

California International Arbitration Week

LITIGATION

CALIFORNIA
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ASSOCIATION

CA California
Arbitration

March 11-14, 2024

Hyatt Regency Embarcadero
San Francisco

The Quest for Speedy Dispute Resolution in Japan and California through International Arbitration

MCLE: 1.5 Hours

Wednesday, March 13, 2024

Speakers:

Shinji Ogawa

Brent Caslin

Kazuhiko Nishihara

Miriam Pereira

Moderator:

Jeffrey Daar

Conference Reference Materials

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Moderator and Speakers

Moderator

Jeffery Daar, Principal, Daar & Newman, P.C.

Panelists

Brent Caslin, Partner, Jenner & Block LLP, California

Kazuhiko Nishihara, Managing Partner, Honmachi International Law Office, P.C., Japan

Shinji Ogawa, Arbitration and Mediation Manager, Japan Commercial Arbitration Association, Japan

Miriam Rose Ivan L. Pereira, Counsel, Oh-Ebashi LPC & Partners; P.R. Officer, Japan Commercial Arbitration Association, Japan

Discussion Topics

1. Pre-Arbitration
2. Arbitration
3. Post-Arbitration

Questions are encouraged at any time during the discussion.

California – Japan Matters

- California and Japan are currently projected as the world's fourth and fifth largest economies.
- Japan is the top foreign direct investor in California in 2022, with 3,471 firms employing 101,169 residents and paying over \$11 billion in wages.
- Japan is one of the largest U.S. foreign markets for agricultural products.

