Asian Journal of Law and Society (2023), **10,** 165–182
doi:10.1017/als.2021.32

CAMBRIDGE UNIVERSITY PRESS

RESEARCH ARTICLE

Exploring the future of commercial dispute resolution in Asia: Accelerating efficiency and effectiveness in ADR

Hiroyuki Tezuka* and Mihiro Koeda

Nishimura & Asahi, Tokyo
*Corresponding author. E-mail: h.tezuka@nishimura.com

Abstract

Since 2017, Japan has rapidly developed its hard and soft infrastructure to accelerate the use of alternative dispute resolution (ADR) in Japan, such as establishing the Japan International Dispute Resolution Center and the Japan International Mediation Center, Kyoto, as well as amending the Foreign Lawyers Act. The legislative process to amend the Japanese Arbitration Act is underway and discussions to accede to the Singapore Convention are ongoing. Mediation and settlement discussions involving judges during the litigation process are traditionally common in Japanese court practices, which would have some implications for investor–state mediation, which is a recent hot topic in the field of investor–state dispute settlement. Numerous means of further improving the efficiency and effectiveness of ADR proceedings have been discussed globally, including mid-stream conferences, Calderbank offers, the use of mediation in complex disputes, and the advanced use of Arb-Med-Arb proceedings utilizing party-appointed arbitrators.

Keywords: settlement involving the Japanese Supreme Court; investor–state mediation; mid-stream conference; Calderbank offer; mediation in complex disputes; party-appointed arbitrators' role in Arb-Med-Arb proceedings

1. Introduction

As in other regions globally, alternative dispute resolution (ADR) is widely used for the resolution of commercial disputes—especially for those with international elements—in Asia, including Japan. This article will provide an overview of the attempts to promote the efficiency and effectiveness of ADR, with a particular focus on arbitration and mediation, in Japan and around the globe. First, we will introduce Japan's recent efforts to promote international arbitration and mediation in Japan (Sections 2 and 3). Then, we will turn our eyes to the worldwide movements to further improve the efficiency of the dispute-resolution systems in the global context, taking guidance from the traditional legal systems in both common-law and civil-law jurisdictions (Sections 4 and 5).

2. Acceleration of the use of ADR in Japan

Since June 2017 when the Japanese government announced that it will "develop a foundation to activate international arbitration" in Japan in its Basic Policy on Economic and Fiscal Management and Reform 2017,[1] Japan has been rapidly growing its presence in the international arbitration community. In parallel with its efforts to promote international

[1] Cabinet Office of Japan (2017).

© The Author(s), 2022. Published by Cambridge University Press on behalf of Asian Journal of Law and Society

https://doi.org/10.1017/als.2021.32 Published online by Cambridge University Press

arbitration, Japan has also been taking steps to become an international hub for international mediation.

In this section, we outline the major examples of the developments in Japan in the field of ADR.

2.1 Establishment of the Japan International Dispute Resolution Center

Following the Japanese government's announcement in 2017, the Japan International Dispute Resolution Center (JIDRC) was established in February 2018 as the first international arbitration-hearing venue in Japan.[2]

JIDRC serves as a hearing venue for international arbitration and other types of ADR proceedings. It offers two hearing facilities: one in Osaka, which started operating in May 2018; and another in Tokyo, launched in March 2020.

In the era of COVID-19, JIDRC is ready to offer parties, arbitral tribunals, and mediators a range of options to efficiently and effectively conduct partially (or "hybrid") virtual hearings in which not all the participants attend the hearing in person. For example, witnesses and counsel residing in Japan can attend the hearing at JIDRC (either at the Tokyo facility or the Osaka facility, or at both), while other participants can attend from hearing centres or from home in each of their jurisdictions. As JIDRC offers two hearing centres in Tokyo and Osaka, attendees from Japan do not have to meet all together at one place.

JIDRC also aims to promote international arbitration and other types of ADR in Japan, providing seminars and other training opportunities for students, practitioners, and the business community in co-operation with leading institutions and practitioners around the world.

2.2 Establishment of the Japan International Mediation Center in Kyoto

The Japan International Mediation Center in Kyoto (JIMC-Kyoto) was officially launched on 20 November 2018 in Kyoto. JIMC-Kyoto is the first international mediation centre in Japan and provides world-class mediation services for various kinds of cross-border disputes.[3]

JIMC-Kyoto offers available venues for mediation hearings to users, including the facilities of Doshisha University, where JIMC-Kyoto is located, and the facilities of Kodaiji-temple, one of the most famous Zen-temples in Kyoto.

While parties and mediators can use JIMC-Kyoto as a venue for ad hoc mediations and those administered by other mediation centres, JIMC-Kyoto also offers services to administer mediation proceedings. It provides the institutional mediation rules (the JIMC-Kyoto Mediation Rules)[4] that parties in a dispute can incorporate into their mediation agreement. Its recommended model mediation clauses are available on its website,[5] which provides a range of options to accommodate the parties' preferences. It also has a roster of mediators from across the world.[6] In mediations administered by JIMC-Kyoto, the parties may request that it provide a list of candidates to act as a mediator[7] or recommend one or more candidates for the parties' agreement,[8] failing which JIMC-Kyoto will appoint a mediator after consultation with the parties.[9]

[2] JIDRC (2021).
[3] JIMC-Kyoto (2021a).
[4] JIMC-Kyoto (2018).
[5] JIMC-Kyoto (2021b).
[6] JIMC-Kyoto (2021c).
[7] JIMC-Kyoto (2018), *supra* note 4, Art. 4.2.
[8] *Ibid.*, Art. 4.3.
[9] *Ibid.*, Art. 4.4.

https://doi.org/10.1017/als.2021.32 Published online by Cambridge University Press

2.3 Amendment to the Foreign Lawyers Act

As part of Japan's efforts to promote international arbitration and mediation in Japan, the Japanese Diet passed a Bill on 22 May 2020 to amend the Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers (the Foreign Lawyers Act),[10] which came into force on 29 August 2020.

The amendment expanded the scope of services that foreign lawyers (i.e. lawyers qualified to practise law in foreign jurisdictions) are allowed to render in international arbitration proceedings within Japan. The amended Foreign Lawyers Act allows foreign lawyers to act as counsel in international arbitration if:

1. all or some of the parties have an address, a head office or other such office in a foreign jurisdiction, including where a person or entity that holds a majority of the issued shares (with voting rights) in a party to the case has its head office or other such office in a foreign jurisdiction;
2. the governing law agreed by the parties is not Japanese law; or
3. the seat of arbitration is in a foreign jurisdiction.

The amended Foreign Lawyers Act also clarified the scope of services that foreign lawyers are allowed to render in international commercial mediation proceedings in Japan. It allows foreign lawyers to represent clients in mediation proceedings in Japan if all of the following requirements are met:

1. The mediation case is "international." The case is considered to be international if:
   a. all or some of the parties to the case have an address, a head office or other such office in a foreign jurisdiction, including where a person or entity that holds a majority of the issued shares (with voting rights) in a party has its head office or other such office in a foreign jurisdiction; or
   b. the governing law agreed by the parties is not Japanese law.
2. All of the parties to the mediation case are commercial entities such as corporations or persons who entered into the contract in dispute as part of their commercial business.
3. The mediation proceedings are not within court proceedings, but are conducted by the private sector.

