

JAPAN AS A CENTRE: TWO POSSIBLE FUTURES

Japan won't emerge as an arbitral centre until local corporations mandate it as a venue, and at the moment they're not willing to. Peter Godwin, partner of Herbert Smith in Tokyo, reports

The Japanese government's stated aim, like that of other governments in Asia, is to promote Japan as a centre for international commercial arbitration. For at least the past five years, the question of how this can be achieved has been puzzling some of the leading business figures in Japan, including those within the highest levels of government. In that time, a new arbitration law has been enacted, based on the UNCITRAL Model Law; the Japan Commercial Arbitration Association has overhauled its rules; and a new body has been formed to help train arbitrators, the Japan Arbitrator's Association. (For ease I will refer to the 'new law' and 'new rules' for the remainder of this piece.)

These developments were heralded by many in Japan as a new dawn. A respected figure in international arbitration in Japan declared in a recent article reviewing the new law and new rules that, as a result of their introduction, "Japan is expected domestically and internationally to be one of the international arbitration centres in Asia." (Tatsuya Nakamura 'Japan's New Arbitration Law and the JCAA New Arbitration Rules'). The unfortunate reality is that the new law and new rules remain underused. There has been no significant increase in the number of international arbitrations being conducted in Japan. Indeed, in 2005 and 2006 there was a decrease in the number of cases conducted under Japan Commercial Arbitration Association Rules, with only 11 requests for arbitration being recorded.

Why is Japan failing to achieve its stated goal? Can it ever become a major international arbitration centre? And, if so, what steps need to be taken?

Cases filed under JCAA rules

Year	No. of cases filed
2000	10
2001	17
2002	9
2003	14
2004	21
2005	11
2006	11

Source: JCAA

The challenge

Japan's challenge in becoming an international arbitration centre is three-fold. First, Japanese companies have to embrace arbitration as a method of settling their international disputes.

Second, having been persuaded of the merits of arbitration, they must then be convinced of the merits of arbitrating in Japan so that, when having the negotiating position to do so, they insist upon it.

Third, and this becomes realistic only after the other two steps are met, the international business community must be persuaded to think of Japan as a centre for international arbitration, in the same way as London, Paris, Geneva and Stockholm or, in Asia, Hong Kong or Singapore.

Step one

To date, Japanese companies have generally not embraced international arbitration with the same vigour as their international counterparts.

A number of reasons have been put forward as the reason, some of which do not ring true

The Japanese are dispute-averse

Often the lack of arbitration taking place in Japan is explained and excused by saying that Japanese companies are dispute-averse, preferring to resolve disputes through informal means (for example by high level management meetings, and so on) without resort to a third party. Historically this may have been true and it may remain true – to a degree. The aversion may in part stem from a scarcity of lawyers; busy and slow courts; and the fact that a winning party is seldom awarded costs. And yet, even if one were to accept that the Japanese are inherently dispute-averse, would that not work in favour of arbitration? Arbitration tends to be less confrontational; unlike litigation, the procedure can to a large extent be formulated by the parties (and those proceedings themselves are often less confrontational); and proceeding are usually conducted in private. All of these should promote arbitration as a method suitable for resolving disputes among the dispute averse.

So, if not a general reluctance to engage in disputes, what is inhibiting the number of arbitrations?

Japanese lawyers and companies are suspicious of arbitration

A more accurate explanation may be that Japanese lawyers and the companies that they advise have traditionally been suspicious of international arbitration, seeing it as a dispute resolution procedure imposed from overseas; as unreliable; and, always, as 'unfamiliar'. Often, this view may have been born of a single bad experience (for example, a Japanese

firm may cite the lack of an appeals mechanism as a failing, after it had a bad experience because a poor arbitrator was chosen).

When Japanese companies have arbitrated in Japan, often the experience has been unsatisfactory. The dissatisfaction probably owed little to the Japan Commercial Arbitration Association rules or the arbitration law of the day, and everything to the experience and quality of the arbitrators and counsel appointed. It is a truism that a party's arbitration is only as good as the tribunal appointed (and to a lesser extent, the counsel appointed). So even where Japanese companies have not been put off arbitrating per se, many have been put off arbitrating in Japan, instead preferring London, Paris, New York, etc.

