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Obstacles for Japanese Investors in International Arbitration (*kokusai chūsai*) to Resolve Commercial Disputes

Wyzwania dla japońskich inwestorów w międzynarodowym arbitrażu (kokusai chūsai) jako narzędziu rozwiązywania sporów komercyjnych

ABSTRACT

Japanese investors' presence in the international arbitration scene is minor compared to its economic scale. The Japanese arbitration law conforms with the UNCITRAL model law, and Japan is a member of the New York Convention. In contrast, the Japanese legal terminology corresponding to arbitration (*chūsai*), incorporated into modern Japanese in the 19th century, is confusing. Chinese law restrains domestic entities, including those with foreign capital, from going to foreign arbitral tribunes, which may undermine Japanese investors in China to settle disputes in arbitration. Direct/cross-examinations, popularly seen in international arbitrations, are not substantial in Japanese court proceedings. As the TPF (Third Party Funding) is not implemented in arbitrations in Japan, Japanese investors may suffer from idea gaps in arbitration tactics. The importance of CISG/UNIDROIT in international arbitration is increasing. Since the Japanese court does not actively refer to them, Japanese

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investors may access them less frequently than their peers abroad, which is a potential risk in forming arbitration strategies. The scarcity of arbitrators possessing Japanese legal education is a matter. The Japanese legal mentality opts for choosing dialogues rather than confronting the other party in court or arbitral tribunes. Since the Japanese arbitration law fulfills the latest UNCITRAL requirements and the government has been keen on ratifying the newest arbitration treaties, including the 2019 Singapore Convention on Mediation (ratified by Japan on 1 October 2023), Japanese investors would be more recurring users in international arbitration in the future.

Keywords: arbitration law; Japan; China; mediation; arbitration; Singapore International Arbitration Centre; Japan Commercial Arbitration Association; UNIDROIT; TPF

INTRODUCTION

There is a "myth" in Japan that Japanese investors are reluctant to go to arbitration when international business disputes occur. T. Cole states that "a disjunction between law and social relations still exists in Japan and that this disjunction, rather than institutional barriers, provides the most compelling explanation for Japan's continuing low rates of litigation and arbitration".[1] The number of international disputes brought to two domestic arbitration organizations in Japan, e.g. the Japan Commercial Arbitration Association (Nihon Shōji Chūsai Kyōkai) and the Japan Shipping Exchange Inc. (Nihon Kaiun Shūkaijyo), is small.[2]

However, some recent academic studies advocate that Japanese investors are changing their minds about international arbitration. P. Harris points out a growing trend for Japanese entities to select international arbitration as the primary means for resolving international business disputes.[3] A. Arison, citing an arbitration case where Itochu Corporation, a Japanese renewable energy investor, commenced arbitration against Spain under the Energy Charter Treaty in 2018, mentions that "Japanese companies began to insist on their rights under international investment treaties". He also predicts that arbitration usage in price review disputes would be available to the parties involved in the Japanese LNG (Liquidated Natural Gas) sector.[4]

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[1] T. Cole, *Commercial Arbitration in Japan: Contributions to the Debate on "Japanese Non-Litigiousness"*, "New York University Journal of International Law and Politics" 2007, vol. 40(1), pp. 29–114.

[2] Japan Commercial Arbitration Association (JCAA) accepted 13 cases in 2018, 9 in 2019, 18 in 2020, 15 in 2021 and 19 in 2022, 86% of which was international arbitration. See https://www.jcaa.or.jp/en/arbitration/statistics.html (access: 11.11.2023). According to T. Nakamura (*Overview of Arbitration Law*, Tokyo 2022, p. 22), the Japan Shipping Exchange Inc. has accepted around 10 cases annually, most of which are international arbitration cases.

[3] P. Harris, *Growing New Wings: The Rise of International Arbitration in Japan*, "Asian International Arbitration Journal" 2021, vol. 17(1), pp. 29–40.

[4] A. Arison, *Price Reviews and Arbitrations in Asian LNG Markets*, "Oxford Institute for Energy Studies Paper" 2019, no. 144, p. 14.

The frequency of choosing arbitration among Japanese investors in two of the most popular international arbitral tribunals for them, i.e. the International Chamber of Commerce (ICC) International Court of Arbitration and the Singapore International Arbitration Centre (SIAC), is tiny taking into consideration of each country's nominal GDP (see Table 1).[5]

Table 1. Number of arbitration cases brought to ICC and SIAC in 2023

Country	ICC	SIAC	2023 GDP*	ICC (normalized: x)**	SIAC (normalized: y)**
USA	259	55	27,361	1.000	1.000
China	72	837	17,795	0.427	23.398
Germany	111	7	4,456	2.631	0.781
Japan	18	8	4,213	0.451	0.944
India	52	141	3,550	1.547	19.758
United Kingdom	47	16	3,340	1.486	2.383
South Korea	25	36	1,712	1.542	10.460

* 2023 GDP: million USD, current basis (World Bank, World Development Indicators).

** Normalised based on the number of ICC & SIAC cases per USA GDP. The formulae are given below:

$$f(x) = \frac{ICC(Country\ A)}{ICC(US)} \times \frac{GDP(US)}{GDP(Country\ A)} \qquad f(y) = \frac{SIAC(Country\ A)}{SIAC(US)} \times \frac{GDP(US)}{GDP(Country\ A)}$$

Source: International Chamber of Commerce, *ICC Dispute Resolution Statistics: 2023*, https://iccwbo.org/news-publications/news/icc-dispute-resolution-statistics-2023 (access: 3.9.2024); Singapore International Arbitration Center, *Annual Report*, 2023.

Many analyses focus on Japanese investors' obstacles in international arbitration in Japanese literature. This paper describes these obstacles in detail by summarizing preceding studies, including those written by legal practitioners and case laws.

Without conducting any scientific research, one can point out that Japan is a jurisdiction with low English proficiency;[6] therefore, international arbitration in which English is the most common communication language is unpopular. Applying this common sense, one must explain why the Koreans, a non-English speaking nation in Asia, use ICC/SIAC arbitration more often than the Japanese. Another usual justification is that Japan belongs to civil-law jurisdiction; therefore, Japanese

[5] The low profile of Japanese investors in ICC/SIAC has continued during the pandemic and post-pandemic period, with 28 cases in ICC and 15 cases in SIAC in 2019, and 16 cases in ICC and 32 cases in SIAC in 2020. SIAC handled 18 cases in 2021 and 10 cases in 2022, where Japan is the origin of the parties. See International Chamber of Commerce, *2020 ICC Dispute Resolution Statistics*, https://jusmundi.com/en/document/publication/en-2020-icc-dispute-resolution-statistics (access: 11.11.2023); Singapore International Arbitration Center, *Annual Reports*, various issues).

