Thoughts on necessary change in Japan

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An anime ninja is among the mascots for the 2020 Olympics in Tokyo

As Japan seeks to internationalise its arbitration offering ahead of the 2020 Olympics, four Tokyo-based practitioners, Yoshimasa Furata, Tony Andriotis, Yuki Sakioka and Michael Mroczek, argue that more certainty is needed on whether foreign lawyers can act as arbitrators and arbitration counsel if the country is to become a sought-after seat.

The success of the 1964 Olympics allowed Japan to show the world that it had pulled itself out of the poverty of the post-war period and was once again in league with the world's most industrialised nations. An example of the Japanese innovations showcased to the world at that time was the first bullet train, the Shinkansen.

With Japan due to host its second summer Olympics and Paralympics in Tokyo 2020 (following on from the 1998 winter Olympics in Nagano), there is discussion of how it can demonstrate its openness and internationalism.

One move by the government, with the assistance of members of the Japanese and international bar, has been to internationalise the legal industry and rules related to arbitration and mediation. The Japan International Dispute Resolution Centre, or JIDRC, was incorporated in February this year to provide state-of-the-art permanent arbitration facilities in Osaka, which opened last month, and in Tokyo, which will open within a year. These are intended to accommodate a wide range of disputes including sports-related disputes arising from the 2020 Games.

The Japan International Mediation Centre-Kyoto, or JIMC-Kyoto, will also be launched soon.

The Japanese government is taking its plan to enhance arbitration seriously. On 1 June last year, the Policy Research Council of the governing Liberal Democratic Party published, "New Axis in Judicial Diplomacy: Five Principles and Eight Strategies", which sets out plans to establish the JIRDC as Asia's predominant arbitration institution, attracting international sports arbitration cases in particular.

A week later, the Cabinet Office released "Basic Policy on Economic and Fiscal Management and Reform 2017", which states that, "the government will...develop a foundation to activate international arbitration, including sports events".

In September last year, a Liaison Council for Related Ministries and Agencies to Promote International Arbitration was established to further these goals, with the Ministry of Justice, as a

member of the council, dispatching officials to seek guidance from Japanese and foreign lawyers in Japan.

The Liaison Council also includes the Cabinet Ministry, the Ministry of Foreign Affairs, the Ministry of Economy Trade and Industry, the Ministry of Land Infrastructure Transport and Tourism and Japan's sports agency, signalling the country's seriousness about improving its reputation in the world of international arbitration.

As part of the initiative, there is also serious talk in government and legal circles about updating Japan's Arbitration Act, which came into force in 2004 and is heavily based on the UNCITRAL Model Law of 1985, to reflect subsequent changes to the Model Law made in 2006.

Other signs of Japan's engagement with international arbitration include the Ministry of Justice's hosting this week of a mock arbitration of an intellectual property dispute with Orrick Herrington & Sutcliffe and the Chartered Institute of Arbitrators' Japan chapter (CIArb Japan). This is the first event of its kind and is designed to help the Japanese business community better understand the effectiveness of arbitration as a dispute resolution mechanism.

This article should be viewed as a humble attempt to contribute to the strengthening of the government's goals.

Non-Bengoshi acting as arbitrators

As highlighted at a recent panel discussion at a gathering of CIArb Japan in February, which inspired this article, one of the main impediments to Japan becoming a sought-after seat of arbitration is the uncertainty over the eligibility of foreign lawyers to appear as arbitrators in Japan-seated cases and limited scope for them to act as counsel – with only "Bengoshi" (lawyers admitted to the Japanese bar) being definitely able to do so.

By way of background, Japan made some efforts to open up its legal market to non-Bengoshi and to internationalise arbitration and mediation in 1987, when the country's Diet, or two-chamber legislature, passed a law permitting foreign lawyers who registered with the Japan Federation of Bar Associations to practice the law of their home jurisdiction in Japan. Amendments were made in 1994 and 2003.

Such registered foreign lawyers are known in the country as "Gaiben" and it is not absolutely certain whether they, along with other non-Bengoshi, can work as arbitrators or mediators in Japan for money without putting themselves at risk of imprisonment.

