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The Quest for More Efficiency in Arbitration: Recent Arbitral Reform Efforts in Japan and Germany

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1. Introduction

The legislative frameworks in Japan and Germany are based on joint legal traditions and share many similarities. With respect to arbitration, the current German Arbitration Act ("**German Act**") was passed in 2001 followed by the Japanese Arbitration Act ("**Japanese Act**") in 2003. Considering that both Acts are based on the UNCITRAL Model Law of 1985, they naturally share many similar traits.

Until recently, neither of these Acts required substantial legislative change. However, reflecting an international push by legislators and global arbitral institutions to improve the framework of arbitration, on 18 April 2023, the German Federal Ministry of Justice published a 12-point key issues paper ("**Key Issues Paper**") which provides a framework for further legislative discussions regarding amendments to the German Act.[1] Three days later, and after more than two years of deliberations and drafting by a reform commission, on 21 April 2023, the Japanese Diet passed amendments to the Japanese Act[2] and introduced legislation to implement the Singapore Mediation Convention.[3]

The proposed reforms are driven by the overarching goal of increasing the countries' attractiveness as seats for arbitration. To do so, both Japan and Germany aim to modernize their legislative frameworks, partially by incorporating updates from the UNCITRAL Model Law 2006 ("**Model Law**") which came into force after the passing of the Japanese and German Acts. This newsletter will compare the developments in the respective jurisdictions and analyze how the reforms can make arbitration in Japan and Germany more attractive. We will also examine two aspects that could be considered for future reform.

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1 Eckpunkte des Bundesministeriums der Justiz zur Modernisierung des deutschen Schiedsverfahrensrechts [in English: *Key issues paper on the modernization of German Arbitration Law*, *German Federal Ministry of Justice*], 18 April 2023, available at: https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/Eckpunkte_Schiedsverfahrensrecht.pdf?__blob=publicationFile&v=2.

2 *Act to Partially Amend the Arbitration Act* (Act No. 15 of 2023). For details: Nishimura & Asahi Corporate Newsletter, "*An overview of the Proposed Amendments of Japan's Arbitration Act*", 27 May 2021, available at: https://www.nishimura.com/en/knowledge/newsletters/20210531-35216.

3 *Act for Implementation of the United Nations Convention on International Settlement Agreements Resulting from Mediation (the "Singapore Convention")* (Act No. 16 of 2023). Please note that this newsletter will focus only on the changes to the Japanese Arbitration Act, not on the introduction of Act No. 16 of 2023.

2. Analysis of Changes

Some key characteristics of the current reforms[4] can be summarized as follows and will be examined in detail below:

a. improved involvement of state courts with respect to arbitral proceedings; and
b. modernization of legal provisions, particularly as to the requirements for arbitration agreements and the formation of arbitral tribunals.

a. Improved Involvement of State Courts

The intersection of arbitral and state court proceedings will likely benefit from the amendments to the Japanese Act, and those proposed in the German Key Issues Paper, through the:

(1) (improved) enforcement of interim measures in international arbitrations;
(2) concentrated jurisdiction of the state courts; and
(3) waiver of translation requirements.

These changes are expected to reduce costs and improve efficiencies for arbitration proceedings insofar as an involvement of the state courts is required.

(1) Improved Interim Measures in International Arbitrations

Both the Japanese and the German Act were introduced prior to the revisions to the Model Law in 2006. They therefore could not have incorporated the 2006 Model Law provisions that allow for the enforcement of interim measures where the seat of the arbitration is outside of the enforcing jurisdiction. Prior to its reform in 2023, the Japanese Act did not grant state courts the power to enforce interim or provisional measures ordered by a tribunal. Non-compliance with interim measures by one party therefore only entitled the other party to damages for breach of the arbitration agreement. The German Act does include a provision on the court enforcement of interim measures ordered by a tribunal, but this is limited to arbitral proceedings seated in Germany.

The amendments to the Japanese Act and the proposed reforms in the German Key Issues Paper envisage express provisions governing the enforcement of interim measures in international arbitrations. As a result, Japanese state courts will be able to enforce interim or provisional measures ordered by an arbitral tribunal regardless of whether the seat of the arbitration is in Japan or outside of it. Similarly, if the amendments proposed in the Key Issues Paper are implemented, German state courts will also have such power. This will align the respective arbitration Acts with Article 17H(1) of the Model Law and will ensure that both Japan and Germany are in step with other pro-arbitration jurisdictions that have already implemented such laws.[5]

(2) Concentrated Jurisdiction of the State Courts

Both reform efforts aim to concentrate the jurisdiction of state courts in arbitration-related proceedings. Being exposed to more of such proceedings, judges develop the knowledge to deal with them in a more effective

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4 As this newsletter intends to comparatively analyze the Japanese reforms and the German proposed reforms, only a selection of the points in the Key Issues Paper are addressed herein.

5 For example Hong Kong, Singapore, Switzerland and United Kingdom.

and efficient manner, which improves their expertise and enhances legal certainty.
To reach this goal in Japan, the amendments to the Japanese Act seek to concentrate the jurisdiction over arbitral proceedings with the Tokyo and Osaka District Courts and enable them to exercise such jurisdiction. A further amendment allows the transfer of an arbitration proceeding from one court to another so that it can be heard in the most appropriate forum. As a result, the arbitration expertise of the Tokyo and Osaka District Courts, which frequently deal with arbitration-related matters, is bound to improve further.

