

JAPAN MAKES CHANGES TO IMPROVE DISPUTE RESOLUTION LANDSCAPE FOR INTERNATIONAL BUSINESS DISPUTES

Long-awaited changes to Japan's framework for dispute resolution were passed by the Diet on 21 April 2023. In addition to making changes to its arbitration law, Japan has also implemented legislation to implement the United Nations Convention on International Settlement Agreements Resulting from Mediation (the "**Singapore Convention**").

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

AMENDMENTS TO THE JAPANESE ARBITRATION ACT

What are they?

The amendments include the following:

1. Interim measures

It is now clear that Japanese courts have the power 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 dispute (for example, by making enforcement of an award impossible).

While the leading regional arbitration centres of Singapore and Hong Kong have had similar 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. This change therefore brings Japan into line with the major arbitration centres in Asia.

2. Establishing an arbitration agreement "in writing"

Article 13(2) of the Arbitration Act provides that arbitration agreements must be made in writing. Such requirement exists because the validity of arbitration

Key issues

- Japan has amended its arbitration legislation with the aim of improving Japan's legislative framework for international arbitration.
- Japan has also taken steps to implement the Singapore Convention.
- The Japanese government and various domestic and international institutions are increasing efforts to promote international arbitration and mediation as means of dispute resolution for Japanese parties.
- The changes did not address expert determination and there remains 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.
- The Japan International Dispute Resolution Centre is unlikely to be available in the future as a physical hearing facility.
- Parties with Japan-related cross border business should carefully consider what dispute resolution processes are likely to provide the best outcomes for them.

agreements is often contested. However, the requirement has now been relaxed, and the newly added Article 13(6) provides that if a non-written contract incorporates a written or electromagnetic record of arbitration agreement by reference as part of such contract, the arbitration agreement incorporated in such non-written contract shall be deemed to have been made in writing. Japan's arbitration law is now consistent with amendments made in 2006 to Article 7 of the United Nations Commission on International Trade Law's Model Law on International Commercial Arbitration ("**UNCITRAL Model Law**"). Most other major arbitration jurisdictions in the region have similar provisions.

3. Translation of documents for arbitration-related proceedings

In relation to applications concerning the recognition or enforcement of an arbitral award, or an application for interim measures, the Japanese courts will have discretion to waive the requirement for the award or other documents to be 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 is now ahead of the curve: South Korea and Thailand still require translation for documents submitted to the courts in international arbitration-related proceedings. However, any relaxation of the requirement to translate is dependent on the Japanese court actually exercising its discretion.

4. Re-organisation of domestic courts' jurisdiction

The new legislation has also re-organised the domestic court system such that the Tokyo District Court and the Osaka District Court 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 is implementation significant?

These 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. Further, these amendments 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 as 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 new legislation therefore increases certainty on these issues and is a welcome development for international businesses considering Japan as a possible seat in their arbitration clauses. We anticipate that further reforms will be made particularly in relation to technology and that dispute resolution institutions, such as the Japan Commercial Arbitration Association (JCAA), will also be upgrading their IT infrastructure which may further encourage use of Japanese institutions by foreign parties. At the same time, it is understood that the Japan International Dispute Resolution Centre (JIDRC) – a physical arbitration hearing facility set

up three years ago – will cease to be available as a physical hearing location although it may continue to host arbitrations online. Parties with existing bookings at the JIDRC are advised to contact the JIDRC to check the status of their reservation.

JAPAN'S IMPLEMENTATION OF THE SINGAPORE CONVENTION ON MEDIATION

At the same time as updating its arbitration law, Japan has enacted legislation to implement the Singapore Convention. This is surprising given that Japan has not actually signed and ratified the Singapore Convention but it is a clear indication that Japan intends to do so in the very near term.

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.

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 is more likely they will choose mediation to provide a final and binding resolution of their dispute. Japan's implementation of 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.

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.

However, whilst changes were made in relation to both arbitration and mediation, they did not address expert determination. 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, we recommend 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.

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.

CONTACTS



Peter Harris
Partner, Tokyo

T +81 3 6632 6635
E peter.harris
@cliffordchance.com



Michihiro Nishi
Partner, Tokyo

T +81 3 6632 6622
E michihiro.nishi
@cliffordchance.com



Mohsun Ali
Associate, Tokyo

T +81 3 6632 6418
E mohsun.ali
@cliffordchance.com

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www.cliffordchance.com

Clifford Chance (Gaikokuho Kyodo Jigyo)

Palace Building, 3rd floor

1-1, Marunouchi 1-chome, Chiyoda-ku, Tokyo
100-0005, Japan

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