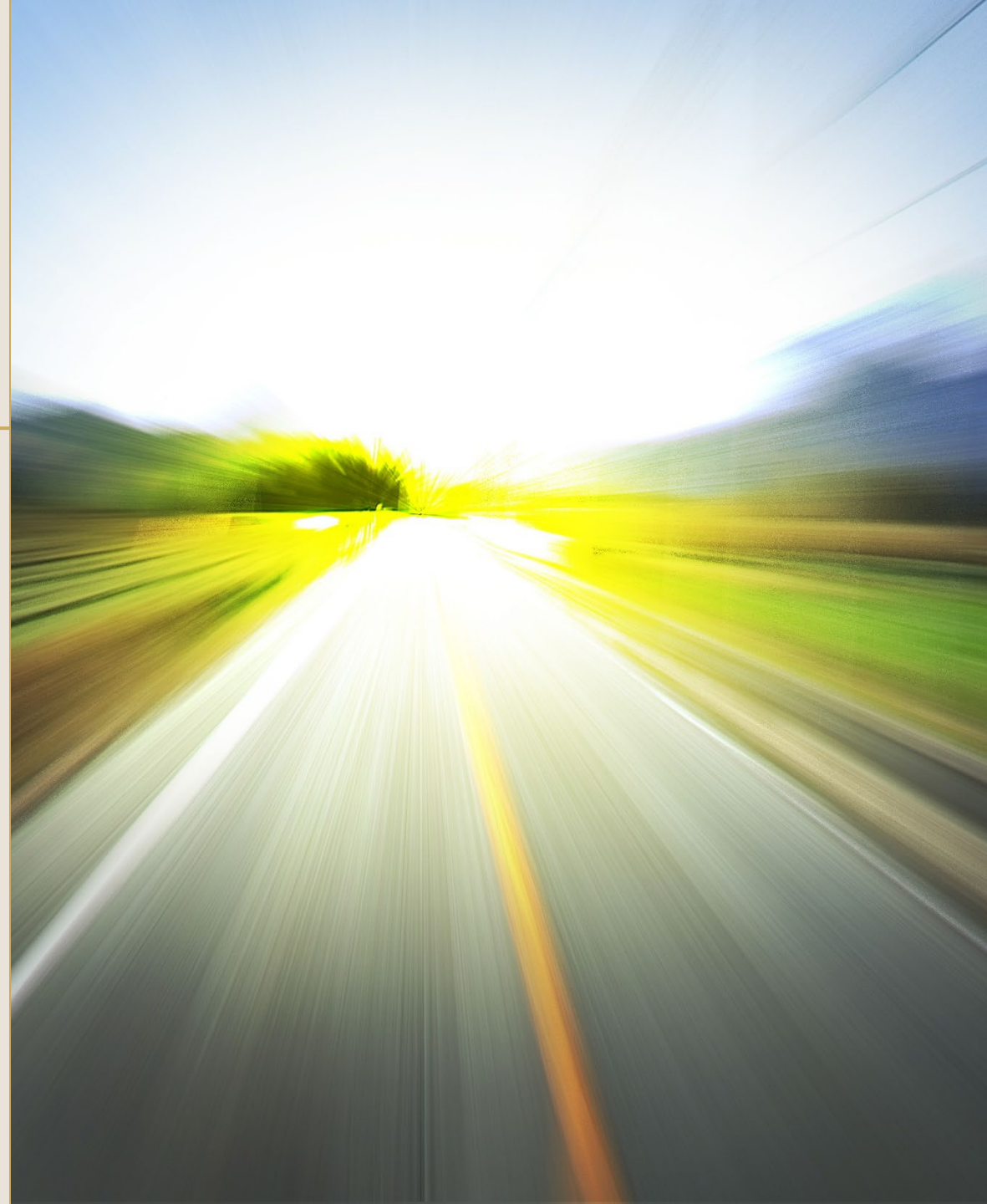


California – Japan Matters

- U.S. exports to Japan were \$80.317 billion in 2022, a 7.7% increase from 2021.
- U.S. imports from Japan to the United States were \$148.33 billion in 2022, representing a 9.9% increase from 2021.
- Japan is California's fourth largest export partner. California exports totaled \$11.607 billion in 2022.
- Imports into California from Japan were \$29.367 billion in 2022, representing a 31.21% increase from 2021.
- Recently California and Japan signed a MOU to deepen cooperation, information-sharing and discussion of best practices between the governments to support the development of green shipping corridors, expand offshore wind, and cut planet warming pollution at ports in Japan and California.

Toward Faster Dispute Resolution - JCAA's Track Record

Shinji Ogawa

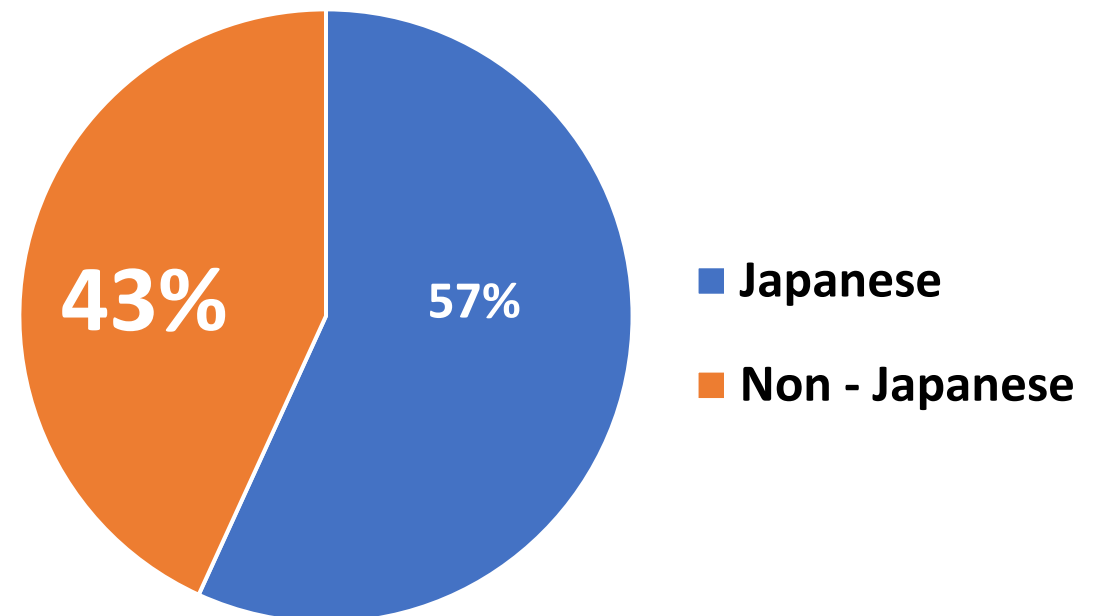


Treaty of San Francisco



Diverse Arbitrator Appointment Records

USA, Canada, France, Germany, Austria, UK, China, South Korea, Singapore, Philippines, Australia and India



