

The International Comparative Legal Guide to:

International Arbitration 2009

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 13.2 of Japanese Arbitration Act, Act 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 (i.e. email transmissions) are deemed to be in writing (Art 13.4).

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 the UNCITRAL Model Law, Japanese courts do not refer the case to arbitration, but dismiss the lawsuit if it finds that the case is brought in breach of an arbitration agreement upon defendant’s motion to dismiss the case prior to oral hearing (Art 14.1).

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 at their discretion or postpone the court sessions once the ADR proceedings are initiated by either party based on the ADR agreement.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings 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 the following website:

www.kantei.go.jp/foreign/policy/sihou/arbitrationlaw.pdf

Please note that amendments made after 2003 have not yet been incorporated in this 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 may attempt to settle the dispute, upon the parties' consent. Generally speaking, Japanese practitioners, including arbitrators, prefer to settle the dispute than to make an arbitration award. This provision requires the parties' consent for the tribunal's attempt to settle, to avoid the situation that arbitrators place unnecessary pressure upon the parties for settling the case. Parties may withdraw their consent at any time until the settlement is reached.
- **Consumer Dispute Exception (Supplementary Provision Art 3).** The Arbitration Act confers on consumers a unilateral right to terminate the arbitration agreement, which is entered into between the consumer and the business entity. Arbitration proceedings may be proceeded if i) the consumer is the claimant of the arbitration, or; ii) the consumer explicitly waives the right to discharge after the arbitral tribunal explains the arbitration procedure to the consumer at an oral hearing.
- **Employment Dispute Exception (Supplementary Provision Art 4).** An arbitration agreement between employer and employee with respect to future disputes over employment is invalid.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in Japan?

Under the Arbitration Act, there are no mandatory rules specifically applied to international arbitration proceedings sited in Japan.

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. Unless otherwise provide by law, civil and commercial disputes that may be resolved by settlement between the parties (excluding that of divorce or separation) are "arbitrable" (Art 13.1). Although there are few laws which explicitly deny "arbitrability", the following subject matters are 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 of the dispute may be 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 has 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?

The court will dismiss the case brought before it upon a motion to dismiss by the defendant prior to the oral hearing. 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?

Based on the *Kompetenz-Kompetenz* rule (Art 23.1. Also see question 3.2 above), the arbitral tribunal may primarily review its own jurisdiction. If the arbitral tribunal rules that it has jurisdiction, any party, within 30 days of receipt of the ruling, may request the court to review such ruling (Art 23.5).

Courts may also address the issue regarding jurisdiction of the arbitral tribunal at the stage of enforcement of and/or enforceability of the arbitration 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. Furthermore, the court extended the scope of an arbitration agreement with respect to the parties to the arbitration proceedings as a result of applying New York law, which was chosen by the parties as a governing law, to the interpretation of the arbitration agreement. *KK. Nihon Kyoiku Sha v. Kenneth J. Feld*, 68 Hanrei Jiho 1499 (Tokyo H. Ct., May 30, 1994); appeal to the Supreme Court denied, 51 Minshu 3709 (Sup. Ct., Sept. 4, 1997).

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in Japan and what is the typical length of such periods? Do the national courts of Japan consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

There is no related provision in relation to limitation periods for the commencement of arbitrations. Japanese law considers such rules of limitation periods substantive. Accordingly, parties may choose the law of limitation under the Act on General Rules of Application of Laws (Act No. 78 of 2007), which contains basic rules of the conflict of laws in Japan.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

Primarily, the arbitral tribunal shall apply the laws as are agreed by the parties as applicable to the substance of the dispute. If the parties fail to agree on the applicable law, the tribunal shall apply such law of the State with which the dispute is most closely connected (Art 36.1 and 36.2). Notwithstanding these provisions, the tribunal shall decide *ex aequo et bono* when the parties have

expressly authorised it to do so (Art 36.3). In addition, where there is a contract relating to the civil dispute, the tribunal shall decide in accordance with the terms of such contract and shall take into account the applicable usages, if any (Art 36.4).

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

Generally speaking, with respect to the circumstances where mandatory laws prevail over the laws chosen by the parties, the same principle as of conflict-of-laws apply. For instance, in those cases involving regulatory issues, i.e. labour law, antitrust law and patent law, mandatory laws may prevail over the laws chosen by the parties to the arbitration.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

According to Art 44.1[2] of the Arbitration Act, validity of the arbitration agreement should be subject to the law agreed upon by both parties as an applicable law, or, in case of failing, to the laws of Japan.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

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

5.2 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.

5.3 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 16.6): (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, 2005).

5.4 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 the grounds for challenging them (Art 18.1[1]). In order to secure the effectiveness of such 'challenge' system, 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).

5.5 Are there rules or guidelines for disclosure of potential conflicts of interest for arbitrators imposed by law or issued by arbitration institutions within Japan?

As mentioned in question 5.4 above, 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). Further, the Japan Association of Arbitrators ("JAA") is expected to publish the "JAA Guidelines on Professional Liabilities of Arbitrators" soon. The JAA Guidelines may not be binding but may at least provide a useful standard in regard with neutrality and impartiality of the arbitrators. In the meantime, the "IBA Guidelines on Conflicts of Interest in International Arbitration" are gradually being accepted among international arbitration practitioners in Japan.

6 Procedural Rules

6.1 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 "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).

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

Yes. In arbitral procedures, certain procedural steps are required to follow by law, which are: equal treatment and due process (Art 25), tribunal's authority on *Kompetenz-Kompetenz* (Art 23.1), time limitation to parties for arguing on the tribunal's jurisdiction (Art 23.2), prior notice of oral hearings (Art 32.3), accessibility to the other party's brief and all evidence (Art 32.4), form of awards (Art 39) and completion of arbitral proceedings (Art 40). In addition, if the arbitral proceedings involve court's intervention and/or assistance, certain procedural steps should be followed pursuant to Art 35.

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

Yes, but they are minimal. Arbitral tribunal should have an oral hearing upon either party's request, unless otherwise agreed to by the parties (Art 32.1 and 32.2). When holding oral hearings for the purpose of oral argument or inspection of goods, other property or documents, the tribunal shall give sufficient advance notice to the parties of the time and place for such hearings (Art 32.3).

6.4 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 23.1), and to render interim measures (Art 24).

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in Japan and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in Japan?

The Lawyers Act (Act No. 205 of 1950) strictly prohibits non-lawyers (including lawyers admitted in foreign jurisdictions) to perform legal business in Japan (Art 72). If registered in Japan, a foreign lawyer may handle some legal business in Japan but only to the extent that the Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers (Act No. 66 of 1986, the "Foreign Lawyers Act") allows them. Meanwhile, as for the arbitration procedures, the Foreign Lawyers Act explicitly sets out an exception to those restrictions, saying that lawyers admitted in foreign jurisdiction (both registered and non-registered in Japan) may perform representation regarding the procedures for international arbitration cases, including the procedures for settlement (Art 5.3 and 58.2 of the Foreign Lawyers Act).

6.6 To what extent are there laws or rules in Japan providing for arbitrator immunity?

There are no statutory laws or rules providing for arbitrator immunity in Japan.

6.7 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 (Art 23.1).

6.8 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 with respect to the number of arbitrators. In absence of agreement by the parties, it is fixed at three for a two-party arbitration; and courts may, upon a party's request, determine the number of arbitrators for a multiparty arbitration (Art 16.2 and 16.3).

Separation of the arbitration procedures are allowed upon the request of either party under Art 17 of the JCAA Rules. Consolidation of the arbitration proceedings is possible if all the claims derive from a single arbitration agreement; otherwise, all parties' consent is required. Third party participation to an on-going proceeding is possible, provided that all parties consent to it (Art 43 of JCAA Rule).

6.9 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).

7 Preliminary Relief and Interim Measures

7.1 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.

7.2 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 before or during the arbitral proceedings in respect of any civil dispute which is the subject of the arbitration agreement, upon request of a party to the dispute.

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

Upon request for the interim relief, the court will first determine whether or not they have jurisdiction on the requested preliminary relief (Art 12 of the Code of Civil Preliminary Relief, "CCPR"). In determining its jurisdiction, courts may consider "factors unique to the particular case". *Malaysian Airline System v. Goto*, 134 Minshu 115 (Sup. Ct., Oct. 16, 1981). Recently, in Heisei 19 (wa) 20047, 1991 Hanrei Jiho 89 (Tokyo D. Ct., Aug. 28, 2007), the Japanese court denied its jurisdiction on the requested preliminary injunction, determining that none of the "unique factors" were located in Japan (in which the parties had agreed to have arbitration in Seoul and the object of the injunction was not located in Japan).

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

Yes. Both national courts and arbitral tribunals may order any party to provide appropriate security in connection with the interim measures (Art 24.2 and relevant provisions of the CCPR).

8 Evidentiary Matters

8.1 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, usually follow Japanese evidence rules, which do not include full-fledged discovery. In the meantime, the “IBA Rules on the Taking of Evidence in International Commercial Arbitration” are getting to be widely acknowledged by Japanese practitioners in international commercial arbitration.

8.2 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 is no limitation 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 disclosure is not common in arbitration practice in Japan. Please see question 8.1.