2.4 Legislative efforts to amend the Arbitration Act

With the aim at reinforcing the legal infrastructure for international arbitration, in October 2020, the Ministry of Justice of Japan established a subcommittee of the Legislative Council to officially discuss a reform of arbitration-related legislation in Japan ("the Subcommittee"). The Legislative Council is an advisory body to the Ministry of Justice, and the Subcommittee is composed of prominent scholars and practitioners in the relevant fields in Japan. The Subcommittee released a draft interim outline of its proposed amendments to the Japanese Arbitration Act on 5 March 2021 for public comments.[11] The next step will be for the Subcommittee to deliberate further and finalize its proposed amendments, taking into account the public comments made.

[10] Ministry of Justice of Japan (2020).
[11] Ministry of Justice of Japan (2021).

https://doi.org/10.1017/als.2021.32 Published online by Cambridge University Press

The current Arbitration Act is basically based on the pre-2006 amendment UNCITRAL Model Law on International Commercial Arbitration 1985 ("the UNCITRAL Model Law"). Deliberation within the Subcommittee is still underway, but in general terms, the envisioned amendments intend not only to adopt the 2006 amendments to the UNCITRAL Model Law, but also adopt advanced features in arbitration-related cases in court aiming for further globalization.

This section briefly introduces the primary features of the envisioned amendments.

2.4.1 Adoption of the 2006 amendments to the UNCITRAL Model Law

The Japanese Arbitration Act was enacted in 2003, when the amendments to the UNCITRAL Model Law were being discussed. The Arbitration Act has partly incorporated Article 7 of the amended UNCITRAL Model Law, which provides for the definition and form of arbitration agreement, in advance of the 2006 amendments to the UNCITRAL Model Law.

In terms of interim measures by an arbitral tribunal, the current Arbitration Act does not provide for the enforceability of the interim measures granted by an arbitral tribunal. Article 24 of the Arbitration Act simply provides as follows:

> Article 24 (Interim Measures or Provisional Measures)
>
> (1) Unless otherwise agreed by the parties, an Arbitral Tribunal may order any party to take interim measures or provisional measures as the Arbitral Tribunal may consider necessary in respect of the subject matter of the dispute, upon the petition of a party.
>
> (2) An Arbitral Tribunal may order any party to provide appropriate security in connection with the interim measures or provisional measures set forth in the preceding paragraph.

The 2006 amendments to the UNCITRAL Model Law introduced categories of interim measures to be issued by an arbitral tribunal[12] and clarified the requirements for the interim measures to be granted.[13] It also provides for the modification, suspension, and termination of the interim measures,[14] and established rules for the recognition and enforcement of the interim measures[15] as well as grounds for refusing the same.[16]

The envisioned adoption of the amended UNCITRAL Model Law is expected to clarify the scope and requirements for the interim measures and improve the effectiveness of the interim measures by granting enforceability under certain circumstances.

2.4.2 Further attempt to globalize arbitration in Japan

While the main focus of the envisioned amendments is the adoption of the 2006 amendments to the UNCITRAL Model Law, the discussions have been extended to court proceedings for arbitration-related cases in order to further strengthen and globalize legal infrastructure in Japan.

The following are a few examples proposed by the Subcommittee in its draft interim outline.

[12] UNCITRAL (2008), Art. 17(2).
[13] *Ibid.*, Art. 17 A.
[14] *Ibid.*, Art. 17 D.
[15] *Ibid.*, Art. 17 H.
[16] *Ibid.*, Art. 17 I.

https://doi.org/10.1017/als.2021.32 Published online by Cambridge University Press

2.4.2.1 Omission of the translation of documents in foreign languages. In court proceedings in Japan, the official language is Japanese only.[17] Any documents in a foreign language to be submitted to the court must be accompanied by a Japanese translation[18] and testimony in a foreign language must be interpreted into Japanese.[19]

This is particularly inconvenient in arbitration-related cases because, in arbitration, English is often selected as the language of the proceedings. Accordingly, documentary evidence in English submitted in the arbitral proceedings would not have been translated into Japanese and arbitral awards, which are the most important documents in cases setting aside or seeking enforcement of the arbitral award, are often written in English. The current Arbitration Act requires that in enforcement proceedings, the enforcing party must submit a Japanese translation of the arbitral award.[20]

In this respect, some jurisdictions have already taken measures to eliminate this language barrier. In the International Chamber of the Paris Commercial Court, for example, translation and interpretation may be dispensed with to the extent possible, as long as the foreign language concerned is English.[21]

The Subcommittee proposed granting Japanese courts discretion to decide, after hearing the views of the parties, not to require Japanese translations of all or part of the documents submitted in arbitration-related court proceedings, in particular the arbitral award. This will make Japan more attractive as a seat of arbitration in the eyes of non-Japanese parties.

2.4.2.2 Concentrating jurisdiction over arbitration-related cases. The current Arbitration Act provides that arbitration-related cases in Japan are in principle to be heard before either the court agreed by the parties, that having jurisdiction over the specific location designated as the seat of arbitration, or that having jurisdiction over the location of the respondent's domicile or that of its principal office, etc. (the "general venue" of the respondent).[22] Accordingly, any district court in Japan may have jurisdiction over arbitration-related cases in the first instance, depending upon the parties' agreement and general venue of the respondent.

In Japan, the number of arbitration-related cases in court has been low[23] and thus not all the courts are familiar with such cases. Under such circumstances, some parties and practitioners may be concerned about the risks of unpredictability and inefficiency if a judge in a local district court unfamiliar with such cases hears their case.

To address this concern and secure the efficiency and effectiveness of the court proceedings for arbitration-related cases, the Subcommittee proposed that if the case is subject to the jurisdiction of any court of Japan, the Tokyo or Osaka District Courts can exercise jurisdiction over the matter in addition to the courts that would have jurisdiction under the current Arbitration Act. The Subcommittee also suggested granting the competent courts the power to transfer all or part of a case to another court with jurisdiction, upon application by a party or at the court's discretion.

If the proposed amendments are realized, it will enhance the Japanese court's expertise on arbitration-related issues by way of functional concentration while leaving flexibility, as some cases may be better heard in different district courts.

[17] Court Act, Art. 74.

[18] Rules of Civil Procedure, Art. 138(1).

[19] Code of Civil Procedure, Art. 154.

[20] Arbitration Act, Art. 46(2).

[21] Paris Commercial Court (2018).

[22] Arbitration Act, Art. 5; Code of Civil Procedure, Art. 4.

