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https://doi.org/10.15017/2146

出版情報：法政研究. 66 (1), pp.383-412, 1999-05-20. 九州大学法政学会
バージョン：
権利関係：

ARTICLE

Educating Transnational Commercial Lawyers for the 21st Century: Towards the Vis Arbitral Moot in 2000 and Beyond (I)

Luke Nottage*

I. Introduction

Every year now, for the week before Easter, hundreds of students (as mock advocates) together with legal academics and practitioners (as mock arbitrators) arrive in Vienna from many parts of the world, to participate in the increasingly popular Willem C. Vis International Commercial Arbitration Moot

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(the Vis Arbitral Moot). The Moot is sponsored by the Institute of International Commercial Law of the Pace University School of Law, and supported by the United Nations Commission on International Trade Law (UNCITRAL), along with major international arbitration institutions. It centers on issues related to the United Nations Convention on Contracts for the International Sales of Goods (CISG). Agreed upon in Vienna in 1980, CISG represented a milestone in efforts to unify or at least harmonise transnational contract law. However, around the time it came into force — over a decade ago now on 1 January 1988 — its major proponents began stressing that these objectives could be readily defeated by differing judicial interpretations and attitudes. Hence they argued for training of judges and arbitrators as well as collection and dissemination of caselaw and arbitral awards applying CISG, together with academic and other commentaries on CISG and related international instruments.[1] Significant progress at least in the latter respects have been achieved by publication of the two-volume UNILEX looseleaf series (also available on CD-ROM);[2] and especially by uploading onto the internet UNCITRAL's "Case Law on UNCITRAL Texts" (CLOUT) service, now incorporated into an extensive database maintained by Pace University School of Law.[3] More recently, attention has focused again on how to help educate the present generation of law students, and their teachers, about CISG and related instruments, particularly those developed by UNCITRAL. In 1992, the idea of a moot competition for law students was proposed,[4] leading to the first annual Vis Arbitral Moot in 1994.

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1 *See eg,.* John Honnold, *Uniform Words and Uniform Application: The 1980 Sales Convention and International Juridical Practice, in* EINHEITLICHES KAUFRECHT UND NATIONALES OBLIGATIONENRECHT [UNIFORM LAW AND NATIONAL LAW OF OBLIGATIONS] 115 (Peter Schlechtriem ed., 1987), Michael Bonell, *A Proposal for the Establishment of a "Permanent Editorial Board" for the Vienna Sales Convention, in* INTERNATIONAL UNIFORM LAW IN PRACTICE (UNIDROIT ed., 1988).

2 UNILEX: INTERNATIONAL CASELAW AND BIBLIOGRAPHY ON THE UN CONVENTION FOR THE INTERNATIONAL SALE OF GOODS (Michael Bonnell, ed., with the assistance of Fabio Liguori, 1996 looseleaf).

3 *See* respectively, <http://www.un.or.at/uncitral/en-index.htm> and <http://www.cisg.law.pace.edu/>. The latter is also an important participant in the *Autonomous Networks of CISG Websites*: <http://www.cisg.law.pace.edu/network.html>. See also the other websites on CISG maintained in various other countries, linked through the *Transnational Law Links* webpage under "Transnational Contract" (<http://www.law.kyushu-u.ac.jp/~luke/transnat.html # contract>).

4 *See* Michael L. Sher's statement *in* UNIFORM COMMERCIAL LAW IN THE TWENTY-FIRST CENTURY: PROCEEDINGS OF THE CONGRESS OF THE UNITED NATIONS COMMISSIONS ON INTERNATIONAL TRADE LAW, New York, 18-22 May 1992, at 101-102, U.N. Doc. A/CN.9/SER.D/1, U.N. Sales No. E. 94. V. 14 (1998).

This article provides more details on how the Moot competition works (III.A), and the challenges that it presents as one possible means of educating transnational commercial lawyers for the 21st century (III.B). First, however, it identifies some initial doubts which might be raised as to its suitability to this task, and indeed the significance of the task itself, particularly as seen from Japan (II.A). To answer these doubts, we need to reassess at the end of the 1990s the role of transnational commercial arbitration in Japan (II.B), the significance for Japan of CISG and *lex mercatoria* more broadly (II.C), and possible directions for legal education in Japan (II.D).

II. The Relevance of the Vis Arbitral Moot As Seen from Japan

A. Prima Facie Limited Relevance?

For a preliminary assessment of the potential relevance of the Vis Arbitral Moot, from a Japanese perspective, let us begin by a brief outline of the competition taken from its website:[5]

> **Goal of the Vis Arbitral Moot:** The goal of the Vis Arbitral Moot is to foster the study of international commercial law and arbitration for resolution of international business disputes through its application to a concrete problem of a client and to train law leaders of tomorrow in methods of alternative dispute resolution.
>
> **Structure of the Moot:** The business community's marked preference for resolving international commercial disputes by arbitration is the reason this method of dispute resolution was selected as the clinical tool to train law students through two crucial phases: the writing of memorandums for claimant and respondent and the hearing of oral argument based upon the memorandums — both settled by arbitral experts in the issues considered. The forensic and written exercises require determining questions of contract — flowing from a transaction relating to the sale or purchase of goods under the United Nations Convention on Contracts for the International Sale of Goods and other uniform international commercial law — in the context of

[5] *See* <http://www.cisg.law.pace.edu/vis.html>.

an arbitration of a dispute under specified Arbitration Rules.

In the pairings of teams for each general round of the forensic and written exercises, every effort is made to have civil law schools argue against common law schools — so each may learn from approaches taken by persons trained in another legal culture. Similarly, the teams of arbitrators judging each round are from both common law and civil law backgrounds. To afford the student lawyers the opportunity to present their cases in an actual arbitration environment, a portion of the oral phase of the Moot is conducted at the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna.

At first glance, this may raise some immediate doubts, at least among readers in Japan, as to its relevance to that country. First, transnational arbitration in Japan is still limited. In fiscal 1997, for instance, only eleven new cases were referred to the Japan Commercial Arbitration Association (JCAA). The Association also had nine cases pending from previous years, bringing the total to 20 cases, of which four settled and six were decided through an arbitral award during 1997.[6] This caseload is virtually unchanged from the late 1980s,[7] despite the Association bringing into effect new Rules in 1991 and especially 1992;[8] and new legislation in effect since September 1, 1996, clarifying the right of foreign lawyers to represent clients in transnational arbitration proceedings in Japan.[9] It stands in quite sharp contrast to the growth of transnational arbitration cases received by the International Chamber of Commerce (ICC) over the last 5 years, including those involving Asian parties;[10] and those received by

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[6] JIGYO HOKOKUSHO (1998) (on file with author). I thank Mr. Onuki of JCAA's Osaka Branch for making this available.

[7] Hiroshi Hattori, *Shadan Hojin Kokusai Shoji Chusai Kyokai* [*The Japan Commercial Arbitration Association, Inc.*], 728 HANREI TAIMUZU 246 (1990).

[8] Hiroshi Hattori, *Administrative and Procedural Rules for Arbitration under the UNCITRAL Arbitration Rules*, XVII YEARBOOK COMMERCIAL ARBITRATION 352 (1992); Hiroshi Hattori, *The New Commercial Arbitration Rules of the Japan Commercial Arbitration Association*, XIX YEARBOOK COMMERCIAL ARBITRATION 283 (1994).

[9] Law No. 65 of 1996, June 12, 1996. *See* Charles Stephens, *New Law Permitting Foreign Lawyer Advocacy in International Arbitrations in Japan*, [October 1996] L.C.I.A. NEWSLETTER 8.

[10] Toshio Sawada, *Ajia to ICC Chusai* [*Asia and ICC Arbitration*], *in* KOKUSAI SHOJI CHUSAI FORUM 98: AJIA NI OKERU KOKUSAI SHOJI CHUSAI NO GENJO TO TENBO [INTERNATIONAL COMMERCIAL ARBITRATION FORUM 1998: THE RECENT SITUATION AND DEVELOPMENTS IN INTERNATIONAL COMMERCIAL ARBITRATION IN ASIA] 75 (Japan Commercial Arbitration Association ed., 1998).

other arbitral institutions in the Asian region such as the China International Economic and Trade Arbitration Commission (CIETAC),[11] and the Hong Kong International Arbitration Center (HKIAC).[12]

Secondly, Japan has still not acceded to CISG. In the early 1990s, some momentum developed for accession. Hence, for instance, accession was included in the agenda of topics for the attention of the legislature in the ensuing calendar year, written by Ministry of Justice legal experts for a major commercial law journal.[13] Yet these announcements were almost in standard form, suggesting that accession had low priority. And accession was not mentioned in announcements after 1992, until it reappeared very recently in the 1998 one.[13a] Here again, however, only brief mention was made at the end of the list among "other topics" (including some like rendering the Civil Code provisions into modern Japanese language, which have also been regularly featured as on the agenda, albeit also to little avail), following more detailed discussion of proposed reforms in lease law, non-profit organisations, and consumer contract law. Thus it appears that accession is back on the agenda, but only marginally so.

