Baker McKenzie.

Dispute Resolution
Tokyo

Client Alert
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International Arbitration Update No. 17

Global arbitration-related updates for Japanese corporations

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Following our previous update on certain developments in the international arbitration space, this client alert will summarize a number of recent developments that may impact Japanese parties.

We will continue to collaborate closely with our global offices to provide updates from around the world that we view as potentially impacting Japanese corporations.

In this client alert, we will cover three topics germane to dispute resolution developments in the UK and Ireland, as well as international investment disputes.

1. England and Wales to introduce new arbitration law

England and Wales, home to London, the most preferred arbitral seat in the world, will introduce a revised arbitration law.[1]

The UK Law Commission, an independent body charged with ensuring that the laws of England and Wales are fit for purpose and up-to-date, has published its final report containing recommendations for reforms to the Arbitration Act 1996.

Following a consultation process which indicated that "root and branch reform" was neither needed nor wanted, the Commission recommended a small number of new initiatives and minor corrections.

Its recommendations include the following:

- A new rule providing that the law of the arbitration agreement is the law of the seat unless the parties expressly agree otherwise

  In the past, case law in England and Wales has been highly complex and created a level of uncertainty.[2] As such, this revision would provide much-needed certainty.

  For clarity and as drafted, the default rule will apply to all arbitrations commenced after the revised Act comes into force.

- A statutory duty of disclosure for arbitrators

  To date, there has been no codified duty on the part of arbitrators to disclose circumstances that may reasonably give rise to justifiable doubts as to their impartiality.

  The new Act will directly address this, confirming that arbitrators must disclose what they actually know and ought reasonably to know could give rise to justifiable doubts.

- Stronger arbitrator immunity around resignation and applications for removal

[1] Arbitration Bill - GOV.UK (www.gov.uk)
[2] e.g., *Enka v Chubb* [2020] UKSC 38.

The revisions will correct the challenges posed by the current law by ensuring that arbitrators are not liable for their resignation (unless the resignation is proved to be unreasonable) or for the costs of any application for their removal (unless they are proven to have acted in bad faith).

This change appears to seek to strike the right balance in terms of fairness for both arbitrators and parties.

- A new power of summary disposal

  This new power will enable claims to be dismissed on a summary basis if a party has “no real prospect of succeeding” on a claim, defense or issue.

  This process reflects the availability of certain remedies in litigation conducted in the courts of England and Wales.

- A revised framework for challenges on the basis that the arbitrator lacks substantive jurisdiction

  Presently, a party may challenge an award on the basis of its substantive jurisdiction, but this involves a full rehearing before a court.

  Under the new Arbitration Act, any challenge should be by way of review only and not a full rehearing.

In introducing the new Arbitration Act, the UK government aims to "clarify the law governing arbitration agreements, strengthen the courts’ supporting powers, and facilitate quicker dispute resolution."[3]

2. Ireland to allow third-party funding of international commercial arbitration

Third-party funding is where someone who is not involved in an arbitration provides funds to a party to that arbitration in exchange for an agreed return. Typically, the funding will cover the funded party's legal fees and expenses incurred in the arbitration.

The third-party funding market is now well-developed and subject to substantial investment. For example, in 2020, the global addressable market for TPF was around USD 11.2 billion.[4]

In Ireland, the Courts and Civil Law (Miscellaneous Provisions) Act 2023 was signed into law by the President of Ireland on 5 July 2022.

The legislation inserts a new section 5(A) into the Arbitration Act 2010 to allow third-party funding in international commercial arbitration and related mediation and court proceedings.

Previously, almost all third-party funding of disputes had been prohibited under the historic offenses and torts of "maintenance" and "champerty," which are widely considered to be outdated.

The new section 5A(4) allows the Minister of Justice to prescribe criteria for third-party funding contracts, including transparency in relation to funders and recipients.

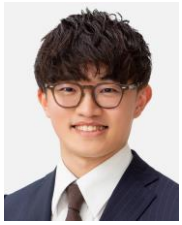
[3] Arbitration Bill - GOV.UK (www.gov.uk)
[4] Europe’s share of litigation funding market set to grow as ESG and human rights fuel cases, report finds - The Global Legal Post

For further information please contact

Yoshiaki Muto
Partner
+81 3 6271 9451
yoshiaki.muto@bakermckenzie.com

Takeshi Yoshida
Partner
+81 3 6271 9723
takeshi.yoshida@bakermckenzie.com

Dominic Sharman
Counsel
+81 3 6271 9496
dominic.sharman@bakermckenzie.com



Eitaro Hirose
Associate
+81 3 6271 9437
eitaro.hirose@bakermckenzie.com

3. UNCITRAL adopts Code of Conduct for Arbitrators in International Investment Disputes

An international investment dispute is a dispute between an investor from one contracting state to an international investment agreement to bring a claim against another contracting state in which it has made an investment (also known as the host state).[5]

In recent years, Japanese parties have brought several claims against the Kingdom of Spain in connection with renewable energy projects. Further, in 2023, Japan itself prevailed in the only claim it has been subject to — a claim brought by a Hong Kong party under the Hong Kong-Japan bilateral investment treaty.

During its 56th annual session in Vienna, UNCITRAL adopted the Code of Conduct for Arbitrators in International Investment Disputes. The development of the Code has been a joint project of the Secretariats of UNCITRAL and ICSID for the past six years. [6]

The Code does the following:

- Reinforces the duty of independence and impartiality
- Regulates the practice of double-hatting (i.e., acting as an arbitrator in one case and as legal counsel or an expert in another)
- Sets out specific disclosure requirements

The Code also addresses obligations related to confidentiality, reasonable fees and expenses and the roles and duties of tribunal assistants.

In terms of its application, the Code will apply to investment arbitration proceedings either by consent of the parties or as a requirement in the investment treaty under which the arbitration is commenced.

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

[5] Briefing European Parliamentary Research Service (europa.eu)
[6] UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013, UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration