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The International Comparative Legal Guide to:
International Arbitration 2011
A practical cross-border insight into international arbitration work

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The International Comparative Legal Guide to: International Arbitration 2011

Chapter 12

Japan

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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 the Japanese Arbitration Act, Act No. 138 of 2003, as amended, the "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 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 elements usually 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 to be used in the procedure; (vi) required qualification and skills of the arbitrator(s); (vii) waiver of sovereign immunity; and (viii) confidentiality agreement.

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

Japanese courts are friendly to arbitration agreements in general. Unlike the UNCITRAL Model Law, Japanese courts do not directly refer the case to arbitration, but dismiss the lawsuit in favour of an arbitration agreement. To this end, the defendant should file a motion to dismiss prior to the first court hearing (Art 14.1).

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in Japan? Were there any significant changes made to that arbitration legislation in the past year?

The Arbitration Act governs the enforcement of arbitration agreements in Japan. It was enacted in 2003 and became effective on March 1, 2004. During the year 2010, there was no significant change to the Arbitration Act. The English translation of the Arbitration Act is available at the following website (please note that this English translation may have not reflected the amendments made after 2003): www.kantei.go.jp/foreign/policy/sihou/arbitr atio nlaw.pdf.

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

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

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

Yes, the Arbitration Act is basically in line with the UNCITRAL Model Law. But there are a couple of differences on the following points:

- 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 1.3 above.
- Promotion of Settlement (Art 38.4). The Arbitration Act stipulates that the tribunal may attempt to settle the dispute. 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.
- Arbitrator's Fee (Art 47). Unless otherwise agreed to by the parties, arbitrators can determine their own fees, while the UNCITRAL Model Law does not have such provisions. Since the fee schedules of arbitration institutions are usually

applied to institutional arbitrations, in practice, this provision only applies to *ad-hoc* arbitration.

- Deposit for Arbitration Costs (Art 48). Unless otherwise agreed to by the parties, arbitrators may order that the parties deposit an amount determined by the arbitral tribunal as the preliminary arbitration costs.
- Consumer Dispute Exception (Supplementary Provision Art 3). The Arbitration Act confers consumers a unilateral right to terminate the arbitration agreement entered between the consumer and a 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 about the arbitration procedure to the consumer at an oral hearing.
- Employment Dispute Exception (Supplementary Provision Art 4). An arbitration agreement between an employer and an employee with respect to future disputes over employment is invalid.

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

Under the Arbitration Act, there are no mandatory rules specifically governing 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 provided 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). However, a matter is not "arbitrable" if the final decision of the dispute may be binding on third parties. 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, e.g. patents, utility models and trademarks; (iii) shareholders' action seeking revocation of a resolution of the shareholders' meeting; (iv) administrative decisions of government agencies; and (v) insolvency and civil enforcement procedural decisions.

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, and 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 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 lawsuit if the defendant files a timely motion to dismiss. If the defendant fails to file a timely motion to dismiss, the court will proceed to hear the merits of the case. Also see question 1.3.

3.4 Under what circumstances can a court address the issue of the jurisdiction and competence of the national arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

Based on the *Kompetenz-Kompetenz* rule (Art 23.1; also see question 3.2 above), the arbitral tribunal will primarily review its own jurisdiction. If the arbitral tribunal affirms its jurisdiction, either party, within 30 days of the receipt of the ruling, may request the relevant court to review such ruling (Art 23.5).

In addition, courts may address the issue of jurisdiction of the arbitral tribunal at the stage of enforcement and/or enforceability of an arbitration award.

The court will conduct the *de novo* review of the tribunal's decision in respect of its jurisdiction. In other words, the court will not be bound by a tribunal's decision itself, and will review the tribunal's jurisdiction case independently from the tribunal's own decision.

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 parties to the arbitration agreement. In the case of a joint-venture, the participants to the joint-venture may be bound to the arbitration agreement to which the joint-venture is a party. 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 governing law) to the interpretation of the arbitration agreement. *K.K. 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., Sep. 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 provision related to limitation periods for the commencement of arbitrations. Under Japanese law, the rules of limitation periods are substantive rather than procedural. Accordingly, parties may choose the law of limitation pursuant to the conflict of laws in Japan (namely, the Act on General Rules of Application of Laws (Act No. 78 of 2007)).

