

The International Comparative Legal Guide to:

International Arbitration 2008

A practical insight to cross-border International Arbitration work



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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of Japan?

An arbitration agreement must be in writing (Art 1.2 of Japanese Arbitration Law, Law No. 138 of 2003, as amended, “Arbitration Act.” Unless otherwise indicated, article and chapter numbers referred to in the article are those of the Arbitration Act). An arbitration agreement is in writing when the agreement is reduced to (i) the documents signed by the parties; (ii) the correspondence exchanged by the parties, including those sent by facsimile transmissions and other communication devices which provide written records of the communicated contents to the recipient; and (iii) other written instructions. Additionally, electromagnetic records are deemed to be in writing (Art 1.4). Therefore, an arbitration agreement reduced to email transmissions is in writing. There is no authority as to whether phonetic recording of oral agreement to arbitrate also satisfies the writing requirement, though such phonetic recording can constitute the electromagnetic record which as stated earlier satisfies the writing requirement.

1.2 Are there any special requirements or formalities required if an individual person is a party to a commercial transaction which includes an arbitration agreement?

No, there are not.

1.3 What other elements ought to be incorporated in an arbitration agreement?

The Arbitration Act does not stipulate specific elements to be incorporated in an arbitration agreement. In practice, the minimum elements to be incorporated are: (i) the parties; and (ii) the scope of the submission to arbitration. In addition, the following elements should be included: (i) applicable arbitration rules; (ii) applicable rules of evidence; (iii) place of arbitration; (iv) number of arbitrators; (v) language of procedure; (vi) required qualification and skills of the arbitrator(s); (vii) waiver of sovereign immunity; and (viii) confidentiality agreement.

1.4 What has been the approach of the national courts to the enforcement of arbitration agreements?

Japanese courts are generally friendly to arbitration agreements. Unlike under the UNCITRAL Model Law, Japanese courts do not refer the case to arbitration, but just dismiss a lawsuit, where the

lawsuit is brought in breach of an arbitration agreement.

1.5 What has been the approach of the national courts to the enforcement of ADR agreements?

As to commercial disputes, ADR agreements do not prevent parties from litigating. Courts may, however, stay the proceedings according to their discretion or postpone the following schedules, once either party starts mediation based on an ADR agreement.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration agreements in Japan?

The Arbitration Act governs the enforcement of arbitration agreements in Japan. It was enacted in 2003 and became effective on March 1, 2004. The English translation of the Arbitration Act is available at: <http://www.kantei.go.jp/foreign/policy/sihou/arbitrationlaw.pdf>, but amendments made after 2003 are not incorporated in that English translation.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do the laws differ?

Yes. The Arbitration Act applies equally to both domestic and international arbitration.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the governing law and the Model Law?

Yes, the Arbitration Act basically follows the UNCITRAL Model Law. But there are significant differences on the following points:

- **Arbitrator’s Fee (Art 48).** Unless otherwise agreed to by the parties, arbitrators can determine their own fees, while the UNCITRAL Model Law does not have such provisions. In practice, since parties usually agree on institutional arbitration, the fee schedules of such institutions will apply. Accordingly, this provision applies to ad-hoc arbitration.
- **Arbitration Cost and Deposit (Art 49).** Unless otherwise agreed to by the parties, arbitrators may order either or both parties to deposit preliminary arbitration costs as determined by the tribunal.
- **Enforcement of Arbitration Agreement (Art 14.1).** The

national court will dismiss a case brought before it if it finds that the parties' arbitration agreement is valid. The court will not order the case to be submitted to arbitration. Please see question 1.4.

- **Promotion of Settlement (Art 38.4).** The Arbitration Act stipulates that the tribunal can encourage the parties to settle, upon the parties' consent. Generally, Japanese practitioners, including arbitrators, like to settle the case without having to make an award to either party. However, if the tribunal seeks settlement according to its own discretion, such an attitude may make the parties' suspicious. This provision is supposed to preclude such ambiguous situations and allow the parties to take the initiative to settle. Parties may withdraw their consent at any time until the settlement is reached.
- **Consumer Dispute Exception (Supplementary Provision Art 3).** While an arbitration agreement between the consumer and the business entity is valid, the Arbitration Act gives the consumer a unilateral termination right, except when the consumer itself becomes the claimant. In cases where the business entity raises a claim, the arbitral tribunal is required to explain arbitration procedure to the consumer at an oral hearing, and confirm whether the consumer accepts arbitration. That is the final opportunity for the consumer to walk away from arbitration.
- **Employment Dispute Exception (Supplementary Provision Art 4).** An arbitration agreement between employer and employee with respect to future disputes over employment is invalid.