[23] E.g. there were only nine new arbitration-related cases nationwide in 2018.

https://doi.org/10.1017/als.2021.32 Published online by Cambridge University Press

2.5 Discussion to accede to the Singapore Convention

In addition to the amendments to the Arbitration Act as mentioned above, the Subcommittee also proposed establishing rules for the enforcement of mediated settlement agreements in Japan. The proposed rules are generally intended to be consistent with the United Nations Convention on International Settlement Agreements Resulting from Mediation ("the Singapore Convention"),[24] bearing in mind the possibility for Japan to accede to the Singapore Convention.

The Singapore Convention provides a uniform, efficient framework for the recognition and enforcement of mediated settlement agreements that resolve international commercial disputes. The lack of a cross-border mechanism for giving legal effect to mediated settlement agreements was recognized as a major barrier to the willingness of some companies to use mediation.

As of 30 May 2021, 53 states signed and six states have ratified or approved the Singapore Convention, which entered into force on 12 September 2020.[25] Japan is not a signatory at the time of the writing of this article.[26]

Although the scope of the Subcommittee's deliberation does not extend to the issue of whether Japan should accede to the Singapore Convention, the Japanese government, together with leading scholars and practitioners in Japan, have been discussing the possibility for Japan to accede to the Singapore Convention as one of the efforts to promote international commercial mediation by the Japanese government. As the Subcommittee's proposal for a concrete set of rules to be established in line with the Singapore Convention shows, the outlook on acceding to the Singapore Convention has been positive in general.

For the new legislation as well as accession to the Singapore Convention, there are still some pending issues that need to be settled, such as whether "international" and "domestic" mediation should be regulated differently in Japan in terms of the enforceability of mediated settlement agreements.

3. Amicable settlement of disputes in Japanese court proceedings

The Japanese legal system has traditionally been closely connected to mediation since the Edo era. In the 1920s, Japan legislated a court-annexed mediation system under its modernized legal system. Since then, the court-annexed mediation system has commonly been used as an effective way to settle disputes under the court's supervision. These days, it has commonly been used for neighbourhood disputes, landlord–tenant disputes, and consumer-loan disputes, while large commercial disputes rarely make their way into this type of service.[27]

It is also common in Japan for parties to a litigation to engage in settlement discussions assisted by the judge during the litigation proceedings in courts. This practice is commonly seen in various types of cases including large commercial disputes. Indeed, every year, a considerable number of cases are settled before the court renders a judgment. For example, 37.1% of all civil cases closed in 2018 were amicably settled, 21.6% were closed due to withdrawal and other reasons, and only 41.4% were closed by judgments.[28]

Article 89 of the Code of Civil Procedure in Japan provides that "[i]rrespective 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."

[24] UNCITRAL (2019).

[25] UNCITRAL (2021b).

[26] As discussed below, the outlook for Japan to accede to the Singapore Convention has been positive in general, but there are still pending issues to be settled before acceding to the same.

[27] Taniguchi (2019), p. 46.

[28] Supreme Court of Japan (2019), p. 11.

https://doi.org/10.1017/als.2021.32 Published online by Cambridge University Press

When a litigation has commenced, each party will receive an enquiry form from the court regarding how to proceed with the litigation, which includes a question concerning whether the party intends to settle the dispute amicably. Taking into account the parties' intention, the judge usually attempts to invite the parties to a settlement discussion involving the judge at an appropriate time.

The settlement discussion can be held in a settlement meeting with the judge. This proceeding is conceptually separated from a court hearing or preparatory proceedings in which the parties and judge discuss the merits of the case. In practice, it is often the case that the parties and judge hold preparatory proceedings to streamline the merits discussions before witness examinations so that the parties and judge can narrow down the important issues and focus on the relevant arguments and evidence. It is similar to so-called mid-stream conferences in international arbitration.[29] If the judge considers it appropriate during the discussions at the preparatory proceedings, the judge may switch the preparatory proceedings to a settlement meeting on the spot and enter into settlement discussions based on the results of the discussions at the preparatory proceedings.

Judges are usually actively involved in the settlement discussions, but the approach they may take differs depending on the judge and the nature of the case. In some cases, the judge may take a facilitative approach, whereas in others they may take an evaluative approach disclosing their preliminary view on the merits to the extent appropriate. In either case, the judge will virtually act as a mediator even if they do not formally take the role of a mediator. Parties and practitioners from a common-law background may feel uncomfortable with this practice, but it is the traditional legal system commonly accepted in Japan as well as some other civil-law jurisdictions. Japanese parties and practitioners generally believe that the judge remains impartial and independent even if the judge serves both functions.

During settlement discussions, judges may use both joint sessions and private caucus sessions, depending on the circumstances. Previously, judges used to only adopt caucus sessions throughout the settlement discussions. As discussions on the use of joint sessions grew among academics as well as judges themselves, taking into account the practices in foreign jurisdictions such as the US, judges now use joint sessions as well. Although Japanese parties and practitioners are accustomed to this practice, some parties from foreign jurisdictions might feel discomfort in the process in which the judge virtually acts as a mediator and holds private caucus sessions. In this sense, Japanese litigation may not necessarily be a perfect option for every case and this is why there is also a certain demand for international mediation.

Settlement discussions involving the judge can also be effective in disputes between state entities and private entities. Basically, not many disputes between state entities and private entities are settled by way of amicable resolution in Japan. For example, in 2018, only 1.2% of litigation cases involving matters of administrative law were closed by way of settlement, while 73.6% were closed by judgment;[30] 25.2% of the cases were closed due to withdrawal or other reasons, which may include cases in which the parties reached an effective settlement outside the court proceedings, so it is safe to say that these kinds of disputes are not often settled in Japanese court proceedings. Nevertheless, there are a few examples in which disputes were amicably settled between state entities and private entities in an effective way before the judgment. To close this section, we would like to introduce a remarkable example in Japan.

The dispute arose in 2000 when Tokyo Metropolitan Government enacted a new prefectural ordinance by which it imposed a tax under a new scheme only on large Japanese banks of a certain scale. The prefectural ordinance would significantly increase the tax

[29] Sachs & Peiffer (2017), p. 575.

[30] Supreme Court of Japan, *supra* note 28, p. 53.

https://doi.org/10.1017/als.2021.32 Published online by Cambridge University Press

burden on the applicable banks. In October 2000, those banks jointly filed a lawsuit against Tokyo Metropolitan Government seeking, *inter alia*, a declaration that the prefectural ordinance was invalid.

The Tokyo District Court in the first instance held, in summary, that the prefectural ordinance contradicted the Local Tax Act and was therefore invalid. In conclusion, the court ordered Tokyo Metropolitan Government to reimburse the taxes already paid by the banks and to compensate damages incurred by the banks.[31]

Tokyo Metropolitan Government appealed to the Tokyo High Court, which reformulated the reasoning and dismissed the banks' claim on damages, but it substantially upheld the conclusion of the Tokyo District Court that the prefectural ordinance was in violation of the Local Tax Act and therefore invalid, and the banks were entitled to be reimbursed for the tax already paid under the prefectural ordinance.[32]

Both Tokyo Metropolitan Government and the banks appealed against the Tokyo High Court's judgment to the Supreme Court but thereafter, without awaiting the Supreme Court's judgment, Tokyo Metropolitan Government and the banks reached a settlement through the Supreme Court's involvement in the settlement discussions in 2003. This news was reported by various media and drew wide public attention at the time.