The relevant legislation in this respect is Japan's Attorney Act, which states at article 73, on the prohibition of the provision of legal services by non-lawyers:

> *No person other than an attorney or a legal professional corporation may, for the purpose of obtaining compensation, engage in the business of providing legal advice or representation, handling arbitration matters, aiding in conciliation, or providing other legal services in connection with any lawsuits, non-contentious cases, or objections, requesting for re-examination, appeals and other petitions against administrative agencies, etc, or other general legal services, or acting as an intermediary in such matters; provided, however, that the foregoing shall not apply if otherwise specified in this act or other laws.*[emphasis added by authors]

According to the Japan Federation of Bar Associations' commentary on the act, the fourth edition of which was published in 2007, the words *"*handling arbitration matters" mean the "resolution of disputes between parties through the issuance of an arbitral decision". This interpretation would mean that a non-Bengoshi receiving compensation for work performed as an arbitrator in Japan could be in violation of act, even if qualified as a Gaiben.

The same would apply to a mediator, as according to the same commentary, the words "aiding in conciliation" mean "ending disputes by asking the disputing parties to compromise".

Violation of article 72 of the Attorney Act may result in imprisonment (no longer than two years) or a fine (no more that 3 million Japanese yen).

So far, the position seems pretty clear. The uncertainty arises from comparing this article with Japan's Arbitration Act, which states at article 17 that the procedure for appointing arbitrators shall be provided by the agreement of the parties. Some legal scholars have argued that, as long as it is customary and generally accepted in a given industry, an individual shall not be subject to criminal penalty by virtue of article 35 of the Penal Code of Japan, which provides that, "an act performed...in the pursuit of lawful business is not punishable".

Furthermore, in 1990, the board of governors of the Japan Federation of Bar Associations concluded that Gaiben *should* be allowed to serve as arbitrators in Japan, so long as they do not breach any requirements of the Arbtiration Act with regard to arbitrators' credentials. Their eligibility to serve has never, however, been tested in the courts and the threat of imprisonment may discourage Gaiben from taking the risk.

The same concerns apply to non-Bengoshi who act as mediators in Japan. While article 28 of the Act on Promotion of Use of Alternative Dispute Resolution (known as the ADR Act) explicitly permits mediators (whether Bengoshis or not) to receive fees for mediation services in the course of "certified dispute resolution", there is no comparable statutory provision for mediation procedures that have not been certified under article 5 of the ADR Act, including (at least at present) mediation procedures at JIMC-Kyoto.

We are concerned that the uncertainty surrounding foreign lawyers' right to sit as arbitrators or mediators will jeopardise the steady growth and expansion of these forms of dispute resolution in Japan and respectfully suggest that the government take immediate action to amend the existing statutes so that non-Bengoshi can act as arbitrators and mediators in Japan.

Non-Bengoshi acting as arbitration advocates

When it comes to non-Bengoshi acting as advocates in domestic and international arbitrations, article 72 of the Attorney Act (quoted above) again applies, prohibiting them from engaging "in the business or providing legal advice or representation." A non-Bengoshi representing a client in a domestic arbitration would be in violation of this, whether or not they are a Gaiben.

For international arbitration, the position is slightly different thanks to the so-called Gaiben Act, otherwise known as the Act on Special Measures Concerning the Handling of Legal Services by Foreign Lawyers. This states in article 5(3) that Gaiben can represent clients in an arbitration case taking place in Japan, if and only if the arbitration qualifies as "international arbitration" as defined in article 2 (11) of the act.

The relevant definition of "international arbitration" is as “a civil arbitration case which is conducted in Japan and in which all or part of the parties are persons who have an address or a principal office or head office in a foreign state”. Accordingly, as long as all or some the parties have an address or a principal or head office in a foreign state, Gaiben may represent a client in an international arbitration in Japan.

In addition, article 58-2 of the Gaiben Act provides that a foreign lawyer, “may, notwithstanding the provision of article 72 of the Attorney Act, represent [clients] in the procedures for an international arbitration case which he/ she was requested to undertake or undertook in such foreign state”.

As such, even non-Gaiben foreign-admitted lawyers may act as advocates on behalf of clients who are parties to Japan-based international arbitrations, as long as they were requested to undertake, or undertook the case, in their home jurisdiction.

The definition of “international arbitration” under the Gaiben Act, however, is problematic – and in the past, at least one case has been moved from Japan to another Asian jurisdiction due to the this, resulting in an article in *GAR* questioning Japan’s future in the world of international arbitration.