[6] In a 2019 survey, Japan dropped third in global English proficiency, squarely in the "low proficiency" band. See E. Margolis, *Japan Doesn't Want to Become Another Casualty of English*, 26.5.2020, https://foreignpolicy.com/2020/05/26/japan-doesnt-want-to-become-anothe-casualty-of-english (access: 11.11.2023).

investors are unfamiliar with arbitration proceedings led by arbitrators (*chūsai nin*) with common-law backgrounds.[7] German investors with civil-law traditions are active ICC arbitration users.

One of the hypotheses is that the procedural aspects are the most severe barriers to making Japanese investors away from arbitration. In Japanese court practice, judges tend to emphasize the documentation submitted during the proceedings more than direct or cross-examining; therefore, Japanese legal counselors are not necessarily strong in oral arguments required by arbitral tribunes. In China, Japan's most prominent foreign trade partner, foreign investors face difficulty using international arbitration conducted outside of the territory of China.

The authors divide this paper into historical, institutional, procedural and business cultural parts to depict the "obstacles" in arbitration usage for Japanese investors. We examine the historical background of the misleading translation of the terminology and the current development of arbitration law in Japan; discuss the difficulties of assessing foreign arbitral tribunes in China, where Japanese investors have a significant presence; evaluate the specific features of the Japanese court exercises in civil law cases that put disproportionally small attention on oral arguments; argue that the low recognition of CISG/UNIDROIT in the Japanese court practice may negatively affect Japanese investors in forming arbitration strategies; analyze the legal mindset of Japanese investors who are apt to avoid court proceedings/arbitrations, preferring to close the disputes via party-to-party dialogues.

GENESIS OF ARBITRATION IN JAPANESE LAW AND ITS DEVELOPMENT

Japan accepted Western law in the late 19th century. The milestone in legal reception (*hō no keijyu*) was the elimination of the consular courts acting independently from the Japanese legal order by setting extraterritoriality (*ryōji saiban-ken*) by Western countries,[8] following the proclamation of the Constitution of the Empire of

[7] T. Nagashima, T. Yasukuni, *Comparison in Practice Between "Japanese" Arbitration and Foreign Arbitration*, "Japan Commercial Arbitration Journal" 2022, vol. 69(2), pp. 3–18.

[8] The first decision to abolish extraterritoriality in Japan was with the Portuguese government signed in 1892 (*Porutogaru Seifu to teiketsu seru jyōyaku-chu, ryōji saiban-ken ni kansuru jyōkan wo mukō to suru ken*). The British government declared the abolition of extraterritoriality and acknowledged a partial tariff autonomy (*kanzei jishu-ken*) of Japan by signing the Treaty of Commerce and Navigation between Great Britain and Japan (*Nichi-Ei Tsūshō Kōkai Jyōyaku*) in 1894. Applying the Most Favoured Nation (MFN) clause (*saikei-koku taigū*), Japan signed similar treaties with 14 countries till 1897, including the USA, France, Germany, Russia, the Netherlands, and Italy. See T. Kayaoğlu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China*, Cambridge 2013, p. 67.

Japan (*Dai Nippon Teikoku Kempō*) in 1889. In Japanese, the word *chūsai* (arbitration) has dual meanings. The first and original meaning is "to intervene in disputes to propose a settlement (*wakai*), or to mediate disputes to rebuild relationship/friendship"; this is widely accepted and commonly used. The transplantation of a legal concept of arbitration to Japan happened in 1890 with the promulgation of the Civil Procedure Code (CPC; *Minji Soshō Hō*). The lawmakers wrongly adopted an existing word of *chūsai* whose primary sense was "settlement" or "reconciliation" as a translation of *Schiedsvertrag* (arbitration agreement) from the tenth book of the German CPC (*Civilprozeßordnung*) of 1877 (CPO/ZPO of 30 January 1877).[9]

In 2003, the Arbitration Act (*Chūsai Hō*; Act No. 138) replaced the above-mentioned arbitration clause in the CPC. The Japanese law is based on the 1985 UNCITRAL Model Law on International Commercial Arbitration.[10] It states that arbitration is a dispute solution procedure based on an agreement (*chūsai gōi*) that the parties entrust the resolution to a third party (arbitrators) and submit to the judgment (arbitration award: *chūsai handan*; Article 2 (1)). Impartial arbitrators (Article 18 (2) (ii)) give the parties a fair opportunity to argue and prove their claims (Article 25). The law provides the same effect as a final and binding court rules to arbitral award (Article 45). In 2023, an amendment Arbitration Act was enacted (Act No. 15) to converge the law with the 2006 UNCITRAL law amendments, including:

- extension of existing Article 24 on interim measures (*zantei hozen sochi*) to list up possible measures such as ordering prohibition of the disposal of or any other change to the property or restoring the *status quo* of the property and so on to protect the subject matter of the dispute (Article 24(1)) as well as stipulating conditions that arbitral tribunal fulfil in ordering interim measures;
- empowering the competent court to order compulsory enforcement (*kyōsei shikkō*) based on a petition brought by the party whose right is under the protection of interim measure(s) issued by a domestic or foreign arbitral tribunal (Article 47);
- enabling the parties to file a petition to Tokyo District Court or Osaka District Court, irrespective of the territorial jurisdiction of district courts, to ask to take specific arbitration-related actions such as annulment of arbitration rewards pursuant to the law or ordering compulsory enforcement, as far as the place of arbitration is in Japan (Article 5).[11]

[9] T. Nakamura, *op. cit.*, p. 1, 5.

[10] *Ibidem*, p. 6.

[11] The Ministry of Justice's special website dedicated to the amendment law below contains information, including a comparison sheet between the existing and amended Law on Arbitration or its English provisional translation: https://www.moj.go.jp/MINJI/minji07_00328.html (access: 11.11.2023).

Japan is a signatory of the New York Convention (Convention on the Recognition and Enforcement of Foreign Arbitral Awards), effective in 1959; therefore, foreign arbitration rewards are legally binding in Japan. The Japanese government ratified the Singapore Convention on Mediation (United Nations Convention on International Settlement Agreements Resulting from Mediation) on 1 October 2023 to enable the court to enforce international settlement agreements resulting from mediation (*chōtei*).[12]

Summing up the above, from the institutional point of view, Japan is catching up with the latest international arbitration standards, especially in recent years. The issue of the terminology selection in translating the concept of arbitration in the 19th century would hinder the Japanese from understanding its original meaning. Next, the authors will analyze other "institutional" obstacles for Japanese investors to go to arbitration in the case of business disputes with Chinese investors.