3 Jurisdiction

- 3.1 Are there any subject matters that may not be referred to arbitration under the governing law of Japan? What is the general approach used in determining whether or not a dispute is "arbitrable"?**

"Arbitrability" is broadly defined in Japan to cover a variety of civil and commercial disputes. There are, however, some exceptions. Art 1.1 provides "[U]nless otherwise provide by law, an arbitration agreement shall be valid only when its subject matter is a civil dispute that may be resolved by settlement between the parties (excluding that of divorce or separation)." Although there are few laws which explicitly denies "arbitrability," the following subject matter is generally considered to be NOT "arbitrable": (i) anti-trust law matters; (ii) validity of intellectual property rights granted by the government, i.e. patents, utility models, and trademarks; (iii) shareholders' lawsuits against the resolution from the general shareholders meeting; (iv) administrative decisions of government agencies; and (v) insolvency and civil enforcement procedural decisions. The matter is not "arbitrable" if the final decision on it is binding on third parties.

- 3.2 Is an arbitrator permitted to rule on the question of his or her own jurisdiction?**

Yes. The Arbitration Act adopted the *Kompetenz-Kompetenz* rule. Art 23.1 provides that: "[T]he arbitral tribunal may rule on assertion made in respect of the existence or validity of an arbitration agreement or its own jurisdictions (which hereafter in this article means its authority to conduct arbitral proceedings and to make arbitral awards)."

- 3.3 What is the approach of the national courts in Japan towards a party who commences court proceedings in apparent breach of an arbitration agreement?**

Japanese courts just dismiss the case. Also see question 1.4.

- 3.4 Under what circumstances can a court address the issue of the jurisdiction and competence of the national arbitral tribunal?**

Upon a party's motion to dismiss, courts may render a judgment to dismiss the lawsuit. The court cannot dismiss the lawsuit once the defendant unconditionally submits a defence on a merit of the case. Courts may also address the issue in its judgment (i) for the recognition and enforcement of the award; and (ii) setting aside the award.

- 3.5 Under what, if any, circumstances does the national law of Japan allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?**

As a principle, an arbitration agreement is binding only upon the signing parties of the arbitration agreement. As to an arbitration agreement to which a joint-venture is a party, it would be possible that respective participant to joint-venture is bound to such an agreement. In addition, courts have extended the scope of an arbitration agreement with respect to the parties by applying California law when they find that such foreign laws are applicable to the interpretation of the agreement. *KK. Nihon Kyoiku Sha v. Kenneth J. Feld*, 68 Hanrei Jiho 1499 (Tokyo H. Ct., May 30, 2004); appeal to the Supreme Court denied, 51 Minshu 3709 (Sup. Ct., Sep. 4, 2007).

4 Selection of Arbitral Tribunal

- 4.1 Are there any limits to the parties' autonomy to select arbitrators?**

No. Parties can agree on anything, including the number, required qualification and skills of arbitrators, selection mechanism and selection of arbitrators.

- 4.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?**

Yes. The Arbitration Act provides a default procedure for selecting arbitrators which is identical to the UNCITRAL Model law.

- 4.3 Can a court intervene in the selection of arbitrators? If so, how?**

Yes. Courts intervene and assist with the selection of arbitrators if the parties and/or party-appointed arbitrators failed to select arbitrators. Upon either party's request, courts will select an arbitrator. In selecting an arbitrator, the court will consider the following factors (Art 15.6): (i) the qualifications required of the arbitrators by the agreement of the parties; (ii) the impartiality and independence of the appointees; and (iii) whether or not it would be appropriate to appoint an arbitrator of a nationality other than those of the parties. Recently, in a maritime dispute between a Japanese company and an Indian distributor, the court selected an attorney as the arbitrator from the candidate list of The Japan Shipping Exchange, Inc. ("TOMAC"). The court did not see any problem

with the fact that all listed candidates were Japanese nationals. The court might have considered the nature of the case, the place of arbitration, and that the agreement stipulated a sole arbitrator. Case No. Heisei 15 (wa) 21462 (Tokyo D. Ct., Feb. 9, 2007).

