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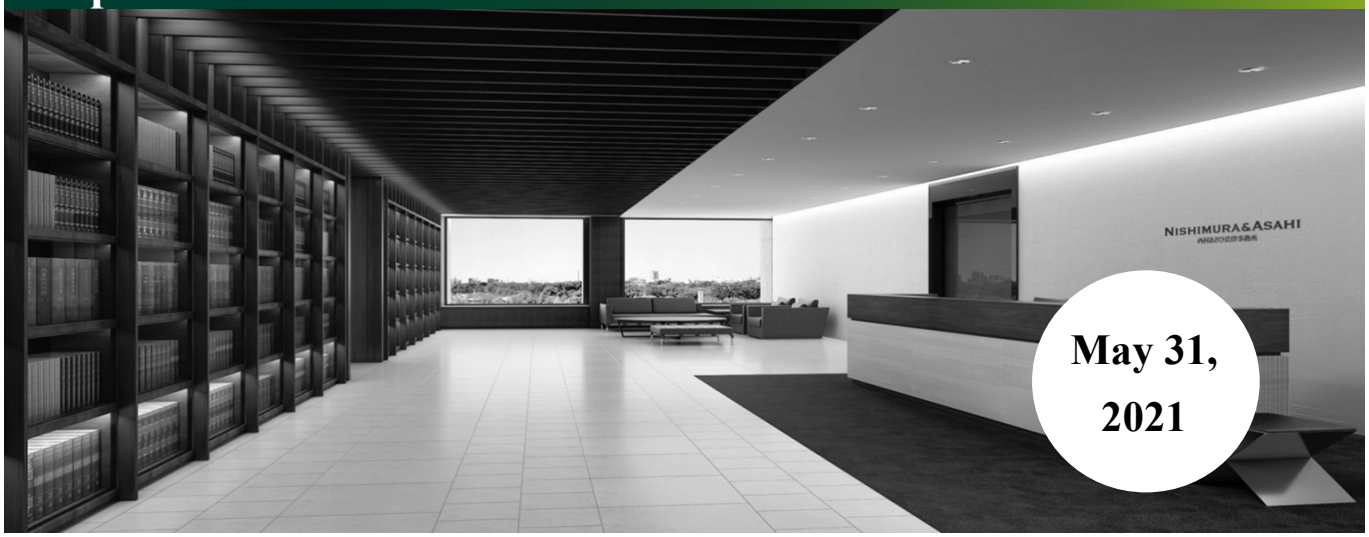

An overview of the Proposed Amendments of Japan's Arbitration Act

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* This newsletter was drafted based upon the information available as of 27 May 2021.

A. INTRODUCTION

In 2017 the Government of Japan, led by the Ministry of Justice, introduced an official policy to promote international arbitration in Japan.[1] The most recent developments in this ongoing effort are the proposed amendments to Japan's Arbitration Act[2] published on 5 March 2021 ("**Proposed Amendments**").[3] They were drafted by the Legislative Council's Subcommittee on the Reform of Arbitration-Related Legislation ("**Subcommittee**"), which is an advisory body to the Ministry of Justice. The Subcommittee's deliberations began in October 2020 and the Proposed Amendments are based on the deliberations in its sixth meeting. While the Subcommittee's main focus is on the Arbitration Act, the Proposed Amendments also address mediation in Japan.

Japan enacted its current Arbitration Act in 2003 based on the UNCITRAL Model Law on International Commercial Arbitration ("**UNCITRAL Model Law**") 1985. The UNCITRAL Model Law itself was amended in 2006. The Proposed

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1 See for example the previous N&A Corporate Newsletter on the Opening Ceremony for Tokyo's Hearing Center, online at https://www.nishimura.com/en/newsletters/corporate_201112.html.

2 See for an unofficial translation of the Arbitration Act online at http://www.japaneselawtranslation.go.jp/law/detail/?id=2784&vm=2&re=02.

3 The proposal was published on the Ministry of Justice's Website in Japanese. The 16 pages proposal is accompanied by a 73 page explanatory note on the suggested amendments. See online at http://www.moj.go.jp/shingi1/shingi04900001_00056.html.