DIFFICULTIES TO USE INTERNATIONAL ARBITRATION IN CHINA

Chinese law prohibits business entities with registered seats in the People's Republic of China (PRC), including a company with foreign capital, from going to foreign arbitral tribunals but to domestic ones. The exception are disputes arising between/among Wholly Foreign-Owned Enterprises (WFOE: *wàishāng dúzī qǐyè*) established in Free Trade Zones (FTZ: *zìyóu màoyì qū*).[13] The legal logic is as follows.

Article 3 of Law of the PRC on the Applicable Law to Foreign-Related Civil Relations (Decree No. 36 of the President of the PRC of 28 October 2010)[14] states that the parties may, following the provisions of the law, choose a law applicable to the foreign-related civil relations (*shèwài mínshì guānxì*). Likewise, Article 278 of the PRC's CPC[15] stipulates that where an arbitration clause covers disputes arising in foreign-related economic trade (*shèwài jīngjì màoyì*), transportation and maritime affairs, or the parties reach a written arbitration agreement to file a Request to commence an arbitration to a foreign-related arbitration institution of the PRC (*zhōnghuá rénmín gònghéguó shèwài zhòngcái jīgòu*) or "other arbitration institutions" (*qítā zhòngcái jīgòu*), the parties shall not sue in the People's Court.

[12] None of the EU member states signed the Singapore Convention. For the possible disconformity with the EU legal culture and the Convention, see H. Brink, *The Singapore Convention on Mediation: Where's Europe?*, 26.3.2021, https://mediate.com/the-singapore-convention-on-mediation-wheres-europe (access: 11.11.2023).

[13] F. Lichtenstein, *International Arbitration Law and Rules in China*, https://cms.law/en/int/expert-guides/cms-expert-guide-to-international-arbitration/china (access: 11.11.2023), point 5.

[14] The Central People's Government of the PRC, https://www.gov.cn/flfg/2010-10/28/content_1732970.htm (access: 11.11.2023). The PRC's CPC, amended in 2021 (in Chinese).

[15] The PRC's CPC, amended in 2021, https://www.ssf.gov.cn/portal/rootfiles/2022/01/07/1643159469539952-1643159469560439.pdf (access: 11.11.2023).

One could interpret that for foreign-related civil relations, there is a freedom to apply an applicable law, and other arbitration institutions can be an option for a case where foreign-related economic trade is the subject matter, a claimant in the territory of the PRC could opt for a foreign arbitral tribune to settle disputes. Article 1 of the Interpretation of the Supreme People's Court (SPC) on Several Issues Concerning the Application of the Law of the PRC on Foreign-Related Civil Relations (I), effective from 13 April 2013,[16] states that the People's Court may recognize it as a foreign-related civil relationship where:

- one or both parties are foreign citizens, foreign legal persons or other organizations, or stateless persons;
- one or both parties have their usual place of residence outside the territory of the PRC;
- the subject matter is outside the territory of the PRC;
- the legal circumstances that give rise to, change, or terminate the civil relationship occur outside the territory of the PRC, or
- in other circumstances, a case may be recognized as foreign-related civil relations.[17]

Since a company with/without foreign capital incorporated in the PRC does not fulfil the above, the procedure law governing arbitration involving such a legal person should be the Law on Arbitration (*zhòngcái fǎ*) of the PRC (Decree No. 31 of the President of PRC of 31 August 1994) with no option to initiate arbitration before foreign arbitral tribunes.

The Japanese Arbitration Act stipulates that the law is applicable (as *lex arbitri*) where the place of arbitration is in the territory of Japan (Article 3). However, there is no restriction for the parties to choose foreign arbitral tribunes to settle disputes. According to a survey published by the Ministry of Foreign Affairs of Japan, in 2022 there were 31,324 business entities with Japanese capital in the PRC. The number is far more extensive than the second largest Japanese capital host country, i.e. the USA, with 8,673 entities.[18] In international arbitration, the parties often choose a neutral place of arbitration for both parties to remove possible biases. T. Nakamura and L. Nottage argue that "in international commercial dealings, Japanese compa-

[16] https://cicc.court.gov.cn/html/1/219/199/201/679.html (access: 11.11.2023).

[17] The SPC reconfirmed the interpretation of foreign-related civil relations on 29 December 2020 by issuing Interpretation of the SPC on the Application of the CPC of the PRC (Article 522). See https://cicc.court.gov.cn/html/1/218/62/84/2133.html (access: 11.11.2023).

[18] The following host countries accept many Japanese businesses: Thailand – 5,856, India – 4,901, Vietnam – 2,373, Indonesia – 2,103, Germany – 1,918, and so on, applying the 10% share capital rule of the OECD. See Ministry of Foreign Affairs of Japan, *Survey on the Number of the Overseas Japanese Companies' Operation Units*, https://www.mofa.go.jp/mofaj/ecm/ec/page22_003410.html (access: 11.11.2023).

nies have been prone to agree to arbitration with the seat outside Japan".[19] In this context, "the seat" is considered an objective foreign seat. The PRC's arbitration law is not based on the UNCITRAL model law. One of the critical discrepancies between both laws is the way of appointing the third arbitrator:

1. UNCITRAL model law: "…in arbitration with three arbitrators, each party appoints one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator…" (Article 11 (3) (a));
2. The PRC Arbitration Law: "If … the arbitral tribunal shall be composed of three arbitrators (*zhòngcái yuán*), each of them shall choose, or each of them shall entrust to the chairperson of the arbitration commission to appoint one arbitrator, and the third arbitrator shall be chosen jointly by the parties or jointly entrusted to the chairperson of the arbitration commission to set. The third arbitrator shall be the Presiding Arbitrator" (*shǒuxí zhòngcái yuan*; Article 31).

Usually, the parties (claimant(s) and respondent(s)) in arbitration fail to choose the third arbitrator jointly since, basically, there is no arbitrator with perfect impartiality or independence satisfying both parties. The UNCITRAL model law gives the right to the two arbitrators chosen by each party to appoint the third arbitrator. In Chinese practice, thus, the arbitration commission nominates the third arbitrator with PRC nationality in many cases. It threatens the impartiality of the arbitral tribune's composition, where one party possesses some non-Chinese elements.[20] F. Lichtenstein points out that for foreign parties or companies with foreign capital, proceedings before people's courts can be risky since judges may follow the PRC administrative bodies, which may "protect the interests of the local party or may be susceptible to outside influences".[21] Since one of the purposes of the PRC's Arbitration Law is to safeguard the healthy development of the socialist market economy (Article 1), such an intervention from the administration could happen in arbitration practices.

