Inoue is a partner at Anderson Mōri & Tomotsune specialising in international arbitration and litigation. He represents clients in a wide range of business disputes, including sales of goods, joint venture, distributorship, licensing, franchising, complex financial products, labour and employment, product liability and construction. He has acted as counsel in a number of international arbitrations under various rules, including the ICC, SIAC, HKIAC, JCAA and UNCITRAL. Mr Inoue received his LLB from the University of Tokyo, and holds an LLM from Columbia Law School. He is admitted to practise in Japan and New York.

Masataka Sato is an associate at Anderson Mōri & Tomotsune, who has represented clients in various dispute resolution procedures, including international commercial arbitration, litigation and domestic alternative dispute resolution. He advises clients on a broad range of disputes, including distributorship, insurance, construction, fictitious transactions, directors' duty of care, online defamation, sales of goods, labour, and real estate. Mr Sato received his LLB from the University of Tokyo, and holds a JD from the University of Tokyo School of Law. He is admitted to practise in Japan.

Anderson Mōri & Tomotsune

Otemachi Park Building
1-1-1 Otemachi, Chiyoda-ku
Tokyo 100-8136
Japan

Tel: +81 3 6775 1122
Fax: +81 3 6775 2122
Email: aoi.inoue@amt-law.com
Web: www.amt-law.com

ANDERSON MŌRI & TOMOTSUNE