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Arbitration and Mediation in Japan: Is the Sun Rising?

Michael McErlaine (Herbert Smith Freehills LLP) · Monday, September 26th, 2022 · Herbert Smith Freehills

The dispute resolution landscape in Japan is almost unrecognisable from the position 20 years ago. In that time, Japan has evolved into a significant market for cross-border contentious legal matters. Sophisticated Japanese corporations with significant overseas business are comfortable using international arbitration and mediation as methods of dispute resolution. 86% of the case load of Japan Commercial Arbitration Association (JCAA) from 2017 to 2021 involved international cases although overall case numbers remained largely static in 2020 and 2021 with an average of around 17 cases per year. The HKIAC and SIAC remain popular institutions in the region for Japanese parties to resolve their disputes with recent annual reports showing an increase in cases involving Japanese parties.

Some of these changes include the updating by the JCAA of its institutional rules and other practices, the successful launch of the Japan International Dispute Resolution Center ("**JIDRC**") and the opening of the Japan International Mediation Center in Kyoto. However, more changes are still on the horizon including important changes to the Japanese legislative framework governing arbitrations seated in Japan as well as legislation designed to promote Japan's attractiveness as a centre for mediation.

Upcoming changes to the arbitration legislative framework in Japan

In late October 2021, the Japanese Ministry of Justice's Legislative Council outlined its proposals to amend Japan's Arbitration Act (Act No. 138 of 2003) (the "**Arbitration Act**"). The proposals largely reflect the integration into Japanese law of the provisions of the UNCITRAL Model Law 2006.

Interim measures

The proposed changes include:

- clarifying the types of interim measures that can be granted by tribunals including, specifically, orders to maintain or restore the *status quo* of the subject-matter of the dispute (such as freezing orders), orders to preserve property necessary for the realisation of an arbitral award and orders

to preserve evidence;
- requirements that tribunals can impose before granting interim measures such as the provision of security;
- the termination or modification of interim measures; and
- the enforcement by the Japanese courts of interim measures granted by arbitral tribunals and limited grounds for refusing enforcement.

In addition, the Ministry of Justice's proposals include empowering the Japanese court to order payment of a penalty fee where a party breaches an interim prohibitory injunction granted by a tribunal. This provision is particularly noteworthy for two reasons. First, such a power goes beyond the contents of the UNCITRAL Model Law 2006. Secondly, it is a significant change given the absence of an equivalent power where a party ignores an interim prohibitory injunction granted by the Japanese courts

The proposals do not extend to the enforceability of interim measures granted by an emergency arbitrator. This reflects both the position under the UNCITRAL Model Law 2006, which equally does not address this issue, and some concerns as to whether enforcement of such interim measures should be granted before the tribunal has had a chance to review them.

The clarity brought by the proposed amendments is largely to be welcomed as they bring the Japanese legislative framework into line with that found in other leading international arbitration centres in the region, including Singapore and Hong Kong.

Proposed administrative changes to the Arbitration Act

A number of the other proposals are aimed at relieving the administrative or other burdens on arbitration users in line with modern practice, such as:

- extending the jurisdiction of the Tokyo District Court and Osaka District Court to hear arbitration-related cases. Currently, arbitration-related proceedings must be brought in (i) the district court designated by the parties, (ii) the district court having jurisdiction over the seat of the arbitration, or (iii) the district court having jurisdiction over the counterparty. The Ministry of Justice wanted to make proposals to cater for circumstances where determining the district court with jurisdiction may not be straightforward e.g. if the parties failed to specify a city in Japan as the seat and neither of them was a Japanese entity. The change should also help contribute to increased expertise in dealing with arbitration-related cases in these two District Courts;
- waiving the requirement to provide Japanese translations of all or some of the evidence in arbitration-related cases. Some non-Japanese parties have been wary to agree to arbitrations seated in Japan in the event they need to engage with the Japanese courts and incur the costs of translating lengthy documents from English to Japanese such as the Award or key contracts. The proposals will help reduce these costs burdens for international parties considering arbitrations seated in Japan by allowing the courts to dispense with translations of all or parts of documents where it considers it appropriate to do so having heard submissions from the parties; and
- parties to oral or other types of less formal agreements will also be able to refer disputes to arbitration more readily. Currently, Article 13(2) of the Arbitration Act prescribes the format of a written arbitration agreement. The proposed changes will mean that the Arbitration Act will reflect Article 7(3) of the UNCITRAL Model Law 2006 in that an arbitration agreement is

deemed to be 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 other means. These changes will be welcomed by businesses where contracts are often made orally such as in ship salvage transactions.