Following the people's court's recognition of a foreign arbitration where both parties were WFOEs, i.e. *Siemens International Trading (Shanghai) Co., v Shanghai Golden Landmark Co., Ltd*. (2013), in which the SIAC provided the arbitration proceedings and gave an award, while the place of delivery and the subject matter was in the PRC, the SPC issued an epoch-making opinion, dated on 9 January 2017: "Where WFOEs registered in the Pilot Free Trade Zones agree with each

[19] T. Nakamura, L. Nottage, *Arbitration in Japan*, "Sydney Law School. Legal Studies Research Paper" 2012 (12/39), p. 37.

[20] M. Ōnuki, *Business Disputes Settlement between Japan and China: Promotion of International Commercial Arbitration*, 15.5.2013, https://www.kansai-u.ac.jp/Keiseiken/publication/seminar/asset/seminar13/s200_3.pdf (access: 11.11.2023).

[21] F. Lichtenstein, *op. cit.*, p. 4.

other to submit commercial disputes to extraterritorial arbitration (*yùwài zhòngcái*), the arbitration agreement shall not be deemed invalid solely on the ground that the disputes do not have foreign-related elements".[22]

Y. Kajita points out that in the territory of FTZs, the shareholding ratio restriction for foreign investors has been relaxed, national treatments have prevailed, and investors can expect faster and easier company establishment procedures. The FTZs have steadily increased in number and area.[23] On 15 April 2015, the State Council of the PRC published the Program on Further Deepening the Reform and Opening-up of China (Shanghai) Pilot Free Trade Zone. In Article 2 (1) (11) the Council stated that it supports the settlement of internationally renowned commercial dispute resolution institutions (*guójì zhīmíng shāngshì zhēngyì jiějué jīgòu*) in the FTZ.[24]

International arbitration institutions seem cautious about expanding their services in the FTZs.[25] According to the Ministry of Justice of PRC, "an overseas arbitration institution may establish a Business Office in China (Beijing) Pilot Free Trade Zone to carry out foreign-related arbitration activities with respect to civil and commercial disputes arising in the fields of, inter alia, international commercial affairs and investment".[26] CUATRECASAS, a law firm, mentioned that "the Beijing FTZ and the Lin Gang New Area of Shanghai FTZ have been open to foreign arbitration institutions. However, there is still no guidance on how the arbitration awards should be enforced, and it remains unclear how the court will conduct a judicial review of the arbitration proceedings and how interim measures will be provided".[27]

Summing up the above, the Japanese investors, whose presence in the PRC is quite substantial, face a country-specific issue of the PRC to file an arbitration

[22] Article 9 of the SPC's Opinion on Providing Judicial Guarantees for the Construction of Pilot Free Trade Zones, updated on 9 January 2017. See https://cicc.court.gov.cn/html/1/219/199/411/807.html (access: 11.11.2023).

[23] Y. Kajita, *The Possibility of Arbitration to Resolve Disputes Between Chinese Corporations Outside China (Part II)*, "Japan Commercial Arbitration Journal" 2019, vol. 66(10), pp. 26–31.

[24] State Council of the PRC, State Council's Notice on the Program on Further Deepening the Reform and Opening-up of China (Shanghai) Pilot Free Trade Zone, 15.4.2015, https://www.gov.cn/zhengce/content/2015-04/20/content_9631.html (access: 11.11.2023).

[25] By the end of 2020, foreign arbitration organizations only opened representative offices in the Shanghai FTZ, including ICC, HKIAC (Hong Kong International Arbitration Centre), SIAC (Singapore International Arbitration Centre), and KCAB (Korean Commercial Arbitration Board). See X. Fāng, *Current Situation and Issues of Foreign Arbitration Institutions Taking Chinese Cities as the Place of Arbitration*, "Japan Commercial Arbitration Journal" 2021, vol. 68(9), pp. 11–17.

[26] Ministry of Justice of PRC, Administrative Measures for Registration of Business Offices Established by Overseas Arbitration Institutions in China (Beijing) Pilot Free Trade Zone, http://en.moj.gov.cn/2021-01/01/c_579217_2.htm (access: 11.11.2023).

[27] CUATRECASAS, *China Offices: Legal Flash. 2020 – Year in Review*, 2021, https://www.cuatrecasas.com/resources/1614246526en-60409cac0c2c2534692611.pdf?v1.54.1.20230608 (access: 11.11.2023), p. 6.

request. The following part will focus on the procedural aspects that could hinder Japanese investors from actively using international arbitration.

PROCEDURAL AND INSTITUTIONAL BARRIERS FOR JAPANESE INVESTORS IN ARBITRATION

As mentioned above, the base of Japanese Arbitration Law is the UNCITRAL model law; thus, the structure of its procedures is harmonized. However, those who manage the arbitration process are natural persons with their own culture and educational backgrounds. In international arbitrations, the origin or personal attributions of each party, arbitrators, the representatives of each party and the officials of the arbitral body are diversified. Therefore, they cannot be completely free from the influence of the court practice (*saiban jitsumu*) and legal culture of their respective countries of origin or the arbitration exercise with which they are familiar.[28]

Many Japanese legal practitioners and executives need to familiarize themselves with common-law proceedings. In civil law countries, including Japan, in court proceedings, judges (*saiban kan*) play a significant role in ascertaining the facts and evidence during a trial. By doing so, judges gradually make up their minds (forming the mind: *shinshō keisei*) and render verdicts based on the facts, evidence and causation. In common law countries, on the other hand, the emphasis is on "how the parties can make the story they present persuasive in the process of presenting facts and evidence".[29]

In Japanese court practice, the time given to each party for direct and cross-examination (*shu-jinmon* and *hantai-jinmon*) is short. One attorney argues that depending on the case, the judge usually issues an order not to exceed 20 minutes for each direct and cross-examination of a witness, plaintiff or defendant convened by attorneys.[30] In a complicated case with many participants and a large expected settlement amount, the Japanese court tends to order the parties to submit a so-called "description document" (*chinjyutsu sho*).[31] This document is not mentioned in the CPC but appears in the pretrial proceedings/conferences and the court's examination

[28] S. Kakiuchi, *Civil Law Style Arbitration: A Comparative Study of JCAA Interactive Arbitration Rules and Prague Rules*, "Japan Commercial Arbitration Journal" 2020, vol. 67(1), pp. 8–14.