4.4 What are the requirements (if any) as to arbitrator independence, neutrality and/or impartiality?

Reasonable doubt as to the impartiality and independence of the arbitrators can be grounds for challenging them (Art 18.1[1]). Furthermore, both arbitrator candidates and arbitrators are obliged to disclose all the facts which may raise doubts as to their impartiality or their independence (Art 18.3 and 18.4). In the meantime, the “IBA Guidelines on Conflicts of Interest in International Arbitration” are gradually being accepted by practitioners of international arbitration in Japan. Moreover, the Japan Association of Arbitrators (“JAA”) is expected to publish the “JAA Guidelines on Professional Liabilities of Arbitrators” in the near future. The JAA’s guidelines do not have legal effect, but are expected to be a useful standard of neutrality and impartiality.

5 Procedural Rules

5.1 Are there laws or rules governing the procedure of arbitration in Japan? If so, do those laws or rules apply to all arbitral proceedings sited in Japan?

Yes, but they are minimal. The Arbitration Act allows parties to have broad autonomy and the arbitral tribunal to have broad discretion (Art 26). The Arbitration Act’s minimum mandatory rules include “equal treatment of parties,” “due process” and “public order.” (Art 25 and 26.1). In addition, the Arbitration Act provides several “default rules” with respect to certain stages and matters of arbitration procedure, such as: waiver of right to object (Art 27); place of arbitration (Art 28); commencement of arbitral proceedings and interruption of limitation (Art 29); language (Art 30); time restriction on parties’ statements (Art 31); procedure of hearings (Art 32); default of a party (Art 33); expert appointed by arbitral tribunal (Art 34); and court assistance in taking evidence (Art 35).

5.2 In arbitration proceedings conducted in Japan, are there any particular procedural steps that are required by law?

Yes. Procedural steps with respect to court’s intervention and assistance are mandatory. Among the procedures within arbitral tribunal and parties that are required by law are: equal treatment and due process (Art 25), tribunal’s authority on *Kompetenz-Kompetenz* (Art 23.1), time limitation to parties for arguing tribunal’s jurisdiction (Art 23.2), prior notice of oral hearings (Art 32.3), accessibility to other party’s brief and all evidence (Art 32), form of awards (Art 39) and completion of arbitral proceedings (Art 40).

5.3 Are there any rules that govern the conduct of an arbitration hearing?

Yes, but they are minimal. Art 32.1 provides that arbitral tribunal should have an oral hearing upon either party’s request, unless otherwise agreed to by the parties.

5.4 What powers and duties does the national law of Japan impose upon arbitrators?

The Arbitration Act provides the arbitral tribunal with a wide range

of powers with respect to arbitral proceedings. For example, if either party requests that the national court assist with the examination of evidence, i.e., witnesses, expert and written evidence, such a party needs to have the tribunal’s consent (Art. 35.2). The Arbitration Act also gives the arbitral tribunal powers to determine *Kompetenz-Kompetenz* (Art 23), and to render interim measures (Art 24).

5.5 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

No, courts may only intervene or support arbitration proceedings upon a party’s request. Once an arbitral tribunal is selected and composed, it will determine how to deal with procedural issues arising during an arbitration procedure.

5.6 Are there any special considerations for conducting multiparty arbitrations in Japan (including in the appointment of arbitrators)? Under what circumstances, if any, can multiple arbitrations (either arising under the same agreement or different agreements) be consolidated in one proceeding? Under what circumstances, if any, can third parties intervene in or join an arbitration proceeding?

Yes, but the Arbitration Act has minimal provisions in this regard. With respect to the number of arbitrators, upon a party’s request, courts may determine the number of arbitrators, unless otherwise agreed to by the parties. The number of arbitrators in a two-party arbitration is fixed at three (unless otherwise agreed to by the parties) (Art 16.3). Among the arbitration bodies in Japan, the Japan Commercial Arbitration Association (“JCAA”)’s rules allows the respondent to request “separation” of procedure within three weeks (JCAA Rule Art 17). Consolidation is possible if all the claims derive from a single arbitration agreement; otherwise, all parties’ consent is required.

5.7 What is the approach of the national courts in Japan towards *ex parte* procedures in the context of international arbitration?

The Arbitration Act does not allow *ex parte* procedures. Even if a respondent does not submit briefs by the deadline decided by the arbitral tribunal, it should not be deemed that the respondent has admitted the claimant’s assertions, and that the tribunal should proceed to the next steps, unless otherwise agreed to by the parties (Art 32.2). If either party without reasonable cause fails to appear at a hearing or fails to submit evidence, an arbitral tribunal may render an arbitral award, unless otherwise agreed to by the parties (Art 33.3). If it was difficult for the claimant to defend itself during the procedures, an award should be set aside, or should not be enforced by the court (Art 44 and 45).

