Ministry of Economy, Trade and Industry of Japan
International Economic Research Project (for Revitalizing International Arbitration) for the Construction of an Integrated Economic Growth Strategy for FY2020

Final Report

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Table of Contents

1. Introduction

In recent years, as overseas investment has increased, and as a means of resolving disputes between companies, international arbitration has come to require a global standard in terms of neutrality, conclusiveness, flexibility, and confidentiality, etc., and the number of uses for international mediation has also been increasing. In addition, investment arbitration is often used as a means of resolving disputes between investors and host nations. Against the backdrop of this global trend, and as an example, the number of cases being reviewed by the Singapore International Arbitration Center (SIAC), which has been playing a central role in international arbitration in the Asian region, was 86 in 2007 and 416 in 2019. Despite the number of cases increasing elsewhere, in Japan the number of arbitration cases handled by Japanese arbitration institutions has not increased at all.

The reason for such a lack of increase for international arbitration in Japan is twofold: Companies outside Japan do not consider Japan to be a third-party country for arbitration, and there is a lack of awareness by Japanese companies of the existence of "international arbitration" as a dispute resolution mechanism.

Against this backdrop, this report aims to breathe new life into international arbitration in Japan by improving the shortcomings of this domain in Japan, creating advantages for carrying out such arbitration, and infusing such advantages into the awareness of Japanese and overseas companies as future customers of Japan's international arbitration domain, all so as to increase the number of international arbitration cases handled by Japanese arbitration institutions.

In addition, in order to activate international arbitration in Japan, and in addition to the need for infrastructure development, which is indispensable for Japan as an economic & financial center, two approaches are conceivable: activating the use of arbitration by Japanese companies and activating third-country arbitration. From both views, it can be said that comprehensive infrastructure development through public-private partnerships and measures/frameworks for such are indispensable.

In this report, while taking into account efforts to promote international arbitration in Japan, we will delve into: how to revitalize Japan's international arbitration by identifying the points for which Japanese arbitration institutions are lacking compared to arbitration institutions in other countries; understanding how to increase the numbers of international arbitration cases; and investigating points for improvement. With this in mind, we will organize the results of desk research into what methods are effective in increasing the number of arbitration cases and what kind of efforts are being made by arbitration institutions in other countries. We will also summarize the fields where the use of international arbitration and international mediation is expected to increase in the future,

including investment arbitration and the starting of cases involving commercial arbitration, etc. In addition, we will dissect the impacts of the COVID-19 pandemic and the efforts to be made in the post-COVID-19 era.

The arbitration institutions of other countries as surveyed in this report are as follows.

- Germany: German Arbitration Institute (DIS)
- France: International Court of Arbitration of the International Chamber of Commerce (ICC)
- U.K.: London Court of International Arbitration (LCIA)
- U.S.: International Centre for Dispute Resolution® of the American Arbitration Association (ICDR/AAA)
- Singapore: Singapore International Arbitration Centre (SIAC)
- China: China International Economic and Trade Arbitration Commission (CIETAC)
- Hong Kong: Hong Kong International Arbitration Centre (HKIAC)
- Republic of Korea: Korean Commercial Arbitration Board (KCAB)

In addition, in preparing this report, the practitioners that cooperated in the hearing survey on current situations and on the actual situation of international arbitration in each country are as follows.

Japan	TMI Associates
Germany	Dr. Boris Uphoff (Munich) from McDermott Will & Emery
France	Jacques Buhart (Paris, Brussels) from McDermott Will & Emery Dr. Tami Chida from Altana
The United States	Dr. Tom Allen from Greenberg Traurig
Singapore	Dr. Smitha Menon from WongPartnership
China	Dr. Chiann Bao from Arbitration Chambers
Hong Kong	Dr. Anselmo Reyes from Singapore International Commercial Court, International Judge
Republic of Korea	Dr. Kevin Kim from Peter & Kim

2. Efforts of arbitration institutions toward increasing the number of arbitration cases

The LCIA, which has traditionally been designated as an Anglo-American arbitration institution, has succeeded in increasing its number of arbitration cases, but it does not support multilingualization in terms of the information that it releases to the public, thus it is hard to say that it is actively undertaking promotional activities. On the other hand, the ICC, SIAC, and HKIAC, which are often used by Japanese companies, disseminate arbitration rules and arbitration procedures in multiple languages via their respective websites, and they all have been actively carrying out overseas promotional activities toward targeting companies in emerging nations, such as India. Also, in recent years, Chinese and Republic of Korea's arbitration institutions such as CIETAC and KCAB, respectively, have been increasing their presence as international arbitration institutions and have also been promoting the multilingualization of their websites and arbitration rules, along with the multinationalization of their arbitrators.

