SQUIRE PATTON BOGGS

Client Advisory on COVID-19

Disputes Update – Impact on Courts in Japan and in the US

April 24, 2020

Introduction

Coronavirus disease 2019 ("COVID-19") has changed daily business and personal life in many ways previously unforeseeable. Some have compared the pandemic to wartime. As companies deal with emerging issues, such as prolonged shutdowns, employees working from home, preparing virtual work environments and maintaining core business functions to meet their obligations, inevitably disputes will arise. However, the institutions designed to handle disputes, such as courts and dispute resolution centers have not been immune to COVID-19. Companies should be aware of the impact of COVID-19 on those institutions in order to protect their rights under the relevant jurisdictions laws, regulations and rules. This is particularly important for multinational companies that operate globally and may have claims arising under a multiplicity of laws.

This advisory focuses on the impact of the COVID-19 pandemic on two of the main institutions that resolve parties' private disputes: (a) the national court systems, including Japan's; and (b) commercial arbitration institutions.

1. The National Court Systems: What Are Some of the Ways National Courts Around the World, Including Japan's, Have Been Affected by the COVID-19 Pandemic?

Court Operations

Japan:

Following the Japanese government's declaration of a state of emergency covering Tokyo and other prefectures, the Tokyo District Court has adjourned most (if not all) civil hearings and court appearances for civil matters. Although the court remains open, and continues to accept filings, the court has limited its operations. Other courts, such as the Yokohama District Court in Kanagawa prefecture, which is also subject to the declaration, have also taken similar measures.

Information about the specifics of the courts' operations are generally not published to the public and no information is published regarding the specifics of pending matters. To obtain such information, a party or counsel must contact the court clerk. Accordingly, a party that is contemplating commencing litigation in Japan or that has a matter pending in a court located in a prefecture subject to the declaration should consult with Japanese counsel to ensure important deadlines, such as statute of limitations or prohibition periods, are met and claims and other rights are not inadvertently waived.

The Tokyo District Court's actions are just the latest in a global trend of courts adjusting to maintain operations during the COVID-19 pandemic. With daily changes occurring throughout the world, it is critical that parties communicate closely with local counsel to understand how the courts are operating where they have, or will have, pending matters. Companies should work closely with counsel to proactively manage litigation deadlines in light of the evolving pandemic, including working with opposing counsel and notifying the court early about any foreseen or anticipated changes that may be required due to COVID-19.

Other examples:

Other jurisdictions, such as the US, are making decisions on a court-by-court and a case-by-case basis. For example, on March 20, 2020, the US District Court for the Southern District of New York issued a standing order for COVID-19 protocols directing non-emergency civil case hearings to be held telephonically or by video, at the discretion of the individual judge.[1] By way of another example, the US District Court for the Central District of California issued an order on March 23, 2020, effective through May 1, 2020, that no civil hearings, other than emergency time-sensitive hearings, will go forward.[2] Most recently, the Supreme Court of the US announced on April 13, 2020, that it will hold oral arguments via teleconference for certain matters that had been scheduled in May.[3] A historic first for the Court known for abiding by tradition.

Gathering Evidence in Japan

The Japanese government has implemented varying degrees of restrictions on foreigners entering Japan, including prohibition of entry and self-quarantine requirements. Counsel may not be able to travel to Japan to gather evidence and meet with clients and witnesses. Companies should be prepared to arrange for alternative means to meet their needs to gather evidence and should consider building case schedules in view of likely delays and disruptions caused by COVID-19.

Taking deposition testimony of a resident of Japan is likely to be particularly difficult not only for travel restrictions but also due to disruptions of ordinary business at the US Embassy in Tokyo and the U.S. Consulate General in Osaka-Kobe, which are the only two locations where depositions may take place within Japan. As seasoned international litigants know, there are strict restrictions concerning the taking of deposition testimony of voluntary witnesses within the territory of Japan.

1 https://www.nysd.uscourts.gov/sites/default/files/2020-03/COVID%20Memorandum%20-%20FINAL.pdf

2 https://www.cacb.uscourts.gov/sites/cacb/files/documents/general-orders/USDC-Order-20-042.pdf

3 https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-13-20

Depositions, generally, may only take place at the US Embassy in Tokyo or the US Consulate General in Osaka in person and a special deposition visa is required for any non-Japanese person residing outside of Japan to attend a deposition. Additionally, where in normal times a work-around may be to have the deponent travel to a location without such restrictions, most countries have implemented border restrictions against persons travelling from Japan.