6 Preliminary Relief and Interim Measures

6.1 Under the governing law, is an arbitrator permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitrator seek the assistance of a court to do so?

Yes (Art 24). The arbitral tribunal can award preliminary and interim relief when it considers it necessary. Usually, preliminary relief is used to protect the status quo. The tribunal can exercise such powers without any assistance of the national court. It should be noted, however, that preliminary relief rendered by a tribunal cannot be

recognised or enforced by courts, because it is not final and binding.

6.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Yes (Art 15). Courts can grant preliminary relief in proceedings subject to arbitration, independently from the arbitration proceedings.

6.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

Courts will determine whether or not they have jurisdiction for preliminary relief. Courts have jurisdiction of preliminary relief: (i) if they have jurisdiction for a regular lawsuit; or (ii) if a subject of the preliminary relief or a disputed object exists in the territorial jurisdiction of the court (Art 12 of the Code of Civil Preliminary Relief, "CCPR"). In determining jurisdiction for a regular lawsuit, courts may consider the "factors unique to the particular case". *Malaysian Airline System v. Goto*, 134 Minshu 115 (Sup. Ct., Oct. 16, 1971). Recently, in Heisei 19 (wa) 20047, 1991 Hanrei Jiho 89 (Tokyo D. Ct., Aug. 28, 2007), the court denied jurisdiction without finding any unique factors in a case where parties had agreed on arbitration in Seoul and an object of a preliminary injunction was not located in Japan.

6.4 Does the national law allow for the national court and/or arbitral tribunal to order security for costs?

Yes (Art 24.2 and relevant provisions of the CCPR).

7 Evidentiary Matters

7.1 What rules of evidence (if any) apply to arbitral proceedings in Japan?

The Arbitration Act does not provide any specific rules of evidence. Instead, it gives arbitral tribunals authority to determine admissibility of evidence, necessity for taking evidence, and probative value of evidence (Art 26.3). Generally speaking, most practitioners in Japan, including both attorneys and arbitrators, at first considered following Japanese evidence rules, which do not include full-fledged discovery. At the same time, the "IBA Rules on the Taking of Evidence in International Commercial Arbitration" are widely acknowledged by Japanese practitioners in international commercial arbitration.

7.2 Are there limits on the scope of an arbitrator's authority to order the disclosure of documents and other disclosure of discovery (including third party disclosure)?

There are no limits on the scope of an arbitrator's authority with respect to the disclosure of documents. At the same time, it should be noted that full-fledged documentary discovery is not common in arbitration practitioners in Japan, unless otherwise agreed by the parties. Please see question 7.1.

7.3 Under what circumstances, if any, is a court able to intervene in matters of disclosure/discovery?

Courts can intervene in or assist with taking evidence upon a request

of the arbitral tribunal or of either party (Art 35.1). The requesting party needs to obtain the tribunal's consent prior to a request. The court's intervention includes examination of witnesses and obtaining expert opinions, but those interventions should follow the Code of Civil Procedure (Law No. 109 of 1996, as amended. "CCP"). It should be noted, however, that, since the CCP does not have rules for full-fledged documentary discovery, courts cannot conduct such discovery even when intervening in arbitration procedure.

7.4 What is the general practice for disclosure/discovery in international arbitration proceedings?

Generally, arbitral tribunals do not conduct full-fledged and exhaustive documentary disclosure in Japan, although it is not prohibited. More often than not, arbitral tribunal request that parties produce specific documents which closely relate to the issues to be determined.

7.5 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal? Is cross-examination allowed?

It is totally left for arbitral tribunal's discretion how the tribunal handles evidence and testimony, unless otherwise agreed by the parties (Art 26, Para 3). As long as the tribunal finds it necessary and appropriate, written testimony is accepted. If such testimony is admitted, the tribunal usually allow the other party to cross-examine in a hearing.

7.6 Under what circumstances does the law of Japan treat documents in an arbitral proceeding as being subject to privilege? In what circumstances is privilege deemed to have been waived?

If the tribunal follows Japanese rules of evidence, attorney-client privilege rarely becomes an issue due to the lack of full-fledged discovery. However, once the issue comes up, arbitrators generally respect attorney-client privilege.