In knowing the current state of the promotional activities of said arbitration institutions, it can be said that, in order to increase one's number of international arbitration cases, it is necessary to first disseminate information on your respective arbitration institution itself, amid a climate where arbitration institutions are not very well known in general. In addition, if an arbitration institution is not well known, it would be considered that the arbitration rules of the institution itself might not be well known, thus it is necessary to prepare English versions of the arbitration rules and make them known.

For example, the SIAC sends representatives overseas to meet with companies and law firms so as to conduct promotion and to explain the advantages of the SIAC's arbitration rules (i.e., regarding transparency, cost, efficiency, etc.), and it also conducts marketing activities and promotion for Singapore-based domestic and foreign law firms, domestic and foreign companies, and chambers of commerce. Regarding this, specifically, seminars and forums are held to explain cases of arbitration as related to the industry to which the respective law firm, company, or chamber of commerce belongs. In addition, the SIAC actively carries out promotional activities internationally at events such as international conferences and through various publications.

Unlike Singapore and Hong Kong, which have developed as transit points for trade, countries involved in major overseas exports, such as Japan, Germany, and Republic of Korea, are home to their own large domestic industries and are thus home to many multinational companies, and thus these countries are regarded by foreign companies as being less than neutral as a seat of arbitration . Therefore, in many cases, if one party in an international transaction is a company that operates as a large global exporter, from the viewpoint of neutrality, it can be seen by some as difficult to

reach an arbitration-related agreement via an arbitration institution based in such a host country (i.e., the large global exporter). However, and thus, even in situations where it is difficult for a large global exporting company in such a major country to set the arbitration institution or place of arbitration within its own borders domestically, when in negotiations with a partner company internationally, arbitration via a third country should not be a given during the start of negotiations, as is often seen contract practice. If third-country arbitration is proposed from the beginning, the partner company could insist on arbitration within the borders of its own country (i.e., at a country that often acts as a transit point for trade), and then even third-country arbitration could become difficult to go to bat for. Therefore, companies in Japan should first insist on the use of their own arbitration institution or the conduct of domestic (Japan) arbitration, and once this is acceptable to the partner company, the Japanese side should assure the partner company that such a situation would not entail disadvantages to said partner company. It is important to try this, and, through such negotiations, it is thought that the number of arbitration cases in Japan could be increased.

3. Regarding future trends in international arbitration

Looking at the future trends of international arbitration by field, the number of cases handled by arbitration institutions in each country under our scope in recent years provides a window into the characteristics of each region. For example, for the ICC and LCIA in Europe, energy seems to hold a large share. Meanwhile, in North America, the AAA/ICDR has been seeing an increase in large-scale arbitration cases in the fields of science and healthcare. In Southeast Asia, the SIAC and HKIAC tend to see many cases that involve the corporate, trade, and maritime fields, and Southeast Asia's background in having played a central role in international arbitration for the Asian region is reflected in the trends in the cases handled. Also, in recent years, China and Republic of Korea, which have been increasing their presence in international arbitration, can be characterized by an increase in not only arbitration for the trade industry but also for electronic equipment and IT-related projects. In Japan as well, it is considered necessary to understand the fields in which demand for international arbitration is increasing and the fields in which Japan has international strength, as well as to take measures such as by promoting arbitrators that specialize in such fields. In fact, moving back to the topic of North America, the AAA/ICDR has set up a panel of arbitrators by specialty so as to meet the detailed needs of various companies from various industries.

Regarding methods of approach, including the efforts of arbitration agencies and governments in various countries, although many countries do not provide support for specific fields, many arbitration institutions are taking measures for the field of construction, as this domain has been seeing a large number of arbitration cases. For example, at the KCAB, the construction and energy industries account for 30–40% of the number of arbitration cases, including domestic arbitration—which is very important strategically. This is very appealing to those in arbitration practice and to Korea's Ministry of Land, Infrastructure and Transport, as it has both expertise in such industries and has the ability to provide arbitration services.

4. Impact of the COVID-19 pandemic

Due to the impact of the spread of the COVID-19 pandemic, most arbitration institutions outside Japan are promoting online arbitration procedures and remote work within their institutions, as each country has been implementing travel restrictions and stay-at-home orders. In addition, in terms of public relations activities, since it is has become difficult to hold in-person seminars, throughout FY2020 the ICC and LCIA have been actively holding online seminars using video conferencing systems.