Traditionally, academics in Japan used to consider that in litigation concerning matters of administrative law or tax law, amicable settlements were not possible or adequate in light of equal treatment under the law and other considerations.[33] The above settlement example is thus remarkable in the sense that it proved that such settlements are workable and valid under Japanese law.

It is also remarkable that the Supreme Court was involved in the settlement negotiation as deeply as it was involved in the formulation of the content of the settlement.[34] Although the Supreme Court has not expressed its position on the validity of that settlement, that fact is significant in that the Supreme Court, the highest court in Japan, *de facto* endorsed the validity of the settlement. This gave the management of the banks comfort in entering into the settlement, since most of them were publicly listed companies that were subject to the risk of being sued by shareholders if the settlement was invalid.

4. Mediation in investor–state disputes

The above example of a settlement in the dispute between Tokyo Metropolitan Government and Japanese banks in 2003 could have some implications for investor–state mediation, which is an emerging hot topic in the field of investor–state dispute settlement, as discussed below.

4.1 Overview

The number of investor–state disputes has been increasing over the last few decades, most of which have been resolved through arbitration. The increase in arbitration proceedings in investor–state matters is due to the high number of bilateral investment treaties and free-trade agreements containing arbitration clauses on which the dispute is based.[35] A survey shows that 66% of respondents think that the use of international arbitration to resolve investor–state disputes will increase in the future.[36]

[31] Tokyo District Court (2002).
[32] Tokyo High Court (2003).
[33] Shinohara (2014), p. 12.
[34] Iwakura (2006), p. 36.
[35] Ruscalla (2019), p. 97.
[36] Queen Mary & White & Case (2018), p. 29.

https://doi.org/10.1017/als.2021.32 Published online by Cambridge University Press

Despite the common use of arbitration as a dispute-resolution method in the field of investor–state disputes as well as international commercial disputes, there have been criticisms of international arbitration concerning the associated costs, lack of speed, etc.[37]

In light of these inefficiencies, parties to international commercial disputes sometimes choose mediation rather than arbitration, or at least once try to resolve the dispute by mediation before or during the course of arbitration. Conversely, it seems that the number of mediation cases for investor–state disputes has been much lower. International Centre for Settlement of Investment Disputes (ICSID) statistics show that there have been only 10 ICSID conciliation cases since 1972.[38]

The statistics also show that 35% of the ICSID arbitration proceedings have been discontinued before the tribunal's final decision due to settlement or other reasons.[39] This suggests that there is more room to increase the use of mediation or conciliation to resolve investor–state disputes in the future. In fact, there is a recent example in which an investor–state dispute was successfully settled by international mediation in 2020.[40]

Given the potential increase in demand for international mediation for investor–state disputes, this section explores how mediation would work in investor–state disputes.

4.2 Benefits and advantages of the use of mediation in investor–state disputes

4.2.1 Maintaining the parties' relationship

One of the advantages of mediation is generally said to be that it allows the parties to maintain a good relationship. In this context, the relationship between a state and an investor is often intended to last for the long term. A complex connection between the state and the investor's business often amounts to a state of interdependence between the host country and the investor. In such a case, the host country is likely to be dependent on the continued provision by the investor of the needed public service and, at least in the short run, has no other option but to continue to deal with the investor. Similarly, the investor, having committed substantial capital to the privatized enterprise, is likely to be dependent on the host country for continued revenues and, at least in the short run, has few options with respect to selling its investment.[41]

During discussions with a mediator, the parties might discover a way to escape from the situation in which only one party would win while the other would lose, and to develop constructive discussions to create new benefits for both parties. In that case, mediation would enable the parties to preserve the existing relationship, or sometimes even improve the relationship as a result of the collaborative process.[42]

4.2.2 High likelihood of voluntary performance

Even if a dispute is resolved by arbitration, this is not the end of the story. The winning party still needs to file an action with a local court to enforce the arbitral award if the losing party refuses to perform its obligation in compliance with the award. The losing party can also file an application to set aside the arbitral award with the relevant court in the seat of the arbitration, which possibly delays enforcement proceedings further. If the court sets aside or does not enforce the award, the whole arbitral proceedings will be in vain. In ICSID arbitration under the ICSID Convention, the arbitral award is not subject to setting aside by a national court and the national courts in signatory states must enforce

[37] *Ibid*., p. 8.

[38] ICSID (2020), p. 8.

[39] *Ibid*., p. 13.

[40] Business Wire (2020).

[41] Salacuse (2007), p. 141.

[42] Sussman (2011), p. 61.

https://doi.org/10.1017/als.2021.32 Published online by Cambridge University Press

the ICSID award as if it was a final and conclusive court judgment, subject to annulment proceedings by an ad hoc committee. However, the annulment proceedings can be very costly and time-consuming, and the issue of state immunity may cause further complications in the enforcement proceedings.

In light of this, one of the merits of mediation is that there is a high likelihood of voluntary performance, because the party who obtains the entitlement under the settlement agreement would not agree to a settlement with which the other party is unlikely to comply, and the party who owes the obligation under the settlement agreement would have been well convinced of the content of the settlement.

4.2.3 Saving time and costs

Saving time and costs is also a well-known feature of mediation, although some may say that it takes more time and money if the mediation turns out to be unsuccessful. Since no one knows whether mediation in the specific case will be successful, and given that arbitration will take much longer compared to successful mediation, it would be safe to say that mediation may be worth trying if there is any chance of success.

As the amounts in dispute in investor–state arbitrations tend to be higher compared with those in commercial arbitration, the time involved and costs associated with investment arbitrations can be a significant burden for the parties. For example, in *Glencore International A.G., et al. v. Republic of Colombia*, which involved a claim in the amount of approximately USD 593.8 million, the investors spent approximately USD 11 million on their legal costs.[43] If such disputes are settled before or at an early stage of the proceedings, the time required and the costs involved for the overall proceedings would be reduced.

4.2.4 Confidentiality

Confidentiality in the mediation proceedings may have more relevance in investor–state disputes than in international commercial disputes. Whereas the confidentiality of the proceedings is often secured in international commercial arbitrations as well, it is not the case in investor–state arbitrations, particularly with recent trends seeking more transparency.[44] Recourse to mediation first rather than immediately commencing arbitration could thus be an effective way for the parties in investor–state arbitrations to secure the confidentiality of the proceedings.

On the other hand, the trend for transparency could be an obstacle to parties agreeing on confidential mediation proceedings, in particular, under intense demands by non-governmental organizations and other stakeholders, with very diverse interests, for transparency and even participation in processes leading to a decision.[45] One possible compromise to address the demand for transparency in mediation while keeping its confidential nature in principle would be that the parties agree on what will be disclosed to the public and to what extent, such as the outcome of the mediation, upon what considerations the parties agreed on the settlement, etc.

