COUNTRY COMPARATIVE GUIDES 2021

The Legal 500 Country Comparative Guides

Japan

INTERNATIONAL ARBITRATION

Contributing firm

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This country-specific Q&A provides an overview of international arbitration laws and regulations applicable in Japan.

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JAPAN
INTERNATIONAL ARBITRATION

1. What legislation applies to arbitration in your country? Are there any mandatory laws?

The Arbitration Act (Act No. 138 of 1 August 2003) (the "**Arbitration Act**") regulates both domestic and international arbitral procedures seated in Japan. In addition, specific rules on court proceedings relating to arbitration are found in the Supreme Court Rules on Procedures of Arbitration-Related Cases (Rules of the Supreme Court No. 27 of 26 November 2003).

Arbitration is a dispute resolution mechanism based on the principle of party autonomy and therefore most matters relating to the conduct of arbitration may be agreed between the parties. However, as set forth in the proviso of Article 26(1), there are provisions in the Arbitration Act under which agreements between the parties may not prevail based on public policy; these include, for example, equal treatment of all parties and rights to full opportunity for a party to present its case (Article 25 of the Arbitration Act).

2. Is your country a signatory to the New York Convention? Are there any reservations to the general obligations of the Convention?

Yes, Japan is a signatory to the New York Convention (the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958), and reserves the principle of reciprocity.

3. What other arbitration-related treaties and conventions is your country a party to?

Japan is a party to the Geneva Protocol on Arbitration Clauses 1923, the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).

Japan is also a party to a number of bilateral treaties including provisions for recognition and enforcement of international arbitral awards, such as the Treaty of Friendship, Commerce and Navigation between Japan and the United States of America (1953), the Treaty of Commerce and Navigation between Japan and Great Britain (1962), Japan-China Trade Agreement (1974), and Japan Germany Commerce and Navigation Treaty (1982).

4. Is the law governing international arbitration in your country based on the UNCITRAL Model Law? Are there significant differences between the two?

Yes, the Arbitration Act is mostly based on the UNCITRAL Model Law 1985. However, it deviates from the model law for some matters, including special treatment of disputes relating to consumers or individual employees (Article 3 and Article 4 of the Supplementary Provisions to the Arbitration Act), and authority for arbitrators to assist settlement negotiations based on written agreement by all the parties (Article 38 of the Arbitration Act).

See also Question 5 and 8.

5. Are there any impending plans to reform the arbitration laws in your country?

Yes, the Subcommittee on Arbitration-Related Legislation of the Legislative Council is currently in the process of deliberating revisions to the Arbitration Act to comply with amendments in UNCITRAL Model Law 2006 and reflect recent changes of circumstances surrounding arbitration. The key parts of the proposed amendments published by the subcommittee on 5 March 2021 ("**Proposed Amendments**") are as follows.

Interim measures and preservative measures

Major amendments are going to be made to interim and preservative measures. Article 24 of the current

Arbitration Act provides an arbitral tribunal with broad discretion to order necessary interim or preservative measures, but the article does not explicitly identify specific measures that it can render nor conditions for issuing such measures. For the sake of foreseeability, the Proposed Amendments suggest providing for conditions for ordering those interim or preservative measures based on Article 17A of the UNCITRAL Model Law 2006. The Proposed Amendments also specify four categories of such measures, largely based on Article 17 of the UNCITRAL Model Law 2006, as follows:

- maintaining the *status quo* of the subject matter of the civil dispute referred to in the arbitral proceedings or restoring a situation to the former *status quo* if it is changed;
- preventing actual or imminent damage or obstruction of the smooth progress of the arbitral proceedings, or stopping action which will likely cause such damage or obstruction;
- preserving assets necessary for the satisfaction of arbitral awards; and
- preserving evidence that may be necessary for the resolution of the civil dispute referred to in the arbitral proceedings.

In addition, interim or preservative measures ordered by an arbitral tribunal are not enforceable by Japanese courts under the current Arbitration Act. Therefore, the Proposed Amendments recommend to give enforceability to those measures and thus suggest to provide for conditions and procedures concerning recognition and enforcement of such tribunal-ordered measures by Japanese courts, with reference to Article 17H and Article 17I of the UNCITRAL Model Law 2006.

On the other hand, the Proposed Amendments do not include recommendations for recognition and enforcement of interim or preservative measures ordered by emergency arbitrators. Under the arbitration rules of major arbitral institutions, interim or preservative measures ordered by emergency arbitrators are not binding on the arbitral tribunals and the arbitral tribunals may modify such measures. Therefore, the Subcommittee on the Arbitration-Related Legislation is suggesting that the necessity and appropriateness of granting enforceability to such measures ordered by emergency arbitrators should carefully be discussed.

Also, the Proposed Amendments do not suggest *ex parte* procedures for ordering interim or preservative measures by arbitral tribunals.

Requirement for arbitration agreement to be in writing

There is some uncertainty as to when the "in writing" requirement of Article 13(2) of the Arbitration Act is satisfied – for example, it is not clear whether a voice recording of an arbitration agreement is acceptable or not. Based on Article 7(3), Option I, of the UNCITRAL Model Law 2006, the Subcommittee on the Arbitration-Related Legislation proposes an amendment to read: "[a]n arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement has been concluded orally, by conduct, or by other means".

Procedures of arbitration-related cases

Under the Proposed Amendments, the Tokyo District Court or the Osaka District Court may exercise additional jurisdiction over cases where a defendant company has its principal place of business in Japan. The extra jurisdiction of those courts will be given in addition to the jurisdiction of the courts currently rendered by the Arbitration Act, in order to further strengthen the arbitration related experience of the Tokyo and Osaka District Courts.