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Amendments trace and intend to implement the partial changes made in the UNCITRAL Model Law 2006, with the broader goal to modernize Japan's Arbitration Act and to bring it in line with international standards. The amendments would constitute the first broad change to Japan's Arbitration Act since its enactment, almost 20 years ago.

This newsletter will provide an overview of the suggested changes included in the Proposed Amendments, which could be relevant for users, counsel, arbitrators and other stakeholders interested in international arbitration and mediation in Japan.

B. INTERIM MEASURES

The Proposed Amendments prominently feature revised rules on interim measures in Japan's Arbitration Act. While the Arbitration Act, in its Article 24, already addressed the arbitral tribunal's authority to issue interim measures in a broader sense, the drafters felt it lacked clarity as to what is to be understood as interim measures. The Proposed Amendments suggest to clarify the types of interim measures that an arbitral tribunal may order as follows:

> "*(i) maintain or restore the status quo of the subject matter of the civil dispute referred to the arbitral proceedings, (ii-1) prevent or stop actual or imminent damage or taking action that is likely to cause such damage, (ii-2) prevent or stop obstruction of the smooth progress of arbitral proceedings or taking action that is likely to cause such obstruction, (iii) preserve property necessary for the realization of arbitral awards, and (iv) preserve evidence that may be necessary for the resolution of the civil dispute referred to the arbitral proceedings.*"

These types of interim measures largely align with the interim measures enumerated in Article 17(2) of the UNCITRAL Model Law 2006.

The current Arbitration Act does not contain a mechanism that would allow for the recognition and enforcement of tribunal-ordered interim measures by Japanese courts. If a party does not comply with interim measures, currently, the other party may only try to seek damages for breach of the arbitration agreement. Once the Proposed Amendments have been implemented, a party can resort to a Japanese court to seek recognition and enforcement of interim measures issued by an arbitral tribunal. To account for the international character of international arbitration, the Proposed Amendments suggest to extend the rules on recognition and enforcement of interim measures regardless of whether the seat of arbitration is in Japan or not.

The Subcommittee did not propose to implement an *ex parte* mechanism on preliminary orders as set forth in Article 17B of the UNCITRAL Model Law 2006. It was mindful that during the deliberation of Article 17B of the UNCITRAL Model Law 2006 some opposed the provision as violating the concepts of "equal treatment of the parties" and "right to be heard". The Subcommittee also did not propose to include a mechanism for the recognition and enforcement of orders issued by an emergency arbitrator, partly because the UNCITRAL Model Law 2006 does not address this issue, partly because it hesitated to allow enforcement before an arbitral tribunal had a chance to review the emergency order.

C. WRITING REQUIREMENT FOR AN ARBITRATION AGREEMENT

Article 13 of Japan's Arbitration Act governs the validity of arbitration agreements. Article 13(2) reads:

> "*An Arbitration Agreement shall be in writing, such as in the form of a document signed by all the parties, letters or telegrams exchanged between the parties (including those sent by facsimile device or other communication measures for parties at a distance which provides the recipient with a written record of the communicated content), or other documents.*"

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This provision was drafted in 2003, when an amendment to the UNCITRAL Model Law 1985, including the relaxation of the writing requirements for arbitration agreements, was being discussed. At the time, Japan took into account the discussions for the amendment and relaxed the writing requirements to recognize electronic means, in advance of the adoption of the UNCITRAL Model Law 2006.

However, there is still some uncertainty as to the scope of the definition of "writing". For example, the Subcommittee considered whether an audio recording of an oral arbitration agreement would satisfy the definition. Therefore the Proposed Amendments suggest adopting the language of Article 7(3) (Option I) of the UNCITRAL Model Law to fully align the Arbitration Act with the UNCITRAL Model Law 2006 in order to provide more legal certainty. The new provision would encompass an orally recorded arbitration agreement.

D. CLARIFYING JURISDICTION OF THE COURTS

The Proposed Amendments also concern themselves with various aspects of the jurisdiction of Japanese courts involved in arbitration-related matters.