8 Making an Award

8.1 What, if any, are the legal requirements of an arbitral award?

An arbitral award must be in writing. The majority of arbitrators must sign the award. If one or more arbitrator(s) cannot sign the award, reasons must be provided as to why they cannot. Reasons for conclusions, the date, and the place of arbitration must be included in the award (Art 39). Where the settlement of parties is reduced to the form of arbitral award, the arbitral tribunal should explicitly mention such background information (Art 38).

9 Appeal of an Award

9.1 On what bases, if any, are parties entitled to appeal an arbitral award?

Technically, no appeal is allowed against an arbitral award. But parties are entitled to request the court to "set aside" an arbitral award (equivalent to an appeal) on the following basis: (i) the arbitration agreement is not valid; (ii) the party making the application was not

given notice as required under Japanese law during the proceedings to appoint arbitrators or during the arbitral proceedings; (iii) the claimant was unable to defend itself in the proceedings; (iv) the arbitral award contains decisions on matters beyond the scope of the arbitration agreement or the claims in the arbitral proceedings; (v) the composition of the arbitral tribunal or the arbitral proceedings were not in accordance with the provisions of Japanese law (or where the parties have otherwise reached an agreement on matters concerning the provisions of the law that is not in accordance with public policy); (vi) the claims in the arbitral proceedings relate to disputes that cannot constitute the subject of an arbitration agreement under Japanese law; or (vii) the content of the arbitral award is in conflict with the public policy or the good morals of Japan (Art 44).

9.2 Can parties agree to exclude any basis of appeal or challenge against an arbitral award that would otherwise apply as a matter of law?

So long as the parties' agreement does not contradict the mandatory provisions of the Arbitration Act, Japanese law, or public policy under Japanese laws, the parties can agree to exclude the possibility of appeal. For example, among grounds for appeal listed in Art 45, item 3, 4, and 6 can be fully or partially excluded by parties' agreement or either party's waiver of his/her rights.

9.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

Probably not. Although there are no explicit provisions in the Arbitration Act which denies parties' expansion of appeal or to challenge grounds stipulated by the Arbitration Act, the court, in obiter, has prohibited the parties' appeal to additional grounds for setting aside an award. *Descente Ltd v. Adidas-Salomon AG et al*, 123 Hanrei Jiho 1847 (Tokyo D. Ct., Jan. 26, 2004).

9.4 What is the procedure for appealing an arbitral award in Japan?

No appeal is allowed against an arbitral award, while a party can file with a competent district court a motion to set aside the award.

10 Enforcement of an Award

10.1 Has Japan signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Yes. Japan signed the New York Convention on June 20, 1959, and ratified it on July 14 of 1961. The New York Convention became effective for Japan from September 19, 1961, with a reservation of reciprocity. Since the New York Convention has direct effect in Japan, there is no domestic statute implementing the New York Convention. On the other hand, foreign awards of a non-signatory country to the New York Convention, i.e., Taiwan, can be enforced according to the relevant provision of the Arbitration Act.

10.2 Has Japan signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

No. Although several bilateral treaties refer to commercial

arbitration, neither of them stipulates simpler procedures than the New York Convention.

10.3 What is the approach of the national courts in Japan towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

Because the New York Convention has direct effect in Japan, parties should just follow the procedure and requirements of the New York Convention. As required in the New York Convention, parties need to prepare a Japanese translation of the award.

10.4 What is the effect of an arbitration award in terms of *res judicata* in Japan? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Arbitral awards, irrespective of whether or not the place of arbitration is in the territory of Japan, "shall have the same effect as a final and conclusive judgment." (Art 45.1). This provision is generally understood that an arbitral award shall be pled as *res judicata*.

11 Confidentiality

11.1 Are arbitral proceedings sited in Japan confidential? What, if any, law governs confidentiality?

The Arbitration Act does not have a particular provision with respect to confidentiality. It is entirely up to the parties' agreement or the rules of the respective arbitration body. At the same time, the rules of most arbitration bodies in Japan, such as Japan Commercial Association Arbitration and TOMAC have confidentiality provisions.

11.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

The Arbitration Act does not prohibit parties from referring to information disclosed in arbitral proceedings. Accordingly, unless otherwise agreed to by the parties, or provided for in the relevant institutional rules for arbitration, parties can refer to the disclosed information in subsequent court proceedings.