Also, currently all documentary evidence needs to be translated into Japanese language for arbitration-related lawsuits before Japanese courts. Under the Proposed Amendments, this burden of translation will be eliminated and the parties will be allowed to submit documentary evidence, including a copy of the arbitral award written in a non-Japanese language, i.e. in its original language, if the court considers it appropriate after hearing the views of the parties.

6. What arbitral institutions (if any) exist in your country? When were their rules last amended? Are any amendments being considered?

Major arbitral institutions in Japan and their latest arbitration rules are as follows:

- The Japan Commercial Arbitration Association ("**JCAA**") – the Commercial Arbitration Rules 2021 ("**JCAA Rules**"), Interactive Arbitration Rules 2021, both effective 1 July, 2021;
- The Japan Intellectual Property Arbitration Center – the Rules for Arbitral Proceedings last amended 1 April, 2014;
- The International Arbitration Center in Tokyo – the IACT Arbitration Rules adopted on 1 September, 2018;
- Japan Anti-Doping Disciplinary Panel – the Sports Arbitration Rules for Doping Disputes last amended on 1 January, 2021;

- Japan Sports Arbitration Agency – Sports Arbitration Rules effective on 1 April, 2021; and
- The Japan Shipping Exchange, Inc. (the Tokyo Maritime Arbitration Commission (TOMAC) – the Rules of Arbitration of Tokyo Maritime Arbitration Commission (TOMAC) of The Japan Shipping Exchange, Inc. effective 1 November 2014.

JCAA is currently the leading arbitral institution in Japan. The Japan International Dispute Resolution Center (JIDRC) was established in February 2018 as an agency to contribute to the furthering of international arbitration and international mediation in Japan, and is actively promoting international arbitration in Japan.

7. Is there a specialist arbitration court in your country?

No, there is no special arbitration court in Japan.

8. What are the validity requirements for an arbitration agreement under the laws of your country?

The Definition of the Arbitration Agreement

For an arbitration agreement to be valid, it first needs to fall under the definition of arbitration agreement. Article 2(1) of the Arbitration Act provides that arbitration agreement means an agreement to refer the resolution of all or part of civil disputes which have already arisen or which may arise in the future in respect of a certain legal relationship to one or more arbitrators, and to accept the award made therefor. As such, the parties must agree that one or more third parties will hear certain legal disputes and that the parties will accept a decision made by such third parties as final. It is not required that an arbitration agreement sets forth an arbitral institution (i.e. *ad hoc* arbitration is acceptable), governing law, or seat of arbitration.

Requirement of Arbitrability

Disputes subject to an arbitration agreement must be arbitrable. In this regard, Article 13(1) of the Arbitration Act provides that except when otherwise stipulated in laws and regulations, an arbitration agreement is valid only where the subject thereof is a civil dispute that may be settled between the parties.

Accordingly, some disputes are excluded from the scope of arbitrable cases. For example, disputes over divorce or dissolution of an adoptive relationship are explicitly excluded from the subject of arbitration agreement. Also, an arbitration agreement concerning a dispute between an individual employee and an employer over working conditions and other matters concerning a labor relationship is invalid, and an arbitration agreement for a future dispute between a consumer and a business operator may be terminated by the consumer (Article 3 and 4 of the Supplementary Provisions of the Arbitration Act).

Requirement for arbitration agreement to be in writing

An arbitration agreement must be in writing, such as in the form of a document signed by all the parties, letters or telegrams exchanged between the parties or other documents (Article 13(2) of the Arbitration Act).

See also Question 5.

9. Are arbitration clauses considered separable from the main contract?

Yes. Article 13(6) of the Arbitration Act provides for the principle of the separability of an arbitration agreement. Accordingly, an arbitration clause is generally treated as an agreement independent of the main contract. However, in limited circumstances, for example where a party enters into a main contract under duress, not only the terms in the main contract but also the arbitration agreement stipulated therein would be considered invalid or voidable.

10. Do the courts of your country apply a validation principle under which an arbitration agreement should be considered valid and enforceable if it would be so considered under at least one of the national laws potentially applicable to it?

No. the courts in Japanese do not apply the validity principle.

11. Is there anything particular to note in your jurisdiction with regard to multi-party or multi-contract arbitration?

The Arbitration Act does not provide for a proceeding for joinder or consolidation of multiple claims and parties. Since arbitration is a dispute resolution mechanism based on agreement between the parties, an arbitral tribunal in principle has no authority to order third

parties to become involved in the case in hand or to order the consolidation of relevant cases.

On the other hand, Article 57 of the JCAA Rules provides for conditions for consolidation. Where a party to an arbitral proceeding requests consolidation in writing and the arbitral tribunal of the proceeding finds it necessary, the arbitral tribunal may consolidate and hear the arbitral proceeding pending before it with another arbitral proceeding for which no arbitral tribunal has been constituted, if:

i. the claims under the pending arbitral proceeding and the arbitral proceeding to be consolidated arise under the same arbitration agreement, and if the parties are different between those proceedings, the parties to the arbitral proceeding to be consolidated so agree in writing; or
ii. the parties to those proceedings are identical and:
    a. the legal or factual issues are identical or of the same kind;
    b. the arbitration agreements based on which those arbitral proceedings are filed provide for arbitration under the JCAA commercial arbitration rules or at the JCAA; and
    c. the arbitral proceedings are capable of being conducted in a single proceeding, taking into account the places of arbitration, the number of arbitrators, languages of the arbitration and other issues set forth in the arbitration agreements.

Arbitral proceedings may be consolidated even after arbitral tribunals have been constituted for both of the proceedings, if all the parties and all the arbitrators agree to such consolidation.