4.2.5 Parties' control over the proceedings and consequences

Although arbitration proceedings are also based on the parties' agreement and require parties' autonomy, a survey shows that some users of arbitration feel that lack of flexibility

[43] *Glencore International A.G., et al. v. Republic of Colombia* (2019), ICSID Case No. ARB/16/6, Award, 27 August 2019, pp. 123–5, 328.

[44] OECD (2005), pp. 4–11.

[45] Reisman (2009), p. 191.

https://doi.org/10.1017/als.2021.32 Published online by Cambridge University Press

is an undesirable characteristic of international arbitration.[46] On top of each arbitrator's character and their belief in managing the proceedings, arbitral proceedings are subject to certain limitations under the arbitration acts in the relevant jurisdictions; otherwise, there would be a risk of the final award being set aside.

The parties' control over the consequences are also limited to some extent in international arbitration as the arbitral tribunal will issue the final award within the terms of the parties' submission to the arbitration.[47]

In contrast, mediation proceedings are not subject to the same restrictions as arbitral proceedings such as the due-process requirements that are applicable to arbitral proceedings, because the outcome of mediation is a settlement agreement that is valid and effective as long as it conforms with the law applicable to the validity of such a settlement. In mediation, the parties have full control over the result of the proceedings, as the consequence is up to the parties' settlement agreement, not the mediator's decision.

4.3 Obstacles and disadvantages of the use of mediation in investor–state disputes

4.3.1 Limited enforceability

The most significant difference between arbitration and mediation is that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the NY Convention") does not apply to mediated settlement agreements. There are now 168 contracting states to the NY Convention as of the time of writing of this article.[48] A survey also shows that more than half of the users of international arbitration recognize the enforceability of awards as one of the most valuable characteristics of international arbitration.[49]

Even though it is expected in general that a settlement agreement will be voluntarily performed as stated above, there is a certain demand for the enforceability of mediated settlement agreements in which the obligation will not be performed immediately after the signing of the settlement or the agreed obligation will continue into the future.

There used to be no international framework for mediated settlement agreements to be enforced, but there is now the Singapore Convention, which entered into force on 12 September 2020. As of 30 May 2021, there are 53 signatories and six states are parties to the Singapore Convention. Accordingly, mediated settlement agreements are not as broadly enforceable as international arbitral awards at this point in time; however, the situation may change if more states become signatories to the Singapore Convention. As stated above, discussions are progressing in Japan, aimed at acceding to the Singapore Convention.

A preconditional issue in the context of investor–state mediation is whether the Singapore Convention would apply to mediated settlement agreements arising from investor–state disputes. This issue may be particularized as whether investor–state disputes would be categorized as "commercial" disputes under the Singapore Convention.

The Singapore Convention provides for the scope of its application in Article 1, which states that the Singapore Convention "applies to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute . . . which, at the time of its conclusion, is international." The Singapore Convention does not define the requirement of "commercial."

In this respect, Article 8(1) of the Singapore Convention provides that a party to the convention may declare that it shall not apply the convention to "settlement agreements to which it is a party, or to which any governmental agencies or any person acting on

[46] Queen Mary & White & Case, *supra* note 36, p. 8.
[47] UNCITRAL (2015), Art. V(c).
[48] UNCITRAL (2021a).
[49] Queen Mary & White & Case, *supra* note 36, p. 7.

https://doi.org/10.1017/als.2021.32 Published online by Cambridge University Press

behalf of a governmental agency is a party." This provision clearly indicates that the Singapore Convention does not automatically exclude investor–state disputes from its scope of application.

It seems that the majority view endorses that investor–state disputes may fall under the scope of "commercial" disputes and thus the Singapore Convention applies to those disputes as well.[50] As long as the investor entered into the investment relationship with the host state in the course of its business, there would be no reason to deny the "commercial" requirement in applying the Singapore Convention to investor–state disputes.

4.3.2 Parties' reluctance to settle

There may be a risk that a state may be reluctant to settle an investor–state dispute for fear of internal criticisms. Some states may have a very complex mechanism for decision-making due to the bureaucratic structures of the relevant organizations, which would make the state's decision to settle a dispute difficult. An investor could also be reluctant to settle a dispute if it is a publicly listed company and bears a risk of being sued by its shareholders for the directors' misconduct.

Even if that concern exists, if a settlement is concluded with the involvement of a mediator with a distinguished reputation, the parties may be able to reduce some of the political fall-out and risk for both government officials and investors in agreeing to settle a dispute that may have political consequences and attract media attention.[51] In light of the settlement example between Tokyo Metropolitan Government and Japanese banks as discussed in section 3 above, it might help the parties to further reduce any potential risks if the mediator, as an independent third person having sufficient experience who is relied upon by both parties, actively engages in formulating the settlement agreement itself.

4.3.3 Insufficient number of experienced practitioners who are familiar with both mediation proceedings and investor–state disputes

Some point out the lack of a sufficient number of experts in both ADR and in the area of international investment law who are able to settle very complex disputes as an obstacle to the use of mediation in investor–state disputes.[52]

As the field of investor–state mediation is a relatively new area of practice, expertise is expected to accumulate as the practice develops and more discussions are held through seminars and publications.

5. Attempts to ensure efficiency in ADR proceedings

While the above sections discuss dispute-resolution frameworks themselves, this section focuses on several strategies that parties and arbitral tribunals could adopt to achieve an efficient resolution of disputes by settlement within the frameworks.

5.1 Settlement attempts in arbitral proceedings

5.1.1 The function of arbitral tribunals in the parties' settlement of disputes

Under the adversarial approach in common law, arbitral tribunals are perceived to not proactively manage the proceedings as is traditionally done in many civil-law countries.[53]

[50] Ruscalla, *supra* note 35, pp. 110–1; Nitschke (2020); Teo & Tan (2020).
[51] Salacuse, *supra* note 41, p. 177.
[52] Ruscalla, *supra* note 35, p. 109.
[53] Prague Rules (2018), Note from the Working Group.

https://doi.org/10.1017/als.2021.32 Published online by Cambridge University Press

In particular, there would be a stark difference between common-law and civil-law practitioners in their perception of the role of the tribunal in settlement discussions. As discussed in section 3 above, it is quite common in Japan that judges actively invite the parties to engage in settlement discussions, and the judges themselves are also substantially involved in the process. This may, however, be perceived by parties and practitioners with a common-law background as the judges/arbitrators becoming biased during the mediation or negotiation process, because a mediator may be exposed to confidential and prejudicial information without being required to disclose this information to all parties involved in the arbitration/litigation.[54]

The prevailing practice seemed to be in accordance with the adversarial common-law approach until recently. However, in light of the users' dissatisfaction with the time and costs involved in arbitral proceedings, practitioners have sought to improve the existing framework to make arbitral proceedings more efficient and expeditious. One of those efforts resulted in the Rules on the Efficient Conduct of Proceedings in International Arbitration ("the Prague Rules"), drafted by practitioners around the world (mainly by civil-law practitioners).[55] Against this background, there have been a variety of attempts to improve or reform efficiency in arbitral proceedings by unifying the traditional civil-law approach with the conventional practices.