Under Article 5(1) of the Arbitration Act, arbitration-related matters can be heard by either of the following courts: (i) the district court agreed to by the parties; (ii) the district court which has jurisdiction over the seat of the arbitration;[4] or (iii) the district court which has jurisdiction over the general venue[5] of the defendant ("**General Venue**") (i.e., usually the domicile, if the defendant is a natural person, or the place of its principal office, if it is a corporate entity).[6]

The Subcommittee considered that under the current Arbitration Act, the actual court venue among Japanese courts having jurisdiction over an arbitration-related matter may be difficult to determine, e.g. if a set-aside application in a Japan-seated arbitration (without designation of a specific city) is made, but the parties have not agreed on a court venue and the defendant does not have its General Venue in Japan. In order to clarify these kinds of situations, the Proposed Amendments suggest designating a specific district court (e.g., the Tokyo District Court) to hear the case if the court venue remains unclear.

The Proposed Amendments also suggest that if the defendant has its General Venue in Japan, the Tokyo or Osaka District Courts can exercise jurisdiction over the matter in addition to the courts that would have jurisdictions under the current Arbitration Act. This functional concentration is aimed at strengthening the arbitration expertise of the Tokyo and Osaka District Courts, which in any event have already heard approximately half of all arbitration-related matters in Japan. Yet, the new regime remains optional, acknowledging that some cases may be better heard in different district courts.

Under Article 5(2) of the current Arbitration Act, if more than one court has jurisdiction pursuant to Article 5(1) of the Act,

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4 This applies provided that a designated arbitral seat is in a specific city or area that belongs to a specific jurisdictional district of a single district court.

5 For the purpose of jurisdiction, the General Venue for a natural person is determined in accordance with Article 4(2) of the Code of Civil Procedure as "*the person's domicile; by the person's residence, if the person is not domiciled in Japan or is of domicile unknown; or by the person's last domicile in Japan, if the person does not have a residence in Japan or is of residence unknown.*" In the case of a domestic company or any other entity, the General Venue is determined in accordance with Article 4(4) of the Code of Civil Procedure as "*the location of its principal office or business office; or by the domicile of its representative or any other principal person in charge of its business, if it has no business office or other office.*" In the case of a foreign company or any other entity, the General Venue is determined in accordance with Article 4(5) of the Code of Civil Procedure as "*the location of its principal office or business office in Japan; or by the domicile of its representative or any other principal person in charge of its business in Japan, if it has no business office or other office in Japan*."

6 Subject to certain exceptional jurisdictional rules for particular types of cases (see Articles 8(1), 12(2), 35(3) and 46(4) of the Arbitration Act).

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the court which first receives an application shall hear the case. The Proposed Amendments suggest granting the competent courts the power to transfer all or part of a case to another court with jurisdiction, upon application by a party or in the court's discretion. This rule aims at ensuring the courts' flexibility to determine the most appropriate venue to hear the particular arbitration-related matter.

E. EASING TRANSLATION REQUIREMENTS

Currently, parties to an arbitration-related matter in Japanese courts have to submit all documents in the Japanese language, which for international cases most often means incurring the time and cost of translations of the arbitral award as well as other accompanying documents. The Proposed Amendments propose that a court may decide, after hearing the views of the parties, not to request translations into Japanese of all or part of the documents submitted in an arbitration-related matter, in particular the arbitral award. This new regulation aims to reduce the burden of translation and to promote the efficiency of arbitration-related Japanese court proceedings.

In exercising its discretion on the basis of the parties' submissions on the issue, a court is to consider whether it is *appropriate* to dispense with the translation requirement. One example provided in the Proposed Amendments is the mere translation of the – undisputed – relief sought, which would make the translation of the rest of the award unnecessary.

F. MEDIATION

Considering the rise of international mediation as a means to settle international commercial disputes as well as to enhance the effectiveness of international arbitration in the form of Med-Arb or Arb-Med, Japan established the Japan International Mediation Center in Kyoto (JIMC-Kyoto) in 2018. As part of a worldwide movement to promote the use of international mediation, the United Nations Convention on International Settlement Agreements Resulting from Mediation ("**Singapore Convention**")[7] was adopted in December 2018 and entered into force on 12 September 2020.