Multi-party arbitration agreements are enforceable under the Arbitration Act. With regard to appointment of arbitrators, Article 17(4) of the Arbitration Act provides that if there are three or more parties to the case, arbitrators shall be appointed based upon the agreement of all the parties, and if the parties fail to reach such agreement, the court shall appoint the arbitrators at the request of a party.

12. In what instances can third parties or non-signatories be bound by an arbitration agreement? Are there any recent court decisions on these issues?

In principle, the effect of an arbitration agreement is limited to the parties or signatories of the agreement, and does not extend to third parties or non-signatories.

However, there are some exceptions to this principle.

First, since a general successor of a party to an arbitration agreement (for example, where a company absorbs another as part of a merger where the company that was absorbed was a party to an arbitration agreement) may be deemed to be the same party, the arbitration agreement shall be extended to the general successor, unless there is a contrary agreement between the original parties to the arbitration agreement or the rights and obligations subject to the succession are personal.

Second, it is also generally understood that the effect of the arbitration agreement signed by a representative of an association or foundation without its own rights and abilities (*Kenrinoryoku-naki-shadan*) extends to their members.

Third, if a representative or officer of a corporation enters into or performs a contract containing an arbitration agreement on behalf of the corporation (i.e. the corporation is the party to the contract), such representative or officer might also be bound by the arbitration agreement. There is a lower court precedent which held that where a Japanese corporation and a British corporation entered into an agency contract including an arbitration clause, the arbitration clause should be applied to the president and directors of the UK corporation as well as to the UK corporation itself. The main reasoning of the court was that it was desirable to judge the appropriateness of the claims against the president, directors and the corporation in a unified manner.

13. Are any types of dispute considered non-arbitrable? Has there been any evolution in this regard in recent years?

As a general explanation, please see Question 8.

There is an increasing trend to admit arbitrability for a broad range of civil disputes. For instance, although a dispute concerning the validity of a patent itself is normally considered to be non-arbitrable, basically an arbitral tribunal may determine the validity of the patent, if it is necessary to resolve the referred dispute concerning the patent license agreement. Also, it is generally accepted that claims for injunctions and for damages arising from violation of the Act on Prohibition

of Private Monopolization and Maintenance of Fair Trade (Anti-Monopoly Act) are arbitrable and may be the subject of arbitration.

14. Are there any recent court decisions in your country concerning the choice of law applicable to an arbitration agreement where no such law has been specified by the Parties?

Where an arbitration agreement does not explicitly stipulate a governing law, the Tokyo District Court decision of 19 June, 2020 (2018 (*Wa*) No.10883) applied Article 7 of the Act on General Rules for Application of Laws and held that as a starting point, the governing law of the arbitration agreement should be determined based on the parties' agreement. The court held that the parties to the arbitration agreement, the plaintiff and a U.K. registered company, had implicitly agreed that the law applicable to the arbitration agreement should be the law of England & Wales, because the governing law of the main contract was English law and the seat of arbitration was the United Kingdom. The district court made clear that it was following the decision of the Supreme Court of Japan of 4 September 1997 (*Minshu* vol. 51 No.8 p.3657).

15. How is the law applicable to the substance determined? Is there a specific set of choice of law rules in your country?

The parties to an arbitration proceeding may agree on the substantive law applicable to the case (Article 36(1) of the Arbitration Act). If the parties designate the law of a state to be applied by an arbitral tribunal, such designation would be deemed as referring to the substantive law rather than conflict of law rules of that state, unless agreed otherwise by the parties.

If there is no such agreement between the parties, the arbitral tribunal will apply the substantive law of the state with which the civil dispute subject to the arbitral proceedings is most closely connected (Article 36(2) of the Arbitration Act).

16. Have the courts in your country applied the UNIDROIT or any other transnational principles as the substantive law? If so, in what circumstances have such principles been applied?

No, we are not aware of any court precedents which applied the UNIDROIT Principles of International Commercial Contracts or any other transnational principles as legally binding principles. However, if the parties of a contract so agree, provisions in UNIDROIT or other transnational principles may be incorporated into the contract as contractual provisions.

17. In your country, are there any restrictions in the appointment of arbitrators?

The Arbitration Act does not impose any restrictions concerning the qualifications of arbitrators. In particular, there are no nationality or citizenship requirements in respect of appointment of arbitrators, unless otherwise agreed by the parties. An arbitrator does not have to be legally qualified, and it is not unusual in Japan for a law professor to serve as an arbitrator.

If the candidate arbitrators have doubts over their own impartiality or independence, they must disclose the relevant information or circumstances (Article 18(3) and (4) of the Arbitration Act). Practitioners in Japan often refer to the IBA Guidelines on Conflicts of Interest in International Arbitration when considering impartiality and independence.

18. Are there any default requirements as to the selection of a tribunal?

Normally arbitration rules of an arbitral institution agreed by the parties govern the procedures for selecting a tribunal (Article 17(1) of the Arbitration Act). The court will appoint arbitrators at the request of a party if either party fails to comply with the agreed process for appointment of its arbitrator (Article 17(5) of the Arbitration Act).

In cases where the parties agree on neither an arbitral institution nor a method for appointment of arbitrators, then if there are two parties and three arbitrators are requested, the parties will each appoint one arbitrator, and the two arbitrators appointed by the parties will then appoint the third arbitrator (Article 17(2) of the Arbitration Act).

Should a party fail to appoint an arbitrator within 30 days of receipt of a request to appoint an arbitrator by the other party who has already appointed an arbitrator, the court must appoint the arbitrator at the request of that other party. If the two arbitrators appointed by the parties fail to appoint the third arbitrator within 30 days of their appointment, the court must appoint the third arbitrator at the request of either party (Article 17(2) of the Arbitration Act).