[29] J.E. Profaizer, E.W. Dittmann, S. Taniguchi, *Current International Arbitration Practice and Challenges for Japanese Corporations*, "Japan Commercial Arbitration Journal" 2021, vol. 68(11), pp. 3–8.

[30] Kansai Hayabusa Law Firm, *Actual Interrogation Scenes*, http://www.k-hayabusa.com/topics/69 (access: 11.11.2023).

[31] R. Fujimoto, *Factual Analysis of Court Cases Where Description Documents (chinjyutu sho) Were Submitted: Preparatory Study for Identifying the Usage of Description Documents (chinjyutu sho)*, "Ritsumeikan Hōgaku" 2000, vol. 271–272(3–4), pp. 802–827.

of evidence (*shōko shirabe*).[32] In the Japanese pretrial proceedings/conferences, the arrangement procedures to classify and summarize points of dispute/evidence (*sōten oyobi shōko no seiri tetsuzuki*) are crucial, corresponding to Articles 164–178 CPC. Before commencing direct and cross-examination, the judges can order the witness, plaintiff and defendant to submit the "description documents" mentioned above.

In international arbitration, much stress is put on cross-examination.[33] According to the American Bar Association, in litigation practices in the USA leading questions (*yūdo jinmon*) are available to prove "the credibility of statements" in direct examination. A reason for backing leading questions is that usually, the witness will resist any suggestion that is not true for them when an attorney representing the opposite party questions them.[34] In Japanese practice, leading questions or impeaching (*dangai shōko*) are uncommon; therefore, these tools are foreign to Japanese investors.[35] F. Kun mentions that "Anglo-American parties and their lawyers will likely expect a highly adversarial approach. In contrast, Asian parties and their lawyers expect an inquisitorial and conciliatory approach".[36]

In addition, an arbitral tribunal may, upon request of a party or *ex officio*, order the submission of documents in the possession of a party as evidence in an arbitration case (production of documents). The scope of document production is said to be more limited than discovery proceedings in Anglo-American litigation but broader in scope than motions for an order to produce documents in Japanese litigation, which is another reason Japanese investors shy away from international arbitration.[37]

In 2021, the International Bar Association (IBA) revised the IBA Rules on the Taking of Evidence in International Arbitration, "intending to provide an efficient, economical, and fair process". The Rules gives many hints and suggestions in consultation on evidentiary issues between parties (Article 2), documents issues (Article 3) or witnesses and appointed experts (Articles 4–6), evidentiary hearing

[32] T. Takakura, *Evolution of the Role of Description Documents (chinjyutu sho) Before and After the Amendment of the Current Civil Procedure Code*, "Chiba University Hōgaku Ronshū" 2008, vol. 23(3), pp. 167–202.

[33] T. Asai, H. Ōba, N. Iguchi, K. Sugimoto, *2019 Cross-examination Workshop Report (II)*, "Japan Commercial Arbitration Journal" 2020, vol. 67(2), pp. 28–36.

[34] American Bar Association, *How Courts Work: Steps in a Trial*, 9.9.2019, https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/crossexam (access: 11.11.2023).

[35] T. Asai, H. Ōba, N. Iguchi, K. Sugimoto, *op. cit*.

[36] F. Kun, *"Globalization" of International Arbitration – Rethinking Tradition: Modernity and East-West Binaries through Examples of China and Japan*, "University of Pennsylvania Asian Law Review" 2015, vol. 11, pp. 243–292.

[37] H. Osajima, *Comparison of International Commercial Arbitration and Litigation Procedure in Japan: A Practitioner's Perspective*, "Japan Commercial Arbitration Journal" 2022, vol. 69(5), pp. 23–29.

(Article 8), or admissibility and assessment of evidence (Article 9). The problem is that among 76 lawyers contributing to drawing the Rules (version 1999, 2010 and 2020), only one Japanese attorney (and one Japanese law firm) is on the drafters' list.

Likewise, only a handful of arbitrators are fluent in Japanese. Among the arbitrators registered in SIAC, 7 arbitrators possess higher education in Japan, and 14 arbitrators express a certain level of Japanese proficiency.[38] Based on inquiries to the Korean and Japanese companies, I. Lee's study reveals that both groups would avoid appointing Japanese/Korean arbitrators but those from neutral country origins. The author mentions that "arbitrations involving parties of countries with uneasy and complex histories might result in the same considerations".[39] The pivotal issue is building a broad talent pool among international arbitrators who understand Japanese legal mentality and law.

Nowadays, arbitration fees have become increasingly expensive. Therefore, in many jurisdictions, a business has sprung up in which a third party, anticipating that a particular party will win the case, provides arbitration funds and demands a percentage fee upon winning the case (Third Party Funding, TPF; *daisansha shikin teikyō*). According to Norton Rose Fulbright, a law firm, in common law countries, historically, "third parties were prohibited from funding an unconnected party's litigation under the doctrines of maintenance and champerty. Maintenance refers to an unconnected third party assisting to maintain litigation by providing, for example, financial assistance. Champerty is a form of maintenance where a third party pays some or all of the litigation costs in return for a share of the proceeds". The rules against maintenance and champerty have been relaxed in England and Wales and parts of Australia, Canada, and the US, where third-party litigation and arbitration funding is now permitted.[40]

Y. Midorikawa points out that the TPF in arbitration has been available in Singapore since 2021 and in Hong Kong since 2018 by the enactment of the amendment law. South Korea, Sri Lanka and Vietnam are in a stance that banning the TPF is not an option, but an appropriate regulation is required. In the PRC, third-party funders exist and function in the legal market.[41] According to Pinsent Masons, a law firm, TPF usage in France, Germany and Switzerland is advanced.[42]

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[38] Singapore International Arbitration Center, *SIAC Panel Japanese language*, https://siac.org.sg/siac-panel?_sfm_siac_panel_languages=Japanese (access: 11.11.2023).

[39] I. Lee, *Practice and Predicament: The Nationality of the International Arbitrator (with Survey Results)*, "Fordham International Law Journal" 2007, vol. 31(1), pp. 603–633.

[40] Norton Rose Fulbright, *Maintenance and Champerty*, 2016, https://www.nortonrosefulbright.com/en/knowledge/publications/bf0fd6fe/maintenance-and-champerty (access: 11.11.2023).

[41] Y. Midorikawa, *Third Party Funding as a Legal Infrastructure for International Disputes: Why We Need It in Japan*, "Japan Commercial Arbitration Journal" 2022, vol. 69(2), pp. 19–24.

[42] Pinsent Masons, *Jurisdiction Guide to Third Party Funding in International Arbitration*, 7.5.2021, https://www.pinsentmasons.com/out-law/guides/third-party-funding-international-arbitration (access: 11.11.2023).

The win percentage rate business (*seikō hōshū*) for lawyers is permissible in Japan; therefore, there is no legal restriction in the above funding scheme. Suppose the funders do not engage in or receive remuneration for legal services, such as providing mediation between the parties. In that case, their activities do not breach Article 72 of the Attorney Act (*bengoshi hō*) (Act No. 205 of 1949). Japanese law prohibits a transfer of the right to the subject matter in arbitration/court proceedings to a trust (*shintaku*) or an attorney (Article 10 of Trust Act [Act No. 108 of 2006] and Article 73 of Attorney Act). T. Nakamura points out that if the TPF funder does not file a request to commence an arbitration upon transferring the right to the subject matter from the parties, the funder does not breach the law.[43]

Japanese legal practitioners, including arbitral tribunals, are cautious about implementing the TFP. Y. Midorikawa points out that foreign TPF funders are reluctant to enter the Japanese market, and private business entities sometimes decide to refrain from using the scheme due to unclear legal circumstances in Japan.[44] The TFP could be harmful as it infringes on arbitrators' impartiality or independence. However, the scheme's low recognition among Japanese investors may lead to misjudgment and a lag in forming an arbitration strategy.

APPLICABLE LAW ISSUE IN ARBITRATION: FROM JAPANESE INVESTORS' PERSPECTIVE

The parties freely choose the arbitration agreement's applicable law (*tekiyō hō*). M. Kodama states that the first candidate would be the home country's law (*hongoku hō*). If both parties insist on the same manner, and two different home countries' law is in the discussion, applying an unfamiliar law is the worst option. However, according to M. Kodama it is not necessarily a critical issue since, in civil and commercial law contracts, voluntary provisions (*nin'i jyōkō*) take precedence over the provisions in the substantive law (*jittei hō*) concerning the matters agreed by the parties. In addition, the parties can include the definition of terms used in the contract, i.e. "defect" (*kashi*) or "nonconformity" (*keiyaku futekigō*), to avoid discrepancies in its interpretation.[45] According to the ICC 2021 Arbitration Rules, when the parties disagree on the applicable law, the arbitral tribunal shall apply the rule of law it determines to be appropriate (Article 21 (1)). In the context of arbitration, according to M. Ōnuki, the rule of law covers an extensive range of normative acts such as national law and international treaties, including those not

[43] T. Nakamura, *op. cit.*, pp. 226–228.

[44] Y. Midorikawa, *op. cit*.

[45] M. Kodama, *Practical Considerations on Governing Law and Dispute Resolution Clauses in International Contracts*, "Japan Commercial Arbitration Journal" 2021, vol. 68(2), pp. 3–8.

yet effective, or *lex mercatoria* (*shō shūkan hō*).[46] The JCAA's Commercial Arbitration Rules 2021 states that the arbitral tribunal shall apply the substantive law of the country or state to which the dispute referred to the arbitral proceedings is most closely connected (Article 65 (2)).

The problem arises when an arbitral tribunal chooses a different law to give an award than that designated by the parties. In such a circumstance, arbitrators may refer to the United Nations Convention on Contracts for the International Sale of Goods (CISG, or 1980 Vienna Sales Convention) and its complementary soft law, the UNIDROIT (International Institute for the Unification of Private Law) Principles of International Commercial Contracts (UPICC).[47] According to K.P. Berger, international arbitrators sometimes refer to the UPICC even in cases where domestic law applies to the contract to make their reasoning more persuasive from a comparative or transnational perspective for parties from different jurisdictions.[48]

This particular character of the CISG/UNIDROIT comes from the provisions of the CISG. Article 1 (1) CISG states that the Convention applies to contracts and sales of goods between parties whose places of business are in different States: (a) when the States are Contracting States or (b) when the rules of private international law lead to the application of the law of a Contracting State.

The number of signatories of the Convention reaches 96, including Japan, the PRC, the EU Member States, the USA, most other Asian and South American countries, newly born states after the collapse of the USSR, and a significant part of African states, but a notable exception of the UK.

The CISG binds the parties unless the parties exclude the application of it or other conditions stipulated in the Convention being applied (Article 6). The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves (Article 9 (1)). Article 9 (2) expresses that the practices are those "widely known in international trade" in "the particular trade concerned". J. Coetzee states that "INCOTERMS® (International Commercial Terms published by the ICC) do not replace the CISG rules in toto but only supersede them in so far as they are mutually exclusive. They will function in tandem as complementary and supplementary instruments of sales law harmonization and unification".[49]

[46] M. Ōnuki, *Export and Import Contracts with Asian Companies after UN Convention on Contracts for the International Sales of Goods (Vienna Sales Convention) Being Effective in Japan*, "Journal of Japan Academy for Asian Market Economies" 2010, vol. 13, pp. 69–78.

[47] UNCITRAL, *HCCH and UNIDROIT Legal Guide to Uniform Instruments in the Area of International Commercial Contracts, with a Focus on Sales*, Vienna 2021, p. 77.

[48] K.P. Berger, *UNIDROIT Principles of International Commercial Contracts, An Article-by-Article Commentary*, "Arbitration International" 2018, vol. 34(3), pp. 469–471.

[49] J. Coetzee, *The Interplay Between Incoterms® and the CISG*, "Journal of Law & Commerce" 2013, vol. 32(1), pp. 1–21.