Depending on the online arbitration process, arbitration institutions have been working on the creation of arbitration protocols (supplementary provisions, etc.) for online hearings and the holding of regular events via webinars, etc. Regarding the availability of online hearings, the situation is different for each arbitration institution. For example, the JCAA included a clause regarding online hearings directly into its arbitration rules, thus it didn't require the separate creation of a protocol. Meanwhile, the SIAC's rules do not state whether or not online hearings can be conducted, and whether or not an online hearing can be conducted is being left to the will of the parties involved and to the judgment of the arbitrator. Furthermore, although it was unclear whether online hearings were possible in the ICC's rules, via the announcing of a protocol, it was clarified that online hearings would be possible.

With the continued reach of the global COVID-19 pandemic, the arbitration community is under pressure to respond quickly to medium- to long-term challenges, and online hearings are expected to become part of the "new normal" in the future. Against this backdrop, online hearings entail the ability to reduce need to designate a country as an arbitration site. In addition, if you are an arbitration institution that hasn't been well known in the past, if there is a system that technically allows for online arbitration to be fair and smooth, it would be a great opportunity to raise your profile. However, while small-scale hearings will change to online format, there is the opinion that large-scale hearings would continue to be held offline, as there are concerns about the online nature of such hearings and the chance for problems to result from that. In addition, while online meeting technology, which has become widely used during the pandemic, comes with the advantage of being easily accessible, there is often a difference in the number of registrants compared to the actual number of participants. Because it is not possible to expect that networking online can be as fruitful as when done offline, once the COVID-19 pandemic has subsided, offline in-person seminars are expected to become popular again.

5. Selection criteria and issues of companies related to the seat of arbitration and the arbitration institution

In recent years, the number of arbitration institutions has also increased, especially in emerging countries, but common seat of arbitration such as Singapore, London, Paris, Stockholm, Hong Kong, New York, and Washington D.C., via the SIAC, ICC, ICSID, LCIA, HKIAC, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), and ICDR, etc., respectively, tend to be the most known when it comes to arbitration institutions, and thus these institutions/sites tend to be selected most often. The choice of arbitration institution depends on the circumstances of the case, along with the reputation of the arbitration institution and the personal experience of the parties involved. For example, matters of concern for companies to assess location would be: whether the arbitration laws of the seat of arbitration are designed to efficiently render enforceable arbitral award decisions; whether the independence of the parties involved is respected; whether decision-making authority is delegated to selected arbitrators; whether it is cost-effective; whether a prompt arbitral award can be made; and whether confidential information can be kept private, etc. From these points of view, it is very important for an arbitration institution to disseminate their merits. For example, the Singaporean government actively promotes the SIAC via means such as holding seminars. Against that backdrop, because Japan's arbitration rules are also not well known, it is necessary to strengthen Japan's arbitration institutions so as appeal to the outside world so that efficient and transparent arbitration can be carried out.

According to hearings with various companies and to similar types of surveys conducted by other organizations, as a challenge for companies to conduct international arbitration in Japan, issues include: insufficient information and awareness about Japan's arbitration systems, Japan's low competitiveness in the sphere of international dispute resolution, Japan's lack of information dissemination regarding its arbitration procedures, and the possibility of an impartial stance when it comes to arbitration between domestic and overseas companies. As a countermeasure to these issues, regarding the merits of the international arbitration system itself and the merits of international arbitration in Japan, and in addition to raising awareness about and publicizing companies in Japan and strengthening the appeal regarding the merits of using Japan as a third-country site for arbitration for companies from overseas, etc., it is necessary to strengthen promotion for using Japanese arbitration institutions.

Another challenge is to raise awareness regarding arbitration itself. Although international arbitration as a field is not well known, especially among SMEs, in Germany some arbitration practitioners consider it important to aggressively promote international arbitration to SMEs, which account for the majority of companies there. This includes not only chambers of commerce or law firms, but also contacting companies that already engage in arbitration in general, as well as to relay the concept of arbitration directly, so as to raise awareness. Also, in Republic of Korea, the KCAB

website, which was previously only in English, has been translated into Korean. The website also shows model clauses that can be used as a reference when devising contracts, etc., in effort to lower the hurdles for SMEs toward using arbitration.

6. Measures for promotion by each country for international arbitration

In Europe, to show that arbitration bodies are independent of governments, there are few government-run arbitration promotion measures and support forms, and in many cases, support is not publicly announced—in contrast to Asian countries.