If there are two parties and one arbitrator is requested, the court will appoint the arbitrator at the request of a party when the parties failed to reach an agreement for appointment of the sole arbitrator (Article 17(3) of the Arbitration Act). If there are three parties or more, the court will appoint arbitrator(s) at the request of a party (Article 17(4) of the Arbitration Act).

19. Can the local courts intervene in the selection of arbitrators? If so, how?

Please see Question 18.

20. Can the appointment of an arbitrator be challenged? What are the grounds for such challenge? What is the procedure for such challenge?

A party may challenge the appointment of an arbitrator if (a) the arbitrator does not meet the qualifications agreed by the parties, or (b) there is reasonable doubt over the impartiality or independence of the arbitrator (Article 18(1) of the Arbitration Act).

The parties may agree on procedures for challenging the appointment of arbitrators (Article 19(1) of the Arbitration Act). In the absence of such agreement, the arbitral tribunal will make a decision on the challenge at the request of a party (Article 19(2) of the Arbitration Act). In such a case, a party that intends to challenge the appointment must submit to the arbitral tribunal a written application within 15 days of becoming aware of (i) the constitution of the arbitral tribunal or (ii) the existence of any grounds for the challenge, whichever comes later (Article 19(3) of the Arbitration Act).

If the challenge is dismissed, the party that made the challenge may file an application to challenge the appointment of the arbitrator with the court within 30 days of receipt of notice of the decision on the challenge. If the court rejects this challenge then no further appeal to a higher court is available for any party (Article 7 of the Arbitration Act). This is so that the dispute over the appointment of the arbitrator may be revolved swiftly.

21. Have there been any recent developments concerning the duty of independence and impartiality of the arbitrators

An important Supreme Court decision was rendered on 12 December 2017 (*Minshu*, Vol. 71, No. 10, p. 2016). In that case, an arbitral award was rendered by an arbitral tribunal, made up of a panel of three arbitrators, including a partner from the Singapore office of an international law firm (the "**Arbitrator**"), in relation to a JCAA arbitration among U.S. corporations X1 and X2, and Japanese corporation Y1 and Singapore corporation Y2. An application for setting aside the arbitral award was filed on the grounds that the Arbitrator failed to disclose the fact that a colleague at the San Francisco office of the same international law firm had acted as counsel for an affiliate company of Y1 in respect of a class action in the United States ("**Fact of Potential Conflict**").

In relation to the legal issue of whether the Arbitrator breached the duty of disclosure under Article 18(4) of the Arbitration Act, the Supreme Court of Japan decided as follows:

- The abstract advance disclosure submitted by the Arbitrator shall not be regarded as disclosure of the Fact of Potential Conflict – the Arbitrator's written statement upon his appointment as the arbitrator that an attorney at his law firm might in the future advise or represent the parties to the arbitration and/or their affiliated companies in relation to cases unrelated to the arbitration at issue, was not sufficient disclosure;
- The duty to disclose is ongoing in nature and the Arbitrator assumed the duty of disclosure for facts concerning his impartiality or independence until the end of the arbitral proceeding, irrespective of requests by a party; and
- The Arbitrator must disclose to the parties not only facts that he was aware of, but also what could usually be found by a reasonable investigation into the existence or non-existence of the facts relating to his impartiality and independence.

The case was remanded to the Osaka High Court for further factual examination and the High Court decided on 11 March 2019 that the Arbitrator did not breach the duty of disclosure under Article 18(4) of the Arbitration Act.

22. Have there been any recent decisions in your concerning arbitrators' duties of disclosure, e.g., similar to the UK Supreme Court Judgment in Halliburton v Chubb?

Please see Question 21.

23. What happens in the case of a truncated tribunal? Is the tribunal able to continue with the proceedings?

Article 22 of the Arbitration Act allows the parties to agree on a method to fill a vacancy when the duties of an arbitrator are terminated. If there is no such agreement, the same method of appointment used for the previous arbitrator will be adopted for appointment of a successor arbitrator. The tribunal will continue with the proceedings upon such appointment.

On the other hand, under Article 37 of the JCAA Rules, where an arbitrator ceases to perform his or her duties after the closing of the arbitral proceedings but before an arbitral award is rendered, the arbitral tribunal may render an arbitral award without a substitute arbitrator being appointed, if the JCAA, after giving the remaining arbitrators and the Parties an opportunity to comment, considers it appropriate.

24. Are arbitrators immune from liability?

The Arbitration Act does not include provisions for immunity of arbitrators. It is generally understood that some liabilities of arbitrators may be exempted but in light of public policy arbitrators will likely be liable for their intentional acts or acts of gross negligence even if the arbitration agreement has a stipulation for immunity for such liability.

In this regard, Article 13 of the JCAA Rules provide for immunity for arbitrators, setting out that no arbitrators shall be liable for any act or omission in connection with the arbitral proceedings unless such act or omission is shown to constitute willful misconduct or gross negligence.

25. Is the principle of competence-competence recognized in your country?

Yes. The principle of competence-competence is recognized in Japan. An arbitral tribunal may address issues of whether its authority is legitimate (Article 23(1) of the Arbitration Act). If the arbitral tribunal decides that it has jurisdiction in an independent decision made prior to an arbitral award, a party may still ask a court for judicial review of that decision as long as the party files such a petition with the court within thirty days from the receipt of that decision although, such judicial review does not necessarily interrupt the arbitral procedure (Article 23(5) of the Arbitration Act).

26. What is the approach of local courts towards a party commencing litigation in apparent breach of an arbitration agreement?

