

Client Alert

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International Mediation Update: Japan

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1. Introduction

In recent years, the popularity of mediation as a method of resolving disputes, either as a standalone mechanism or used alongside arbitration, has increased globally. Indeed, there continues to be efforts worldwide to improve the usability of international mediation and ensure the enforceability of any consequent decisions.

As explored in our previous client alert,¹ there are several advantages to international mediation, not least that it is both a flexible and cost-effective manner of reconciling differences. Despite the numerous advantages of mediation, however, it is yet to take root as a popular dispute resolution method in Japan.

Against this background and the more recent necessity for compromise in light of myriad difficulties presented by COVID-19, there have been several important steps in Japan with respect to international commercial mediation.

In this client alert, we provide a brief summary of five distinct steps related to mediation in Japan, in both the private and public sectors, to strive to increase Japan's capabilities as a regional hub for international mediation.

2. The Singapore Convention


Historically, parties to international mediation may have harboured doubts about the eventual enforceability in court of any settlement agreement resulting from a mediation. This was largely the result of a lack of an efficient, harmonised manner in which to enforce such agreements between countries.

On 7 August 2019, in what represents a landmark step for international mediation, a signing ceremony took place in Singapore for the United Nations Convention on International Settlement Agreements Resulting from Mediation ("**Singapore Convention**").

Not unlike the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**"), the Singapore Convention aims to allow the easy enforcement and invoking of settlement agreements resulting from cross-border mediation by providing a homogenised legal framework within which to enforce these agreements.

The Singapore Convention was signed by 46 States on 7 August 2019, including the US, China and India. Given the clear benefits of the Singapore Convention, Japan's deep-rooted conciliation culture and pressure from within Japan's legal industry, it is widely expected that Japan will sign the convention. Indeed, we understand that Japan's Ministry of Justice ("**MOJ**") and the Japan Federation of Bar Associations ("**JFBA**") are actively considering signature of the Singapore Convention.

¹ See *International Arbitration Update No. 8, Merits of International Commercial Mediation*, 24 July 2017, available at https://www.bakermckenzie.co.jp/wp/wp-content/uploads/ClientAlert_201707_InternationalArbitrationUpdate_No8_E.pdf.



For further details of the Singapore Convention, please refer to our separate client note, "*Singapore Mediation Convention Strengthens Enforcement of Mediation Settlements*."²

3. Establishment of Mediation-related Facilities

In November 2018, international commercial mediation in Japan was boosted by the establishment of the new Japan International Mediation Centre in Kyoto ("**JIMC-Kyoto**"). Linked to the Japan Association of Arbitrators ("**JAA**"), JIMC-Kyoto is working with the Singapore International Mediation Centre ("**SIMC**") under a memorandum of understanding to establish a panel of mediators, and it offers various international commercial mediation services, including appointing mediators and administering mediations.

Additionally, the Japan International Dispute Resolution Center ("**JIDRC**") has opened facilities for alternative dispute resolution ("**ADR**") in both Osaka and Tokyo in May 2018 and March 2020, respectively. The JIDRC facilities are for use in not only institutional and ad-hoc arbitration, but other ADR processes, such as international mediation.

Formerly, certain commentators have ascribed the comparatively low number of ADR processes in Japan, at least in part, to a lack of appropriate hearing facilities. The abovementioned facilities should go some way to remedying this prior shortcoming.

4. The JCAA Mediation Rules 2020

In early 2020, the Japan Commercial Arbitration Association ("**JCAA**") introduced the Commercial Mediation Rules 2020 ("**Mediation Rules**"). The Mediation Rules, effective as of 1 February 2020, incorporate a number of features that aim to attract domestic and foreign users to utilise the JCAA's services.

The key features of the Mediation Rules include:³

- The requirements for enforceability under the Singapore Convention are incorporated to enable more straightforward enforcement in signatory countries.
- Proceedings are privileged, without prejudice and confidential, mostly based on the UNCITRAL Model Law on International Commercial Mediation, in order to facilitate more frank settlement discussions.
- The rules reflect a greater degree of party autonomy by encouraging parties to discuss and agree on how to proceed with a mediation, including as regards the process and mediator remuneration.

Through the new Mediation Rules, the JCAA provides a viable and modern option for companies interested in institutional international mediation, especially in the face of heightened competition between major ADR institutions.

² See *Singapore Mediation Convention Strengthens Enforcement of Mediation Settlements*, 30 August 2019, available at <https://www.bakermckenzie.com/en/insight/publications/2019/08/singapore-mediation-settlements>.

