INSIDE ARBITRATION: SPOTLIGHT ON PETER GODWIN REGIONAL HEAD OF DISPUTES ASIA

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Legal Briefings – By **Peter Godwin, Regional Head of Disputes Asia**

After a school careers counsellor steered him away from a degree in accountancy, Peter Godwin went into law, and hasn't looked back. Here, he reflects on a long legal career, life in Asia, and international arbitration in the Japanese context.

WHAT BROUGHT YOU TO ASIA ORIGINALLY?

I studied maths and sciences at school, and was heading towards a degree in accountancy, until my school careers teacher warned me that I would find it "boring". I ended up reading law at Bristol University – really for want of any better idea – then stumbled into the legal hiring "milk round", and landed a training contract at a London City firm.

A few years later, my wife was posted to Hong Kong, and I followed her as a trailing spouse. I joined Herbert Smith Hong Kong in July 1998, and spent my first six months with the firm in a portakabin at Hong Kong Airport, assisting the Airport Authority with its enquiry into multiple failures that had occurred when the airport opened. After that, I spent a few years doing IP and general commercial litigation in the Hong Kong courts.

"MY MOVE TO JAPAN WAS THE RESULT OF A CHANCE ENCOUNTER IN A HONG KONG TAXI QUEUE WITH DAVID WILLIS, THEN THE FIRM'S ASIA MANAGING PARTNER"

He had just come off the plane from Tokyo, where he had signed a lease on temporary offices, and asked if I fancied joining the new office. My wife and I went for a look-see, which involved a side-trip to Disneyland with our three year old son. He loved it so much that we had no choice but to move. I signed a two-year contract, and here I am, sixteen years later.

UNTIL VERY RECENTLY, JAPAN WAS KNOWN FOR AVOIDING DISPUTES, NOT ARBITRATING THEM. WHAT DID A FOREIGN LITIGATION LAWYER THINK HE COULD DO THERE?

When I arrived in Tokyo in 2000, Japanese companies did everything they could to avoid litigating a dispute. If they were ever involved in litigation, it was as defendants, having failed to settle. It was extremely rare for a Japanese party to initiate a claim. Involving a foreign lawyer was unheard of. The firm had sent me to Tokyo to do international arbitration, but no Japanese client I met had ever even heard of it, and I myself had never done one. Not an auspicious start.

I set out to educate both myself and my clients about the process of arbitration. It's taken time, and a lot of shoe leather, but the market has slowly changed. The recession in the mid-2000s played a significant part. Japanese companies found themselves without the funds to settle claims against them, so they started to fight them. At the same time, these companies were seconding more employees abroad, particularly to the US. The secondees were influenced by the US mindset and practice, and returned to Japan more comfortable with the idea of openly defending a claim. In the last five years, things have changed even more.

Japan has evolved into a significant market for cross-border, contentious, legal work. The majority of my work today involves helping Japanese clients to bring claims, usually against non-Japanese counterparties.

COMPARED TO SINGAPORE, HONG KONG OR EVEN KOREA, JAPAN ISN'T USUALLY ASSOCIATED WITH ARBITRATION – HAS IT REALLY CHANGED THAT MUCH?

Yes and no. As I have said, Japanese clients are much more comfortable with the idea of pursuing or defending a claim than they were 15 years ago. There is much broader awareness of international arbitration at the corporate level, particularly among the trading houses and other sophisticated companies that do business overseas. Originally, senior Japanese lawyers tended to be more familiar with the courts, and steered their clients toward litigation, not arbitration. Most good-size Japanese companies now understand the advantages of arbitration, and consider it the preferred dispute resolution mechanism for their deals.

A number of Japanese law schools now offer arbitration courses (including one at Tokyo University that I teach). The Japan Commercial Arbitration Association (**JCAA**) has modernised its rules. In addition, Japanese lawyers have begun to understand the benefits of specialising in disputes work. When I first arrived, law students all wanted to focus on transactional work which was seen as more prestigious.

So, there has been some progress, but relatively little and relatively slow.

"THERE REMAIN A NUMBER OF HURDLES FOR JAPAN TO OVERCOME BEFORE IT CAN COMPETE WITH OTHER ASIAN ARBITRAL CENTRES"

For example, some Japanese clients have tried arbitration but had bad experiences, often because they have instructed lawyers who don't understand the process themselves, or lack experience. Understandably, these clients are reluctant to arbitrate again.

To avoid this, clients must instruct specialist arbitration lawyers, most of whom are registered foreign lawyers in Tokyo, or lawyers based outside Japan. However, Japanese law distinguishes between international and domestic arbitrations, for the purposes of instructing counsel. An "international arbitration" is defined as "a civil arbitration case which is conducted in Japan and in which all or part of the parties are persons who have an address or a principal office or head office in a foreign state". This is interpreted so that an arbitration between two Japanese subsidiaries of non-Japanese parent companies is not international arbitration, even where the parties' agreement clearly indicates that they intended any arbitration to be international.

Clients cannot instruct foreign lawyers unless the arbitration is international. Instead, they are forced to fall back on the less experienced local lawyers.

Yet, because there are so few arbitrations seated in Japan, there are few opportunities for these lawyers to gain the experience they need; it becomes a vicious circle.

Finally, Japan has not invested in arbitration to anything like the same degree as other Asian centres. For example, though there are perfectly adequate hearing facilities in Tokyo, it lacks anything comparable to HKIAC's state-of-the-art rooms, or Singapore's Maxwell Chambers arbitration hub. While this remains the case, Japanese parties have little incentive to select a Japanese seat over one outside Japan. In turn, choice of seat influences choice of rules: the majority of HSF's Japan-related cases are under SIAC or ICC Rules, not those of JCAA, which registered only 20 cases in total during 2015, and 14 the previous year.

I have witnessed many improvements during my time in Tokyo, but there is still more to do.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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