3.7 What is the effect in Japan of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

Neither the Arbitration Act nor the Bankruptcy Act provides any specific provisions as to how ongoing arbitration proceedings will be affected by insolvency proceedings with respect to the parties to the arbitration. In addition, there is no particular case law on this point. Thus, it is difficult to define the effect in Japan of pending insolvency proceedings upon arbitration proceedings, while an academic authority argues that the arbitration proceedings shall be suspended upon the commencement of insolvency proceedings on the parties and shall be resumed once a bankruptcy trustee is appointed.

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 law 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 (Arts 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, in the case of a contract dispute, the tribunal shall decide in accordance with the terms of the 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, in those cases where regulatory issues (e.g. issues relating to labour law, antimonopoly law and patent law) are involved, 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 an arbitration agreement should be subject to the law agreed 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?

There are no specified limits to the selection of arbitrators, i.e. parties may agree on the number, required qualification and skills of arbitrators, and the methods of 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 basically the same as that of the UNCITRAL Model Law.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

Yes. Courts can select arbitrators upon request of either party if there is no agreement between the parties with respect to the selection of arbitrators, or the parties and/or party-appointed arbitrators fail to select arbitrators. In selecting arbitrators, the court shall take into account the following factors: (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 (Art 17.6).

In a maritime dispute case between a Japanese company and an Indian distributor, the court selected an attorney listed in the candidate list of the Tokyo Maritime Arbitration Commission of the Japan Shipping Exchange ("TOMAC") as the sole arbitrator. Although the court seemed to have considered the nationalities of the parties, it chose a Japanese arbitrator on the basis that all listed candidates of TOMAC were Japanese nationals and that the foreign party did not mention its preference on nationality of the arbitrator during the proceeding. Case No. Heisei 15 (wa) 21462, 1927 Hanrei Jihou 75 (Tokyo D. Ct., Feb. 9, 2005).

5.4 What are the requirements (if any) as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators imposed by law or issued by arbitration institutions within Japan?

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 (Arts 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, if published, will provide a standard in regard with neutrality and impartiality of the arbitrators. In the meantime, the "IBA Guidelines on Conflicts of Interest in International Arbitrator" are widely recognised 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 in principle, the Arbitration Act allows parties to have broad autonomy and the arbitral tribunal to have broad discretion (Art 26). The mandatory rules are concerning "equal treatment of parties", "due process" and "public order" (Arts 25 and 26.1). In addition, the Arbitration Act provides "default rules" with respect to the procedure, including: 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 the 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 arbitration proceedings, certain procedural steps are required under the Arbitration Act, which include: equal treatment and due process (Art 25); the tribunal's authority (*Kompetenz-Kompetenz*) (Art 23.1); time limitation for arguing 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). The Arbitration Act further provides the rules for the arbitration proceedings which involve a court's intervention and/or assistance (Art 35).

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

Yes, but they are minimal. An arbitral tribunal should have an oral hearing upon request by either party, unless otherwise agreed by the parties (Arts 32.1 and 32.2). When an oral hearing is held for oral argument or inspection of goods, other properties or documents, the tribunal shall notify the parties of the time and place for such hearing in advance (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, the party who intends to request the court to assist with the examination of evidence, e.g., witnesses, expert witnesses and written evidence, shall obtain the tribunal's prior consent (Art 35.2). The Arbitration Act also gives the arbitral tribunal powers to determine on its jurisdiction (*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) from performing legal business in Japan (The Lawyers Act, Art 72). A foreign lawyer registered in Japan 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. On the other hand, the Foreign Lawyers Act explicitly sets out an exception to those restrictions, saying that lawyers admitted in foreign jurisdictions (whether registered in Japan or not) may represent in the international arbitration proceedings, including the settlement procedures (Arts 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 intervene or support arbitration proceedings only when requested by the parties to the arbitration. Once the arbitral tribunal is composed, procedural issues arising during the arbitration procedure should be handled by the tribunal (Art 23.1).

6.8 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 on time, it should not be deemed as an admission of the claimant's assertions, and the tribunal should continue the proceedings (Art 33.2). If either party fails to appear at a hearing or fails to submit evidence without reasonable cause, the tribunal may render an arbitral award against it, unless otherwise agreed to by the parties (Art 33.3). If the claimant was unable to defend itself during the proceedings, it may constitute a basis for setting aside the award or not enforcing the award (Art 44 and 45).

7 Preliminary Relief and Interim Measures

7.1 Is an arbitrator in Japan 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 maintain the *status quo*. The tribunal can exercise such powers without any assistance of the court. However, the preliminary relief rendered by the arbitration tribunal shall not be recognised or enforced by the courts.