JCAA Expedited Arbitration Procedures

Automatic application to disputes valued up to JPY 300 million
(approximately, **USD 2.1 million**) (2021 Rule revision)



Average Duration

12 months

- from constitution date of arbitral tribunal to the rendering of final award
- encompasses all cases concluded from 2014 to 2023
- excludes any stay periods due to settlement negotiations or other reasons

For expedited arbitration procedures:

3.1 months (Dispute amount: JPY50 million or less)

6.3 months (Dispute amount: JPY50 million to 300 million)

Arbitrator's Role in Facilitating Settlement

According to the JCAA Rules, only with the written consent of both parties:

- Arbitrator can facilitate the parties' settlement.
- Arbitrator can confer individually with one party.

Proactive Arbitrator – JCAA Interactive Arbitration Rules

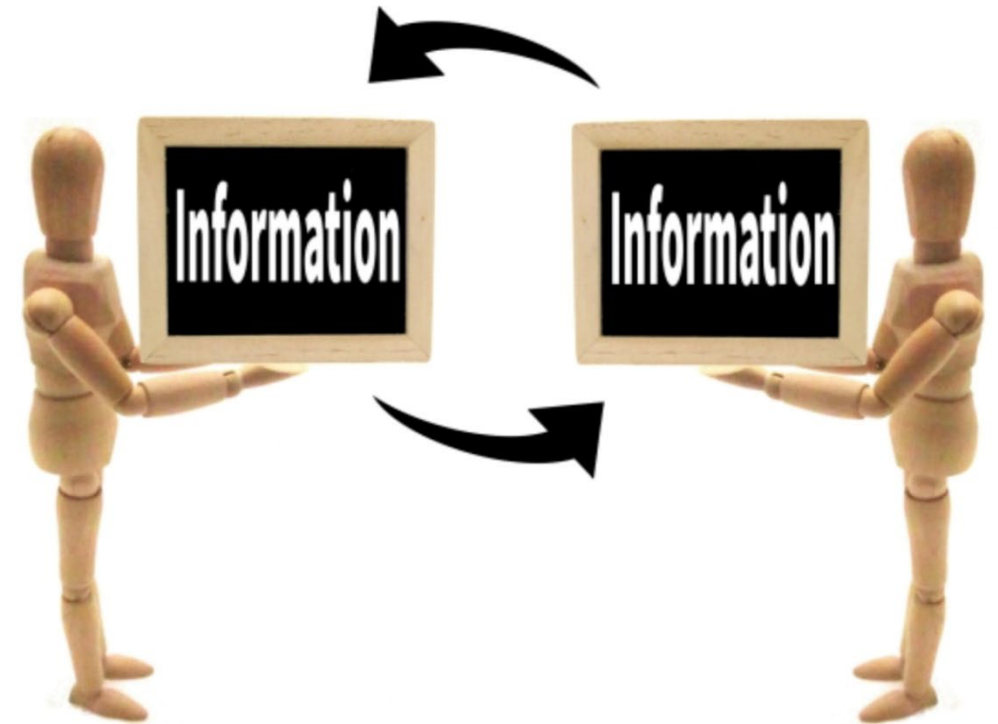
To strengthen efficiency and transparency, tribunal will proactively communicate with parties to improve its understanding of the case and to assist the parties to focus on critical factual and legal issues:

- Present a summary of the parties' claims as well as a list of issues at an early stage that would be material to the outcome of the case for the parties' review and comments.
- Present its non-binding preliminary views on material issues before the oral hearing for the parties' review and comments.



Information Exchange / Discovery

Brent Caslin



Information Exchange / Discovery

1. Certain impact on schedule
2. Certain impact on cost
3. Some would argue impact on ability to deliver informed decision
4. Japanese and US public court discovery systems are very different
5. General experiences of Japanese and California lawyers are also very different

Information Exchange / Discovery

1. Party agreement should control, including rules agreed to
2. Fair to ask what the arbitrator needs for fair and complete adjudication – and what that means to the participants?
3. Translation challenges
4. Depositions
5. Experts

Shaping Up for More Efficient International Arbitration in Japan

- Miriam Rose Ivan L. Pereira -



Overview of the Arbitration Act of Japan

- Act No. 138 of 2003
- Follows the 1985 UNCITRAL Model Law on International Commercial Arbitration prior to the amendments in 2006
- Generally applies to arbitration cases seated in Japan (Art. 3)
- Partially amended by Act No. 15 (passed on April 21, 2023, promulgated on April 28, 2023, to take effect by April 1, 2024) to adopt most of the 2006 amendments to the UNCITRAL Model Law (international standards)