Pursuant to Article 14(1) of the Arbitration Act, if the defendant requests so, Japanese courts must dismiss the litigation without prejudice based on the existence of the arbitration agreement, except where:

i. the arbitration agreement is invalid due to nullity, rescission or for any other reasons;
ii. it is impossible to carry out an arbitration procedure based on the arbitration agreement; or
iii. the request was made after the party making the request presented oral arguments on the merits of its case or made statements on the merits in preparatory proceedings.

27. How are arbitral proceedings commenced in your country? Are there any key provisions under the arbitration laws relating to limitation periods or time bars of which the parties should be aware?

Unless otherwise agreed by the parties, arbitral proceedings commence when one party gives the other party notification of the arbitral proceeding (Article 29(1) of the Arbitration Act). If, however, the party files for arbitration with the JCAA, Article 14(6) of the JCAA Rules provide that the proceedings shall be deemed to have commenced when the Request for Arbitration is received by the JCAA.

Commencement of arbitral proceedings postpones the expiry of, and renews, the prescription period, unless the arbitral proceedings are terminated without an arbitral award (Article 29(2) of the Arbitration Act).

28. In what circumstances is it possible for a state or state entity to invoke state immunity in connection with the commencement of arbitration proceedings?

When the defense of state immunity is invoked in arbitral proceedings concerning disputes on commercial transactions, state immunity in some cases may be deemed to have been waived by having agreed to the arbitration agreement.

Also, the Act on the Civil Jurisdiction of Japan with respect to a Foreign State, etc. (the "**Civil Jurisdiction Act**") provides, with respect to a written arbitration

agreement relating to a commercial transaction between a foreign state and another state's natural person or entity, that a foreign state shall not be allowed to raise the state immunity defense in court proceedings in relation to the existence or non-existence or validity of the arbitration agreement or the arbitration proceeding based on the arbitration agreement, unless the parties otherwise agree in writing (Article 16).

It should also be separately agreed that property held by a state or state entity is subject to civil execution in order to avoid difficulty in the phrase of enforcement of arbitral awards (Article 17(1)(ii) of the Civil Jurisdiction Act).

29. What happens when a respondent fails to participate in the arbitration? Can the local courts compel participation?

The respondent must state its defense with respect to claims made by the claimant within the period determined by the arbitral tribunal (Article 31(2) of the Arbitration Act). If the respondent fails to provide a defense, the arbitral tribunal will continue the arbitral proceedings, unless otherwise agreed by the parties (Article 33(2) of the Arbitration Act). If the respondent fails to appear at an oral hearing or to submit required documentary evidence, then, unless agreed otherwise by the parties or the respondent has reasonable grounds for failure to do so, the arbitral tribunal may render an arbitral award based upon the evidence that has been presented to it up to that time (Article 33(3) of the Arbitration Act).

30. Can third parties voluntarily join arbitration proceedings? If all parties agree to the intervention, is the tribunal bound by this agreement? If all parties do not agree to the intervention, can the tribunal allow for it?

The Arbitration Act is silent on joinder. Although it would be decided on a case-by-case basis, even if all parties agree to the joinder, the arbitral tribunal would still be able to deny the joinder if the tribunal finds reasonable grounds to do so. If all parties do not agree to the joinder, the arbitral tribunal will not be able to allow for the joinder.

In this regard, the JCAA Rules allow third-party participation and the joinder of parties in certain conditions, such as, for example, when all claims are made under the same arbitration agreement or all parties and the third party agreed in writing to the joinder (Article 56 of JCAA Rules). Even when the requirement under the JCAA Rules is met, the arbitral tribunal may deny joinder if the arbitral tribunal finds it inappropriate due to expected delay in the arbitral proceedings or any other reasonable grounds (Article 56(5) of the JCAA Rules).

Issues regarding the participation of a third party are in practice resolved through consultation and agreement among the parties, the third party and the arbitrators based on the specific circumstances.

31. Can local courts order third parties to participate in arbitration proceedings in your country?

The Arbitration Act does not have provisions on this issue, but local courts would not have the power to compel the third parties to participate in the arbitration proceedings, since the third parties are not the party to the arbitration agreements.

32. What interim measures are available? Will local courts issue interim measures pending the constitution of the tribunal?

Article 24(1) of the Arbitration Act gives the arbitral tribunal power to order any party, upon the request of another party, to take such interim or preservative measures as the arbitral tribunal may consider necessary for the subject matter of the dispute, unless otherwise agreed by the parties. The arbitral tribunal may also order any party to provide appropriate security in connection with those interim or preservative measures (Article 24(2) of the Arbitration Act).

Before or during an arbitral proceeding, a party may file a court petition for a provisional order with regard to a civil dispute that may be the subject of the arbitration agreement (Article 15 of the Arbitration Act). The Arbitration Act does not include procedures for specific interim measures and these are handled in accordance with the Civil Preservation Law (Law No. 91 of 1989).

The JCAA Rules set out detailed interim measures that the arbitral tribunal may order, subject to certain conditions being satisfied; these include appointment of an emergency arbitrator in urgent situations (Article 71 through 79 of the JCAA Rules).

Under the current Japanese law, interim measures issued by arbitral tribunals are not enforceable in Japanese courts.

See also Question 5 for the plan for amendments.

33. Are anti-suit and/or anti-arbitration injunctions available and enforceable in your country?

Although the interim or preservative measures ordered by arbitral tribunals are limited to the ones necessary for the subject matter of the dispute, given the broad discretion under Article 24 of the Arbitration Act, the arbitral tribunal will be able to issue an anti-suit injunction. However, it is not enforceable by local courts, and even under the Proposed Amendments, it has been pointed out that enforceability of anti-suit injunction needs to be judged on a case-by-case basis. See Question 5 and 32.