8.3 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 the request. The court’s intervention, including examination of witnesses and obtaining expert opinions, are subject to the Code of Civil Procedure (Law No. 109 of 1996, as amended, “CCP”).

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

Generally, arbitral tribunals in Japan do not conduct full-fledged and exhaustive documentary disclosure, unless parties agree to have such disclosure. More often than not, the arbitral tribunal requests that parties produce specific documents which closely relate to the issues to be determined.

8.5 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 left for the arbitral tribunal’s discretion how it handles evidence and testimony, unless otherwise agreed by the parties (Art 26.3). As long as the tribunal finds it necessary and appropriate, written testimony may be accepted. If such testimony is admitted, the tribunal usually allows the other party to cross-examine the witness in a hearing.

8.6 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?

As long as the tribunal follows Japanese rules of evidence, attorney-client privilege rarely becomes an issue because full-fledged discovery is not usually conducted. In case where the arbitral

proceedings give rise to such issue, arbitrators will generally respect attorney-client privilege.

9 Making an Award

9.1 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).

10 Appeal of an Award

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

Technically, no appeal is allowed against an arbitral award. However, 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).

10.2 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 those grounds for appeal listed in Art 45, item 3, 4, and 6, can be fully or partially excluded by the agreement of the parties or by either party’s waiver of his/her rights.

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

Probably not. There are no explicit provisions in the Arbitration Act which restrict parties from expanding the grounds for appealing or challenging the arbitral award. However, the court, in *obiter*, rejected the parties’ argument to set aside the award based on an additional ground set out in the mutual agreement by the parties. *Descente Ltd v. Adidas-Salomon AG et al*, 123 Hanrei Jiho 1847 (Tokyo D. Ct., Jan. 26, 2004).

10.4 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.

11 Enforcement of an Award

11.1 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, 1961. The New York Convention became effective in 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.

11.2 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 that of the New York Convention.

11.3 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 can simply follow the procedure and requirements stated in the New York Convention. As required in the New York Convention, parties need to prepare a Japanese translation of the award if it is written in foreign language.

11.4 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*.

12 Confidentiality

12.1 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 provisions in respect of confidentiality.

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

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

12.3 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.

13 Remedies / Interests / Costs

13.1 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 in amount might not be enforced by Japanese courts, as courts may find the concept of punitive damages is against the "public policy" in Japan. Both the New York Convention (Art 2(b)) and the Arbitration Act (Art 45 and 46) allow the courts to reject the enforcement of an award that is contrary to the "public order" of the jurisdiction in which the award will be enforced. A foreign judgment which contained punitive damages, claimed separately from compensatory damages, have been rejected by the court on the ground that the enforcement of which would be contrary to "public order". *Mansei Industrial K.K. v. Northcon [I]*, 51 Minshu 2530 (Sup. Ct., Jul. 11, 1997).

13.2 What, if any, interest is available, and how is the rate of interest determined?

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).

13.3 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?

Arbitration Acts provides for the rules with respect to the costs of the arbitration proceedings. As a general rule, each party to the arbitration shall bear the costs it has disbursed in the arbitral proceedings, unless otherwise agreed by the parties (Art 49.1). If it is so indicated by the agreement of the parties, the arbitral tribunal may, in an arbitral award or in an independent ruling, determine the apportionment between the parties of the costs (Art 49.2). The ruling on the cost by the tribunal shall have the same effect as an arbitral award (Art 49.3).

13.4 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 relevant taxes. The basis of such may differ depending on the nature of the payment and the underlying dispute.

14 Investor State Arbitrations

14.1 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.

14.2 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)?

Yes. Japan had entered into around 20 BITs by the end July 2008 and some of which (including BIT with Korea and Russia) explicitly allow parties to resort their disputes to ICSID.

14.3 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.

14.4 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 and how has the government of Japan responded to any adverse awards?

Not yet. However, under the Arbitration Act, ICSID awards will be treated in the same way as the other awards rendered by other foreign arbitration tribunal.

14.5 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 immune from liability, the liabilities arose from non-sovereign activities, such as commercial transactions, of the foreign government will not be exempted. *Tokyo Sanyo Trading K.K. v. Islamic Republic of Pakistan*, 60 Minshu 2542 (Sup. Ct., Jul. 21, 2006). In May 2009, a new legislation with respect to the immunity of the foreign state, which is basically tracing the said Supreme Court ruling, has passed in the Diet. It will be enacted within a year.

15 General

15.1 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.

15.2 Are there any other noteworthy current issues affecting the use of arbitration in Japan, such as pending or proposed legislation that may substantially change the law applicable to arbitration?

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 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.