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Japan

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A. Legislation and rules

A.1 Legislation

International arbitration in Japan continues to be governed by the Arbitration Act of 2003, which took effect in 2004 and to which no legislative amendment has been made since.

A.2 Institutions, rules and infrastructure

The major international arbitration institution in Japan is the JCAA. Having revised its Commercial Arbitration Rules most recently in 2014 and 2015, the JCAA is in the process of further amending its Rules to better suit the potential needs of businesses engaging in arbitration.⁶ The amended Rules are scheduled to come into effect on 1 January 2019.

From late 2017 through 2018, three new establishments relating to ADR were created in Japan: (i) the Japan International Dispute Resolution Center in Osaka, which will provide facilities for arbitration and other types of ADR cases; (ii) the Japan International Mediation Center in Kyoto, whose mandate is to provide mediation services for cross-border disputes between Japanese and non-Japanese parties; and (iii) the Japan International Arbitration Center in Tokyo, which will provide services focusing on the resolution of intellectual

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⁶ See the JCAA's publication, "Reform of the JCAA Arbitration Rules: Three Sets of Rules in Response to All Business," 16 November 2018. This publication is available through the JCAA's website.

property disputes. These establishments were opened, in part, following an effort from the Japanese government and industry to support international ADR in Japan.

B. Cases

In a recent case, Japan’s Supreme Court overturned a decision of the Osaka High Court to set aside a JCAA award on the ground that the presiding arbitrator had failed to disclose relevant facts to the parties.⁷

In the arbitration subject to this decision, the presiding arbitrator was a partner in the Singapore office of a global firm, and an attorney in the Firm’s US office represented an affiliate of the claimants in an ongoing matter unrelated to the arbitration. This fact was not disclosed to the parties or the JCAA, as required both by Japan’s Arbitration Act and international best practice (under the “IBA Guidelines on Conflicts of Interest in International Arbitration” this was an “Orange List” matter for which a conflicts check should have been undertaken). After the tribunal rendered an award in favor of the claimants, the respondent commenced proceedings in Osaka District Court, arguing that, among other things, the non-disclosure had rendered the constitution of the tribunal contrary to Japanese law and triggered the right to seek a set-aside under article 44(1)(vi) of Japan’s Arbitration Act.

The Osaka District Court dismissed the application for set-aside as: (i) there would not have been “reasonable grounds” to suspect the impartiality or independence of the arbitrator under article 18(1)(ii) of Japan’s Arbitration Act and, even had the relevant circumstances been disclosed, they were not such as to affect the outcome of the award; and (ii) if there had there been any breach of the duty of disclosure, it was “minimal”: the arbitrator had submitted an “advance waiver” to the JCAA and the applicant did not make any objection to it. The

⁷ Supreme Court Third Bench decision on 12 December 2017, Case No. Heisei 28 (Kyo) 43. This decision overturned the ruling of the Osaka High Court in *X1 and X2 v. Y1 and Y2*, Osaka High Court 4th Civil Division 2015 (Wo) No 547, 28 June 2016, Hanrei Times No. 1431, p. 108.



Osaka High Court on appeal, however, overturned the Osaka District Court's decision. According to the Osaka High Court, from the perspective of the applicant, the non-disclosed fact was critical information bearing on the respondent's decision whether or not to seek to challenge the presiding arbitrator and should have been disclosed. Moreover, the presiding arbitrator was subject to a duty to investigate whether there were facts to be disclosed by him. Specifically, he was bound to retrieve information that was readily accessible. He could have identified the non-disclosed fact through a conflicts check without any difficulty. This was information he should have disclosed. The Osaka High Court considered that the non-disclosure here was a significant procedural defect which, even on the assumption that it had no direct effect whatsoever on the outcome of the arbitration, triggered the ground for annulment under article 44(1)(vi) of Japan's Arbitration Act. To ensure the fairness of the arbitral procedure and award and to maintain confidence in the arbitral system, the Osaka High Court held it was necessary to set aside the award.

In December 2017, Japan's Supreme Court overturned the Osaka High Court's decision. The Supreme Court agreed with the Osaka High Court as regards the extent of disclosure and the ongoing duty to disclose, and it also agreed that an advanced waiver submitted to the JCAA by the arbitrator was not sufficient to amount to disclosure for the purposes of article 18 of Japan's Arbitration Act. The Supreme Court, however, did not agree with the standard set by the Osaka High Court. The court held that an arbitrator has a duty to disclose "all the facts that would likely give rise to doubts as to his/her impartiality or independence"⁸ if he or she either: (i) was aware of such facts, or (ii) could have normally discovered such facts by conducting a reasonable investigation. The Supreme Court found that it was unclear whether the arbitrator in this case was aware of the conflict and whether the arbitrator could have discovered the conflict prior to the conclusion of the arbitration, even if the arbitrator had conducted a reasonable

⁸ Arbitration Act, article 18(4).

investigation. Consequently, the case was remanded to the Osaka High Court for further consideration of these issues.

It is at least debatable here whether the systemic considerations raised by the Osaka High Court, partially supported by Japan's Supreme Court, ought to trump the interests of the parties in finality, given that the possibility of any actual bias on the part of the presiding arbitrator appeared remote. When one considers the time and expense needed to get to the final award, there may be much to be said for an approach like that taken by the Osaka District Court, whereby a set-aside application can be refused on discretionary grounds if the breach is minimal because, for example, it has no direct effect on the outcome of the award. Be that as it may, this case is one where the presiding arbitrator ought to have erred on the side of caution, but failed to do so.

C. Diversity in arbitration

In 2018, an amendment to Japan's Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers was proposed, by which certain restrictions over foreign (i.e., non-Japanese) lawyers who represent clients in international arbitration and mediation cases in Japan would be relaxed. The earliest these proposed amendments may be voted on by Japan's legislature is 2019.

The proposed amendments represent an example of the Japanese government's efforts to enhance arbitration in Japan and would facilitate the involvement of non-Japanese lawyers in Japan-based arbitration. If passed, the amendments are expected to lead to an increase in the number of international arbitration and other ADR cases that take place in Japan.