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). Upon request of a party to the dispute, courts can grant preliminary relief at any time before or during the arbitral proceedings, in respect of any civil dispute subject to arbitration.

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 it has 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" of the case were located in Japan (in which the parties had agreed to conduct the arbitration in Seoul and the object of the injunction was not located in Japan).

7.4 Under what circumstances will a national court of Japan issue an anti-suit injunction in aid of an arbitration?

Japanese courts will not issue an anti-suit injunction in aid of arbitration under any circumstances.

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

Yes. Both courts and arbitral tribunals may order either party to provide appropriate security for 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 fully-fledged discovery. In the meantime, the "IBA Rules on the Taking of Evidence in International Commercial Arbitration" are being widely acknowledged by Japanese practitioners of 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 (including third party disclosure)?

There is no limitation on the scope of an arbitrator's authority with respect to the disclosure of documents. However, fully-fledged documentary disclosure is not common in arbitration practice in Japan. Also see question 8.1.

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

Unless otherwise agreed by the parties, courts can intervene in or assist with taking evidence upon request of the tribunal or of a party (Art 35.1). The requesting party shall obtain the tribunal's consent prior to the request. The court's intervention, including examination of witnesses and obtaining expert opinions, is subject to the Code of Civil Procedure (Law No. 109 of 1996, as amended, "CCP").

8.4 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 up to the arbitral tribunal's discretion to decide 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 admitted. If such testimony is admitted, the tribunal usually allows the other party to cross-examine the witness in the hearing.

8.5 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 poses as an issue because fully-fledged discovery is rarely conducted. However, if the arbitral proceedings give rise to such issue, arbitrators will usually respect attorney-client privilege.

9 Making an Award

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

Arbitral awards 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 an 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 44.1).

Regarding (iii) above, a recent court decision articulated that "unable to defend" shall mean that there was a material procedural violation in the arbitration proceedings (i.e., the opportunity to defend was not given to the claimant throughout the proceedings). With respect to (vii) above, the same court also said that merely claiming that the factual findings or ruling of the arbitration tribunal were unreasonable should not be regarded as a valid basis for setting aside the award. In *re American International Underwriters, Ltd*., 1304 Hanrei Taimuzu 292 (Tokyo D. Ct., July 28, 2009).

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, items 3, 4, and 6, can be fully or partially excluded by the parties' agreement or either party's waiver of such 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, however a party can file with a competent district court a motion to set aside the award. Such motion should be made within three months upon the receipt of the arbitration award or before the enforcement decision has become final and conclusive (Art 44.2).

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 singed 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/region to the New York Convention, such as Taiwan, can be enforced according to the relevant provision of the Arbitration Act (Art 46).

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, none of them provides simpler enforcement 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 a direct effect in Japan, parties can simply follow the procedural 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 a 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 arbitration took place 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*.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

As per Art 45.2[9] of the Arbitration Act, Japanese courts will consider if the enforcement of the award will be in conformity with the laws of Japan, whether it is procedural law or substantive law. This standard is basically the same as the one used to set aside an arbitral award (Art 44.1[8]).

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 relevant institutional rules for arbitration rules applied to the procedure. 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 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, "punitive damages" that exceed compensatory damages might not be enforced by Japanese courts, as courts may find that the concept of punitive damages is against the "public policy" in Japan. Under the New York Convention (Art 2(b)) and the Arbitration Act (Art 45 and 46), courts may reject the enforcement of an award if is contrary to the "public order" of Japan. A foreign judgment which contained punitive damages, claimed separately from compensatory damages, have been rejected by the court on the grounds 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 other 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 relevant taxes in Japan. 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 24 BITs (including Economic Partnership Agreements with an investment section) by the end of 2010, some of which explicitly allow parties to resort their disputes to ICSID. Also, Japan is a member country of the Energy Charter Treaty.

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. Japan does not.

14.4 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 ruled 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 exempt. *Tokyo Sanyo Trading K.K. v. Islamic Republic of Pakistan*, 60 Minshu 2542 (Sup. Ct., Jul. 21, 2006). A new legislation with respect to the immunity of the foreign state, which came into effect as of April 1, 2010, basically traces the above Supreme Court ruling.

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 (domestic or international) and construction (mostly domestic) are two major areas in which arbitration procedures are frequently used 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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