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Japan: Gaining momentum in international arbitration with new legislative updates

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Summary

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IN SUMMARY

Japan's dispute resolution landscape witnessed significant advancements on 1 April 2024, with the simultaneous entry into force of the amended Arbitration Act and the Singapore Convention. These legislative developments, coupled with the government-led policy initiative to promote the use of international arbitration in Japan, including the centralisation of arbitration-related cases at the Business Court in Nakameguro, Tokyo, demonstrate Japan's unwavering commitment to promoting international arbitration. As the country navigates the landscape following the closure of the JIDRC Tokyo facility, stakeholders eagerly anticipate further initiatives and developments that will solidify Japan's position as a leading destination for international dispute resolution.

DISCUSSION POINTS

- Amendment of the Arbitration Act and the Singapore Convention enters into force in Japan
- Japan's ongoing initiative to promote international arbitration: navigating the landscape following the closure of the JIDRC Tokyo facility
- The Business Court is ready for international arbitration-related cases
- Tokyo District Court upholds the arbitration agreement's effect to a non-signatory company director under the laws of England and Wales

REFERENCED IN THIS ARTICLE

- Arbitration Act
- Law with respect to implementation of United Nations Convention on International Settlement Agreements Resulting from Mediation
- Singapore Convention on Mediation
- ICCA's Guide to the Interpretation of the 1958 New York Convention
- *Pilica International Japan v Y*

AMENDMENT OF ARBITRATION ACT AND SINGAPORE CONVENTION ENTERS INTO FORCE

The date 1 April 2024 marked a significant milestone in the landscape of dispute resolution in Japan as the long-awaited amendment to the Arbitration Act[1] and the Singapore Convention, along with the law implementing the Convention,[2] simultaneously entered into force. These legislative developments are expected to offer more efficient, effective and flexible options for international dispute resolution mechanisms.

The amendment to the Arbitration Act brings clarity and alignment with the 2006 UNCITRAL Model Law on International Commercial Arbitration, particularly in the realm of interim measures. Arbitral tribunals seated in Japan now have a set of clearly defined options of interim measures and their requirements to grant a wide range of provisional reliefs, including anti-suit injunctions,[3] evidence preservation,[4] asset preservation[5] and orders to maintain the status quo.[6] Although the original Arbitration Act set forth the arbitral tribunal's power

to grant interim measures, the amendment clarified a toolkit that empowers parties to strategically protect their interests pending arbitration and lay the groundwork for successful dispute resolution outcomes, aligning with the Japanese legal practice.

Under the amended Arbitration Act, a party who has obtained an interim order from the tribunal can now enforce the order in Japan by filing a petition for enforcing the order with a competent court.[7] The court is obliged to grant enforcement of the order unless it finds the limited statutory grounds for rejecting enforcement of the order corresponding to the grounds for rejecting enforcement of an award under the UNCITRAL Model Law.[8] Once the enforcing party secures the enforcement decision, the execution procedure depends on the type of interim measure: (1) for prohibitory interim measures,[9] the enforcing party may seek a penalty payment order (and subsequently execute based on the relevant penalty payment order),[10] and (2) for preventive or restitutionary interim measures, the enforcing party may directly proceed to execution.[11]

Moreover, the amendment increased the efficacy of interim measures by extending the jurisdiction of Japanese courts to enforce these interim measures within Japan, even for arbitration proceedings where the seat of arbitration is located outside of Japan.[12] Coupled with the introduction of a penalty payment mechanism for enforcing interim measures, which had no precedent in Japan (even for court-issued preliminary injunctions), these changes are expected to significantly strengthen the effectiveness of interim measures issued by arbitral tribunals.

Concurrently, Japan's accession to the Singapore Convention introduces another layer of flexibility for international dispute resolution by ensuring the enforceability of international settlement agreements resulting from mediation proceedings. While a comprehensive analysis of the Convention's mechanics is beyond the scope of this article, it is worth highlighting a couple of procedural features adopted both in the amendment of the Arbitration Act and the law implementing the Singapore Convention, which enhance the use of arbitration and mediation. First, enforcing parties may be exempt from submitting Japanese translations of all or some of the evidence (ie, arbitral awards, orders of interim measures and settlement agreements) in court proceedings for enforcement, if the court deems it appropriate,[13] thereby facilitating the recognition and enforcement by reducing the burden of an enforcing party. Second, the amendment extended the concurrent jurisdiction to the Tokyo and Osaka District Courts over cases involving the enforcement of arbitral awards, interim measures and mediation agreements,[14] allowing for the concentration of expertise and fostering consistency in the application of the law.