Thirdly, the notion of training law students by encouraging them to participate in a mock trial may seem alien to the tradition of legal education in Japan. As was the case in civil law jurisdictions in continental Europe, from which Japan borrowed heavily in the late 19th century and early 20th century, legal education has focused on professors lecturing to large groups of students, imparting large volumes of information (such as the conceptual structure of large chunks of private law) predominantly in one direction. Some classes (*zemi*) are taught in smaller groups, but there the pattern usually involves one or two students presenting papers on particular topics, followed by discussion primarily with the teacher rather than other students.

Despite such obstacles, however, arguably the Vis Arbitral Moot and its

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[11] Michael Moser, *CIETAC Arbitration: A Success Story?*, 15 J. INT'L ARB. 27 (1998).

[12] Peter Caldwell, *The Recent Situation and Developments in International Commercial Arbitration in Asia: Hong Kong, in* KOKUSAI SHOJI CHUSAI FORUM 98: AJIA NI OKERU KOKUSAI SHOJI CHUSAI NO GENJO TO TENBO [INTERNATIONAL COMMERCIAL ARBITRATION FORUM 1998: THE RECENT SITUATION AND DEVELOPMENTS IN INTERNATIONAL COMMERCIAL ARBITRATION IN ASIA] 61 (Japan Commercial Arbitration Association ed., 1998).

[13] *See* 440 N.B.L. (1990), 464 N.B.L. 16 (1991), and 488 N.B.L. 20 (1992).

[13a] 656 N.B.L. 20 at p.21.

objectives *are* already relevant even to Japan, and likely to become increasingly so into the early 21st century. Partly, this is for practical reasons; but partly, the Moot and its objectives have a more theoretical interest.

B. Transnational Commercial Arbitration and Japan

First, Japanese corporations certainly are no longer strangers to transnational commercial arbitration. This can be gleaned, for instance, from a survey of Japanese corporations conducted over September-October, 1995. Questionnaires were sent to 3,487 corporations and were completed by 992 (a 28.4% response rate). Respondents ranked as follows the means which they used most frequently to resolve transnational disputes:[14]

	Giving Up Asserting Rights	Negotiations with the Other Party	Mediation (*chotei*)	**Arbitration**	Settlement of Court Proceedings	Judgment (*hanketsu*) etc.
1st Ranked	2.4% (3.7%)	85.0% (88.1%)	0.5% (0.3%)	**2.4%** (**2.0%**)	5.9% (3.9%)	3.8% (2.0%)
2nd Ranked	34.8% (40.6%)	10.0% (7.3%)	4.8% (4.3%)	**9.6%** (**8.5%**)	29.2% (29.9%)	11.6% (4.4%)
3rd Ranked	16.2% (12.6%)	4.0% (3.0%)	9.3% (7.6%)	**9.8%** (**11.4%**)	22.0% (22.1%)	38.7% (43.1%)
Overall	53.4% (56.9%)	99.0% (98.4%)	14.6% (12.2%)	**21.8%** (**21.9%**)	57.1% (55.9%)	54.1% (54.5%)

(Percentages in brackets are from responses to a similar question to similar respondents in a survey in 1990.)

Not surprisingly, dispute resolution through direct negotiation was overwhelmingly most common, with a total of 99% reporting this as within their top three most common methods (and 85% reporting it as their most common method). Dispute resolution through the courts was also common, either through pursuing cases through to judgment (54.1% reporting this within their top three) or through settling during proceedings (57.1%). Over half (53.4%) reported, as within their top three, giving up asserting their rights. But overall,

[14] KAISHA HOMUBU: DAI NANAJI JITTAI CHOSA NO BUNSEKI HOKOKU [CORPORATE LEGAL DEPARTMENTS: ANALYTICAL REPORT ON THE SEVENTH EMPIRICAL STUDY], Bessatsu NBL no. 38 (1996).

almost a quarter (21.8%) reported arbitration as within their top three, almost double the proportion reporting mediation (12.2%). Further, while overall the former percentage is almost unchanged from 1990 (21.9%), in 1995 a slightly larger percentage of firms — probably shipping or trading companies — reported arbitration as their most common dispute resolution method (2.4%), and an even larger increase was reported for arbitration as a second most common method (9.6%).

The involvement of Japanese parties in transnational arbitration is also apparent even from a well-known English language source, the *Yearbook of Commercial Arbitration*. As Appendix A shows, most volumes since its inception (in 1976) include reports of court judgments or awards decided in Japan or a range of other jurisdictions, particularly the U.S.A. and the U.K. More extensive LEXIS database searching, for instance, quickly reveals many more cases, not to mention the many others which are reported in Japanese.[15] This is quite remarkable given not only that only a small proportion of disputes ever end up reported in caselaw, whatever the field. It is especially remarkable, given that one of the major advantages of arbitration is confidentiality of proceedings, which users can be wont to jeopardise by bringing enforcement proceedings through courts (whereby their dispute, particularly if reported, may enter the public domain) or by allowing the arbitral proceedings to be published even on condition of anonymity (which may not be perfect).

Such evidence runs counter to claims by some that Japanese parties have some engrained "cultural" aversion to arbitration as a form of dispute resolution. Part of the problem in this respect has been that "cultural "explanations often seem to stand out from other explanations. For instance, Neil Kaplan Q.C., an experienced judge and arbitration law expert from Hong Kong, presented a paper to the London Court of International Arbitration conference held in Bermuda in June 1996,[16] beginning his survey of developments in Japan with the following words: "Japan sees very little arbitral activity due, I believe, to cultural factors . . .". Yet he continued: ". . . and also the ban on the use of

[15] *See eg.*, Prof. Kazuo Iwasaki's round-up of reported cases in various jurisdictions outside Japan, often involving Japanese parties, in the issues of J.C.A. JOURNAL since issue No. 304 (1983).

[16] Extracted in *Asia-Pacific Region*, [Ocotber 1996] L.C.I.A. NEWSLETTER 4.

foreign lawyers even in international arbitration cases. However a new law has recently been promulgated [see fn. 9, *supra*] which seems to get over this problem and gives foreign lawyers the right to appear in international arbitration cases in Japan". Later, moreover, he added: "It has been noted that Asian businessmen are far more sophisticated than they used to be. No longer will they meekly agree to arbitrate half way across the world in unfriendly climes and in a very different cultural atmosphere. This attitude, which goes with an increase in bargaining power, is one reason why some major arbitration centres have seen such a growth in business." Structural barriers, such as access to representation by lawyers, combined with increasing sophistication in transnational business and increasing bargaining power — albeit probably dented somewhat since the Asian crisis! — are clearly very important determinants of arbitration usage which are mostly difficult to reconcile with "culturalist" explanations. Yet the latter retain an exotic appeal, and tend to stick in peoples' memories.

Similarly, for instance, in a speech presented at the Biennial Conference of the International Council for Commercial Arbitration (ICCA) held in Seoul on October 10-12, 1996, Professor Yasuhei Taniguchi is reported by Mr Bernando Cremades (an internationally renowned Spanish arbitration expert) as having begun with a contrast between the conciliation culture of East Asia and the litigation culture of the West, with the following striking words:[17]

> A typical example is Japan, wherein under the feudal regime which lasted for more than 250 years until 1868 there was no practice of law allowed to exist, there was a strong communal system to promote amicable settlement of disputes and to suppress litigation. Litigation was condemned as a moral wrongdoing to the society and to the other party. A good judge was not supposed to give judgement but to try to give a good conciliation. This tradition was deeply embedded in the people's mind and formed a dispute resolution culture in Japan.

[17] Quoted in Bernando Cremades, *Overcoming the Clash of Cultures: The Role of Interactive Arbitration*, 14 ARB. INT'L 157, 159 n.2 (1998).