In that sense, Japan suffers from a 'chicken and egg' scenario, namely that the lack of arbitration being conducted in Japan has led to a shortage of experienced arbitrators in Japan and a shortage of experienced arbitration counsel. This skill gap has been deepened by a reluctance, where the law allows, to turn to international arbitrators and international counsel. The upshot is that many lawyers continue to advise their clients to provide in their contracts for Tokyo District Court litigation even in circumstances where this is plainly inappropriate from a legal perspective (to give an example, Tokyo District Court litigation is often provided for in contracts with Indonesia, even though as a matter of law, judgments from Japan are not enforceable in Indonesia – nor are judgments from any other state. Indonesia is, however, a signatory of the New York Convention, as is Japan).

The answer to this conundrum lies within the power of the legal community in Japan. The deeper the pool of talented Japanese arbitration lawyers becomes and the more positive the experiences that Japanese companies have with international arbitration, the weaker the (mis)perception that arbitration is bad, unreliable and so on will become. First, though, Japanese companies must be persuaded not to resort to litigation before the Tokyo District Court. To achieve this, Japanese lawyers, and in-house counsel alike, must be educated in the advantages and disadvantages of arbitration so that when advising on appropriate dispute resolution provisions for any particular contract, thought will be given to key issues (such as the future enforcement of any judgment or arbitral award). Above all, where appropriate, companies must be advised to choose arbitration over litigation.

Having a dispute heard by a Japanese national is inherently advantageous

A contributing factor to these less-than-ideal experiences is a perception that it is advantageous

if a dispute is heard by a Japanese national, regardless of their capability or expertise. This may explain why Japanese companies tend to choose domestic litigation or else appoint a Japanese national as an arbitrator.

An experienced foreign arbitrator who is experienced in the relevant field for the particular arbitration in question will no doubt render a more consistent and fairer award than an inexperienced domestic arbitrator who lacks relevant expertise. In addition, it seems insufficiently understood that most large international commercial arbitrations are heard before a tribunal of three arbitrators, meaning that the Japanese party will have an opportunity to nominate a Japanese arbitrator if it so wishes, although it should not do so simply to have a Japanese national on 'its side' but because the person has the right experience for the case in question.

Arbitration is considered less 'official' than litigation
Since being based in Tokyo, I have heard that a reason not to arbitrate is that it is a private contractual process rather than a formal 'state-run' mechanism and hence any award does not carry the same authority as a court judgment. At the most extreme, it has even been suggested that because arbitration is less official, losing may expose companies to lawsuits from their shareholders. Although I am not a Japanese lawyer and cannot opine on this point as a matter of Japanese law, from my international experience, I would be amazed if this were true.

If nothing else, such an attitude contradicts the policy of many major multinational companies, which now consider arbitration preferable to litigation not least because, in having the ability to appoint or influence the appointment of at least one of the tribunal members, they feel that the award is likely to be more reliable than a court judgment.

The challenges outlined above can be overcome with the right education and practical experience. The more that Japanese lawyers and companies arbitrate, the more they will become familiar with the system and the more the myths outlined above will be dispelled. The stronger the culture of arbitration becomes among corporate Japan, even if the arbitrations initially take place primarily outside Japan, the greater the chances are that Japan will eventually rise as a regional, if not international, arbitration centre.

Encouragingly, over the past five years or so, more Japanese companies have participated in international arbitrations held outside of Japan than the figures for arbitration held inside Japan indicate. Furthermore, personal experience suggests that Japanese companies are becoming more willing as a group to assert their legal rights. So there are signs that step one in our three-step process is at least commencing.

Step two

Corporate Japan must embrace arbitration.

Once it has done so one might expect (or hope) that, when it has the negotiating position to do so, a Japanese company will start to insist on their arbitrations being seated in Japan.

For those companies to do that, many of the concerns outlined in step one above must be addressed. After that, the concerns of the Japanese companies' international business partners must be addressed. International business tends to ask four principal questions when considering a location and set of rules for international arbitration.