Further proposed changes to enhance Japan as a destination for international mediation

On 4 February 2022, the Japanese Ministry of Justice's Legislative Council published legislative proposals for the enforceability of settlement agreements arising out of mediations whether domestic or cross-border. The proposals include amendments to the Act on Promotion of Use of Alternative Dispute Resolution (Act No. 151 of 1 December 2004) (the "**ADR Act**") which applies to domestic mediations, while a new law is proposed for those arising out of international mediation.

Japan is not yet a signatory to the Singapore Convention on Mediation but it has been examining whether signing up to it would require any amendments to domestic law. The new legislative proposals were made in that context with a view to future implementation of the Singapore Convention in Japan. This move is significant given the increasing prevalence of mediation in the toolkit for dispute resolution in Japan. Other significant developments in this regard are the launch of the Japan International Mediation Center in Kyoto (JIMC-Kyoto) in 2018 and the JCAA's publication of its own Commercial Mediation Rules in 2020.

Concluding remarks

The proposed changes to the Arbitration Act would see Japan join the other leading arbitral jurisdictions in the region in modifying their legislation to conform with the UNCITRAL Model Law 2006. The arbitral community in Japan welcomes these changes as well as those additional changes designed to increase the attractiveness of Japan as a seat for international arbitration.

It is hoped that the relevant changes will be passed into law in 2023.

Japan is also likely to take steps to enhance its position as the leading regional centre for mediation. It seems likely that Japan will eventually ratify the Singapore Convention after it has adapted its domestic legislation to cater for its implementation.

Of course, the dispute resolution landscape does not remain static. As soon as the proposals discussed in this article are implemented, the Japanese Ministry of Justice will need to address new topics such as the legal framework for third-party funding in international arbitration as well as whether any legislative changes are required to reflect the recent popularity of emergency arbitrator provisions. Nonetheless, this continues to be an exciting time for the Japanese arbitration community as it looks – albeit somewhat belatedly – to carve out its position in the Asia-Pacific international dispute resolution market.

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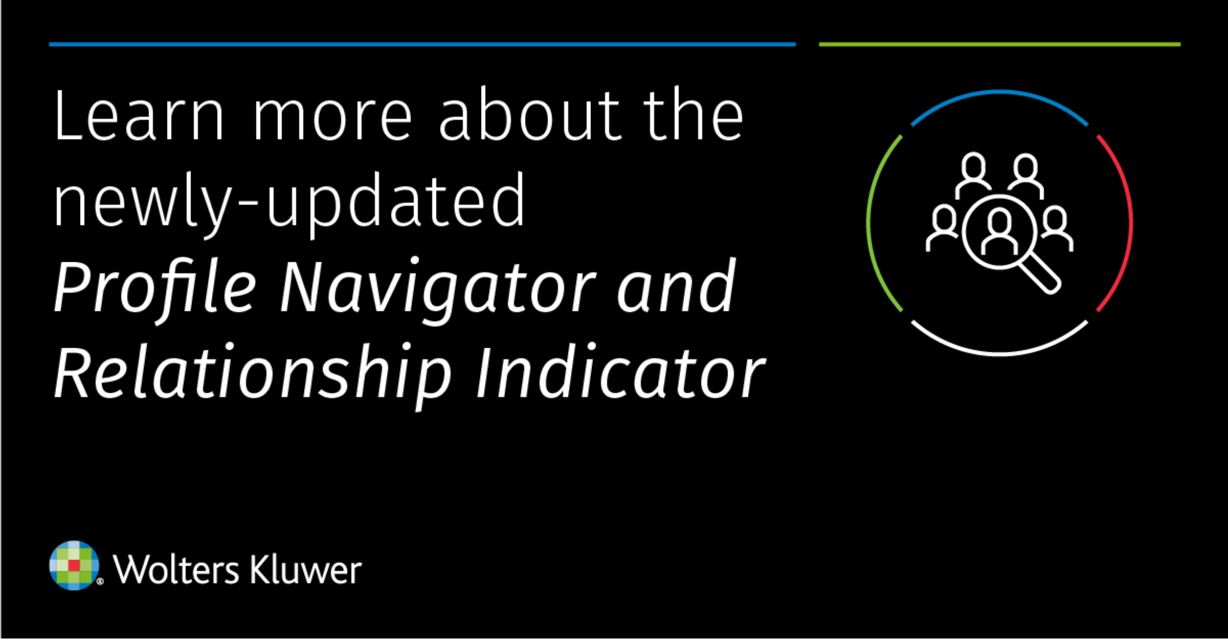

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