The ICC dispute in question was between the Japanese subsidiaries of two foreign parent companies and concerned an agreement that was negotiated by senior staff of the respective foreign parent companies before being signed by the Japanese subsidiaries. The relevant contracts were drafted in English, and it was agreed that the arbitration would be conducted in English. Although a foreign lawyer was initially chosen to advocate on behalf of one of the parties, their appointment was called into question on the grounds that a dispute between two Japanese subsidiaries was purely a domestic dispute, and as such, a foreign lawyer was not permitted to perform any form of advocacy.

The foreign counsel in the case, **Peter Godwin** of Herbert Smith Freehills in Tokyo, initially removed himself from the role of primary advocate as neither of the parties had an address or a principal office or head office in a foreign state as required under article 2(11) of the Gaiben Act.

Ultimately, however, the parties moved the seat of arbitration to Singapore, and Herbert Smith Freehills was reappointed as primary advocate for its client.

This outcome was, unfortunately, inevitable under current Japanese law. As per the clear wording of article 2(11) of the Gaiben Act, a case involving two wholly owned Japanese subsidiaries of non-Japanese parents cannot be regarded as “international arbitration” in which a Gaiben, or other foreign qualified lawyer, can act as advocate.

As a matter of general perception and expectation in the international business community, this outcome may appear unreasonable, if not completely illogical. Therefore, if the Japanese government truly intends to promote international arbitration, serious consideration should be given to amending the definition provided in article 2 (11) of the Gaiben Act.

Contractual fixes as a possible solution

The main purpose of the CIArb Japan gathering in February was to propose best practices to ensure flexibility for clients in light of the current state of Japanese arbitration law. For example, how might a foreign parent company ensure that they would be able to select their preferred international counsel were a dispute to arise in relation to a contract between its Japanese subsidiary and a Japanese registered corporation?

One proposal was that the parties should deem the transaction international in nature and thus state clearly in the contract that any disputes stemming from the agreement would be settled in international arbitration.

But, as mentioned above, the definition of international arbitration is essentially set in stone in Japan. One cannot simply deem an arbitration to be international unless one of the parties has a principal office or head office outside Japan.

Another proposal involved including the foreign corporate partner or a foreign subsidiary as a party to the relevant agreement. This would permit the classification of any arbitration that arose as international, but would raise other concerns – for example that the non-Japanese party to the agreement would face liabilities under it, even when they were not actively involved in fulfilling any obligations.

Possible solutions to the problem raised at the CIArb event included executing separate side agreements designed to limit liability for the foreign party, or creating an overseas shell corporation with limited assets for the sole purpose of internationalising the agreement.

This article does not address whether these proposed "fixes" might work. Realistically, we believe few parties would go through such additional steps to ensure that a Japan-based arbitration had flexibility in regard to the selection of an arbitrator or advocate – preferring, like the parties in the case described, to choose a more malleable jurisdiction, such as Singapore, as the seat of arbitration.

Lagging behind

Over the past few years, Japan has made great strides in internationalising and opening up its legal industry. With respect to arbitration and mediation, however, it seems to be lagging behind. The current legislation lacks certainty as regards non-Bengoshi acting as arbitrators or mediators; excludes non-Bengoshi from representing parties in domestic arbitrations even where they have international elements; and defines international arbitration too narrowly, with negative impact on Japan’s economic interests.

As contractual fixes do not appear to be a solution, it would appear that only structural statutory reform will assuage the concerns of detractors and bring Japan's arbitration regime in line with the CIArb's "Centenary London principles", which say that a safe arbitration seat must offer "a clear right for parties to be represented at arbitration by party representatives ... of their choice, whether from inside or outside the seat."

The authors welcome the ongoing efforts by the Japanese government to further internationalise arbitration in Japan and hope the recommended changes in this article will be considered. Serious consideration should also continue to be given to revising the Arbitration Act to bring it in line with the current version of the Model Law, as amended in 2006.

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*The CIArb Japan panel that inspired this piece was made up of Furuta, Andriotis and Mroczek and was moderated by **Haig Oghigian** of Squire Patton Boggs and **Yoshihiro Takatori** of Orrick Herrington & Sutcliffe.*