

MICHAEL MROCZEK

PARTNER AT OKUNO&PARTNERS

From across the Pacific, *Lawyer Monthly* here benefits from rich insight into the arbitration practice in Japan, the challenges of involving foreign lawyers in the practice, and one lawyer's goals of making Japan the first choice for international arbitration in Asia.

Michael Mroczek is a Partner at Okuno&Partners, a Japanese business law firm with a special focus on bankruptcy and restructuring, corporate and finance, M&A as well as dispute resolution (litigation, mediation, and arbitration). Michael specialises in international arbitration and is currently changing Japan's legal sphere towards the more and more popular practice of arbitration.

Okuno and Partners

Michael Mroczek, Attorney at Law
michael.mroczek@okunolaw.com
Kyobashi TD Bldg. 8F 1-2-5
Kyobashi, Chuo-Ku, Tokyo

104-0031, JAPAN
T:03-3274-3807
F:03-3272-2245
www.okunolaw.com



Why would you say you are a Legal Game Changer within your field?

Japan is a country that still possesses a very low density of practicing lawyers (approximately 37,000 lawyers/127,000,000 inhabitants). Furthermore, the majority of law firms are domestic firms. By joining Okuno&Partners, I have been given a unique chance to be the firm's first foreign partner and, in doing so, this has initiated the transition of being recognized as an international law firm.

Although I'm handling a variety of cases (M&A, financial regulations, corporate) with my team, my main practice area is international arbitration—which has turned out to be a challenge. Although the Japan Commercial Arbitration Association (JCAA) is one of the oldest arbitration institutions in Asia, it seems like commercial arbitration is still far behind Singapore's SIAC or Hong Kong's HKIAC—institutions that are both considerably younger, but admittedly the two leading institutions in this region at the moment. It is my personal objective to increase the popularity of commercial arbitration in Japan.

I try to promote arbitration on every possible platform: by educating local companies in seminars and conferences, teaching commercial arbitration at Japanese universities and by promoting it among my Japanese and foreign colleagues. I am deeply grateful to have the support from my firm to call attention to this seemingly niche expertise in Japan.

How comprehensive is corporate legislation in Japan?

Japanese corporate law was modeled after German law. Having a civil law background from Switzerland, which also partially originates from German law, I would say that Japanese corporate law is easy to understand—at least with respect to the general principles. The Japanese legislator seems to have recently put a lot of effort into making the law more user-friendly; these efforts, however, often find their limits in the practice.

A recent example goes back to April 2015, when the Companies Act was revised, inter alia, by abandoning the requirement that at least one company's director had to reside inside Japan (i.e. all directors can now reside outside of Japan). Clearly, the purpose of this revision was to attract more foreign direct investments (FDI) to Japan. Despite this deregulation, Japanese banks still refuse to open bank accounts with foreigners without residency in Japan. In other words, the recent deregulation still reaches limitations in the strict practice of Japanese banks.

Opposite to the relatively comprehensive corporate legislation are the financial regulations; Swiss wealth managers, banks, and other financial institutions often seek our advice for lack of general understanding of the Japanese financial regulations and their application.

Do you see any room for improvement for Japan's corporate legal system? What developments would you like to see?

Under Prime Minister Abe, the Japanese government is making great efforts to increase FDI into Japan. Having a Swiss background, I would like to see less formalism, less discrepancy between written law and its application, more legal text to be accessible in English, and finally, a stronger integration of foreign lawyers in Japan.

On one hand, administrative bodies and courts in Japan are very formalistic and not ready to take a pragmatic approach by accepting exceptions. On the other hand, when dealing with administration or courts, one regularly encounters unwritten rules - which tend to create distortions within the written law. This may be one

of the explanations as to why much Japanese legislation remains untranslated into English.

With respect to the integration of foreign lawyers in Japan, there has been significant progress in the past years. The required eligibility for admission as a foreign lawyer into the Japanese bar was lowered from five to three years' practice in the original jurisdiction. There is, however, still room for improvement.

For example, the required three years of practice still appear unfair when keeping in mind that Japanese lawyers, after absolving their training at the Training Research Institute at the Supreme Court of Japan, are immediately allowed to practice law in Japan.

Foreign lawyers, according to the Foreign Law Act, are allowed to represent parties in arbitration seated in Japan. However, the representation is limited to international arbitration, in which "international arbitration" means that at least one party has its seat outside of Japan. Arbitration proceedings between two Japanese subsidiaries of foreign or multinational companies are accordingly regarded as domestic, and thus, foreign lawyers remain excluded from the party representation.

