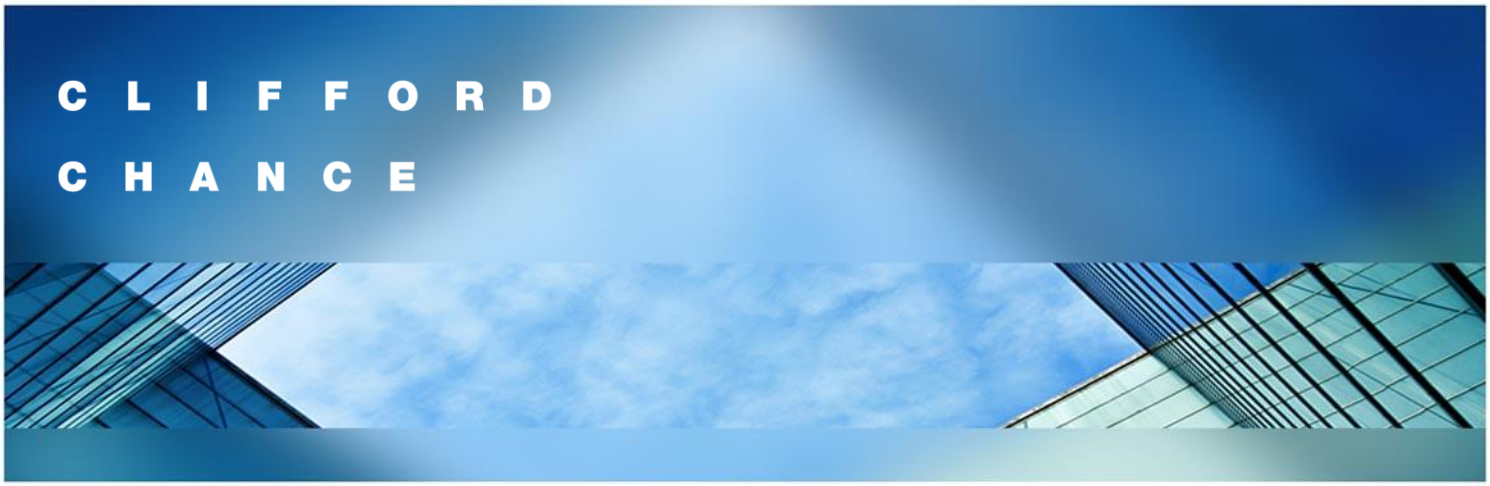

JAPAN'S PROPOSED CHANGES TO THE ARBITRATION AND MEDIATION REGIMES - WHAT IS THE LIKELY IMPACT?

Major developments have taken place in the Japanese alternative dispute resolution landscape over the past decade. These include reforms to the Foreign Lawyers Act, launching the Japan International Dispute Resolution Centre (JIDRC) and revitalising the Japan Commercial Arbitration Association (JCAA). Japan has also made efforts to promote itself as a destination for international mediation. However, more recently, these reform efforts have slowed. In particular, Japan has not yet implemented a number of proposed reforms relating to arbitration and has not signed the United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention).

This briefing gives an overview of the contemplated changes to the arbitration and mediation regimes in Japan and how they may impact parties involved in Japan-related disputes, if and when adopted. It also considers how the proposed reforms may enable Japan to compete with other regional centres for dispute resolution.

Key Takeaways

- Japan is planning to make changes to its arbitration legislation with the aim of improving Japan's legislative framework for international arbitration.
- Japan is also looking to implement processes whereby settlement agreements achieved through a mediation process can be recognised and enforced in Japan.
- The proposed reforms are taking time to implement and Japan has not yet signed the Singapore Convention on Mediation.
- Japan has very little in the way of legal or institutional infrastructure for dealing with expert determination and this is unlikely to change in the near term.
- Parties with Japan-related cross border business should carefully consider what dispute resolution processes are likely to provide the best outcomes for them.

PROPOSED AMENDMENTS TO THE JAPANESE ARBITRATION ACT

What are they?

In March 2021, a dedicated arbitration-focused sub-committee of the Ministry of Justice proposed various amendments to the Japanese Arbitration Act aimed at improving Japan's profile as a reliable place or "seat" for arbitration proceedings. Indeed, the Japanese Ministry of Justice expressly states on its website that it is "actively promoting international arbitration in Japan".