Taking into account these developments and in light of a growing interest in mediation in Japan, the Proposed Amendments consider the possibility of establishing rules for the enforcement of mediated settlement agreements in Japan.[8]

The proposed rules are generally intended to be consistent with the Singapore Convention. The specific procedures for the enforcement of mediated settlement agreements proposed in the Proposed Amendments are similar to those for arbitral awards. Similar to the Singapore Convention, the suggested rules shall not be applicable to certain types of disputes, e.g. those involving consumers or family-related issues or between an employer and particular employee. They will also not apply to settlement agreements reached between parties and approved by a court during court proceedings. The Proposed Amendments currently leave it open whether they will apply to the outcomes of domestic mediations.

G. CONCLUSION

The explanatory note to the Proposed Amendments addresses two issues which were discussed, but not included in the

[7] See for the Singapore Convention's full text online at https://uncitral.un.org/sites/uncitral.un.org/files/singapore_convention_eng.pdf.

[8] Japan has not acceded to the Singapore Convention, and the issue of whether and how Japan should accede to the convention is outside the scope of the Proposed Amendments.

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Proposed Amendments due to a lack of consensus among the Subcommittee. One was the suggestion to address the "new normal"[9] of virtual hearings. The majority of the Subcommittee shared the view that the current Arbitration Act does not preclude virtual hearings, but no consensus was reached as to whether and how the Arbitration Act should be amended to clarify this point.

The Subcommittee also reached no consensus on the rather technical issue of requiring a writ of summons. This is important in practice, because it addresses how to summon a party to appear at an arbitration-related court hearing in Japan. While the Arbitration Act generally does not require a hearing to be held in arbitration-related court proceedings, this is different for set-aside or enforcement actions pertaining to arbitral awards. Japanese courts, out of respect for the sovereignty of other jurisdictions, in practice require a writ of summons to be formally served if a defendant is located outside of Japan. The Subcommittee discussed whether the requirement can be explicitly dispensed with in order to expedite Japanese arbitration-related court proceedings, but no consensus was reached.

With the changes proposed in the Proposed Amendments, Japan would, albeit somewhat belatedly, join the countries which have adopted legislation based on the UNCITRAL Model Law 2006.[10] This fact will hopefully further increase Japan's attractiveness as a seat of arbitration. Yet, if Japan is to take inspiration from some of its Asian neighbors, future amendments to the Arbitration Act may want to address additional topics, such as the recognition and enforcement of orders and decisions made by emergency arbitrators, as well as a legal framework for third-party funding. The necessity of legislation for third party funding is currently being discussed on a policy level in Japan.[11] In order for Japan to level the playing field with other pro-arbitration jurisdictions, particular in Asia, and to promote its international arbitration prowess, a continuous reform process seems desirable. The Proposed Amendments represent a good step in this direction, and we will be happy to report about further developments to come.[12]

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9 See for a previous N&A Corporate Newsletter on this topic online at https://www.nishimura.com/en/newsletters/corporate_200511.html.

10 See for the status of UNCITRAL Model Law online at https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status.

11 See for this a recent post on Kluwer Arbitration Blog by Natalie Yap (Nishimura & Asahi, Counsel) on Third Party Funding in Japan: Opportunity for a Clear Policy, 30 April 2021, online at http://arbitrationblog.kluwerarbitration.com/2021/04/30/third-party-funding-in-japan-opportunity-for-a-clear-policy/, with a reference to "*the session notes of a meeting between the Japanese Ministry of Justice ("MOJ"), the Japanese Commercial Arbitration Association, and the Japan International Dispute Resolution Center ("JIDRC")* [which] *record that third party funding may play a role in promoting the use of international arbitration by mitigating the burden of arbitration costs on Japanese arbitration and Japanese parties.*", online available at https://www.cas.go.jp/jp/seisaku/kokusai_chusai/kanjikai/dai12/gijisidai.pdf.

12 It is not only the Ministry of Justice that continues to work on promoting Japan as a seat of arbitration. The Japan Commercial Arbitration Association (JCAA) conducted a call for public comments on its proposed amendments to the existing JCAA Arbitration Rules in May 2021. The proposed amendments address expedited arbitration procedures and the JCAA's administrative fee. The JCAA further proposes a new set of rules to act as appointing authority (with the parties' agreement) in ad-hoc arbitrations or in arbitrations administered by the rules of other arbitral institutions. See online at https://www.jcaa.or.jp/en/news/?mode=show&seq=166.

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