11.3 In what circumstances, if any, are proceedings not protected by confidentiality?

Because confidentiality of arbitration proceedings relies on the rules of each arbitration organisation, the confidentiality of arbitration proceedings has the same protection as an ordinary confidentiality agreement.

12 Remedies / Interests / Costs

12.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

No. However it should be noted that "punitive damages" that exceed compensatory damages might not be enforced by Japanese courts, because punitive damages might be against "public policy" in Japan. Both the New York Convention (Art 2(b)) and relevant provisions of the Arbitration Act (Art 45 and 46) allow the courts to

reject the enforcement of an award that is against the “public order” of the jurisdiction where the award would be enforced. Although there is no published case where the court rejected the enforcement of an award, foreign judgments which contained punitive damages, claimed separately from compensatory damages, have been rejected by the court on the ground of “public order”. *Mansei Industrial K.K. v. Northcon [I]*, 51 Minshu 2530 (Sup. Ct., Jul. 11, 2007).

12.2 What, if any, interest is available?

It is up to the relevant provisions of the applicable substantive law. Where Japanese law applies to the merits of the case, the arbitral tribunal will award such interest as stipulated in the contract, or in the Japanese statute (which is 6% per annum in commercial matters and 5% per annum in civil matters).

12.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

The Arbitration Act does not provide a default rule on the allocation of costs for arbitration. It is up to the arbitral tribunal, or the relevant institutional rules.

12.4 Is an award subject to tax? If so, in what circumstances and on what basis?

Payment made pursuant to an arbitral award may be subject to Japanese taxes. It depends on the nature of the payment and the underlying dispute.

13 Investor State Arbitrations

13.1 Has Japan signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965)?

Yes. Japan signed it on September 23, 1965 and ratified it on August 17, 1976.

13.2 Is Japan party to a significant number of Bilateral Investment Treaties (BITs) or Multilateral Investment treaties (such as the Energy Charter Treaty) that allow for recourse to arbitration under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID)?

No, it is not.

13.3 Does Japan have standard terms or model language that it uses in its investment treaties and, if so, what is the intended significance of that language?

No, it doesn't have standard terms or model language.

13.4 In practice, have disputes involving Japan been resolved by means of ICSID arbitration and, if so, what has the approach of national courts in Japan been to the enforcement of ICSID awards?

Not yet. However, under the Arbitration Act, ICSID awards will be treated in the same way as the other awards.

13.5 What is the approach of the national courts in Japan towards the defence of state immunity regarding jurisdiction and execution?

The Supreme Court of Japan held that, while sovereign activities shall be protected by sovereign immunity, non-sovereign activities, such as commercial transactions, by the foreign government will not be protected by it. *Tokyo Sanyo Trading K.K. v. Islamic Republic of Pakistan*, 60 Minshu 2542 (Sup. Ct., Jul. 21, 2006).

14 General

14.1 Are there noteworthy trends in the use of arbitration or arbitration institutions in Japan? Are certain disputes commonly being referred to arbitration?

Use of commercial arbitration has been stable in Japan in recent years. Maritime disputes (domestic or international) and construction disputes (most of which are domestic) are two major areas which frequently see the parties resort to arbitration to resolve disputes.

14.2 Are there any other noteworthy current issues affecting the use of arbitration in Japan?

Although the use of arbitration has not increased dramatically, the increasing number of legal professionals as a result of legal reforms may be affecting the development of international commercial arbitration in Japan.

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ANDERSON MORI & TOMOTSUNE

Anderson Mori & Tomotsune has a wide-ranging litigation, arbitration and dispute resolution practice that encompasses the many facets of business in Japan. We have extensive experience in areas that closely reflect the international nature of our client base, and the international experience and diversity of our people. We are able to provide a complete litigation service to our client's ranging from preliminary advice aimed at early resolution and prevention of disputes to the conduct of complex trials. Our attorneys have experience working in overseas jurisdictions and include two former judges, including a Supreme Court Justice. As well as engaging in the day-to-day conduct of litigation, some of our attorneys are also involved in imparting their experience to students through university lecturing. The types of disputes in which we are regularly involved in protecting our client's interests include:

Representing clients or acting as an arbitrator in institutional arbitrations filed with and administered under the rules of the Japan Commercial Arbitration Association (JCAA); International Chamber of Commerce (ICC); American Arbitration Association (AAA); London Court of (LCIA) and the Daini Tokyo Bar Association; and representing clients or acting as an arbitrator in Ad Hoc Arbitration/ADRs.