Parties and counsel should consider engaging counsel located locally in Japan to assist them in the jurisdiction where the case is pending to avoid visa and self-quarantine requirements. If depositions must take place in Japan, work closely with opposing counsel, the Court and the US Embassy to ensure depositions may still go forward within the court's pre-trial schedule.

International Service of Process

When a party commences litigation in Japan against a foreign domiciled defendant, the district court in which the complaint is filed serves process through the defendant's government. According to various treaties, including the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, to which Japan is a signatory. Generally, this process can take anywhere from three months to a year – even in normal times –depending on the method of service (e.g., consular service or central authority service). With the implementation of strict border controls and quarantine measures around the world and significant focus on emergency matters to address COVID-19 health issues, time to complete service is likely to be significantly impacted.

Parties with cases in Japan that require service of pleadings or other judicial documents should communicate closely with the district court to monitor the status of service of process and ensure their rights are preserved in the event that service cannot be completed within a prescribed period.

Statute of Limitations

While COVID-19 is disrupting some operations of certain courts Japan, it appears that even those courts continue to accept filings of new civil cases. Moreover, the Japanese government has not made provisions to extend or toll statute of limitations in view of the COVID-19 pandemic. A party that intends to file a claim under Japanese law in a Japanese court must, therefore, ensure that statutory limitations are met and claims are not inadvertently waived.

In some jurisdictions, more drastic approaches have been taken, such as suspending the statute of limitations and courts not accepting non-essential filings.[4] Other jurisdictions, particularly in areas most affected by COVID-19 may adopt similar measures.[5]

Companies with claims that may expire, either in Japan or in other jurisdictions affected by COVID-19 should work closely with their legal counsel to determine by when, where, and how to prosecute legal claims within the prescribed period.

2. Contractual Arbitration: Can International Commercial Arbitration Provide Effective Alternatives for Dispute Resolution?

Given the challenges that COVID-19 is imposing on national court systems, parties to disputes may wish to consider the alternative of international commercial arbitration to resolve their disputes. This section reviews certain core aspects of international commercial arbitration that may prove effective in this regard.

Wide Acceptance

An underlying premise of international arbitration is that the parties must have agreed that their dispute will be determined not in a court of law, but rather privately through binding arbitration. However, such agreement to arbitrate would be nothing without the willingness of court systems to accept and enforce parties' agreements to arbitrate and to recognize and enforce final arbitral awards duly rendered in such arbitrations. Without such acceptance and enforceability (that is, if parties could easily evade an agreement to arbitrate and/or courts were unwilling to recognize and enforce arbitral awards), arbitration would be a hollow shell and infrequently utilized.

Fortunately, virtually every civilized country recognizes the binding nature of an agreement to arbitrate, which promotes the typically valued public policy of relieving stress and congestion on the national court systems. Further, national courts accept that at an international level, parties may deem arbitration as providing a "level playing field", i.e., one in which neither side is considered as having a biased "home court" advantage through its local court system. In the US, for example, federal law codifies the binding nature of agreement to arbitrate and the validity of an arbitral award in the Federal Arbitration Act. Likewise, in Japan, the Arbitration Act (*Chusai-ho*) provides similar protections of the enforceability of arbitration agreements and the binding effect of arbitral decisions.

The strong public policy in favor of international arbitration is also reflected in the widely-adopted treaties on recognizing and enforcing international arbitral awards, namely The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention). Japan, the US, China and the UK are among the 163 signatories to the New York Convention. In fact, there are few developed countries that are not.

Flexibility

A fundamental hallmark of international arbitration is that it is "party driven". That is, the parties can decide, through their agreement to arbitrate, what institution, if any, will administer the arbitral proceedings, what rules to follow, what claims and disputes are to be arbitrated and which, if any, can or must be litigated in court, and similar aspects.

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4 Governor Cuomo of New York by Executive Order suspended New York state law-based statute of limitations on March 20, 2020 until April 19, 2020 (https://www.governor.ny.gov/news/no-2028-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency). Following the suspension, the Chief Administrative Judge of New York Courts announced that New York State courts will not accept non-essential papers (https://www.nycourts.gov/whatsnew/pdf/AO-78-2020.pdf) .