There are many cases where arbitral tribunals gave arbitration awards referring to the CISG/UNIDROIT in which the applicable law the parties agreed on was a national law. In such cases, the arbitrator often refers to the CISG as a part of the national law where the home country of the applicable law is one of the Contracting States of the CISG. Below is a short extract of cases, including: (a) the case number, (b) parties, (c) the governing law in the original agreement, and (d) applied provisions of CISG/UNIDROIT:

- (a) ICC International Court of Arbitration ICC-FA-2020-226; (b) a European Buyer and a European Supplier; (c) the law of the Supplier country; (d) CISG (Article 7 (1), Article 26, Article 49 (2) (b)) and UNIDROIT (Article 1.7);[50]
- (a) ICC International Court of Arbitration 18728, a case in 2018; (b) a state-owned company whose majority owner was a Lithuanian company (Buyer) and a Cypriot company (Seller); (c) Cyprus law; (d) UNIDROIT (Articles 1.7 and 3.2.7);[51]
- (a) International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation on 1 February 2007; (b) an Estonian company (Seller) and a Kazakhstani company (Buyer); (c) Russian law; (d) CISG (Article 81) and UNIDROIT (Articles 1.3, 7.2.1, 7.2.2);[52]
- (a) ICC International Court of Arbitration, Paris 15949 (00-05-2012); (b) a company registered in a North African country (Claimant) and a company registered in an Eastern European country (Respondent); (c) French law; (d) UNIDROIT (Article 7.1.7);[53]
- (a) Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce on 28 January 2009; (b) a Serbian seller and an Albanian buyer; (c) Serbian law; (d) CISG (Articles 62 and 78).[54]

The CISG came into force in Japan on 1 August 2009 (Treaty No. 8; Notification of the Ministry of Foreign Affairs No. 394). UNILEX database, including both national courts and arbitral tribunals' case law nor the CLOUT (Case Law on UNCITRAL Texts), UNCITRAL's court case law inventory, includes any case applying the CISG/UNIDROIT by arbitral organizations or national court of Japan.[55] T. Uchida states that the Japanese judges would not apply UNIDROIT in court decisions.[56]

[50] https://www.unilex.info/principles/case/2281 (access: 11.11.2023).
[51] https://www.unilex.info/principles/case/2307 (access: 11.11.2023).
[52] https://www.unilex.info/cisg/case/1332 (access: 11.11.2023).
[53] https://www.unilex.info/principles/case/2107 (access: 11.11.2023).
[54] https://www.unilex.info/cisg/case/1432 (access: 11.11.2023).
[55] https://www.uncitral.org/clout/search.jspx?f=en%23cloutDocument.country-ref0_s%3aJapan (access: 11.11.2023).
[56] T. Uchida, *Age for Contracts: Japanese Society and the Contract Law*, Tokyo 2009, p. 257.

In an arbitration case where the governing law agreed was Swiss law, the arbitrators applied CISG (Article 25) and UNIDROIT (Article 7.3.1), insisting that Swiss law does not know the concept of "material breach". The respondent requested the Swiss Supreme Court to annul the arbitral award. The Court rejected the respondent's request on 16 December 2009. It stated that the Arbitral Tribunal did not apply a foreign law (i.e. CISG/UNIDROIT) excluded by the parties but applied Swiss law, which provided that a contract is to be interpreted according to the common intention of the parties or, if no such common intention can be established, according to the understanding of a reasonable person.[57]

Among Japanese literature, M. Ōnuki argues that where the governing law is Japanese law, the arbitral tribunal should apply the CISG; K. Nakamura, instead, argues that the application of a different law than the governing law by an arbitral tribunal is not reasonable since doing so, the tribunal may lose the parties' trust even where (the relevant court) may not order the annulment (*torikeshi*) of the award or refuse to recognize it (*shōnin kyozetsu*).[58]

According to T. Uchida, there are many advanced provisions in UNIDROIT, such as hardship (Articles 6.2.1 to 6.2.3), cooperation between the parties (Article 5.1.3) or duty to mitigate harm by the aggrieved party (Article 7.4.8).[59] He states that UNIDROIT gives significant discretion to the judges/arbitrators, focusing on substantive fairness, consistent with the practices seen in international transactions, and maintaining the principle of freedom of contract.[60] With more international arbitration cases involving Japanese investors, the legal concepts in CISG/UNIDROIT would be transplanted into international commercial practices in Japan.

LEGAL CULTURAL BARRIERS FOR JAPANESE INVESTORS IN ARBITRATION

Japan's unique business culture does not easily rhyme with the arbitral proceedings provided by arbitrators with common law roots. T. Asai, H. Ōba, N. Iguchi and K. Sugimoto pointed out the weakness as follows:[61]

1. The company's top management often has no awareness that in arbitration, the company representative stands before the tribunal "alone". In the prepara-

[57] https://www.unilex.info/cisg/case/1516 (access: 11.11.2023).

[58] M. Ōnuki, *Export and Import Contracts…*; K. Nakabayashi, *Interpretation of Contracts in International Arbitration*, "Shūdō hōgaku" 2017, vol. 39(2), pp. 159–178.

[59] T. Uchida, *Age for Contracts…*, pp. 262–265, 271–274.

[60] *Ibidem*, pp. 276–277.

[61] T. Asai, H. Ōba, N. Iguchi, K. Sugimoto, *op. cit*.

tion phase, the top management does not show up at the legal advisor's office but dispatches subordinates to form a strategy.

2. The presentation-dominant culture: a thick PowerPoint presentation is a prerequisite in Japanese business scenes. The legal department makes a spectacular scenario: when, where, and who said what. However, in arbitrations, testimony by witnesses counts, and there is no way to control it.
3. The scenarios prepared by the law firms emphasize "protecting the entire company" by assigning each an appropriate role in the tribunal to "line up" with the story. Collaborated story-making collapses in logic on cross-examination to lead the party to lose the case.

In the authors' experience, the parties negotiated to make any court or arbitral proceedings impossible or put a high hurdle to refrain from them. In one case, the parties (a Japanese company and a European (continental) research institute) designated the Tokyo District Court in the choice of jurisdiction clause with English law as the governing law.

In a complex case where a US public authority insisted on choosing the New Mexico law and the District Court of Albuquerque to resolve future disputes, the Japanese party inserted the "Good Faith Consultation Clause (*seijitsu kyōgi jyōkō*)", stating that "if any question arises as to any provision of this Agreement, the parties shall consult and amicably resolve the matter by the principles of good faith".[62] As P. Lansing and M. Wechselblatt indicated, it is "not unusual to see such (clause) in a Japanese contract".[63] T. Uchida analyses the frequent use of the "good faith clause in Japan" from "the tradition of preferring reconciliation through negotiation and solutions through mediation to formal dispute resolutions through lawsuits".[64] F. Kun describes different approaches to arbitration between the Japanese and US corporations as follows: "Japanese corporations generally try to negotiate very hard before they file any arbitration claims, and as a result, we see a relatively low settlement rate in arbitration cases involving Japanese parties. In contrast, US companies often file an arbitration as a strategy in order to push the other side to negotiate seriously, and many arbitration cases are indeed settled before a final award is rendered".[65] Japanese investors consider avoiding conflicts as much as possible or preventing them from arising.

[62] P. Lansing, M. Wechselblatt, *Doing Business in Japan: The Importance of the Unwritten Law*, "The International Lawyer" 1983, vol. 17(40), pp. 647–660.