The proposed amendments include the following:

1. Interim measures

The proposed change will expressly confirm and clarify the powers of the Japanese courts to grant interim measures to support or protect arbitrations

seated in Japan. Such measures could take the form of freezing orders or other injunctions needed to prevent actions that could unfairly disturb the status quo of the arbitration. While the existing legislation already contains broad powers for the courts to support arbitration in this way, the proposed wording would add clarity as well as allow for enforcement through the Japanese courts of interim measures granted by an arbitral tribunal (including through imposing penalties on the breaching party).

While the leading regional arbitration centres of Singapore and Hong Kong have had these kind of provisions in place for a relatively long time, other emerging centres have only recently adopted such amendments. For example, South Korea made amendments facilitating the grant and enforcement of interim measures in 2016 while Malaysia clarified its legislation on interim measures in 2018.

2. Establishing an arbitration agreement "in writing"

The proposed wording will make it easier for arbitration agreements contained in electronic or less formal kinds of contracts to be recognised in Japan. The current wording of the Japanese Arbitration Act is relatively prescriptive in specifying the form of an arbitration agreement in writing (based on Article 7(4) of the UNCITRAL Model Law). The new wording proposed would allow for an arbitration agreement to meet the requirement of being an agreement in writing "if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means" (consistent with Article 7(3) of the UNCITRAL Model Law).

3. Translation of foreign arbitral awards

Another proposed change will make it easier for parties seeking to approach the Japanese courts in relation to an arbitration matter by allowing the Japanese courts discretion to waive the requirement to have the relevant documents (such as the arbitral award) translated into Japanese. Assuming the discretion is exercised, this will reduce the time and cost for enforcement proceedings in Japan as well as any other arbitration-related litigation before the Japanese courts.

Given that most international arbitration proceedings are conducted in English (even when English is not the native tongue of either Party), this is an important amendment. In comparison with other regional centres where the official language is not English, Japan will be ahead of the curve if this amendment goes through: South Korea and Thailand still require translation for documents submitted to the courts in international arbitration-related proceedings.

4. Re-organisation of domestic courts' jurisdiction

Other proposed changes include re-organisation of the court system such that Tokyo and Osaka will become the go-to venues for any arbitration-related court proceedings. This will also increase certainty and build up a concentration of arbitration expertise in the Tokyo and Osaka courts.

Why are the amendments significant?

These proposed amendments contribute to a series of recent government actions to promote international arbitration in Japan as well as to increase Japan's reputation as a reliable seat for international arbitration. If passed, they will provide substantive clarifications and reform that will bring Japan closer in line with more popular arbitration destinations in the region such as Hong Kong and Singapore as well as allowing Japan to compete more easily with emerging centres such South Korea, Malaysia and Thailand.

Generally, Japan is a safe seat for international arbitration. However the relative inexperience of the Japanese courts creates some uncertainty around how they will approach issues such as interim measures. The proposed legislation would increase certainty on these issues and is therefore a welcome development for international businesses considering Japan as a possible seat in their arbitration clauses.

This said, in addition to making improvements to the legal framework, Japanese arbitration institutions may need to focus efforts on a particular sector or procedural innovation in order to create a unique selling point for parties. For example, building on its reputation as an innovative, tech-driven economy, Japan may be well placed to specifically target tech sector disputes or to harness new technology to improve arbitration processes.

Why are we waiting?

Since the draft amendments were proposed in March 2021, they have been further considered by the Ministry of Justice subcommittee responsible for them. However, it has been reported that a revised bill will not be submitted to the Japanese Diet until the end of 2022 – so the new law is unlikely to take effect until next year.

As with other countries around the region, the Japanese government has been busy dealing with more pressing challenges including relating to COVID-19 as well as the situation in Ukraine.

Nevertheless, it seems there is broad support for the proposed amendments and they are likely to be passed next year.

PROPOSED REFORMS FOR MEDIATION IN JAPAN

Mediation is another form of alternative dispute resolution that Japan is making efforts to promote. In 2018, Japan launched the Japan International Mediation Center in Kyoto (JIMC-Kyoto) with the aim of promoting Japan as an attractive place for parties to settle their international business disputes. In 2020, the JCAA also launched its own Commercial Mediation Rules which mean the JCAA is also well-equipped to administer mediations.