On the other hand, the availability of anti-arbitration injunctions by local courts is still under discussion.

34. Are there particular rules governing evidentiary matters in arbitration? Will the local courts in your jurisdiction play any role in the obtaining of evidence? Can local courts compel witnesses to participate in arbitration proceedings?

Generally, the arbitral tribunal has the power to carry out the arbitral procedure in such a manner as it finds appropriate, unless otherwise agreed by the parties. Such power includes determination of the admissibility of evidence, necessity of examination, and weight of evidence (Article 26 of the Arbitration Act). The IBA Rules on the Taking of Evidence in International Commercial Arbitration are recognized as the primary guidelines used for arbitrators in Japan.

The arbitral tribunal, or a party who has acquired consent from the arbitral tribunal, may request court assistance in taking evidence pursuant to the Code of Civil Procedure, unless otherwise agreed by the parties. The taking of evidence can include examination of witnesses and experts, production of documents, the commission of an examination, and inspection (Article 35 of the Arbitration Act). The Code of Civil Procedure governs actual procedures and the effects of court orders. Based on permission by the presiding judge, the arbitrators may ask factual witness and expert witnesses questions (Article 35(5) of the Arbitration Act).

35. What ethical codes and other professional standards, if any, apply to counsel and arbitrators conducting proceedings in your country?

There are no special ethical rules that are applicable to counsel or arbitrators in international arbitrations in Japan.

Some arbitration practitioners in Japan do take into consideration the IBA Guidelines on Party Representation in International Arbitration. The Arbitration Act does require arbitrators to be impartial and independent (Article 18(1)(ii) of the Arbitration Act) and provides for criminal offences relating to bribes to arbitrators (Articles 50 to 55 of the Arbitration Act). Also, the Japan Association of Arbitrators issued the Code of Ethics for arbitrators in 2008.

36. In your country, are there any rules with respect to the confidentiality of arbitration proceedings?

The Arbitration Act is silent on the confidentiality of information regarding arbitral proceedings. However, in practice, binding confidentiality obligations are generally incorporated in arbitration agreements. In addition, the rules of most arbitration organizations expressly require that arbitral proceedings and records be kept confidential from the public (e.g., Article 42 of JCAA Rules).

37. Are there any recent decisions in your country regarding the use of evidence acquired illegally in arbitration proceedings (e.g. 'hacked evidence' obtained through unauthorized access to an electronic system)?

We are not aware of any such recent decisions.

38. How are the costs of arbitration proceedings estimated and allocated?

The Arbitration Act has only generic provisions on fees and no specific fee structure is stipulated by it. The parties may agree on how to apportion the cost of the arbitration procedure, including legal fees, between them (Article 49(1) of the Arbitration Act).

If the parties agree on arbitration before the JCAA, its website provides automatic calculation of the arbitration costs based on rules, number of arbitrators and the amount of the claim (https://www.jcaa.or.jp/en/arbitration/costs.html). The arbitral tribunal may apportion the costs of the arbitration, including reasonable legal fees of counsel, between the parties, taking into account the parties'

conduct throughout the course of the arbitral proceedings, the determination on the merits of the dispute, and any relevant circumstances (Article 80(2) of the JCAA Rules). It is generally recognized that a large number of arbitral awards under the JCAA Rules have adopted the principle of "costs follow the event".

In the absence of agreement, each party must bear its own costs in relation to the proceedings (Article 49(2) of the Arbitration Act); the unsuccessful party is not obligated to pay the successful party's costs.

39. Can pre- and post-award interest be included on the principal claim and costs incurred?

This will be determined based on the applicable substantive law. Under Japanese law, depending on facts of the case, it is possible to grant pre- and post-award interest on the principal claim. The current statutory interest rate is 3 % per annum for both commercial and civil claims.

40. What legal requirements are there in your country for the recognition and enforcement of an award? Is there a requirement that the award be reasoned, i.e. substantiated and motivated?

An arbitral award has the same effect as a final and binding judgment in Japan (Article 45(1) of the Arbitration Act). The arbitral award becomes automatically binding unless it falls under one of the items set forth in Article 45(2) of the Arbitration Act.

An arbitral award must be reasoned; provided, however, that such requirement does not apply to cases where the parties have agreed otherwise (Article 39(2) of the Arbitration Act).

In order to enforce an arbitral award in Japan, a party who seeks enforcement must file an application with the competent court for an execution order. Such order will be granted unless an exception under Article 45(2) of the Arbitration Act is found by the court (Article 46(7) to (9) of the Arbitration Act). Article 45(2) of the Arbitration Act sets out substantially the same legal requirements for enforcement as those found under the New York Convention.

41. What is the estimated timeframe for the recognition and enforcement of an award? May a party bring a motion for the recognition and enforcement of an award on an ex parte basis?

It will typically take several months for the enforcement procedures at the court of first-instance to acquire an execution order. If a party attempts to enforce an arbitral award against assets in Japan of the other party and the other party does not have business premises or other office in Japan, the formal international service of the written application will be required. In such case, enforcement procedures will take a significant amount of time.

Under the Arbitration Act, an *ex parte* procedure is not available for enforcement of an arbitral award (Article 46(10) and Article 44(5) of the Arbitration Act).

42. Does the arbitration law of your country provide a different standard of review for recognition and enforcement of a foreign award compared with a domestic award?

No, the same standard of review applies for both domestic and foreign awards.