Recent studies indicate that this received wisdom seriously underestimates the role of legal norms, and especially their active invocation by ordinary Japanese people, during the Tokugawa period.[18] Also, Professor Taniguchi did go on immediately to consider the issue raised also by Kaplan, namely whether times are changing. He suggested that: "Radical political and economic changes taking place in the past hundred years have certainly affected this culture, but it still persists in many noticeable forms".[18a] Although this conclusion may also understate the significance of rising civil litigation rates since the early 1970s,[19] and the potentially far-reaching changes to Japanese law and society in the 1990s which have become further entrenched in the years since he presented his report,[20] Professor Taniguchi's qualification was important. It creates more space for considering the resilience of "cultural" practices and norms supposedly dating back centuries, as well as structural impediments affecting the bringing of proceedings, whether before courts or arbitral bodies. Yet his qualification is much less striking than his opening words. Its impact was further diminished when he went on:[21]

> In China where this type of culture originated, a strong emphasis on the conciliation was kept even under the Maoist communist regime as the means to resolve the so-called 'contradition within the people'. The judge's primary obligation was said to be not to decide cases but to 'educate' the parties so that they become willing to cease disputing.

Again, this categorisation of "traditional" Chinese culture is now the subject of academic controversy.[22] More importantly, it seems very dangerous to run together a communist regime like that of mainland China, with a highly industrialised liberal democracy like Japan. It runs the risk of encouraging "legal orientalism", stifling careful analysis of a complicated contemporary world.[23]

[18] *See eg.*, HERMANN OOMS, TOKUGAWA VILLAGE PRACTICE: CLASS, STATUS, POWER, LAW (1996).
[18a] *Supra* note 17.
[19] Luke Nottage and Christian Wollschläger, *What Do Courts Do?*, 1996 N.Z.L.J. 369 (1996).
[20] Luke Nottage, *Top Ten Changes and Continuities in Japanese Law and Society* - 1997, in YEARBOOK 3: 1997 611 (New Zealand Association for Comparative Law ed., 1998).
[21] *Supra* note 17.
[22] *Cf. e.g.*, VALERIE HANSEN, NEGOTIATING DAILY LIFE IN TRADITIONAL CHINA: HOW ORDINARY PEOPLE USED CONTRACTS 600-1400 (1995).
[23] *Cf.* Veronica Taylor, *Beyond Legal Orientalism, in* ASIAN LAWS THROUGH AUSTRALIAN

The proceedings of the Seoul conference have subsequently been published, including the full text of Professor Taniguchi's speech. Although in more polished form, it restates the passages quoted above.[23a] In fact however, while not ignoring them, the rest of this published paper does *not* overly stress long-standing cultural factors associated with the continued reluctance to conduct arbitration proceedings in Japan. Professor Taniguchi argues forcefully that the ideology of transnational commercial arbitration is driven particularly by the practical concerns of businesspeople for cost-efficiency, and concludes:[23b]

> There are very many different arbitral practices associated with different legal and commercial cultures. However, the world has been unmistakenly proceeding toward a single commercial culture. Japanese businessmen, for example, are negotiating business in the English language not only with English speaking businessmen but also Korean, European and Middle Eastern businessmen. This is one of the realities of international trade today. Even the most nationalistic Japanese authority cannot require them to use only the Japanese language in their business. The practicality of English is undeniable, although the Japanese side may want to make a contract officially bilingual for the protection of its interest.
>
> The same kind of practical choice must be taking place in dispute resolution. Adoption of an arbitration clause is certainly such a choice. But from that point on, the practice varies. Despite an arbitration clause, a Japanese businessman is likely to continue negotiations to find an agreeable solution. An American businessman, advised by a lawyer, may quickly start an arbitration. [. . .] Increasing participation of lawyers has created a trend of legalization of commercial dispute resolution, which has been criticized by some as excessive to a detriment of commercial interest. East

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EYES 47 (Veronica Taylor ed., 1997).

[23a] Yasuhei Taniguchi, *Is There a Growing International Arbitration Culture? An Observation From Asia, in* INTERNATIONAL DISPUTE RESOLUTION: TOWARDS AN INTERNATIONAL ARBITRATION CULTURE 31, 31-32 (Albert van den Berg, ed., 1998).

[23b] Ibid., 39-40. *See also* Yasuhei Taniguchi, *Nihon no Kokusai Shoji Chusai no Shorai to Ajia* [*Asia and the Future of Japanese International Commercial Arbitration*], *in* KOKUSAI SHOJI CHUSAI FORUM 98: AJIA NI OKERU KOKUSAI SHOJI CHUSAI NO GENJO TO TENBO [INTERNATIONAL COMMERCIAL ARBITRATION FORUM 1998: THE RECENT SITUATION AND DEVELOPMENTS IN INTERNATIONAL COMMERCIAL ARBITRATION IN ASIA] 1 (Japan Commercial Arbitration ed., 1998).

> Asian parties may feel this way about the manner in which American attorneys want to conduct an arbitration. American and European *lawyers* may feel that East Asian arbitrators' intervention for conciliation is too intrusive and unfair. But it is another question how American and East Asian *businessmen* feel about it.
>
> At a time of cultural convergence as today, it should not be too difficult to find a single "international commercial arbitration culture" which is acceptable by all reasonable business people concerned. [. . .] The combination of arbitration and conciliation, the influence of national legal culture ("bag and baggage"), and the national courts' attitude towards international commercial arbitration are some of the important aspects which determine the nature of international commercial arbitration culture which we are looking for.

This provides rich material indeed for further investigation into the future of transnational commercial arbitration not only in Japan, but world-wide. Yet it seems to involve or require the working assumption that Japanese parties in cross-border deals, and arbitration in particular, are driven by economic rationality like their counterparts overseas. Such rationality in itself may be enough to explain the rise of, and justify, more conciliation attempts within arbitration proceedings.[23c] Awareness of the force of economic rationality may also explain the tendency, in Japan as elsewhere, towards national courts (and legislatures) laying down rules favouring transnational commercial arbitration and its autonomy. Certainly, economic rationality may become subject to various limits, and perhaps these can be related to differing "national legal culture"; but the latter must then be clearly delineated and its relevance demonstrated to the issue at hand.

My concern is that these promising avenues of enquiry, and the sensible conclusions and other finely nuanced arguments in the rest of Professor Taniguchi's presentation, will be too readily lost from sight in favour of culturalist arguments. The risk is particularly great for even the most astute experts in

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[23c] For arguments primarily driven by economic rationality, albeit also drawing on ostensibly cultural predilictions for conciliation e.g. among Chinese disputants, see CHRISTIAN BÜHRING-UHLE, ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS (1996).

transnational commercial arbitration from outside Japan, who almost invariably must rely on secondary literature for their understanding of Japanese law and dispute resolution. The problem is epitomised by the way Mr. Cremades only cites the opening parts of Professor Taniguchi's presentation (cited *supra*) in his own article, for one of the most widely-read transnational arbitration journals. But "culturalist" argument also seems to have had an impact on the above-mentioned views of Neil Kaplan Q.C., or at least it may spread to those most impressed by the opening words of his paper.

It should be sufficient to gainsay the force of putative cultural aversion on the part of Japanese parties to arbitration, or at least transnational arbitration, by pointing to evidence (presented above and in Appendix A) as to considerable involvement of Japanese parties in transnational arbitration proceedings, albeit not necessary in Japan. The more interesting questions then revolve around why there are still so few proceedings in Japan. It may be that in contract negotiations Japanese parties tend not to propose arbitration clauses specifying arbitration in Japan under JCAA Rules. Or, if they do but face opposition, they tend not to push hard for this.[24] Both possibilities may be tied to notions, themselves often premised on culturalist grounds, that Japanese parties do not negotiate contracts carefully, and do not incorporate matters into a written contract.[25] Yet recent empirical studies show that these too are dangerous over-generalisations. At least in contracts between those involved in trading between New Zealand and Japan, for instance, an interesting trend appears to be emerging. There is more pressure — from both ends, interestingly, not just New Zealand — to conclude at least a framework agreement, formalising

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[24] Part of the reason for this may be that non-Japanese, especially U.S., parties may argue forcefully that Japanese arbitral proceedings would take too much time to resolve efficiently any major dispute (*cf.* John Haley, *The Myth of the Reluctant Litigant*, [1978] J. JAPANESE STUD. 265). Certainly, "war stories" are recounted where representatives had to travel to Japan dozens of times for hearings (*see, e.g.*, Charles Ragan, *Arbitration in Japan: Caveat Foreign Drafter and Other Lessons*, 7 ARB. INT'L 93 (1991)). The arbitration administration and arbitrators may have improved since then, but it is still true that where *bengoshi* are involved the arbitration may be treated like court proceedings and hence settle into their routine of very protracted trials and so on (Taniguchi, *supra* note 23b). Even if all this has been improved, furthermore, there will remain (mis-) conceptions.