Are the arbitration laws and institutional rules convenient?

For Japan – in theory, yes. The new law is based on the UNCITRAL Model Law and the new rules have been updated in a manner that is consistent with this. The more appropriate question though, is whether these are being applied in line with international norms. It is too soon to say with certainty either way. What can be said is there has been at least one encouraging recent case in which the Tokyo District Court supported a party's application to the court for its assistance in taking evidence in an international arbitration.

Is English spoken? Is Japan convenient and are the costs reasonable?

English is arguably the principal language of international arbitration. In fact, language is not as much of a problem as one might expect in Japan as there are many good Japanese lawyers who speak excellent English, and the number is increasing.

Although geographically not as convenient as Hong Kong and Singapore, Tokyo is convenient enough for location not to be an issue. Often, which location is specified in an arbitration agreement comes down to the parties' relative bargaining power.

Finally, with regard to costs, although meeting rooms, hotels and flights may be more expensive than other regional centres such as Hong Kong and Singapore, it should be noted that costs are on a par with London, New York and Paris. Hence, again, this ought not to be a major deterrent.

Are Japanese lawyers capable as counsel and can international counsel be appointed?

As suggested, the issue with Japanese lawyers and international arbitration can be seen as one of experience and attitude more than ability. Many Japanese lawyers prefer Tokyo District Court litigation, are hesitant towards any form of arbitration, particularly one not under ICC rules, run arbitrations as if litigating before the Tokyo District, and condemn the arbitration as a whole after a single bad experience.

As the pool of experienced arbitration lawyers becomes deeper, however, attitudes will shift. Indeed following a restructuring of legal education, more lawyers are qualifying in Japan with the result that larger law firms are appearing. In such an environment, young lawyers will be increasingly able to specialise in certain fields, such as arbitration.

In the interim, enlightened Japanese lawyers,

recognising their limitations, are starting to team up with experienced international arbitration counsel. This is to be encouraged as it can only lead to an acceleration in the education process and so, hopefully, an acceleration in the development of Japan as an international arbitration centre.

Can appropriate arbitrators be appointed in Japan?

Two challenges arise with respect to the appointment of arbitrators in Japan. The first concerns a legal ambiguity as to who may serve as an arbitrator. The second is the shallow pool of experienced arbitrators in Japan.

With regards to the first, article 72 of the Lawyer's Law appears to prohibit anyone who is not a Japanese qualified lawyer from serving as an arbitrator. On the other hand, it has been argued that under an article of the Penal Code (article 35), acting as an arbitrator does not violate article 72 if it is in the course of "legitimate business conduct". Japanese commentators have stated that foreign lawyers and law professors can act as arbitrators and indeed foreign lawyers have done so on numerous occasions in Japan Commercial Arbitration Association arbitrations. All the same, the position has never been tested. To dispel this ambiguity, article 72 should be amended to make it clear that non-Japanese people, whether lawyers or not, can serve as arbitrators in arbitrations located in Japan.

The second challenge lies with the shallow pool of experienced arbitrators in Japan. Part of the solution lies in nurturing young arbitration lawyers. As these lawyers mature, they will become the next generation of experienced arbitrators. Ultimately, the deeper the pool of appropriately experienced arbitrators, the better.

For the meantime, it would be sensible to appoint at least one experienced international arbitrator to every tribunal that sits in Japan.

Step three

Only once Japan has established its credentials 'domestically' as an arbitration centre, and Japanese companies are starting to extol the virtues of arbitrating in Japan, will international companies be prepared to consider Japan as a neutral venue for a genuine international arbitration (meaning, cases where neither side is Japanese)? Unfortunately, the day that international lawyers suggest Tokyo ahead of Hong Kong or Singapore is a long way off.

Ultimately, the key to encouraging international business to choose Japan and its rules for international arbitration lies with Japanese companies and lawyers and their own acceptance of the arbitral process. If Japanese companies can be persuaded to put faith in international arbitration, Japan will develop the pool of experience that the wider world requires of an international arbitration centre. Until then, the prospect of international business choosing it must be close to nil.