43. Does the law impose limits on the available remedies? Are some remedies not enforceable by the local courts

The Arbitration Act does not stipulate the specific types of remedy available. The arbitral tribunal can award any remedy that would be available in court litigation on the same dispute; this may include damages, injunctions, declarations and payments of interest. If those remedies are contrary to the public policy of Japan, such remedies are not enforceable by the local courts (Article 46(8) and 45(2)(ix)). For example, arbitral tribunal's ordering payment of punitive damages or debts of gambling, or delivery of goods prohibited under the laws will likely violate the public policy and thus unlikely be enforceable.

44. Can arbitration awards be appealed or challenged in local courts? What are the grounds and procedure?

The Arbitration Act does not stipulate an appeal mechanism once an arbitral award is recognized to be final.

However, arbitral awards can be challenged and set

aside in Japanese courts if the place of the arbitration is in Japan (Article 3(1) and Article 44(1) of the Arbitration Act). Article 44(1) limits the grounds for challenging arbitral awards to the following:

- the arbitration agreement is invalid due to the limited capacity of a party;
- the arbitration agreement is invalid on grounds other than the limited capacity of a party pursuant to the laws and regulations designated by the agreement of the parties as those which should be applied to the arbitration agreement;
- the requisite notice under the arbitration proceeding, including the one for appointment of arbitrators, was not given to one party;
- one party was unable to defend its case;
- the subject matter of the award is beyond the scope of the arbitration agreement or claims of the arbitration;
- the composition of the tribunal or arbitration proceeding was not in accordance with Japanese laws or the parties' agreement;
- the award was based on a dispute not qualifying as a subject for arbitration; or
- the award is against public policy.

Parties may not challenge an award when an execution order has become final and binding or more than 3 months after receiving notice of the award, whichever comes first (Article 44(2) of the Arbitration Act). The local court will hold a hearing of the parties to adjudicate on any challenge (Article 44(5) of the Arbitration Law), but will not re-evaluate the merits of the case.

45. Can the parties waive any rights of appeal or challenge to an award by agreement before the dispute arises (such as in the arbitration clause)?

The Arbitration Act does not stipulate whether it is possible to waive any rights to challenge an arbitral award by agreement before the dispute arises. Although the Code of Civil Procedure allows parties to waive the right to appeal to the High Court (i.e., the court of second-instance in Japan), an agreement to waive all the rights to set aside an arbitral award under Article 44 of the Arbitration Act is likely to be considered invalid. Issues such as whether an arbitral award violates the public policy of Japan are closely connected to just and proper dispute resolution by arbitration.

46. To what extent might a state or state entity successfully raise a defence of state or sovereign immunity at the enforcement stage?

Under the Civil Jurisdiction Act, in principle, a state can invoke state or sovereign immunity at the enforcement stage.

However, in the following exceptional circumstances a state cannot invoke it: (i) when the state provides explicit consent to execute its assets based on the arbitral award, or (ii) when execution is made against assets owned by the foreign state that is used, or is intended to be used, only for purposes other than government non-commercial purposes (Articles 17 and 18). With regard to (i), the conclusion of an arbitration agreement shall not be deemed to constitute a consent to execute the award rendered in arbitration proceedings based on the arbitration agreement so therefore a separate consent is required for the execution against the assets of the foreign state.

See also Question 28.

47. In what instances can third parties or non-signatories be bound by an award? To what extent might a third party challenge the recognition of an award?

Arbitral awards will not bind third parties or non-signatories who did not participate in the arbitral proceedings. As such, third parties and non-signatories may not apply for setting aside an arbitral award.

Please also see Question 12.

48. Have there been any recent court decisions in your jurisdiction considering third party funding in connection with arbitration proceedings?

No, we are not aware of any court precedents considering third party funding in connection with arbitration proceedings. The Attorney Act and the Trust Act may be relevant to validity of third party funding, but it is generally understood that if third party funding is operated appropriately, these acts do not prohibit parties from relying on third party funding.

49. Is emergency arbitrator relief available in your country? Are decisions made by

emergency arbitrators readily enforceable?

The Arbitration Act does not have any explicit provisions for emergency arbitrators. However, Article 75 through Article 79 of the JCAA Rules set out requirements and procedures for appointment of emergency arbitrators.

As stated in Question 32, interim measures issued by arbitrators, including emergency arbitrators, are not enforceable in Japan though he Arbitration Act is currently being amended in this respect. See Question 5.

50. Are there arbitral laws or arbitration institutional rules in your country providing for simplified or expedited procedures for claims under a certain value? Are they often used?

The Arbitration Act is silent on simplified or expedited procedures, but Part 2 (Article 83 to Article 90) of the JCAA Rules provides for expedited arbitration procedures. Unless the parties agree otherwise or there are circumstances that make it clearly inappropriate to apply the expedited procedures, arbitration before the JCAA may be conducted under an expedited procedure if: (a) the amount in dispute is JPY300 million or less; or (b) a party notifies the JCAA in writing of the agreement by the parties to submit the dispute to expedited arbitration procedures (Article 84(1) and (3) of the JCAA Rules). Under expedited procedures, the arbitral tribunal will make reasonable efforts to render an arbitral award within 6 months from the date of the constitution of the tribunal or within 3 months where the amount in dispute is JPY 50 million or less (Article 88 of the JCAA Rules). Expedited procedures are often used for JCAA administered arbitration.

51. Is diversity in the choice of arbitrators and counsel (e.g. gender, age, origin) actively promoted in your country? If so, how?

Yes. Japan actively promotes diversity of arbitrators and counsel. For example, JCAA international arbitration from 2016 to 2020 reportedly had 48% of non-Japanese arbitrators.

52. Have there been any recent court decisions in your country considering the setting aside of an award that has been enforced in another jurisdiction or vice versa?