One of these attempts is so-called mid-stream conferences, which are held at an early stage of the arbitration (typically between the first and second rounds of submissions) to discuss the merits of the case before the main hearing. This gives the tribunal the opportunity to point out the issues it preliminarily considers decisive for the outcome of the case and those which it preliminarily deems irrelevant. The arbitrators can further indicate aspects on which counsel and experts should focus in their following submissions.[56]

Mid-stream conferences have been advocated mainly by practitioners from a civil-law background, but some common-law practitioners also support similar procedural concepts.[57] As aforementioned, a similar legal background exists in Japan as well. Japanese parties and practitioners would therefore be familiar with and sympathetic to the approach. The Prague Rules also envisage this proactive role of arbitral tribunals.[58]

Discussions on the merits of the case before the main hearing could save unnecessary time and costs being expended on the proceedings thereafter, by streamlining the issues and evidence including witness testimony to be focused on in the subsequent proceedings. This may be particularly effective where the case involves a number of legal issues or a number of witnesses, some of which may be considered to be irrelevant by the other party or the arbitral tribunal. In such a case, the mid-stream conference would enable the parties to consider whether respective legal arguments or witnesses are really necessary to support their case and worth pursuing and expending time and costs on.

The purpose of the mid-stream conference could be achieved more fully if the arbitral tribunal indicates its preliminary view on the merits, including the weight and relevance of evidence submitted by the parties up to that point of the proceedings. Where parties submit a number of legal arguments but some of them may be seen as irrelevant by the other party, mere discussions in which the preliminary view of arbitral tribunal is not indicated would not help the parties greatly, as they would feel that they still needed to formulate their respective arguments on the issues to be safe. If the arbitral tribunal indicates its preliminary view as to whether it considers those arguments to be relevant, it would be helpful for the parties to determine whether they should expend time and costs

[54] Rosoff (2009), p. 90.

[55] Prague Rules, *supra* note 53, Appendix I.

[56] Sachs & Peiffer, *supra* note 29, p. 575.

[57] Kaplan (2014), p. 279; Partasides & Vesel (2015), p. 167.

[58] Prague Rules, *supra* note 53, Art. 2.4.

https://doi.org/10.1017/als.2021.32 Published online by Cambridge University Press

to further pursue or rebut such arguments.[59] It would also help the parties to recognize the strengths and weaknesses of their case from an objective perspective, which could facilitate the parties' discussions to settle the case well before the main hearing.[60]

Indeed, the advocates of mid-stream conferences state that the indication of the arbitral tribunal of its preliminary view could also be a part of the mid-stream conference, provided that the parties so agreed.[61] The Prague Rules allow the arbitral tribunal to indicate its preliminary view if it deems it appropriate, followed by another sentence stating "[e]xpressing such preliminary views shall not by itself be considered as evidence of the arbitral tribunal's lack of independence or impartiality, and cannot constitute grounds for disqualification."[62]

In light of the concerns held by common-law parties and practitioners about the arbitrators' impartiality and independence, however, it might be safer for the arbitral tribunal to indicate its preliminary view only if all the parties agree to do so immediately before the disclosure of such a preliminary view, especially when the case involves a party from a common-law background or the case has any connection with common-law jurisdictions.

Further to the indication of the arbitral tribunal of its preliminary view, it might also be an effective option for the arbitral tribunal to be involved in the parties' settlement discussions. A prominent arbitrator has also proposed that the arbitral tribunal may make a settlement proposal based on its preliminary assessment of the case, if so wished by the parties.[63] The Prague Rules provide that "[u]nless one of the parties objects, the arbitral tribunal may assist the parties in reaching an amicable settlement of the dispute at any stage of the arbitration."[64]

Although the arbitral tribunal should be cautious about the risk of being seen to be biased at a later stage, it is also true that judges' involvement in the parties' attempts to settle the case is accepted in many civil-law jurisdictions. Taking into consideration the success of Japanese courts in efficiently and effectively resolving disputes by being actively involved in the parties' settlement discussions, it may be worth continuing discussions about the possibility of arbitral tribunals taking further steps than they have done in arbitral proceedings.

5.1.2 Effective settlement offer from a party

Another approach discussed in this article is how parties can effectively conduct settlement discussions during arbitral proceedings.

The International Chamber of Commerce (ICC) released a revised Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration on 1 January 2021, in which the ICC proposed the use of sealed offers.[65] A sealed offer (often referred to as a "Calderbank letter" or "Calderbank offer") is a written offer to settle a dispute that has been referred to arbitration, made "without prejudice save as to costs." What distinguishes the sealed offer from an ordinary offer to settle a dispute is the cost penalty that the arbitral tribunal is expected to impose against an offeree who does not accept the offer and fails subsequently to achieve a more favourable award by continuing the proceedings.[66]

Parties cannot disclose the details of a sealed offer to the tribunal until after it renders its decision on the merits and is ready to apportion the arbitration costs. Although the

[59] Pickrahn (2016), p. 177.
[60] Sachs & Peiffer, *supra* note 29, pp. 576, 582.
[61] *Ibid.*, p. 575.
[62] Prague Rules, *supra* note 53, Art. 2.4.
[63] Sachs & Peiffer, *supra* note 29, p. 584.
[64] Prague Rules, *supra* note 53, Art. 9.1.
[65] ICC (2021), p. 38.
[66] Anjornshoaa (2007), p. 19.

https://doi.org/10.1017/als.2021.32 Published online by Cambridge University Press

tribunal retains the discretion to decide what weight, if any, should be given to a sealed offer, a party's unreasonable refusal to accept a settlement offer may be considered by the tribunal when deciding the allocation of costs. By adopting sealed offers, parties may be incentivized to reach a settlement by taking the settlement offer seriously and consider the strength of their own case carefully.[67]

While the concept of sealed offers or Calderbank offers derives from English law,[68] this should be available in arbitration cases governed by civil law as well. The allocation of arbitration costs is generally at the discretion of the arbitral tribunal unless the parties have agreed otherwise.[69] It is also the case under the Japanese Arbitration Act, although it sets forth no express provision on this. For clarity, Article 80(2) of the Commercial Arbitration Rules 2019 of the Japan Commercial Arbitration Association (JCAA) provides for the discretion of the arbitral tribunal in the allocation of arbitration costs.[70]

As an attempt to facilitate an amicable settlement by the parties, the arbitral tribunal may consider informing the parties at an early stage of the proceedings that it will be ready to take into account any Calderbank offer in deciding on the allocation of the arbitration costs if any or both parties so wish.[71]

5.2 Use of hybrid ADR proceedings

5.2.1 Use of mediation in complex disputes

Some might have a perception that mediation would not work in complex cases in which there are a plethora of issues relevant to the outcome of the case or in which there are a number of parties whose interests are intertwined with each other. This is, however, a misconception.