Driven by the same aim for specialization, the German Key Issues Paper proposes concentrating jurisdiction at yet-to-be-established Commercial Court Senates of specific Higher Regional Courts.[6] These senates are designed to handle complex commercial cases, but their formation will require an amendment to the German Code of Civil Procedure.[7]

(3) Waiver of Translation Requirements

A major focus of the reforms to arbitral proceedings is time and cost efficiency. To achieve a more efficient process, the amendments to the Japanese Act and the proposed amendments in the German Key Issues Paper envisage removing mandatory translation requirements which currently prescribe that all documents and arbitral awards in proceedings before the courts must be translated into Japanese or German, respectively. Once the amended Japanese Act comes into force, upon application by a party, Japanese state courts will have discretion to decide whether and to what extent translations of arbitral awards are required. The Key Issues Paper contains two proposals for Germany: first, a broad (non-discretionary) waiver of the translation requirements for arbitral documents; and second, the conducting of English language proceedings at the Commercial Court Senates (once established). These amendments should increase the attractiveness of Japan and Germany as arbitral seats.

b. Modernization

The amendments to the Japanese Act and the proposals in the Key Issues Paper modernize the current legislative frameworks in Japan and Germany by bringing them in line with the Model Law.

In 2006, Article 7(3) (Option I) of the Model Law expanded the definition of “arbitration agreement” to include such “*recorded in any form*”, i.e. concluded orally, by conduct, or other means. The newly added Article 13(6) of the Japanese Act emulates the Model Law and the Key Issues Paper proposes a similar amendment in Germany.

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6 As a result of earlier amendments, some German federal states have already concentrated jurisdiction for arbitration-related proceedings at specific senates, e.g. Bavaria, Hesse and North Rhine-Westphalia at the Bavarian Supreme Court in Munich, and the Higher Regional Courts of Frankfurt and Cologne, respectively. The proposed concentration at Commercial Court Senates, aims to improve the interaction with state courts even further. Unlike ordinary senates, the proposed Commercial Court Senates are to specifically focus on the needs of parties to complex and high-value cross-border disputes.

7 See Referentenentwurf des Bundesministeriums der Justiz, Justizstandort-Stärkungsgesetz [in English: *German Federal Ministry of Justice, draft bill on enhancing the German dispute resolution hub*], 25 April 2023, available at: https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_Justizstandort_Staerkung.pdf?__blob=publicationFile&v=3. To this day, various legislative efforts to introduce Commercial Court Senates in Germany have remained unsuccessful. Just recently, the German Legal Committee rejected one of the draft bills relating to the introduction of Commercial Courts Senates, available at: https://www.bundestag.de/presse/hib/kurzmeldungen-945046. Even though reform efforts in this regard continue, it is uncertain whether they will bear fruit in the near future.

In addition, to modernize the provisions relating to the formation of arbitral tribunals in Germany, the Key Issues Paper proposes an express provision for the appointment of arbitrators in multi-party arbitration proceedings. Such provision already exists under the Japanese Act.

3. Further Considerations

Notwithstanding the above-mentioned significant changes, future reforms might consider two further aspects.

a. Recognition and Enforcement of Decisions Made by Emergency Arbitrators

The amendments to the Japanese Act have not introduced express provisions for the recognition and enforcement of decisions made by emergency arbitrators. The German Key Issues Paper also does not contain clear recommendations in this regard. However, the topic has been tabled as “open for discussion”.

Even though hesitation on this matter is understandable – partly because the Model Law itself does not address this issue; and partly because such decisions would have to be enforced before an arbitral tribunal has the chance to review the emergency order – considering such an express provision in the future might be Japan’s and Germany’s chance to catch up with progressive arbitral jurisdictions like Hong Kong, Singapore and Switzerland, which are among the few jurisdictions to have regulated the issue.

b. Remote Hearings

The current amendments to the Japanese Act have not addressed the admissibility of remote hearings. German legislators have, however, expressed their intent to consider this.

In the future, to add to its attractiveness as an international arbitration hub, an express provision in the Japanese Act explicitly allowing remote hearings might be advisable as it would lead to added legal certainty.[8] Remote hearings have in many instances proven to make arbitration more efficient and accessible for all stakeholders involved.

4. Concluding Remarks

From a legislative perspective, Japan and Germany have always been close. The first arbitration laws in Japan, introduced in the late 19th century, were very similar to the respective German arbitration provisions passed just a little more than a decade earlier.[9]

Prior to the recent reform efforts, both the Japanese and the German Acts remained unamended for more than 20 years. This is probably more due to a well thought out and functioning arbitral framework than a reluctance to modernize. Be that as it may, it is encouraging that, as a result of the parallel reform efforts being introduced and considered by each jurisdiction, the close alignment of the two arbitral regimes will continue in the future – this time with Japan as first out of the gate.

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8 Y. Ohara, M. Umezawa, A. Hsu, Japan: Parties’ Right to a Physical Hearing in the Lex Arbitri, ICCA, available at: https://cdn.arbitration-icca.org/s3fs-public/document/media_document/Japan-Right-to-a-Physical-Hearing-Report.pdf.

9 H. Oda, Arbitration Law Reform in Japan, ZJapanR / J.Japan.L. 18 (2004), 5–22, available at: https://www.zjapanr.de/index.php/zjapanr/article/view/601.

The current and proposed reforms will allow companies both in Japan and Germany to continue to feel comfortable arbitrating their disputes in either jurisdiction, knowing that they will now benefit from a modernized arbitration framework that reflects international best practices.

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