JAPAN'S ONGOING INITIATIVE TO PROMOTE INTERNATIONAL ARBITRATION: NAVIGATING THE LANDSCAPE FOLLOWING THE CLOSURE OF THE JIDRC TOKYO FACILITY

The Japan International Dispute Resolution Center (JIDRC) announced that it would discontinue its Tokyo-facility service after 31 May 2023. As a key component of the government's five-year research project to develop infrastructure and groundwork for revitalising international arbitration, JIDRC's closure of its hearing facility in Tokyo necessitated a re-evaluation of the initiative's future direction.

The Japanese government established the Practical Research Group for the Steady Promotion of International Arbitration Utilisation in Japan (the Research Group) to review the research and promotion project commissioned to the JIDRC over the past five years

and prepare recommendations for government policy to further promote international arbitration. The Research Group aimed to analyse the initiatives introduced by both the public and private sectors, assess the needs of users and practitioners involved in international arbitration, and propose more effective measures for the further promotion of international arbitration in Japan and Asia.

The Research Group's report,[15] published in January 2024, outlines a comprehensive set of proposals for the Japanese government to further promote international arbitration. Central to these recommendations is the call for greater government involvement, particularly through the Cabinet Office's inter-ministerial liaison committee. By coordinating with relevant ministries such as the Ministry of Justice; the Ministry of Economy, Trade and Industry; and the Ministry of Foreign Affairs, the government can more effectively engage with their respective private sector organisations. The proposals encompass a wide range of initiatives, including strengthening partnerships with foreign justice ministries and arbitral institutions, assuming a leadership role in developing dispute resolution rules at UNCITRAL, raising awareness among Japanese companies, especially small- and mid-sized enterprises, and supporting efforts by Japanese arbitral institutions to increase their international recognition.

Recognising the importance of regional cooperation, the report also emphasises the need for collaboration between relevant ministries, foreign governments, overseas arbitral institutions, UNCITRAL and the Association of Southeast Asian Nations (ASEAN) Secretariat to promote international arbitration in Asia, particularly in ASEAN countries. Additionally, it calls for closer cooperation between local arbitral institutions, related organisations and the government to promote Japan as a seat of arbitration to non-Japanese users.

The Japanese government's commitment to promoting and vitalising the use of international arbitration remains steadfast. With the Research Group's proposals serving as a roadmap, stakeholders are now working together to introduce new initiatives that will solidify Japan's position as a leading destination for international dispute resolution.

THE BUSINESS COURT IS READY FOR INTERNATIONAL ARBITRATION-RELATED CASES

In our previous report, we highlighted the opening of the Business Court, which consists of the Intellectual Property High Court and Nakameguro Branch of Tokyo District Court, in October 2022. In preparation for the implementation of the amended Arbitration Act and to accumulate expertise in relation to arbitration-related cases, the Tokyo District Court's administrative distribution rules underwent significant changes in December 2022. As a result, arbitration-related cases filed at the Tokyo District Court, which were previously distributed among its various civil divisions, have been intensively allocated to the Business Court since April 2023.[16] This case-allocation arrangement led the Business Court to more efficiently accumulate knowledge and experience of arbitration-related cases. According to the Business Court, six arbitration-related cases (two setting aside cases, two enforcement cases and two jurisdictional challenge cases) were pending before the Business Court from April 2023 to March 2024.

The Business Court has been eager to increase expertise of judges on international arbitration. For instance, when a Japanese translation of ICCA's Guide to the 1958 New York Convention was published last year,[17] to commemorate this publication, the Business Court hosted lectures by arbitration experts, including the Honourable Dominique Hascher. This initiative, which aligns with the recent amendments to Japan's Arbitration Act, aimed to assist

judges in appreciating the New York Convention and its underpinning principles, including pro-enforcement bias.[18] Japanese courts have demonstrated a pro-enforcement stance, as evidenced by an even higher rate of enforcement of arbitral agreements and awards under the Arbitration Act compared to that of other major arbitration-friendly seats and this event underscored the proactiveness of the Japanese judiciary, demonstrating their commitment to solidify the trust and reputation as a pro-arbitration jurisdiction.

Pilica International Japan V Y

In a judgment dated 1 June 2022,[19] the Tokyo District Court affirmed the application of the arbitration agreement to a company director who was a non-signatory of the relevant arbitration agreement, applying the laws of England and Wales. The judgment exemplified the Japanese courts' pro-arbitration stance, duly endorsing article 2 of the New York Convention.

The plaintiff, Pilica International Japan, Inc, a Japanese corporation, entered into an exclusive distribution agreement (the Agreement) in 1997 with BÖRLIND GmbH (BÖRLIND) for the sale of BÖRLIND's products in Japan. The defendant, Y, a German individual was the managing director and representative of BÖRLIND. The Agreement contained a clause providing that the governing law would be the laws of England and Wales, and the arbitration agreement stated that all disputes arising from the Agreement and all interpretations and validity of the Agreement's provisions would be resolved through arbitration in London, the United Kingdom (the Arbitration Agreement).