Unlike arbitrators, mediators are not necessarily bound to some specific procedures to secure the parties' rights to present their case. It is therefore possible for mediators to, for example, ask the parties to narrow down to three major issues that each party considers to be the most important and proceed with subsequent discussions essentially focusing on those issues. Indeed, this kind of technique could lead to an expeditious settlement of a large and complex dispute though mediation.

As mediation is not bound by strict procedural rules for the consolidation of proceedings or the joinder of additional parties unlike arbitration, it could achieve a comprehensive resolution of complex disputes. For example, if there is a lease agreement between the lessor and lessee and a sublease agreement between the lessee and sublessee, and the sublessee demands that the rent be decreased due to changes in economic circumstances, the lessee may be reluctant to settle because the lessee will need to negotiate with the lessor to amend the lease agreement between them. Another example is a dispute arising out of a circular transaction in which one party's liability would virtually affect the other parties involved in the transaction. In such cases, mediation could involve all the interested parties to discuss the issues together and lead to a better and expeditious resolution of all the disputes among the parties, without having to resort to several lawsuits or arbitrations.

5.2.2 Advanced use of Arb-Med-Arb proceedings

The use of Arb-Med-Arb proceedings has been a hot topic for many years. This article focuses on one possible way to attempt to utilize the Arb-Med-Arb proceedings, in which

[67] *Ibid*., p. 21; Welser & Stoffl (2016), pp. 91–2.
[68] Welser & Stoffl, *supra* note 67, pp. 88–9.
[69] Anjornshoaa, *supra* note 66, p. 19.
[70] JCAA (2019).
[71] ICC, *supra* note 65, p. 38.

https://doi.org/10.1017/als.2021.32 Published online by Cambridge University Press

arbitrators are involved in the mediation proceedings to resolve the dispute in an effective and expeditious manner.

As stated above, in common-law jurisdictions, it is not considered to be appropriate for arbitrators to also act as mediators in principle, for the reason that they will become biased if they also act as mediators because a mediator may be exposed to confidential and prejudicial information without being required to disclose this information to all parties involved in the arbitration/litigation.[72] Due to such a due-process concern, Arb-Med-Arb proceedings are often discussed on the assumption that the arbitrators and mediator(s) are different persons.

In this case, however, the parties will need to familiarize both arbitrators and mediator(s) with the case. If the mediation fails, the time and costs involved in explaining the case to the mediator(s) will be in vain. Furthermore, if the case requires expertise in a specific area, it may be difficult for the parties to find appropriate and reliable mediator(s) in addition to the arbitrators.

Taking into account these considerations, the dual role of the arbitrator–mediator should not be excluded from the parties' options when they consider the appropriate procedure to fit the specific case at hand.

In this context, there is an interesting approach proposed by Dr Alfonso Gómez-Acebo from Madrid. In his article, he proposes that if the parties so agree, each party appoints an impartial and independent party-appointed arbitrator, who will be required to act as a "partial" co-mediator who supports the appointing party for the sole purpose of exploring zones of possible agreement in the mediation proceedings within the arbitration process. If mediation fails, they will resume their role as impartial and independent arbitrators. The third arbitrator remains impartial and independent throughout the arbitral process, and will not serve as a mediator nor be involved in the mediation activities in any way.[73]

This novel approach sounds workable with the potential to achieve increased efficiency and effectiveness, if carefully organized and all the parties so agree expressly. Of course, there will be opposing views saying that the party-appointed arbitrators will be perceived as losing their impartiality and independence when the mediation fails; their role in the mediation phase in itself should not amount to grounds for disqualification as arbitrators, as long as the parties have agreed to it. The final award should also be regarded as maintaining legitimacy if the third arbitrator remains impartial and independent throughout the arbitral process.

6. Concluding remarks

Some of the attempts addressed in this article have already been introduced in actual practice and have become widely known in the legal community, while others are still in conceptual stages and may need to be further analyzed. The authors hope that this article further stimulates ongoing discussions among global practitioners to make international dispute-resolution mechanisms better than ever.

Acknowledgements. The authors acknowledge and appreciate Mr Yusuke Mizuno, associate at Nishimura & Asahi, for his assistance with research and editing in preparation for this article.

References

Anjornshoaa, Poupak (2007) "Costs in International Arbitration and the Use of Sealed Offers." 9 *Asian Dispute Review* 19–22.

[72] Rosoff, *supra* note 54, p. 90.
[73] Gómez-Acebo (2019), pp. 404–8.

https://doi.org/10.1017/als.2021.32 Published online by Cambridge University Press

Business Wire (2020) "The Dominican Government and the Odebrecht-Tecnimont-Estrella Consortium Reach Agreement to Settle All Existing Disputes and Guarantee Completion and Final Delivery of the Coal-Fired Central Termoeléctrica Punta Catalina Project (CTPC)," https://www.businesswire.com/news/home/20200317005791/en/Dominican-Government-Odebrecht-Tecnimont-Estrella-Consortium-Reach-Agreement-Settle (accessed 30 May 2021).

Cabinet Office of Japan (2017) "Basic Policy on Economic and Fiscal Management and Reform 2017 (English Version)," https://www5.cao.go.jp/keizai-shimon/kaigi/cabinet/2017/decision0609.html (accessed 30 May 2021).

Gómez-Acebo, Alfonso (2019) "A Special Role of Party-Appointed Arbitrators?," in J. Engelmayer Kalicki & M. A. Raouf, eds., Evolution and Adaptation: The Future of International Arbitration. ICCA Congress Series, Vol. 20, 381–416.

ICC (2021) "Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration," https://iccwbo.org/content/uploads/sites/3/2020/12/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration-english-2021.pdf (accessed 30 May 2021).

ICSID (2020) "The ICSID Caseload—Statistics" (Issue: 2020–1), https://icsid.worldbank.org/sites/default/files/publications/Caseload%20Statistics/en/The%20ICSID%20Caseload%20Statistics%20%282020-1%20Edition%29%20ENG.pdf (accessed 30 May 2021).

Iwakura, Masakazu (2006) "Tatakai Hajimeta Kigyo—Hoka Shakai heno Tashikana Ashidori [Companies have begun to fight—Firm Steps to the Legal Society]." 4 Business-Homu 34–42.

JCAA (2019) "Commercial Arbitration Rules 2019," https://www.jcaa.or.jp/common/pdf/arbitration/Commercial_Arbitration_Rules2019_en.pdf (accessed 30 May 2021).

JIDRC (2021) "JIDRC," http://idrc.jp/en/ (accessed 30 May 2021).

JIMC-Kyoto (2018) "Japan International Mediation Center in Kyoto: The Institutional Mediation Rules (Effective as of 20 November 2018)," https://www.jimc-kyoto.jp/rules (accessed 30 May 2021).

JIMC-Kyoto (2021a) "JIMC-Kyoto," https://www.jimc-kyoto.jp/ (accessed 30 May 2021).