Relevant Amendments to Promote International Arbitration in Japan

- Make orders for interim measures enforceable in Japan (whether or not the arbitration is seated in arbitration)
 - compensation for damages (unless otherwise agreed upon by the parties)
 - order for payment of penalty for actual/likely non-compliance (in most cases)
- Give courts discretion to waive the Japanese translation requirement for the enforcement of interim measures/awards (all/part thereof)
- Give the Tokyo and Osaka District Courts jurisdiction in addition to courts with original territorial jurisdiction
 - generally requires the seat of the arbitration, the venue of the respondent, or location of the subject matter of the claim/property to be seized to be in Japan
- Provide other improvements in arbitration-related court proceedings

Interim Measures

- Prohibit the disposal of/change to the property needed to pay a money claim or the property that is the subject of a claim
- Prevent any substantial loss or imminent danger with regard to the property or rights that is the subject matter of the dispute, take necessary prevention measures, or restore the status quo of the property or relationship of rights, to avoid the subject loss or danger
 - not subject to an order for payment of penalty
- Prohibit actions that may cause harm or prejudice to the arbitration proceedings
- Prohibit actions, such as disposing, erasing or altering evidence necessary for the arbitration proceedings

Amendments to the Practice of Foreign Lawyers in International Arbitration and Mediation Cases

- Act No. 33 was passed on May 22, 2020 and promulgated on May 29, 2020 to amend the Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers (Act No. 66 of May 23, 1986)
- Expansion of the scope of foreign legal representation in international arbitration cases (broader definition of international arbitration cases)
- Foreign legal representation in international mediation cases

Broader Scope of International Arbitration Cases

- Cases where any party (including any owner of more than 50% of the voting shares or equity of such party, or other similar persons specified by the Ministry of Justice) has an address or main office in a foreign country
- Cases where the governing law of the agreement is a foreign law
- Cases where the seat of arbitration is a foreign country

International Mediation in Japan

Kazuhiko Nishihara



Mediation - Speedy and Amicable Dispute Resolution

One JIMC-SIMC Joint Protocol case.

- Claimant (Japanese company) commenced arbitration at SIAC. Claimant and Respondent (Indian company) agreed to a full online mediation pursuant to the SIAC-SIMC Arb-Med-Arb Protocol and JIMC-SIMC Joint Protocol.
- 1st day: The arbitral tribunal stayed the procedure and SIAC transferred the case file to SIMC.
- 15th day: 2 mediators were appointed (one by SIMC and another by JIMC).
- 25th day: First procedural meeting.
- 35th day: Both parties filed their positioning papers.
- 43rd, 45th, and 47th day: Three online mediation sessions were held and the case was finally settled.

Singapore Convention on International Commercial Mediation

On August 7, 2019, 46 countries, including the U.S., China, India, Singapore, and South Korea, signed the Singapore Convention on International Commercial Mediation, which entered into force on September 12, 2020.



Settlement by the Court in Japan

Article 89 of the Code of Civil Procedure

“Irrespective of the extent to which litigation has progressed, the court may attempt to arrange a settlement or have an authorized judge or a commissioned judge attempt to arrange a settlement.”

Court Annexed Mediation System in Japan

Court-annexed mediation has more than 100 years of history.

- Family mediation
 - mandatory, more than 130,000 cases filed per a year
- Civil mediation
 - not mandatory, around 40,000 cases filed per a year
- The conciliation committee in charge of a case consists of one (1) judge and two (2) civil mediators who are selected from lawyers, other experts (e.g., real estate appraisers, architects, certified public accountants, etc.), or senior citizens.

Act on Promotion of Use of ADR

- Mediation outside of the court system has also been used in Japan.
- On December 1, 2004, the Act on Promotion of Use of Alternative Dispute Resolution (ADR Act) was enacted to promote the use of ADR (mediation) without using legal procedures.
- The ADR Act did not adopt the UNCITRAL Model Law.
- The ADR Act allowed non-lawyers to act as mediators at certified ADR institutions.