The same Ministry of Justice document containing the proposed amendments to the Japanese Arbitration Act also proposes the implementation of rules concerning the enforcement of settlement agreements achieved through mediation. The proposed amendments are expressly referable to Articles of the Singapore Convention – an international treaty which aims to provide parties with a process for the international recognition and enforcement of settlements resulting from mediation.

Curiously, although the proposed amendments seem designed to make Japan ready for implementation of the Singapore Convention, Japan has not yet signed or ratified the Singapore Convention. The Convention currently has 55 signatories including the US, Singapore, Australia, South Korea and China.

It seems there is some internal pressure within Japan to sign the Singapore Convention, including from those responsible for promoting the JIMC-Kyoto and the JCAA as mediation centres, but this has not yet happened.

Why are the reforms significant?

If the parties to a mediation can be assured that compliance with the terms of a negotiated outcome will be supported by the relevant domestic courts, it

more likely they will choose mediation to provide a final and binding resolution of their dispute. Japan's proposals to implement these changes demonstrate that Japan is a supporter of mediation as a method for dispute resolution and may make it more attractive for parties to resolve Japan-related business disputes through mediation, if possible.

Why are we waiting?

Given the legislative proposal for creating a legal framework for mediation in Japan draws directly on the Singapore Convention, it seems likely that Japan is planning to sign and ratify the Singapore Convention in due course but wishes to prepare itself for implementation first.

In the meantime, the JIMC-Kyoto and its Singapore counterpart, the Singapore International Mediation Centre (SIMC), have been co-operating on various initiatives including a COVID-19 Protocol which aims to provide quicker and easier access to online mediation for companies engaged in a Japan-related dispute. This protocol provides for relatively low fees as well as an expedited procedure. Article 4(4) specifically provides that parties adopting the protocol "*may seek enforcement in countries that have approved or ratified the Singapore Convention on Mediation*". The JCAA Commercial Mediation Rules also incorporate requirements for the enforceability of settlements under the Singapore Convention.

Coming out of the pandemic, it seems probable that Japan will take the next step and sign/ratify the Singapore Convention in the near future. In any event, the domestic legislative reforms concerning enforcement of mediated settlements are likely to be implemented along with the proposed amendments to the Japanese Arbitration Act in 2023.

EXPERT DETERMINATION

In addition to arbitration and mediation, expert determination is a popular form of dispute resolution for cross-border disputes. In Japan it is not unusual to see expert determination clauses at least in relation to discrete issues such as disputed valuations arising out of contentious exits from M&A transactions. However, in Japan and in the wider Asia-Pacific region there is a notable absence of institutional rules and guidelines for expert determination processes. There are also very few professional institutions that have experience appointing expert determiners in Japan. Consequently, expert determination processes can be challenging for Japan-related disputes and should be approached with caution.

There are no current plans for the development of a legal framework for expert determination in Japan, so parties are required to rely on international rules and guidelines and centres located in the US or Europe. While the JCAA has published a set of Appointing Authority Rules in 2021 these rules are focused on the appointment of arbitrators. The JCAA may in practice also be able to help parties appoint appropriate expert determiners, but it does not formally promote this service.

Unless the JCAA or other institutions develop further rules and guidelines, and prepare themselves to become expert appointment authorities, it is recommended that parties think carefully and seek legal advice before including an expert determination clause in a Japan-related contract.

CONCLUSION

Japan continues to push forward legislative reforms aimed at making it more attractive as a centre for alternative dispute resolution. The same reforms will also assist Japanese businesses and those involved in commercial relationships with Japanese parties by facilitating access to mediation and arbitration. The amendments bring Japan more into line with the leading dispute resolution hubs in the region (Singapore and Hong Kong) as well as enabling it to compete more credibly with emerging centres such as those in South Korea, Malaysia and Thailand.

While some criticism has been voiced against Japan for doing too little too slowly it must be acknowledged that there have been higher priorities in recent times. It would also be more surprising if reforms of this nature occurred quickly. The direction of travel for promoting alternative dispute resolution in Japan is clear as is the likelihood of increasing government and corporate sector support for reforms. Like parties involved in dispute resolution, we just need to be patient.

FURTHER INFORMATION

The Clifford Chance Tokyo team has extensive experience of advising on alternative dispute resolution including arbitration, mediation and expert determination processes. The team regularly represents clients in relation to cross-border disputes as well as helping clients structure their dispute resolution clauses at the contract drafting stage.

Please get in touch if you would like to receive any further information in this area or if you have any queries on the specific content of this briefing.

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