According to the plaintiff's allegations, since around 1997, the plaintiff had been exclusively distributing BÖRLIND's products in Japan based on the Agreement. However, from 2002 onward, companies other than the plaintiff began to sell BÖRLIND's products in Japan via the internet. The plaintiff requested the defendant to take measures to prevent these other companies from selling BÖRLIND's products in Japan, but the defendant did not comply. Furthermore, around January 2020, to avoid discussions with the plaintiff, the defendant resigned as the managing director and representative of BÖRLIND and the defendant's daughter, who was completely unaware of the previous circumstances, took over the position.

The plaintiff filed a tort claim at the Tokyo District Court against the defendant and sought compensation of damages of approximately ¥850 million, claiming that the defendant caused the decrease in the plaintiff's sales. In response to the defendant's jurisdictional objection to dismiss the lawsuit based on the Arbitration Agreement, the plaintiff argued that the Arbitration Agreement does not apply to the defendant because the defendant is not a party to the Arbitration Agreement.

The primary issue in this case was whether the effect of the Arbitration Agreement extends to the defendant, the managing director and representative of BÖRLIND who is not a party to the Agreement. The question here can be framed as whether the effect of an arbitration agreement with a company may extend to its director.

The Court affirmed the defendant's argument and dismissed the lawsuit based on the Arbitration Agreement (article 14, paragraph 1 of the Arbitration Act). In reaching this conclusion, the Court first ruled that the scope of the Arbitration Agreement should be determined according to the governing law of the Agreement, which was the law of England and Wales.

The Court then addressed the issue of the subjective scope of the Arbitration Agreement's effect (ie, whether the effect of the Arbitration Agreement extends to the defendant, who is not a party to the Agreement). The Court pointed out that there are precedents from the UK High Court and the UK Court of Appeal stating that a wholly owned subsidiary of a parent company can invoke the arbitration agreement concluded by the parent company. The Court then stated that the defendant, who was a director of BÖRLIND, was completely controlled by BÖRLIND at the time, and 'the determination of the defendant's liability and the determination of BÖRLIND's liability are so closely related that a consistent judgment is necessary to avoid the possibility of duplicate proceedings and inconsistent judgments'. Therefore, the court concluded that 'under English law, the defendant can assert against the plaintiff that the effect of the arbitration agreement between the plaintiff and BÖRLIND extends to the disputes related to the plaintiff's claims against the defendant'.

The applicability of an arbitration agreement to an enforcing party's company director, such as the defendant in this case, is not necessarily clear and remain a debatable issue under the laws of England and Wales.[20] However, Japanese courts have, to date, consistently enforced arbitration agreements governed by the laws of England and Wales, beyond a party to an arbitration agreement to include closely associated third parties. For instance, the Tokyo District Court, in its judgment on 19 June 2020,[21] affirmed the applicability of arbitration agreements under the laws of England and Wales, which were entered into by the plaintiff and a UK company, to non-signatory individuals and legal entities affiliated to the UK company: an executive of the UK company; an employee vested with authority to act on behalf of the UK company in a specific region; and a wholly owned subsidiary of the UK company.

The Court's conclusion that the defendant can invoke the Arbitration Agreement under English law makes sense because the plaintiff ostensibly filed a tort claim against the defendant to settle disputes under the exclusive distribution agreement with BÖRLIND that were subject to the Arbitration Agreement. Having said that, the reasoning of the Court warrants closer examination. As mentioned above, the Court relied on English case law involving a wholly owned subsidiary controlled by its parent company as a basis for its ruling, drawing parallels between a director of the company and a subsidiary, emphasising that a director was similarly under complete control. However, the relationship and interests between a director and a company are fundamentally different from those of a subsidiary and its parent company. Therefore, the court is expected to refine its reasoning to dismiss a tort claim to a non-signatory to an arbitration agreement when such claim was submitted to the court apparently to evade an arbitration agreement.[22]

This judgment showcases the pro-enforcement stance adopted by Japanese courts and their commitment to properly enforcing article 2 of the New York Convention. By recognising that an arbitration agreement can bind a company's representative in certain situations, the court interprets arbitration agreements broadly, aligning with international norms. This approach enhances Japan's reputation as an arbitration-friendly jurisdiction.

Endontes

[1] https://www.japaneselawtranslation.go.jp/ja/laws/view/4440.

[2] https://www.japaneselawtranslation.go.jp/ja/laws/view/4441.

[3] Article 24, paragraph 1, item 4 of the Arbitration Act.

[4] Article 24, paragraph 1, item 5 of the Arbitration Act.

[5] Article 24, paragraph 1, item 1 and 2 of the Arbitration Act.