JIMC-Kyoto (2021b) "Model Clause," https://www.jimc-kyoto.jp/20190517102057 (accessed 30 May 2021).

JIMC-Kyoto (2021c) "Panels of Mediators," https://www.jimc-kyoto.jp/mediators (accessed 30 May 2021).

Kaplan, Neil (2014) "If It Ain't Broke, Don't Change It." 12 *German Arbitration Journal* 278–80.

Ministry of Justice of Japan (2020) "Act on Amendment Part of the Act on Special Measures Concerning the Handling of Legal Services by Foreign Lawyers," http://www.japaneselawtranslation.go.jp/common/data/outline/200522151124_200522.pdf (accessed 30 May 2021).

Ministry of Justice of Japan (2021) "Draft Interim Outline of Proposed Amendments to the Arbitration Act," http://www.moj.go.jp/content/001344407.pdf (accessed 30 May 2021).

Nitschke, Frauke (2020) "A Preview of ICSID's New Investor-State Mediation Rules," Kluwer Mediation Blog, http://mediationblog.kluwerarbitration.com/2020/01/10/a-preview-of-icsids-new-investor-state-mediation-rules/ (accessed 30 May 2021).

OECD (2005) "Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures," 2005/01, OECD Working Papers on International Investment, Paris: OECD Publishing, http://dx.doi.org/10.1787/524613550768 (https://www.oecd.org/daf/inv/investment-policy/WP-2005_1.pdf) (accessed 30 May 2021).

Paris Commercial Court (2018) "Protocol on Procedural Rules Applicable to the International Chamber of the Paris Commercial Court," https://www.cours-appel.justice.fr/sites/default/files/2018-06/CICAP_EnglishVersion_Protocole%20barreau%20de%20Paris%20-%20Tribunal%20de%20commerce%20de%20Paris.pdf (accessed 30 May 2021).

Partasides, Constantine, & Scott Vesel (2015) "A Case Review Conference, or Arbitration in Two Acts." 81 *The International Journal of Arbitration, Mediation and Dispute Management* 167–8.

Pickrahn, Günter (2016) "The Road to Predictability in International Arbitration." 14 *German Arbitration Journal* 173–8.

Prague Rules (2018) "Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules)," https://praguerules.com/upload/medialibrary/9dc/9dc31ba7799e26473d92961d926948c9.pdf (accessed 30 May 2021).

Queen Mary University of London, & White & Case (2018) "2018 International Arbitration Survey: The Evolution of International Arbitration," http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF (accessed 30 May 2021).

Reisman, W. Michael (2009) "International Investment Arbitration and ADR: Married but Best Living Apart." 24 *ICSID Review* 185–92.

Rosoff, Jacob (2009) "Hybrid Efficiency in Arbitration: Waiving Potential Conflicts for Dual Role Arbitrators in Med-Arb and Arb-Med Proceedings." 26 *Journal of International Arbitration* 89–100.

Ruscalla, Gabriele (2019) "Latest Developments in Conciliation and Mediation in Investor-State Disputes." 16 *Revista Brasileira de Arbitragem* 96–112.

https://doi.org/10.1017/als.2021.32 Published online by Cambridge University Press

Sachs, Klaus & Peiffer, Evgenia (2017) "Mid-Stream Conference: An Innovative Tool for Saving Time and Costs of Arbitral Proceedings," in R. A. Schütze, ed., Fairness Justice Equity: Festschrift für Reinhold Geimer zum 80 Geburtstag, München: C.H. BECK, 575–84.
Salacuse, W. Jeswald (2007) "Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution." 31 *Fordham International Law Journal* 138–85.
Shinohara, Katsutake (2014) "Zeimu Tetsuzuki heno Wakai no Donyu ni Kansuru Kento [Study on Introduction of Settlement to the Tax Procedures]." 78 *Zei-dai Ronshu* 1–89.
Supreme Court of Japan (2019) "Daihachikai Saiban no Jinsokuka ni Kakaru Kensyo ni Kansuru Hokokusyo—2. Chiho Saibansyo ni Okeru Minji Dai'isshin Sosho Jiken no Gaikyo Oyobi Jitsujyo [Eighth Report on Review of the Expediting of Trials—2. Overview and the Actual Situation of Civil Proceedings in the First Instance at District Courts]," https://www.courts.go.jp/vc-files/courts/file4/hokoku_08_02minji.pdf (accessed 30 May 2021).
Sussman, Edna (2011) "The Advantages of Mediation and the Special Challenges to Its Utilization in Investor State Disputes." 7 Revista Brasileira de Arbitragem 54–67.
Taniguchi, Yasuhei (2019) "National Report for Japan (2019)," in L. Bosman, ed., ICCA International Handbook on Commercial Arbitration, The Hague: ICCA & Kluwer Law International, 1–48.
Teo, Kirsten, & Philip Tan (2020) "Opportunities and Challenges in View of the Singapore Convention on Mediation: Inaugural YSIAC-Young ICSID Joint Webinar," Kluwer Arbitration Blog, http://arbitrationblog.kluwerarbitration.com/2020/06/17/opportunities-and-challenges-in-view-of-the-singapore-convention-on-mediation-inaugural-ysiac-young-icsid-joint-webinar/ (accessed 30 May 2021).
Tokyo District Court (2002) Judgment dated 26 March 2002: 1099 Hanrei-times 103.
Tokyo High Court (2003) Judgment dated 30 January 2003: 1124 Hanrei-times 103.
UNCITRAL (2008) "UNCITRAL Model Law on International Commercial Arbitration 1985 With Amendments as Adopted in 2006," https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf (accessed 30 May 2021).
UNCITRAL (2015) "Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)," https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/new-york-convention-e.pdf (accessed 30 May 2021).
UNCITRAL (2019) "United Nations Convention on International Settlement Agreements Resulting from Mediation," https://uncitral.un.org/sites/uncitral.un.org/files/singapore_convention_eng.pdf (accessed 30 May 2021).
UNCITRAL (2021a) "Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the 'New York Convention')," https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2 (accessed 30 May 2021).
UNCITRAL (2021b) "Status: United Nations Convention on International Settlement Agreements Resulting from Mediation," https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status (accessed 30 May 2021).
Welser, Irene, & Alexandra Stoffl (2016) "Chapter II: The Arbitrator and the Arbitration Procedure, Calderbank Letters and Baseball Arbitration—Effective Settlement Techniques?," in C. Klausegger, P. Klein, et al. eds., Austrian Yearbook on International Arbitration 2016, Vienna: MANZ'sche Verlags- und Universitätsbuchhandlung, 87–99.

Cite this article: Tezuka, Hiroyuki and Koeda, Mihiro (2023). Exploring the future of commercial dispute resolution in Asia: Accelerating efficiency and effectiveness in ADR. *Asian Journal of Law and Society* **10**, 165–182. https://doi.org/10.1017/als.2021.32

https://doi.org/10.1017/als.2021.32 Published online by Cambridge University Press