[63] *Ibidem*.

[64] T. Uchida, *Contract Law Reform in Japan and the UNIDROIT Principles*, "Uniform Law Review" 2011, vol. 16(3), pp. 705–717.

[65] F. Kun, *op. cit*.

CONCLUSIONS

Japan's commitment to recognizing and enforcing foreign arbitral awards has a long history; Japan signed the 1927 Geneva Convention, under which the award should satisfy "double exequatur" in a jurisdiction where the award was issued, and the subject matter of the award exists.[66] However, the occurrence of international arbitration where one of the parties is Japanese investors is low compared to its GDP size.

Japan had a "big bang" approach in its legal reception in the late 19th century under Western pressure. The original meaning of the Japanese word chosen to express the concept of arbitration was not arbitration but mediation. As a part of civil law jurisdiction, Japan's legal provisions stipulating arbitration consisted of an independent chapter in the Civil Procedure Code before 2003, when the Arbitration Act based on the 1985 UNCITRAL model law replaced them (in 2023, the law converged with the 2006 Modified UNCITRAL Model Law). Japan is a party to the 1959 New York Convention and signed the 2019 Singapore Convention on Mediation in 2023. Japan's harmonization with the international arbitration standards is in an advanced stage.

In China, where Japanese investors invest most often by the number of enterprises with Japanese capital abroad, international arbitration is impossible between the legal persons incorporated in China. Since the arbitration committee usually nominates the Presiding Arbitrator among Chinese nationals in China, foreign investors are doubtful of the potential biases of the tribune in favor of the Chinese party.

In Japanese court practice, the judges pay little attention to direct and cross-examination during proceedings but document submission in the pretrial proceedings and examining evidence. Therefore, Japanese legal practitioners often lack experience in vital and vigorous cross-examining witnesses by the attorney representing the opposite side, which is common in international arbitration. Japanese lawyers are not necessarily active in international cooperation to implement international standards in arbitration proceedings by private initiatives (see the example of 2021 IBA Rules on the Taking of Evidence in International Arbitration). Since the TPF is unpopular in Japanese domestic arbitration practice, Japanese investors may be reluctant to use it when others consider its utilization.

In international arbitration, arbitrators may choose a different law to give an award the parties agreed to apply in the original contracts. In such circumstances, arbitrators often refer to the CISG or the UPICC. Since the Japanese court is reluctant to apply UPICC, a soft law in court decisions, Japanese investors may miss the opportunity to deepen their knowledge.

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[66] Y. Yang, *On the Overlap of Articles in International Conventions on the Recognition and Enforcement of Arbitral Awards: International Legislation Trend and Problems in the Existing Arbitration System in China*, "Kobe College Studies" 2015, vol. 62(2), pp. 229–243.

The Japanese tend to avoid direct conflict. Therefore, they try to abstain from going to the court or the arbitral tribunal to resolve the dispute between the parties. Even T. Nakamura and L. Nottage pointed out that "disputes are unlikely to eventuate or be initiated by the Japanese side – is related to what some have argued to be a traditional preference for amiable settlement among the Japanese".[67]

The author concludes that since the Japanese arbitration law converges with international standards, and there is a growing concern about international arbitration, Japanese investors would gradually reach it more habitually.

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[67] T. Nakamura, L. Nottage, *op. cit*.

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New York Convention (Convention on the Recognition and Enforcement of Foreign Arbitral Awards), signed on 10 June 1958.
Singapore Convention on Mediation (United Nations Convention on International Settlement Agreements Resulting from Mediation) adopted on 20 December 2018.
UNCITRAL Model Law on International Commercial Arbitration (1985) with amendments, adopted in 2006.
United Nations Convention on Contracts for the International Sale of Goods (CISG, or 1980 Vienna Sales Convention), signed on 11 April 1980.

Case law

Arbitral Award of Foreign Trade Court of Arbitration of the Serbian Chamber of Commerce, 28 January 2009.
Arbitral Award of ICC International Court of Arbitration, ICC 18728, date and year unknown.
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ABSTRAKT

Obecność japońskich inwestorów na międzynarodowej scenie arbitrażowej jest niewielka w porównaniu do jej skali gospodarczej. Japońskie prawo arbitrażowe jest zgodne z UNCITRAL Model Law (1985) ze zmianą w 2006 r., a Japonia jest członkiem konwencji nowojorskiej z 1958 r. Z kolei japońska terminologia prawna odpowiadająca arbitrażowi (*chūsai*), włączona do współczesnego języka japońskiego w XIX w., jest myląca. Chińskie prawo powstrzymuje podmioty krajowe, w tym te z kapitałem zagranicznym, przed zwracaniem się do zagranicznych trybunałów arbitrażowych, co może utrudniać japońskim inwestorom w Chinach rozstrzyganie sporów w drodze arbitrażu. Przedstawienie przez obie strony sporu tematu oraz zadawanie pytań świadkowi przeciwnej strony, popularne w międzynarodowych arbitrażach, nie są istotne w japońskich postępowaniach sądowych. Ponieważ TPF (*Third Party Funding*) nie jest wdrażany w arbitrażach w Japonii, japońscy inwestorzy mogą cierpieć z powodu luk ideowych w taktyce arbitrażowej. Znaczenie CISG/UNIDROIT w arbitrażu

międzynarodowym rośnie. Ze względu na to, że japońskie sądy nie odwołują się do nich aktywnie, japońscy inwestorzy mogą mieć do nich dostęp rzadziej niż ich zagraniczni odpowiednicy, co stanowi potencjalne ryzyko w kształtowaniu strategii arbitrażowych. Problemem jest również niedobór arbitrów posiadających japońskie wykształcenie prawnicze. Japońska mentalność prawna skłania raczej do wyboru dialogu niż konfrontacji z drugą stroną przed sądem lub trybunałami arbitrażowymi. Z uwagi na fakt, że japońskie prawo arbitrażowe spełnia najnowsze wymogi UNCITRAL, a rząd wyrazi zamiar do ratyfikowania najnowszych traktatów arbitrażowych, w tym Konwencję singapurską o mediacji z 2019 r. (ratyfikowaną przez Japonię 1 października 2023 r.), japońscy inwestorzy najprawdopodobniej będą w przyszłości częściej korzystać z arbitrażu międzynarodowego.

Słowa kluczowe: prawo arbitrażowe; Japonia; Chiny; mediacja; arbitraż; Międzynarodowy Sąd Arbitrażowy w Singapurze; Japońskie Stowarzyszenie Arbitrażu Handlowego; UNIDROIT; TPF