[6] Article 24, paragraph 1, item 3 of the Arbitration Act.

[7] Article 47, paragraph 1 of the Arbitration Act. Under the amended Arbitration Act, only an 'arbitral tribunal' is authorised to issue interim measures with enforceable power, and the amendment did not extend this authority to emergency arbitrators.

[8] Article 47, paragraph 7 of the Arbitration Act.

[9] Article 24, paragraph 1, items 1, 2, 4 and 5 of the Arbitration Act.

[10] Article 49, paragraph 1 of the Arbitration Act. A party seeking for prohibitory provisional measures may simultaneously seek for a penalty payment order in case of a breach of a prohibitory order.

[11] Article 48 of the Arbitration Act.

[12] Article 47, paragraph 1 of the Arbitration Act.

[13] Article 46, paragraph 2 and article 47, paragraph 2 of the Arbitration Act; article 5, paragraph 4 of the law with respect to implementation of the United Nations Convention on International Settlement Agreements Resulting from Mediation. Whether to allow the omission of submitting translated documents such as arbitration awards, and to what extent, will be determined by the court on a case-by-case basis, taking into consideration the necessity for the proceedings after hearing the opinions of the respondent. Atsushi Fukuda, Naoki Fujita, Takahito Kawahara, Kei Yoshikawa, 'Explanation of the Amendments of the Arbitration Act', 2023, NBL, No. 1244, page 11.

[14] Article 5, paragraph 2 of the Arbitration Act; article 5, paragraph 5 of the law with respect to the implementation of the Singapore Convention.

[15] https://www.cas.go.jp/jp/seisaku/kokusai_chusai/pdf/r6_kenkyukai_houkoku.pdf (Japanese only). During the research phase, the Research Group held hearings with internationally based experts, including, Dr Donna Huang, Director of the ICC International Court of Arbitration North Asia Dispute Resolution Services; Mr Christopher Lau, a Singapore-based arbitrator; Mr Steve Kim, Secretary General of Korean Commercial Arbitration Board International; Mr Felix Dasser, President of Swiss Arbitration Association; Mr Damian Hickman, CEO of IDRC; and Ms Ramona Schardt, Secretary General of DIS (German Arbitration Institute).

[16] Kenya Suzuki, 'Handling of Arbitration-related Cases at the Tokyo District Court', ***Horitsu-no-hiroba***, 2024, Vol. 77, No. 1, page 30.

[17] Available on ICCA's website (https://cdn.arbitration-icca.org/s3fs-public/document/media_document/ICCA_NYC_Guide_Japanese.pdf).

[18] 'If there are several possible interpretations, courts should choose the meaning that favours recognition and enforcement.' English version of ICCA's Guide on the Interpretation of the 1958 New York Convention, page 15.

[19] Tokyo District Court judgment of 1 June 2022, (wa) No. 33456, LEX/DB database (Literature No. 25606253).

[20] In this regard, for instance, several US courts have allowed officers, directors and employees of a corporate party to invoke the arbitration clause in that party's underlying commercial contracts, even though these individuals are not parties to the contract under ordinary contractual principles (Gary Born, International Commercial Arbitration, 2024, 3rd ed., §10.02[M]). In a related case, the Supreme Court of Japan upheld the extension of an arbitration agreement's effect to a non-signatory company representative under US law (The Supreme Court, Judgment of September 4, 1997, ***Minshu***, Vol. 51, No. 8, page 3657.). The Supreme Court's ruling addressed a claim for damages based on a tort allegedly committed by the defendant, the representative of a US company, when the contract containing the arbitration agreement was executed with the plaintiff. The Supreme Court held that the effect of the arbitration agreement extends to the defendant, as the representative of the US company, in light of the Federal Arbitration Act and federal court precedent, which governed the arbitration agreement in this case. The Supreme Court's ruling was based on the understanding that the plaintiff's tort claim against the defendant was substantially identical to a claim for damages against the US company for breach of the contract since it was recognized as constituting 'fraud in the inducement of contract' under US law.

[21] Tokyo District Court judgment of 19 June 2020, (wa) No. 10883, LEX/DB database (Literature No. 25585189). Also, the Tokyo District Court affirmed the applicability of an arbitration agreement to a legal entity that signed as the 'Guarantor' in the contract containing the arbitration agreement governed by the laws of England and Wales. Tokyo District Court judgment of 15 April 2021 (wa) No. 13402, LEX/DB database (Literature No. 25589014).

[22] Yukiko Hasebe, 'Case Study on International Civil Execution and Provisional Remedies (44).

A case where the effect of an arbitration agreement with a corporation as a party was held to extend to the representative of the corporation', Tokyo District Court Judgment, 1 June 2022 (LEX/DB Literature Number 25606253), JCA Journal, 2023, Vol. 70, No. 10, pages 53–54.

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