We are not aware of any such court decisions in Japan. As a matter of law, even if an arbitral award were enforced in another jurisdiction, the Japanese courts would decide whether to set aside such award on a case-by-case basis pursuant to the Arbitration Act.

On the other hand, although the court in Japan is not necessarily obliged to refuse to make an enforcement decision for an arbitral award set aside by the courts in the seat of arbitration (Article 46(8) of the Arbitration Act and Article V.1. (e) of the New York Convention), the Arbitration Act as a basic rule prevents the enforcement of a foreign arbitral award that has been set aside at the seat of arbitration (Article 46(8) and Article 45(2)(vii) of the Arbitration Act).

53. Have there been any recent court decisions in your country considering the issue of corruption? What standard do local courts apply for proving of corruption? Which party bears the burden of proving corruption?

We are not aware of recent court decisions on the issue of corruption in relation to arbitration. If an arbitrator has received a bribe, the award rendered by the arbitrator may be set aside under Article 44 of the Arbitration Act and may not be recognized or enforced under Article 45 of the Arbitration Act as being contrary to public policy.

The issue of corruption by judges is not common in the courts in Japan. Japan was ranked 19th out of 180 countries in Transparency International's Corruption Perceptions Index (2020).

54. Have there been any recent court decisions in your country considering the judgment of the Court of Justice of the European Union in Slovak Republic v Achmea BV (Case C-284/16) with respect to intra-European Union bilateral investment treaties or the Energy Charter Treaty? Are there any pending decisions?

We are not aware of court decisions considering the Achmea ruling by the Court of Justice of the European Union. As far as we know, no case is pending on this issue.

55. Have there are been any recent decisions in your country considering the General Court of the European Union's decision Micula & Ors (Joined Cases T-624/15, T-694/15 and T-694.15), ECLI:EU:T:2019:423, dated 18 June 2019? Are there any pending decisions?

We are not aware of court decisions on the Micula decision by the General Court of the European Union. As far as we know, no case is pending on this issue.

56. What measures, if any, have arbitral institutions in your country taken in response to the COVID-19 pandemic?

The COVID-19 pandemic has prompted JCAA to take up online hearing, instead of in-person hearing, in many more cases than before (called virtual remote hearing, Article 50(3) of the JCAA Rules). The parties have the option to use a hearing room at the Japan International Dispute Resolution Center (JIDRC) in Tokyo or in Osaka, which is equipped with state-of-the-art facilities for virtual hearings.

57. Have arbitral institutions in your country implemented reforms towards greater use of technology and a more cost-effective conduct of arbitrations? Have there been any recent developments regarding virtual hearings?

As stated in Question 56, JIDRC offers hearing rooms with state-of-the-art technology facilities in Tokyo (from 2020) and in Osaka (from 2021). These facilities enable the parties to avail themselves of virtual remote hearings as well as online meetings, which alleviates costs (time and money) that parties would otherwise incur.

JCAA introduced the Interactive Rules in 2019 in the expectation of making JCAA arbitration more cost-effective. Parties can opt for the Interactive Rules instead of the normal Commercial Arbitration Rules. Under the Interactive Rules the tribunal is obliged to 'dialogue' with the parties by expressing its preliminary views to the parties prior to its decision as to whether witness examination will be conducted (Article 56). It is expected to enable the parties to focus on the genuine issues and thereby saves substantial time. The Interactive Rules also provide fixed remuneration of arbitrators, no matter how much time the arbitrator has spent for the case, rather than the hourly charging under the Commercial Arbitration Rules, (Articles 94 and 95).

58. In your country, does the insolvency of a party affect the enforceability of an arbitration agreement?

The insolvency of a party will impact on the enforceability of an arbitration agreement in several ways but court precedents in this area of law have not yet settled.

First, there is a controversy as to whether an arbitration agreement made by a party binds trustees (*Kanzainin*) and creditors in insolvency proceedings. Although there is no clear stipulations in the Arbitration Act, majority of scholars appear to consider affirmatively.

In this regard, in relation to the corporate reorganization of Sanko Steamship Co., Ltd., Tokyo District Court held that the dispute as to whether claims for charter fee of a creditor fall under the category of the common-benefit claims was an issue inherent in the interpretation of the Corporate Reorganization Act and as interpretation of the parties' intention, such dispute is outside the scope of the arbitration agreement in the time charter party.

Second, generally, if an insolvency proceeding commences for a person, litigation to which such person is a party shall be suspended (e.g. Article 44(1) of the Bankruptcy Act). There are arguments of whether the same rules are applicable to arbitration.

59. Is your country a Contracting Party to the Energy Charter Treaty? If so, has it expressed any specific views as to the current negotiations on the modernization of the Treaty?

Yes, Japan is a Contracting Party to the Energy Charter Treaty. In the negotiations on the modernization of the Energy Charter, the Japanese Government expressed its position in October 2019 that Japan believed that it is not necessary to amend the current ECT provisions.

60. Have there been any recent developments in your jurisdiction with regard to disputes on climate change and/or human rights?

We are not aware of any recent developments in those areas.

61. Has your country expressed any specific views concerning the work of the UNCITRAL Working Group III on the future of ISDS?

The Japanese Government has clearly expressed its position in favor of the existing current ISDS system. The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which Japan played an important role in negotiating and concluding, includes the investment chapter of high quality that accommodates the ISDS clause. Given that the CPTPP forms the core of the Japanese government's foreign policy strategy to boost regional economic integration and thereby build up a significant free trade zone in the Asia-Pacific region, it is likely that Japan will continue to maintain its position in favor of the current ISDS system in the near future.

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