[25] Of definitive importance, particularly for subsequent commentators from outside Japan, was Takeyoshi Kawashima, *The Legal Consciousness of Contract in Japan*, 7 LAW IN JAPAN 1 (1974). *See generally* Luke Nottage, *Contract Law, Theory and Practice in Japan: Plus ça change, plus c'est la même chôse?, in* ASIAN LAWS THROUGH AUSTRALIAN EYES 316 (Veronica Taylor ed., 1997).

somewhat the trading relationship hitherto involving just a series of deals constituting individual contracts.[26] These framework agreements sometimes include arbitration clauses, including some specifying JCAA arbitration in Japan. Yet these, and clauses in other agreements, are not always clearly drafted.[27] If a dispute arises, they may not be enough to get arbitration proceedings initiated smoothly. More generally, even if parties have clearly agreed on an arbitration clause specifying JCAA arbitration in Japan, they may voluntarily decide that actually initiating the arbitral proceedings there is inadvisable (even for the Japanese party) for reasons of cost, potential delay in proceedings, and so on. Instead, they may agree to arbitrate the matter in a third country, for instance. More likely, they will settle the matter between themselves, especially if the applicable law is reasonably clear on the point at issue.[28]

We may see more arbitration in Japan if Japanese parties become more careful in specifying JCAA arbitration in Japan, and if disputes become more complex and more varied, such as those arising from the rapid increase in foreign investment and transnational alliances in Japan's financial sector in recent years.[29] The legislation in 1996 clarifying foreign lawyers' status, mentioned above, should underpin this; but this will take time, especially before disputes arise which cannot be resolved through negotiations and end up in arbitral proceedings in Japan.[30] In the mean time, some alternative arbitration

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[26] Luke Nottage, *Bargaining in the Shadow of the Law and the Law in the Light of Bargaining: Contract Planning and Renegotiation in the US, New Zealand and Japan, in* CHANGING LEGAL CULTURES II: INTERACTION OF LEGAL CULTURES 113 (Johannes Feest & Volkmar Gessner, eds., 1998) (also, in abridged form, at <http://www.law.kyushu-u.ac.jp/~luke/onati.html>).

[27] Even major concession contracts: *cf. eg.*, Luke Nottage, *Planning and Renegotiating Long-Term Contracts in New Zealand and Japan: An Interim Report on an Empirical Research Project*, [1997] N.Z. L. REV, 482, 515-516 (1997).

[28] As is the case especially in New Zealand law (at least on the cursory analysis that most businesspeople, their legal staff, or even their lawyers may subject the dispute to), and possibly some aspects of Japanese commercial law. On predictability as a major factor promoting settlement, see generally HIRAI YOSHIO, GENDAI FUHOKOIHO RIRON-NO ICHITENBO [A PERSPECTIVE ON MODERN TORT LAW THEORY] (1980), J. Mark Ramseyer, *Reluctant Litigant Revisited: Rationality and Disputes in Japan*, [1988] J. JAPANESE STUD. 111 (1988).

[29] *See generally* Eric Sibbett, *A Brave New World for Mergers and Acquisitions of Financial Institutions in Japan*, U. PA. J. OF INT'L BUS. L. (forthcoming 1999). Joint venture contracts often specify as governing the law of the jurisdiction in which the joint venture is incorporated, since corporate law issues will be governed by that law anyway. So more investment in Japan should bring more specification of Japanese law, in which case it may often seem more sensible to also have any dispute resolved in Japan under Japanese arbitration proceedings.

[30] *See also* Taniguchi *supra* note 23b at p.4. *Cf.* Stevens, *supra* note 9 (predicting that the new legislation "should rapidly change [the] situation", of foreign parties regularly refusing to

venues may become less attractive. Already, CIETAC's caseload seems to be declining, possibly as other legal infrastructure in the People's Republic of China becomes more settled,[31] or as increasingly sophisticated Chinese corporations become less bound by government encouragement to always specify CIETAC arbitration. The HKIAC, by contrast, may lose its comparative attraction as a regional arbitration venue as uncertainties persist about the political and economic future of Hong Kong.[31a] Finally, Japan may adopt the UNCITRAL Model Law to update its antiquated provisions on arbitration, further encouraging international law firms to develop a new market in transnational commercial arbitration in Japan.

However, legislative reforms and further reform of JCAA Rules, for instance, will probably not bring much growth in arbitral business within Japan. Nor can we expect much from a relative decline in some other arbitral venues. For, as Dezalay & Garth have pointed out recently, "competition" in the "market" for transnational commercial arbitration is muffled. A major reason is that the most sought-after arbitrators are not bound to any particular arbitral venue. Another is that becoming one of these arbitrators is still a *social* process, involving initiation into a select group, whereby overt touting for business is still viewed with considerable disdain. This aspect may change as a result of increasing conflict between the "grand old men" (mainly comprised of law professors from continental Europe) who developed the world of transnational commercial arbitration from around 1970, and a newer generation of those who have formally studied the new legal and institutional environment, including Anglo-American big firm lawyers. However, Dezalay and Garth also point out that nation-states and supra-state organisations, re-emerging despite — or even because of — globalisation, may re-take some of the terrain conquered by private, non-state transnational commercial arbitration over the last twenty years.[32] Nonetheless, transnational commercial arbitration is proving resil-

designate Japan as a place of arbitration and of transnational arbitration in Japan numbering less than ten per year, due to the apprehension that foreign lawyers representing clients in such arbitration might be subject to disciplinary or criminal proceedings).

[31] Taniguchi *supra* note 23b at p.1.

[31a] *See* Katherine Lynch, *International Commercial Dispute Resolution in Greater China: The Prospects and Problem for Internatinal Commercial Arbitration — One Country, Three Systems* (paper presented at the conference on "Non-Judicial Dispute Resolution in International Financial Transactions" organised by the Law Center for European and International Cooperation (R.I.Z.), Cologne, March 22-23, 1999.

[32] YVES DEZALAY AND BRYANT G.GARTH,DEALING IN VIRTUE:INTERNATIONAL COMMERCIAL

ient.[33]

Thus, transnational commercial arbitration is of practical significance *to* Japan nowadays, since it is well-known to Japanese corporations. Even if it has hitherto been of comparatively limited significance *in* Japan, this may well change as Japanese law, economics and society continues to be reshaped at the end of the 1990s. Yet thinking through these issues also invites consideration of more theoretical issues, like those as to the role of "culture" in contemporary Japanese law and society, and other issues raised by Dezalay and Garth as to the rise — and, perhaps, fall — of transnational commercial arbitration in different parts of the globe. Both practical and theoretical perspectives therefore make the Vis Arbitral Moot decidedly more relevant, from a Japanese viewpoint, than might seem from a static or narrow focus on the number of transnational commercial arbitration proceedings presently reported in Japan.

C. Japan, CISG, and the Emergence of the New *Lex Mercatoria*

CISG is also more relevant for Japan than it appears at first glance. Certainly, as mentioned above (II.A), there has been and still is no great groundswell of support for Japan acceding. On the contrary, it was not mentioned in another recent comprehensive summary of forthcoming legislation.[34] One reason may be higher priority for scarce law reform and drafting time, for issues seen as more pressing as Japan experiences a continued economic slowdown and considerable socio-economic restructuring in the 1990s.[35] If so, one might expect enactment of CISG to move back up the legislative agenda, particularly as the economy recovers. However, there remain the more general problems associated with commercial law reform, particularly the sub-set involving trans-border issues. Put shortly, politicians everywhere realise there are relatively few votes in pushing for a new set of rules for interna-

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ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER (1996).

[33] Luke Nottage (Noboru Kashiwagi trans.), *Kokusai Shoji Chusai to Lex Mercatoria no Hensen* [*The Vicissitudes of Transnational Commercial Arbitration and the Lex Mercatoria*], 113 HO NO SHIHAI 18 (1999).

[34] Shuichi Yoshikai, *Minji Kihon Rippo no Doko to Kadai* [*Trends and Issues in Basic Private Law Legislation*] (*1*) (*2*), 1650 HANREI JIHO 1, 1651 HANREI JIHO 1 (1998).