I hope that Japanese legislators will address these insufficiencies in the near future. It would be, in my view, a significant step towards the increase of FDI into Japan.

Your major practice area is international arbitration; to what extent would you define Tokyo as a continental arbitration hub?

After handling arbitration cases in Switzerland, one of the preferred arbitration hubs worldwide, I have now been practicing arbitration for over three years in Tokyo.

Japan has a UNCITRAL Model Law based arbitration law. The JCAA rules were revised in 2014 and reflect the recent trends in arbitration by providing the following: multiple claims, multi-party procedure, emergency arbitrator, and expedited procedure. Furthermore, since 1961, Japan has been the signatory party of the New York Convention on the Recognition and Enforcement of Arbitral Awards.

Since the IBA annual conference in Tokyo, which attracted thousands of lawyers from all over the world back in October 2014, it is uncontested that Japan has the best reputation in terms of security, convenience, and hospitality. Despite these excellent perquisites, Tokyo has not yet been recognized as a continental arbitration hub.

What major differences have you found between corporate law activity in Europe and those in Japan?

During the 3.5 years of practicing in Japan I have observed two major differences:

- 1) A discrepancy between the written law and the practice, which may be partially due to the existence of a significant number of lacunas—or lack of regulation—leading to interpretations by the administrative bodies or courts.
- 2) The decision-making process in Japanese companies often lacks transparency and is fairly slow. It is often not clear who has the authority to make the final decision.

What advantages would you say arbitration has over litigation in the corporate law sphere?

Japanese courts are known for being very efficient. Within the international business transactions, arbitration brings the advantage of flexibility. Parties can, for instance, agree on whether the procedure is conducted in English or an alternative language. Other advantages

include facilitated enforceability of decisions—where arbitral awards can be enforced in over 150 jurisdictions based on the New York Convention—and, of course, confidentiality.

You are also a lecturer at Rikkyo University on international arbitration; what do you envision for the future generations of arbitration practitioners?

The majority of Japanese lawyers are not trained in arbitration and, in my experience there is not enough awareness of arbitration as an alternative to litigation in Japan. It is therefore important to increase awareness at the university level. Future generations of lawyers should be able to provide objective advice on alternative dispute resolution methods. In my class we study and analyse leading international cases, compare rules of different institutions, and address the advantages or disadvantages of different seats of arbitration.

In addition, I'm also putting effort into increasing students' interest in arbitration by discussing current issues. This is to not only encourage a future generation of arbitration practitioners who possess a solid knowledge base, but also to foster a genuine interest in the practicing of arbitration.

You wrote and published an article titled 'How Deep is the Pool of Arbitration Specialists in Japan?' What primary conclusions did you draw in this?

Japan has been criticized for not having enough arbitration practitioners. In my article, I'm questioning the legitimacy of the criticism based on the number of arbitration practitioners in Japan. By addressing the modern legal framework for arbitration and a very favourable environment, I imply that the reasons for criticism may be the lack of transparency and sound competition.

What do you find most enjoyable about your work and why?

In addition to being a partner at Okuno&Partners and a lecturer of arbitration, I also preside on the Swiss Chamber of Commerce and Industry in Japan (SCCIJ). What I find most enjoyable about my work is the diversity of responsibilities among these three positions. On top of that, there's the pressing fact that Japan, the third biggest world economy, has a lot of potential regarding international arbitration.

Coincidentally, all three positions also possess a common ground; arbitration. As a lawyer, I advise and represent parties in arbitration proceedings. As a lecturer, I'm increasing the awareness of arbitration of the future generations. And finally, as President of the SCCIJ I'm able to promote arbitration within member companies of the chamber—with over 160 members as of February 2016 and growing!

What do you hope to further achieve in the coming years of your legal career?

My clear objective is to make Japan the first choice for international arbitration in Asia.

Is there anything else you would like to add?

According to my esteemed colleagues, there have been on-going discussions on how to increase the significance of Japan with respect to international arbitration. However, this has been received with rather modest results. I believe that Japan's favourable environment creates good perquisites for making this country a real arbitration hub in Asia. Ultimately, this will require more coordination, transparency and joint efforts between Japanese colleagues and foreign practitioners—in and outside of Japan. **LM**