³ See *JCAA's New Commercial Mediation Rules*, available at <https://www.jcaa.or.jp/en/common/pdf/mediation/JCAA-new-commercial-mediation-rules.pdf>.



5. The JIMC-SIMC Joint COVID-19 Protocol

In light of the ongoing coronavirus pandemic, the JIMC and the SIMC introduced a new protocol ("**Joint Protocol**"), adopted by way of a Memorandum of Understanding signed on 12 September 2020.

Under the Joint Protocol, businesses involved in disputes with Japanese companies can resolve them more cost effectively and swiftly through a new mediation service started by the SIMC and its counterpart in Japan.

The Joint Protocol includes several features:

- Mediations may be filed with either the JIMC or SIMC online by paying a JPY 20,000 or SGD 250 filing fee. The JIMC and SIMC will jointly manage mediations.
- Cases will be resolved by two experienced mediators who will be appointed by each Center (one from the JIMC and one from the SIMC). For example, in a mediation between a Japanese company and non-Japanese company, each party may appoint each co-mediator, who has profound knowledge and experience of the legal and cultural background of each country, from the list of mediators at JIMC and/or SIMC.
- Fixed and reduced fees will apply to the mediation, adapted specifically for the Japanese market. For example, for disputes with a value of less than approximately USD 1,000,000, each party will bear costs of around USD 5,000.
- Mediations may be conducted online to address current limitations on international travel.
- In signatory States, settlement agreements may be enforced under the Singapore Convention.

Taken together, the facets of the Joint Protocol appear geared towards giving parties to an international arbitration the best possible chances of reaching settlement. The Joint Protocol, which is expected to be formally launched later this year at an event marking JIMC's 2nd year anniversary on 20 November 2020, will be binding to parties incorporating the Joint Protocol into their mediation agreement or with a relevant clause in their contract.

6. Revisions to the Foreign Lawyers Act

Until now, there were no explicit provisions in Japanese law to address the representation of parties in international mediation in Japan by foreign lawyers.

As of 29 August 2020, revisions to the Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers ("**Foreign Lawyers Act**")⁴ will allow foreign lawyers expressly to act in so-called "International Mediation Cases"⁵ For a case to qualify as an "International Mediation Case," one or more of the following must apply:

⁴ An English translation of the Foreign Lawyers Act can be found at <http://www.japaneselawtranslation.go.jp/law/detail/?id=3584&vm=04&re=02>.

⁵ Such cases include civil conciliation cases and are limited to cases on disputes relating to civil contracts or transactions in which all of the parties are corporations, other associations or foundations, or individuals who have become parties to those civil contracts or transactions as a business or for a business.

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- Any of the parties have an address, a principal office or head office in a foreign state;
- More than 50% of the voting shares or equity interest of any of the parties are held by persons who have an address or a principal office or head office in a foreign jurisdiction; or
- The substantive law that applies to the dispute as agreed between the parties is not Japanese law.

In the above cases, foreign lawyers may act where the foreign lawyer is:

- A registered foreign lawyer in Japan ("*Gaikokuho-Jimu-Bengoshi*," literally meaning "registered foreign lawyer"); or
- Not a registered foreign lawyer in Japan, is practising outside Japan and is requested or undertakes in the foreign jurisdiction in which he or she practises to act on the case.

Other important revisions to the Foreign Lawyers Act include:

- Foreign lawyers will be allowed to act in a broader range of arbitrations due to a widening of the scope of what is considered an international arbitration; and
- Altering the requirements for foreign lawyers to become a registered foreign lawyer in Japan to enable easier qualification.

7. Conclusion

Throughout the world, international mediation continues to grow and the number of parties partaking in the process is ever increasing. Indeed, in a recent survey, 49% of respondents indicated that their preferred method of resolving cross-border disputes was arbitration in conjunction with ADR, e.g., mediation.⁶

Despite a historic tendency for Japanese parties to prefer "good faith consultation" to adversarial means of resolving disputes and conciliation steered by the courts continuing to play an important role for the resolution of disputes, Japanese parties have remained somewhat unfamiliar with international mediation.

The numerous steps taken in both the public and private sectors in Japan with respect to international mediation (as set out in this client alert), however, are likely to lead to an uptick in international mediations taking place in Japan. One would envisage such uptick might be particularly likely given the challenges presented by COVID-19 and the related increase in the number of disputes that require quick, efficient, flexible and cost-effective resolution.

If you would like to discuss any of the issues raised in this alert, please contact us.

⁶ See *2018 International Arbitration Survey: The Evolution of International Arbitration*, 2018, available at <http://www.arbitration.qmul.ac.uk/research/2018/>.