Meanwhile, France is home to ICC headquarters and has gained a reputation as a seat of international arbitration, but no financial support is provided by the French government. However, France is promoting international arbitration through indirect subsidies such as for the introduction of the relocation area when the ICC headquarters relocated to Paris, for the cost of furniture, and for partial rent support, etc.

Compared to the ICC in France, the DIS in Germany handles only a small number of cases dealing with international arbitration and thus can be said to be small in scale. In Germany, there is no financial or physical support provided by the government, but under the country's arbitration laws, courts are regulated so as not to interfere excessively with arbitral awards. Therefore, the stability required to attract companies to international arbitration in Germany is ensured. Collaborative relationships also exist in the form of the DIS co-sponsoring events with Germany's ministry of justice, i.e., the Federal Ministry of Justice and Consumer Protection.

An advantage of attracting an arbitration institution to one's country is that, in addition to being able to anticipate the economic effects of conducting arbitration hearings domestically, one can also expect that hotels, restaurants, conference halls, and interpreting service providers would also stand to benefit. Furthermore, it would also attract a lot of legal professionals to the country that want to continue working in the field of arbitration. In addition to the economic effects related to arbitration, there is also the advantage of gaining a reputation as a location to resolve legal disputes. Thus, in the sense that it can bring business into the country, the field of arbitration is an important investment target.

7. Preferred strategies: Japan

7.1.1 Preferred strategies: Domestic companies

According to this research project, regarding domestic companies in Japan, especially for SMEs, the importance of dispute resolution clauses and the lack of understanding regarding arbitration systems are issues. This includes: lack of awareness of the benefits of international arbitration (even in large companies that are already using international arbitration), insufficient measures to further utilize arbitration (including making Japan the seat of arbitration), and weak awareness of the importance of acting as a seat of arbitration and the merits of using Japan as a seat of arbitration.

Therefore, in order to raise awareness, first of all, according to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, it is necessary to become more aware of arbitration itself, along with the merits of hosting such, and that, compared to trials, it is easy to conduct arbitration in foreign countries, etc. The objective regards that it is necessary to provide know-how regarding how to set dispute resolution clauses according to: the significance of the level of arbitration, the business customs of each industry, and the actual situation of contracts for corporate officials, economic organizations, and lawyers (i.e., corporate lawyers that have particularly strong influence on corporate contract terms) that advise on corporate contracts, etc.

In addition, through hearings with foreign law firms, the importance of not only a top-down approach from the state but also bottom-up intervention from the business world should be emphasized in promoting arbitration. As an approach in the business world, it is important not only to confirm the intentions and needs of Keidanren (Japan Business Federation), Japanese chambers of commerce, and foreign chambers of commerce of each country located in Japan, etc., but also to directly approach individual companies of various sizes.

In addition, in order to be able to respond appropriately to the international disputes faced by Japanese companies expanding overseas, it is necessary to have tools that clearly employ know-how regarding dispute resolution clauses for corporate entities. In hearings, when the legal affairs officer of a company that actually negotiates an arbitration clause makes Japan the seat of arbitration or designates a Japanese arbitration institution, some people have said that they desired materials that could appeal to the partner companies regarding the merits, neutrality, fairness, and convenience of arbitration in Japan.

Furthermore, for situations in which companies (especially SMEs with little practical experience in dispute resolution) can feel more comfortable regarding arbitration (i.e., knowing about successful arbitration cases, loss due to failure to include appropriate arbitration clauses, etc.), it is also important to introduce case studies and to provide concrete overviews.

Therefore, as a concrete method for effective public relations activities to domestic companies in Japan, and as according to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, it is necessary to proactively publicize a wide range of awareness-raising issues, such as the fact that enforcement is often easier to execute in a foreign country than in a trial, the speed of the procedure, and the promise of corporate confidentiality due to the non-disclosure of proceedings.

In addition, Japan's arbitration system, which is not well known worldwide, recognizes stable arbitral awards and has quality in its hearings such that it meets international standards—it is therefore fair for foreign companies. It is necessary to raise awareness regarding the provision of stable procedures and to create a fertile ground where Japanese companies can select Japan as a seat of arbitration even in contracts with foreign companies. Also, it is aimed to disseminate specific cases that can make arbitration feel more comfortable (i.e., success cases using arbitration, cases in which losses were incurred due to failure to include appropriate arbitration clauses, etc.) (through the creation of booklets, websites, etc.). It is also expected that such resources can be used as tools at the time of contract negotiations by sharing examples, etc., with foreign companies regarding how Japanese companies were able to agree to make Japan a seat of arbitration.