5 The California Judicial Council adopted emergency rules tolling statute of limitations in civil matters from April 6, 2020, until 90 days after the Governor of California declares the state of emergency is lifted. (https://jcc.legistar.com/View.ashx?M=F&ID=8234474&GUID=79611543-6A40-465C-8B8B-D324F5CAE349).

One ramification of arbitrations being a creation of the parties' agreement is that arbitration proceedings can and should be flexible. Parties can choose institutional administration that is relatively fulsome, such as the International Chamber of Commerce (ICC), which is based in Paris, has a long history of administering many large, very complex cases at any given time, has a well-developed set of Arbitration Rules that is widely copied by other institutions, and maintains a large and diverse pool of arbitrators.

Alternatively, if speed and simplicity are most necessary and desired, the parties can elect to use a streamlined administration with no institutional administration, known as "*ad hoc*" arbitration. In the latter case, the parties are typically responsible for selecting and appointing the arbitrator or tribunal themselves (although agreements for *ad hoc* arbitration still normally name a default institution to appoint the arbitrator or tribunal if the parties cannot do so). Once appointed, the arbitrator or tribunal then both conducts and administers the proceedings. Exemplary rules exist for parties to adopt, if they choose, for *ad hoc* arbitrations, the most popularly adopted being the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, the International Institute for Conflict Prevention and Resolution (CPR) and the International Non-Administered Arbitration Rules.

Further, parties are largely free to modify or amend institutional rules that they adopt. Thus, for example, they may specify shorter, or longer, time frames for the various stages and steps in the proceedings, including outer limits on timing for final hearings and issuance of awards.

Ability to Constrain and Define Allowable Pre-Hearing Discovery

Along with the ability to determine the timetable for the arbitral proceedings, the parties can specify (either through their choice of institutional rules to be applied or by specifying directly in their agreement to arbitrate) the amount of pre-hearing informational exchanges (which, in litigation is referred to as "discovery"). At a high level, there are typically far fewer informational exchanges in an international arbitration proceeding compared to pre-trial discovery in, say, a US court case. However, in a given business or commercial context, the parties may agree that at least some amount of informational exchange would benefit efficient and fair arbitral proceedings, and an arbitrator or tribunal would generally attempt to follow and give effect to any specified agreement by the parties in this regard.[6]

Remote Hearings

By definition, international arbitration proceedings typically involve parties that may be located in different countries – sometimes many different countries. Likewise, arbitral tribunals may be constituted by individual arbitrators that live in different countries. The arbitral institution administering the proceeding (if not *ad hoc*) may be headquartered in a location where none of the parties or the arbitrators are located.

For these reasons, international arbitration rules typically provide for electronic transmission of submissions, telephonic hearings on status conferences or interim applications, and, where required, due to logistics or other reasons, even remote video-conferenced substantive hearings. Given the drastic impact that the COVID-19 pandemic has had, and continues to have, on national court systems, this aspect of international arbitration may be of interest where essentially having the resolution of a business dispute through the courts cannot wait until the COVID-19 pandemic passes.

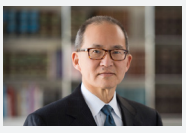
In this regard, it may be worth noting that the requirement that parties have voluntarily agreed to arbitrate their disputes does not mean they need to have done so as part of the underlying transaction now in dispute. Parties can agree, after the fact, to submit their dispute to binding arbitration, even where there is already pending court litigation.[7]

Summary

It is clear that the COVID-19 pandemic is wreaking havoc and creating almost unprecedented strains on national court systems. Various countries are dealing with this havoc and these strains in different ways and it is crucially important for entities that find themselves involved in such court proceedings to be vigilant in protecting their rights and interests in light of such exigent circumstances. In addition, it may be worth considering whether a business dispute, whether nascent, existing, or even already in litigation, might most effectively and efficiently be resolved during these turbulent times through international arbitration.

Our Tokyo office has a number of experienced disputes lawyers. If we can be of assistance to you in dealing with these issues, please let us know.

Authors



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6 Many arbitration agreements adopt the International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration (https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx).

7 In such a case, the parties would typically jointly request that the court proceedings be stayed, pending alternative arbitration proceedings. Given the public policy of relieving over-congestion of court resources mentioned above, most courts readily agree to such a request.

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