[35] For an outline of the "top ten" changes, *see* Nottage, *supra* note 20. For an analysis of how deregulation can involve *more* law-making, see Part IV. of Nottage, *New Zealand Law through the Internet: The Commonwealth Law Tradition and Socio-Legal Experimentation*, 12 KOKUSAI KAIHATSU FORUM (Nagoya University) 55-85, (1999).

tional sales, for instance. Lawyers, on the other hand, are busy dealing with cases on an individual basis; they have no time, and often little organisational back-up, to press for such law reform. Yet these issues are common to many countries, such as New Zealand, which have eventually ratified and incorporated CISG.[36] One strategy might be to have CISG rules put forward as a private member's Bill, a growing tendency in legislative reform in Japan.[37]

So far, however, some reluctance about enacting CISG apparently has been expressed by Japanese corporations, which no doubt contributes to keeping it down the list of priorities and may pre-empt this strategy or other enactment efforts. Presumably the staff in their legal departments, which have been gradually strengthened especially in the 1990s,[38] feel comfortable now with contracts drafted in accordance with or governed by either Japanese law, or even the foreign law of major trading or investment partners.

Yet Japanese corporations will not always be able to insist on Japanese law as the express governing law in their contracts. Further, as the number of states signatory to CISG continues to grow (53 as of December 1998), more and more contracts will come to be governed by CISG. CISG applies not only when parties have their place of business in different states which have acceded to the Convention (Article 1(1)(a)). Unless the state has made a reservation excluding this when acceding (Article 95), it will also apply where the rules of private international law applied by a court or arbitral tribunal lead to the application of the law of an acceding state (Article 1(1)(b)). Hence courts in the People's Republic of China and arbitrators in Italy, both countries which acceded in 1988, have already applied CISG to cases involving a Japanese party (see Appendix B). Many more disputes are no doubt being settled out of court, where CISG applied and provided rules to help resolve the dispute. Such pragmatic reasons

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[36] Luke Nottage, *Trade Law Harmonisation in the Asia-Pacific Region: A Realist's View from New Zealand—and a Way Forward?*, [1995] N.Z.L.J. 295.

[37] Including commercial law reform, such as that on stock options: see Shigeru Morimoto, *Giin Rippo ni yoru Shoho Kaisei* [*Commercial Law Reform via Diet Members Bill*], *in* GENDAI NI OKERU BUKKENHO TO SAIKENHO NO KOSAKU 395 (Festschrift Hayashi Publication Committee ed., 1988). This strategy worked for New Zealand in enacting basically the UN Model Law on Arbitration as the Arbitration Act 1996, first proposed by the NZ Law Commission back in 1991: *see* NEW ZEALAND LAW COMMISSION, ARBITRATION (1991).

[38] Toshimitsu Kitagawa and Luke Nottage, *Globalization of Japanese Corporations and the Development of Corporate Legal Departments: Problems and Prospects* (paper presented at the conference on "The Emergence of an Indigenous Legal Profession in the Pacific Basin" at Harvard Law School, December 11-14, 1998).

for accession proved influential in New Zealand.[39] On the other hand, the U.S. (Japan's largest trading partner) *has* ratified and incorporated CISG, but it entered an Article 95 reservation so that when rules of private international law lead a court to apply "U.S." law, this does *not* mean applying CISG, but rather the relevant purely domestic contract rules (primarily, the Uniform Commercial Code).

Another pragmatic reason, raised by a British legal scholar involved in the negotiations leading to conclusion of CISG in 1980, is that accession is important to allow local courts and academics to help determine the future course of CISG, as it comes to be applied by courts around the world.[40] Japanese academics were involved both in those negotiations and the discussions in the years following its conclusion.[41] Many wish to continue this tradition of contributing to the

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[39] NEW ZEALAND LAW COMMISSION, THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: NEW ZEALAND'S PROPOSED ACCEPTANCE p.15 para. 39; p.45 para. 138 (1992).

[40] Barry Nicholas, *The Vienna Convention on International Sales Law*, 105 L.Q.R. 201 (1989). This argument has not yet carried the day in his home country: the U.K. still has not ratified CISG. It seems this is due to staunch opposition from English practitioners, particularly barristers, who collectively derive a huge amount of fees from representing clients in English court or arbitral proceedings, or from acting as arbitrators, in cases where these venues and "English law" have been specified in contracts. If CISG is acceded to and "English law" comes to incorporate CISG, of course, they stand to lose their pre-eminent claim to this business. There are also more philosophical objections. English critics have argued that English law is preferable because it is more certain than CISG, which does not cover important issues (such as contract validity issues and passing of property) and which includes some "multi-cultural compromises" and other more broadly worded provisions than English contract law rules. They also argue that the issue should be left to the market, namely the preferences of parties as to which type of regime they prefer: "encouraging the development of the best scheme in a climate of free competition and choice". *See* Barry Nicholas, *The United Kingdom and the Vienna Sales Convention: Another Case of Splendid Isolation?*, 9 SAGGI, CONFERENZE E SEMINARI (Centro di studi e ricerche di diritto comparato e straniero ed., 1993).

[41] Most notably, Profs. Shinichiro Michida and Kazuaki Sono. Their work in western languages include: Michida, *Possible Avenues to Preparation of Standard Contracts for International Trade on a Global Level, in* UNIFICATION OF THE LAW GOVERNING INTERNATIONAL SALES 251 (John Honnold ed, 1966), Michida, *Cancellation of Contract*, 27 AM. J. COMP. L. 279 (1979), Sono, *Activities of UNCITRAL: The United Nations Convention on Contracts for the International Sale of Goods (Vienna 1980)*, 9 CURSO DE DERECHO INTERNACIONAL vol. 1, 461 (1982), Sono, *The Role of UNCITRAL*, in International Sales ch. 4, 1-13 (Galston & Smit ed., 1984), Sono, *UNCITRAL and the Vienna Sales Convention*, 18 INT'L LAW. 7 (1984), Sono, *Delocalization of the Law of International Sales and the Restoration of the Rule of Reason: A Commentary on International Sale of Goods Laws, in* ASIAN PACIFIC REGIONAL TRADE LAW SEMINAR, INCORPORATING THE 11TH INTERNATIONAL TRADE LAW SEMINAR (22-27. 11. 1984), PAPERS & SUMMARY OF DISCUSSIONS 395 (Australian Attorney-General's Office, ed. 1985), Sono, *Formation of International Contracts under the Vienna Convention: A Shift Above the Comparative Law, in* INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES 111 (Sarcevic & Volken eds., 1986), Sono, *The Vienna Sales Convention:*

development of a new normative order in transnational commercial contracting.[42] They are starting to be joined by other scholars whose focus has been more domestic, namely those interested in broad-based reconceptualisations of Japan's Civil Code — or, more precisely, its Law of Obligations — now that it has reached its centenary in 1998.[43] If even some of their proposals bear fruit, inspired by CISG and related international instruments, pressure for enactment of CISG for trans-border transactions will grow further,

In addition, of course, the Vis Arbitral Moot also addresses problems involving other, "softer" uniform law. An example is interpretation of INCOTERMS, rules derived from trade usage but incorporated by consent of the parties into particular contracts. These and other rules are highly relevant to Japan, irrespective of if and when CISG is enacted. Further, the Moot problems provide rich examples of how international transactions are put together, and the sort of disputes which can arise. Such concrete examples are thus valuable, particularly for students, no matter what rules are applied. In particular, as the outline of the Moot cited above mentions, the examples and the mock proceedings aim to bridge sometimes differing ways of approaching problems in the civil and common law traditions — and, no doubt, sub-traditions.[44] This can be particularly helpful from a Japanese perspective, given that overcoming differences within conceptual structures remains a classic problem for law students, academics, and practitioners.[45]

Again, most of the arguments advanced so far are practical; but the Vis Arbitral Moot also holds and invites more theoretical interest, from lawyers in Japan just as much as elsewhere. Specifically, it encourages consideration of how transnational commercial law or the *lex mercatoria* has developed in the latter half of the 20th century, and how it may continue to develop into the next

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History and Perspective, in INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES 1 (Sarcevic & Volken eds., 1986), Sono, *Restoration of the Rule of Reason in Contract Formation: Has There Been Civil and Common Law Disparity?*, 21 CORNELL INT'L L.J. 477 (1988).

[42] *See, eg.*, the growing bibliography at the *CISG-Japan Database*, maintained by Hiroo Sono, at <http://www.law.kyushu-u.ac.jp/~sono/cisg/english.htm>.

[43] *See, eg.*, Yoshihisa Nomi, *Riko Shogai* [*Leistungsstörung*], *in* SAIKENHO KAISEI-NO KADAI TO HOKO [ISSUES AND DIRECTIONS OF OBLIGATION LAW REFORM], 103 (Bessatsu NBL no. 51, 1998).

[44] Hein Kötz, *Taking Civil Codes Less Seriously*, 50 MODERN L. R. 1 (1987).

[45] Zentaro Kitagawa, *Theory Reception: One Aspect of the Development of Japanese Civil Law Science*, 4 LAW IN JAPAN 1 (1970).

millenium. For instance, some of the uniform law debated at the Moot consists of commercial practices developed by private parties, such as INCOTERMS. This forms one aspect of transnational commercial law or the *lex mercatoria*, following a venerable tradition dating back to the Middle Ages.[46] Yet CISG, also debated, is another very important aspect. While it draws in part upon commercial practices in trans-border trade,[47] CISG goes far beyond this because it is a convention agreed between nation-states, which then binds parties along with other applicable national law. As Professor Roy Goode points out:[48]

> The codification of unwritten usages in a standard set of rules adopted by contract subjects them to national law, namely, the law governing the contract. Accordingly, an international convention or a contractually adopted codification is at most evidence of the uncodified rules previously existing; and by itself it is not very reliable evidence because the purpose of most conventions or contractual modifications is not to reproduce an existing set of universally adopted usages — for in truth no such universality exists — but, rather, to build on existing usage and to provide best solutions to current problems. It is in the nature of conventions that they do not simply reproduce the *status quo*; they change it, and sometimes quite radically.

At an even more general level, this tension between private contract practices and convention rules agreed between nation-states is interesting because the resilience of the latter runs counter to those who predict the demise or growing irrelevance of nation-states, in the wake of rapid globalisation of economic relations[49] bolstered by accelerating technological progress in the

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[46] *See, e.g.*, FILIP DE LY, INTERNATIONAL BUSINESS LAW AND LEX MERCATORIA (1992).

[47] *See, e.g.*, JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 430-433 (1982) (with respect to Art. 79 on exemptions from liability).

[48] Roy Goode, *Usage and Reception in Transnational Commercial Law*, 46 I.C.L.Q. 1, 2-3 (1997).

[49] *See, e.g.*, KENICHI OHMAE, THE END OF THE NATION STATE (1995). *But cf. e.g.* Michael Reisman, *Designing and* Managing the Future of the State, 3 EUROPEAN J. OF INT'L L. 409 (1997) (arguing that nation-states are proving resilient because they fulfill deep human pschological needs and solve collective action problems, and particularly because social strata other than elites may resist globalisation); Marie-Anne Slaughter, *The Real World*

latter half of the 20th century.[50] Teubner argues, for instance, that transnational commercial law or the *lex mercatoria* has developed from private sources, namely cross-border contract practices, which are closely linked to economic globalisation; but that the very closeness of these links invite its repoliticisation, epitomised by CISG. On the other hand, he recognises that repoliticisation may occur in forms unrelated to nation-states, as other transnational rule-making bodies come under public scrutiny and debate.[51] The latter seems to be occuring with closer attention paid recently to the growth of commercial arbitration.[52] It may also follow as bodies seemingly seen as "private" come to be seen as part of a political process, such as the Lando Commission which devised the "Principles of European Contract Law",[53] even if this process is supra-national (developing in tandem with the European Union) as well as driven by nation-states in the conventional mode.[54] Other, ostensibly even more private bodies, such as the Rome-based International Institute for the Unification of Private Law (UNIDROIT), may also become subject to more scrutiny as their impact grows, for instance through its "Principles for International Commercial Contracts".[55] Both sets of Principles drew on CISG rules or what were perceived to be its main conceptual foundations, and in turn they are used increasingly — especially the UNIDROIT Principles — to resolve issues of

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Order 76 FOREIGN AFFAIRS 183 (1997) (arguing for the emergence of a new "transgovernmentalism", in which individual elements of states interact directly with their counterparts abroad).

[50] THE HUMAN DEVELOPMENT REPORT 83 (United Nations Development Programme ed., 1990), cited in Sir Kenneth Keith, *Governance, Sovereignty and Globalisation*, 28 VICTORIA U. OF WELLINGTON L. REV. 477 (1998) at 80-81.

[51] Gunther Teubner, *'Global Bukowina': Legal Pluralism in a World Society, in* GLOBAL LAW WITHOUT A STATE 3 (Gunther Teubner ed. 1997). Rather similarly, a very significant private law-making body in the U.S., the American Law Institute, is now subject to scrutiny: compare Richard Hyland, *Perspectives on Private Law Codification in America in the 21st Century* (paper presented at the conference on "Legislation in the 21st Century and Private Law", Tokyo, Nov. 12, 1998). with Geoffrey Hazard, *The American Law Institute: What It Is and What It Does, in* 14 SAGGI, CONFERENZE E SEMINARI (Centro di studi e ricerche di diritto comparato e straniero ed., 1994).

[52] BUHRING-ÜHLE, *supra* note 23c; DEZALAY & GARTH, *supra* note 32.

[53] *See* <http://ra.irv.uit.no/trade_law/doc/EU.Contract.Principles.1997.preview.html>; and TOWARDS A EUROPEAN CIVIL CODE (Arthur Hartkamp et al. eds., 2nd revised and expanded ed., 1998).

[54] *See, e.g.*, MARIE-BÉNÉDICTE DEMBOUR, HARMONIZATION AND THE CONSTRUCTION OF EUROPE: VARIATIONS AWAY FROM A MUSICAL THEME (European Union Institute Working Paper No. 96/4, 1996).

[55] *See* <http://www.unidroit.org/english/principles/contents.htm>; and MICHAEL BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW (2nd ed. 1998).

interpretation still not clarified in CISG.[56]

Thus, for practical reasons participants in the Vis Arbitral Moot must grapple with these different categories of legal rules making up transnational commercial law or the *lex mercatoria*. In doing so, however, they also are challenged to think about the interrelationships among the categories and how this corpus of law is developing, and ultimately more theoretically about how any legal system develops.

D. Legal Education in Japan

As mentioned above (II. A), the predominant form of legal education in Japan at present remains lectures to large classes, supplemented by seminars (*zemi*) with discussion primarily directed towards the teacher rather than freely exchanged among students. This does not encourage the oral presentation and argumentation skills promoted by the likes of the Vis Arbitral Moot, and therefore diminishes its relevance at first glance. However, here too changes are underway or fairly foreseeable. Already, younger Faculty members — often exposed to different pedogogical approaches during extended study or research outside Japan — are experimenting with *zemi* involving oral argumentation among students. This can now draw on a significant interest in debating, extending beyond law faculty doors around the country.[57]

Such training provides the basis to develop the skills in more structured mooting situations. Mooting in Japanese law schools has involved mainly one-off mock trials, sometimes involving legal academics as the advocates as well as the adjudicators. This has provided little of the nation-wide coordination or sense of continuity that could encourage the emergence of strong teams or even a tradition of producing strong teams. Some encouraging signs, however, include the recent publication of a set of mock moot materials.[58] Precisely in the area of transnational law, moreover, teams of students from Japan have been prepared for participation in the Jessup Moot since 1979.[59] This can offer

[56] *See, e.g.*, Klaus Peter Berger, *The Lex Mercatoria Doctrine and the Unidroit Principles of International Commercial Contracts*, 28 LAW & POL'Y INT'L BUS. 943 (1997).

[57] *See, e.g.*, the website of the National Association for Forensics and Argumentation, <http://www.t3.rim.or.jp/~nafa/index-e.shtml>.

[58] MINJI MOGI SAIBAN NO SUSUME [AN INVITATION TO MOOT COURTS ON CIVIL MATTERS] (Takeshi Kojima et al. eds., 1998).

[59] *See generally* the website of the Philip C. Jessup International Law Moot Court Competition Japan Round, at <http://www.hongo.ecc.u-tokyo.ac.jp//%7Ej80226/jessup/index.html>.

guidance and an important precedent in preparing teams for participation in the Vis Arbitral Moot.