As a target, such public relations activities could include corporate lectures and lectures for international trade experts, etc., especially regarding the significance of arbitration for corporate legal affairs, economic organizations, corporate lawyers, etc., as according to the business customs and contract conditions of each industry. It is thus conceivable to hold seminars and symposiums on know-how regarding how to set dispute resolution clauses accordingly. Moreover, it could be considered to expand such public relations activities to not only the respective embassies of each country in Tokyo, but also to Keidanren (Japan Business Federation), the Japan Chamber of Commerce and Industry, and foreign chambers of commerce of each country located in Japan (American Chamber of Commerce in Japan, European Business Council in Japan, etc.).

Also, for individual companies, in order to be able to respond appropriately to international disputes as faced by Japanese companies expanding overseas, it is also necessary to inform companies regarding know-how in dispute resolution clauses and to set up a consultation desk. In particular, it is important to educate and raise the awareness of managers at SMEs that are not familiar with arbitration systems.

7.1.2 Preferred strategies: Overseas companies

For foreign companies, Japan's low recognition as a seat of arbitration and the fact that it does not support multiple languages, including English, make it difficult for those overseas to fully understand the scope of Japan's arbitration rules and procedures.

Therefore, in order to raise awareness, when disseminating Japan as a seat for third-country arbitration, it is not only necessary to appeal to entities such as the embassies of each country in Tokyo, the American Chamber of Commerce in Japan, and the European Business Council in Japan, etc., but it is also necessary to approach local law firms and individual companies by holding joint seminars with foreign arbitration institutions abroad so as to highlight Japan as a seat of arbitration. It is also efficient to promote the usefulness of Japanese arbitration in fields that match the popular image of Japan, i.e., the field of technology, etc., in a way that mimics the approach of other arbitration institutions that have strengths in specific conflict types and industries.

In addition, because of the fact that Japan has strong social infrastructure and that it is attractive as a tourist destination, at the very least, Japan has the advantage of being a good place for arbitration hearings, and it can be seen as appealing that arbitration management can be carried out at any location in Japan. Furthermore, for companies such as those in Republic of Korea and China, it can be mentioned as a merit that Japan and these countries share similar civil law systems and cultural sensibilities.

In addition, as is done on the websites of arbitration institutions in other countries, the arbitration rules are not disseminated only in English but are also rendered in multiple languages, thus it is necessary to consider measures to widely disseminate the actual situation of Japan's arbitration system and its arbitration-executing agencies. Specifically, regarding the websites of arbitration institutions detailing arbitration rules and procedures, not only English but also Asian languages that are geographically close to Japan (i.e., Chinese, Korean, Vietnamese, Indonesian, etc.) and other highly versatile international languages, such as Spanish, French, Russian, and Arabic, etc.) should be used. As for content, it is desirable to add rich, contextual information on arbitration rules, arbitration procedures, and arbitration-related judicial precedents, etc., so as to provide a concrete image of arbitration in Japan.

As a regional target, it is considered effective to take a positive approach to economic organizations, law firms, etc., in countries (i.e., countries where a relatively large number of Japanese companies are expanding, countries in which a region hosts commercial distribution in the international transactions of Japanese companies, etc.) that host corporate entities that could become parties to arbitration.

In addition, as a concrete method for conducting effective public relations activities to foreign companies, when government officials attend overseas conferences, symposiums, etc., related to international arbitration, opportunities for holding seminars and symposiums targeting economic organizations, law firms, etc., in countries where there are many companies that could become parties can be expected by introducing Japan's arbitration system and the cases and actual

conditions of Japan's arbitration institutions.

Furthermore, while promoting the functions and equipment inherent to an arbitration institution, from a long-term perspective, training young practitioners is also essential, along with dispatching Japanese arbitrators to overseas arbitration institutions (such as SIAC, ICC, etc.), which are often used by Japanese companies. Conversely, it is necessary to actively exchange human resources with arbitrators in other countries, such as by inviting young foreign practitioners to Japan.

Against the backdrop of the COVID-19 pandemic, as webinar-style public relations activities have come to the fore, it is necessary to hold more-frequent online seminars that foreign companies can easily participate in and to try to increase opportunities to promote Japan as a seat of arbitration with its own arbitration institutions. In addition, collaboration should be undertaken with arbitration institutions in nearby countries/regions (such as Republic of Korea, Hong Kong, etc.) that are likely to select Japan as a third-country arbitration site, along with countries such as Germany, etc., where the number of international arbitration cases being handled is still small.