Act for Implementation of Singapore Convention

- This Act will take effect from April 1, 2024.
- The parties **must agree** that the settlement could be enforced through civil enforcement based on the Singapore Convention or laws and regulations implementing the said Convention (Article 3).

Japan adopted an “**opt-in**” **approach** under Article 8.1(b) of the Singapore Convention.

- A party must file a petition with the court for an enforceability order indicating the obligor as the respondent (Article 5(1)).

Panel Discussion

A close-up photograph of a person's hand wearing a white, perforated leather golf glove. The hand is holding a white golf ball on a white tee, positioned on a lush green golf course. The background is a soft-focus green field.

PRE-ARBITRATION

ARBITRATION



A landscape of rolling green hills under a bright, hazy sky, with a small cluster of trees on a distant ridge. The hills are covered in lush green grass, and the lighting is soft and golden, suggesting a sunrise or sunset. The overall mood is peaceful and serene.

POST-ARBITRATION

Q&A

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Principal
Daar & Newman, P.C.

*International Litigation and Arbitration track
record for more than 25 years*

- Principal of Daar & Newman, P.C., Los Angeles
- President, Los Angeles City Ethics Commission
- Immediate Past Chair, Alternative Dispute Resolution Committee, California Lawyers Association
- Fellow, Chartered Institute of Arbitrators
- Past Chair, International Law Section of The State Bar of California
- Past Chair, International Law Section of the Los Angeles County Bar Association

Shinji Ogawa

Case Manager

Japan Commercial Arbitration Association
Arbitration and Mediation Department

Shinji is dedicated to facilitating fair and quick resolution processes as he oversees all arbitration and mediation cases filed with the JCAA. With a wealth of experience managing over 80 international arbitration cases, he brings valuable insights to his work. Shinji actively contributes to the refinement of JCAA Rules and serves as a member of the Study Group on the Steady Promotion of the Use of International Arbitration in Japan, a governmental initiative aimed at fostering the growth of international arbitration in the country.



Brent Caslin

Partner, Jenner & Block LLP, California

Brent has 25 years of experience with international disputes, having tried civil and criminal cases, represented clients in domestic and international arbitration tribunals, and argued before several courts of appeal. He co-founded Jenner & Block's Los Angeles outpost in 2009, opening an office that has been named among the "Most Admired Law Firms to Work For" by the Los Angeles Business Journal and starting a disputes practice ranked Band 1 in California by Chambers USA. Brent's management of disputes has also been commended by the National Law Journal, Daily Journal, and the Legal 500. In 2017, he was awarded a California Lawyer Attorney of the Year (CLAY) Award for his work on a substantial cross-border dispute. Brent previously served as the Chair of the California Bar's International Law Section (2011-2012) and practiced as a Visiting Attorney with Mori, Hamada & Matsumoto in Tokyo (2003-2004).



Miriam Rose Ivan L. Pereira

Counsel, Oh-Ebashi LPC & Partners
Public Relations Officer, JCAA

Miriam is a registered foreign lawyer in Japan licensed in both the Philippines and the State of New York. She is a Counsel at the Tokyo office of Oh-Ebashi LPC & Partners where she is regularly involved in cross-border transactions, inbound investments into Japan as well as international dispute resolution and compliance investigation matters. She concurrently serves as a volunteer P.R. officer of the Japan Commercial Arbitration Association to help promote ADR in Japan. She is also the co-founder of the Japan chapter of ENERAP/Energy Related Arbitration Practitioners, which is a worldwide forum established to promote a better understanding of commercial and investment arbitration proceedings related to the energy sector. She is a member of ArbitralWomen as well.



Kazuhiko Nishihara

Managing Partner
Honmachi International Law Office, P.C.

Kazuhiko is an attorney admitted to practice in Japan and the State of New York. He is the founder of Honmachi International Law Office, P.C., and his practice covers a wide range of cross-border matters, including international transactions, M&A, and dispute resolution. He is the founding Secretary General of the Japan International Mediation Center in Kyoto (JIMC-Kyoto). He is an accredited mediator with the Center for Effective Dispute Resolution (CEDR), a member of the Specialist Mediator Panel of the Singapore International Mediation Center (SIMC), and is on the list of mediators of the Vietnam Mediation Center (VMC), the Osaka Summary Court, and the Osaka Mediation Center.



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