More generally, law faculties in Japan will increasingly find it in their interests to develop innovative, more interactive learning opportunities. Competition between universities should intensify in the wake of declining student numbers.[60] A deregulating and more transparent economy, and a reshaped state sector, require them to provide their graduates not only with the ability to analyse legal requirements. Law faculties also must develop their ability to apply these skills and argue their points persuasively both within and outside their organisations, be they private corporations[61] or firms of legal professionals.[62] Significant developments recently, for instance at Kyushu University Law Faculty, include the inauguration from April 1999 of three visiting professorships for experienced attorneys from the Fukuoka Prefecture Bar Association, and related moves to further expand the graduate school.[63] Involving practitioners may encourage novel forms of teaching based on their skills and experience as advocates, not just more "practical" substantive content for their courses, while an expansion of the graduate school should allow for a greater number of smaller classes conducive to such experiences. More generally, in the long run, we may see more "clinical legal education" in various forms in Japanese law schools.[64] After a slow start in Japan, recent developments in

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[60] *See., e.g., Kokuritsu Daigaku no Nyugaku Teiin Rainendo 10-mannin ware: 9-nen buri* [*Numbers of New Students for National Universities To Drop Below 100,000 in 1999: First Time in Nine Years*], ASAHI SHIMBUN, September 1, 1998, at p.3. *Cf. generally* FUJII, DAIGAKU NO 'ZOGE NO TO' NO KYOZO TO JITSUZO [THE TRUTH AND FALACIES OF THE UNIVERSITY'S IVORY TOWER] (1997) (arguing that Japanese universities need to undergo widespread reforms).

[61] *Cf.* Kitagawa & Nottage, *supra* note 38.

[62] Luke Nottage, *Cyberspace and the Future of Law, Legal Education and Practice in Japan*, 1998 WEB J. OF CURRENT LEG. ISSUES, Part II.C. <http://webjcli.ncl.ac.uk/1998/issue5/nottage5.html>. For subsequent debate on restructuring the legal profession in Japan, as part of widespread changes to the civil justice system, see, e.g., 21 SEIKI SHIHO E NO TEIGEN [PROPOSALS FOR CIVIL JUSTICE IN THE 21ST CENTURY] (Setsuo Miyazawa et al., eds., 1998), Susume Yonezawa, NIHON NO SHIHO WA DOKO E IKU? [WHERE IS JAPAN'S CIVIL JUSTICE SYSTEM HEADING?] (1998), MINJI SHIHO NO KASSEIKA NI MUKETE [TOWARDS THE REINVIGORIZATION OF CIVIL JUSTICE] (21st Century Public Policy Institute, ed., 1998) (with an abstract in English, *Towards the Revitalization of Japan's Civil Justice System*, available through the Keidanren website at <http://www.keidanren.or.jp/21ppi/english/policy/index.html>).

[63] *Kyudai ni Bengoshi Kyoju* [Lawyer Professors at Kyushu University], YOMIURI SHIMBUN, January 20, 1999.

[64] Mark Levin, (Teruki Tsunemoto & Ko Hasegawa, trans.) [*Legal Education for the Next Generation: Ideas from America*] HOKUDAI HOGAKU (forthcoming, 1999 : on file with author) (Unpublished paper on file with author).

Information Technology can provide many new ways to use limited teaching resources more efficiently to engage even the more reticent Japanese law students in more interactive forms of legal education.[65] Many of the skills developed through these media complement those encouraged by the Vis Arbitral Moot.

Admittedly, this view of the Moot's relevance to legal education in Japan remains perhaps the most speculative, for it is tied up with developments which appear far more distantly on the horizon than the growing relevance of CISG or its eventual accession by Japan, or the existing and potential significance of transnational commercial arbitration for Japan. Combined with the latter arguments, it does reinforce the view that the Vis Arbitral Moot holds greater relevance than may appear at first sight; but it highlights the particular challenges involved in preparing teams from Japan for participating in the competitions over the shorter term. Part III. B of this article therefore turns to these, after a closer examination in Part III. A of the Moot's history, substantive law (and hypotheticals) adopted, and procedure.

[Continued in Vol.66 No.3]

[65] Nottage, *supra* note 62, Part IV.C.

Appendix A: Arbitral Proceedings Involving Japanese Parties, Reported in ICCA Yearbooks[1]

Jurisdiction	Date	Court or Arbitral Institution	Parties	Reference	Details
1. Japan	March 14, 1963	Tokyo High Court	Niroshi Nishi (Japan) v. Casaregi Compania di Navigazione e Commercio (Italy)	Vol. I (1976), p.194	Japanese seller of ship (respondent in arbitration); did not participate in London arbitration; award against it enforced in Japan; New York Convention (NYC) Art. I (3)
2. Japan	November 30, 1976	Japan Commercial Arbitration Association (JCAA)	(Japanese company) v. (U.S. company)	Vol. IV (1979),[2] p.123	Japanese supplier (respondent); U.S. distributor partially succeeded in claim for breach of agreement

[1] In addition the following two ICC awards, also involving Japanese parties, are reported in Vol. 1, *ICC Arbitral Awards* (Derains et al, ed.) at pp.49-53 and 297-301, respectively:
(a) Case No. 2114, October 10, 1972 (arbitrated in Geneva by Prof J.-G. Castel, from Canada), Meiki Co. Ltd. (Japan) v. Bucher Guyer S.A. (Switzerland): Japanese licensor's claim upheld for breach by Swiss licensee of obligations not to make or sell similar products, and to keep manufacturing processes secret;
(b) Case No. 2708, 1976 (arbitrated in Paris): Japanese buyer successfully claimed for non-delivery by a Belgian seller, after not acceding to the latter's request for an increased price (*rebus sic stantibus* defence rejected).
Arbitral awards rendered by the Tokyo Maritime Arbitration Commission (TOMAC) of the Japan Shipping Exchange (JSE), Inc. are also occasionally reported in their bulletin. *See eg.*,
(a) M Shipbuilding Company, 31 Bulletin of the Japan Shipping Exchange Inc., 1 (1995) (arbitrated by Messrs. Oshiro, Harada, and Tonomura);
(b) Vessel "S", 34 Bulletin of the Japan Shipping Exchange Inc., 1 (1997) (Messrs. Miyake, Takashiba, Tsubaki);
(c) Bill of Lading, 34 Bulletin of the Japan Shipping Exchange Inc., 8 (1997) (Messrs. Shinya, Shimizu, Shirozu);
(d) Motor Vessel "O", 34 Bulletin of the Japan Shipping Exchange Inc., 14 (1997) (Mr. Takaya).
The Bulletin also includes translations of judgments or notes on a number of Japanese court decisions related to arbitration proceedings.

[2] This Volume also contains an extensive country report on arbitration in Japan by Prof. Teruo Doi (pp.115-138).

3. U.S.A.	October 12, 1979	U.S. District Court, Southern District of New York	Sumitomo Corp. & Oshima Shipbuilding Co. Ltd. (Japan) v. Parakopi Compania Maritima, S.A. (Greece)	Vol. VI (1981), pp.245-7 (and published in full in 477 F. Supp. 737 (1979))	Japanese trading company and shipbuilder (plaintiff/claimant); successfully compelled arbitration in New York for a claim for non-payment by the Greek buyer, who had argued in a Greek Court "unforeseeable circumstances" and fraud related to 69% rise in yen vs. dollar
4. Japan	September 20, 1975	Japan Shipping Exchange (JSE)	(unclear) v. (unclear, but probably Japanese company)	Vol. VIII (1983), p.153	Shipbuilder (probably Japanese company); contractor partially succeeded in claim for non-delivery, despite shipbuilder's cost escalation following 1 st oil shock.[3]
5. Japan	May 30, 1980	Yokohama District Court	K.K. Ameroido Nihon (Japan) v. Drew Chemical Corporation (U.S.A.)	Vol. VIII (1983), pp.394-7	Japanese company sole distributor (respondent in arbitration, plaintiff in Court); arbitration in New York compelled under NYC Art. II para. 3

[3] For another Japanese arbitral body's similarly strict interpretation of contractual provisions, and a rejection of a further defence of *force majeure*, is the award in the "M.S. Sun River" case, between a Panamanian shipowner (claimant) and a Korean charterer, with the JSE rendering its final award on July 8, 1983: see ICCA Yearbook, Vol. XI, pp.193-5. But cf. Copal Co. Ltd. (Japan) v. Fotochrome Inc. (U.S.A.), Case 11 in this Table *infra*, where arbitrators (two Japanese, one from the U.S.A.) held the Japanese seller's delay in production to specification to be excusable, where it was "caused by unexpected and external difficulties, and the seller kept the buyer constantly informed on the delays in the delivery and on its reasons. The buyer, on its part, did not object to the late shipments, but 'rather approved it, possibly with some feelings of dissatisfaction'" (p.150).

For another award by the JSE (dated September 18, 1985), but again involving non-Japanese parties (Taiwanese insurer claimant, Taiwanese shipowner and charterer respondents), see ICCA Yearbook Vol. XII, p.159.

6. Japan	August 2, 1979	JSE	Voyage Charterer (probably Japanese) v. Shipowner (probably U.S.A.); "The Golden Ray"	Vol. X (1985), pp.85-7	Voyage Charterer (claimant in arbitration, defendant in U.S. Court), for transport of logs and lumber from the U.S. (hence probably Japanese); succeeded in claim for declaration that clause incorporated from Beizai Charter Party Form, whereby not liable
7. Japan	April 22, 1983	Osaka District Court	Texaco Overseas Tankship Ltd. (U.K.) v. Okada Shipping Co. Ltd. (Japan)	Vol. X (1985), pp.483-4	Japanese time charterer (respondent); unsuccessfully argued against enforcement of New York arbitral award, on grounds of Art. V para 1. (b)
8. U.K.	June 23, 1983	Court of Appeal	Chiyoda Chemical Engineering & Construction Co. Ltd. (Japan) et al. v. Abu Dhabi Gas Liquefaction Co. Ltd. (Abu Dhabi); id. v. Ishikawa-Harima Heavy Industries Co. Ltd. (Japan)	Vol. X (1985), pp.448-51 (and published in [1982] 2 Lloyd's L. Rep. 425)	Abu Dhabi company claimed against one Japanese company (Chiyoda) as head contractor for defects in liquefaction tanks constructed; the latter claimed against another Japanese company (IHI) as sub-contractor; after agreement could not be reached on an arbitrator for both arbitral proceedings (London), the case was referred to English courts; Court of Appeal appointed one arbitrator for both
9. U.S.A.	September 9, 1983	U.S. District Court, District of Columbia	Gates Energy Products, Inc. (U.S.) v. Yuasa Battery Co. Ltd. et al. (Japan)	Vol. X (1985), pp.566-8 (also published in 599 Fed. Supp. (1983) p.368).	Japanese joint venture partner (defendant); sued for unlawful disclosure of know-how; successfully argued for a stay based on agreed arbitration in Japan; cf. NYC Art. II

10. U.S.A.	July 2, 1985	Supreme Court	Mitsubishi Motors Corp. (Japan) v. Soler Chrysler-Plymouth, Inc. (U.S.A.)	Vol. XI (1986), pp.555-66	Japanese manufacturer (claimant) successfully had arbitration of distributorship claim referred to JCAA arbitration; NYC Articles I (3), II (1), V (2) (b)
11. Japan	September 18, 1970	JCAA	Copal Co. Ltd. (Japan) v. Fotochrome Inc. (U.S.A.)	Vol. XII (1987)	Japanese manufacturer (claimant) of cameras to specification of U.S. buyer (subsequently in corporate reorganization); succeeded almost totally for non-payment for cameras ordered
12. U.S.A.	September 15, 1987	American Arbitration Association	International Business Machines Corp. (U.S.A.) v. Fujitsu Ltd. (Japan)	Vol. XIII (1988), pp.24-102	Japanese licensee (respondent); IBM alleged breach of 1983 Settlement Agreement; two arbitrators fashioned new framework for cooperation[4]
13. U.K.	March 19, 1987	Court of Appeal	NMB (UK) Ltd. (UK/Japan) v. Etri Fans Ltd. (UK/France)	Vol. XIV (1989), pp.731-7.	French company licensed Japanese company (Kondo Co. Ltd.), but not for the U.K.; the former's related U.K. company sued the latter's U.K. subsidiary for importing fans there which infringed copyright in licensed products; Court of Appeal refused to allow Kondo to join the litigation as parties and stay the action; cf. NYC Article II (3)
14. Japan	June 30, 1987	Kobe District Court	Fujiwara Line Ltd. (Japan) v. Ming Chiao Shipping PTE Ltd. (Singapore): "The Semarang"	Vol. XIV (1989), pp.159-61	Japanese time-charter (plaintiff); successfully enforced London award against Singaporean shipowner; under NYC Articles I (3) and IV

[4] For an account by one of them, see Robert Mnookin, *Creating Value Through Process Design*, 11 J. INT'L ARB. 125 (1994).

15. Germany	February 19, 1989	Hamburg Hanseatisches Oberlandesgericht (Court of Appeal)	(German assignee of a German shipping company) v. (Japanese shipyard)	Vol. XV (1990) (also published in 35 RIW (1989) pp.574-8)	Japanese shipbuilder (claimant); German buyer's assignee sued alleging inter alia that the purchase price was too high due to commission paid to third party; court proceedings stayed and dispute referred to MSE arbitration in Tokyo[5]
16. Mexico	October 21, 1986	Corte Superior de Justicia, Fourth Chamber, Federal District	Mitsui de Mexico S.A. (Mexico) and Mitsui & Co. Ltd. (Japan) v. Alkon Textil S.A. (Mexico)	Vol. XVI (1991), pp.594-8	Japanese trading company (claimant); sued by buyer; successfully had dispute referred to JCAA arbitration in Japan; NYC Articles II (1), II (3)
17. Japan	January 27, 1994	Tokyo High Court	Buyer (P.R. China) v. Seller (Japan)	Vol. XX (1995), pp.742-4.	Japanese seller of battery manufacturing plant (defendant); unsuccessful in arguing against enforcement of CIETAC award; NYC Arts. IV and V
18. Canada	October 24, 1990	British Columbia Court of Appeal	Quintette Coal Ltd. (B.C., Canada) v. Nippon Steel Corp. et al. (Japan) (published in [1990] B.C.J. No. 2241	Vol. XVIII (1993), pp.159-65	Japanese consortium of buyers of coal (claimant?); arbitral body rendered award fixing new price; successfully prevented application to have this set aside[6]

[5] This was reversed on appeal to the *Bundesgerichthof* (Federal Court of Justice, Germany's highest court for civil matters), Vol. XVII (1992) pp.510-2 (also published in WERTPAPIER-MITT. (1991) pp.384-6): stressing that the arbitration clause was not sufficiently clearly drafted to include the assignees of the original buyer, which was a special type of partnership.

[6] *See generally* William Neilson, *Price Adjustments in Long-Term Supply Contracts: The Saga of the Quintette Coal Arbitration*, 18 CANADIAN BUS. L.J. 76 (1991).

19. U.S.A.	May 29, 1992	U.S. District Court, Northern District of Illinois, Eastern Division	Daihatsu Motor Co., Inc. (Japan) v. Terrain Vehicles, Inc. (U.S.)	Vol. XVIII (1993), pp.575-8	Japanese manufacturer; U.S. distributor's suit initially dismissed and JCAA arbitration in Osaka ordered; award in favour of Japanese company successfully enforced; NYC Arts. III, IV.
20. Japan	January 30, 1992	Ontario Court, General Division	Kanto Yakin Kogyo K.K. (Japan) v. Can-Eng. Manufacturing Ltd. (Canada)	Vol. XIX (1994), p.263	Japanese company successfully sought enforcement of Tokyo arbitration award.
21. Japan	May 30, 1994	Tokyo High Court	Japan Educational Corporation (Japan) v. Kenneth J. Feld (U.S.A.)	Vol. XX (1995), pp.745-9	Japanese contractor (plaintiff/appellant); claimed in Tokyo District Court breaches of contract with Ringling Bros. (U.S. circus performance company) by its representative, Feld; but District then High Court agreed with New York Federal District Court's injunction to proceed to ICC arbitration in New York[7]

[7] The arbitration clause had provided for all disputes to be referred to ICC arbitration, to be held either in New York at the request of JEC or in Tokyo at the request of Ringling Bros. For a commentary on this case, see Yuko Nishitani, *Die Bestimmung des Schiedsvertragsstatuts und dessen sachliche und personliche Reichweite*, 6 ZJAPANR 185 (1998).

Appendix B:
Court Judgments or Arbitral Awards Involving Japanese Parties Where CISG Was Applied

Jurisdiction	Date	Court	Parties	Internet Citation	Original Citation	Details
1. China	December 1994	Fujian Higher People's Court	San Ming v. Zhanzhou Metallic Minerals	http://cisgw3.law.pace.edu/cases/941200c1.html	Zhongguo Shenpan Anli Yaolan (1995) 1261-1266	Japanese Seller; CISG Article 30
2. China	August 1994	Xiamen Intermediate People's Court	San Ming v. Zhanzhou Metallic Minerals	http://cisgw3.law.pace.edu/cases/940800c1.html	Zhongguo Shenpan Anli Yaolan (1995) 1261-1266	(First Instance judgment of Case 1).
3. Italy	19 April 1994	Ad hoc arbitral proceedings, Florence	n/a	http://cisgw3.law.pace.edu/cases/940419i3.html	Diritto del Commercio Internazionale 1994, 867-873	Japanese buyer (defendant); leather/textile wear; Articles 1(1)(b); 6