ICLG

The International Comparative Legal Guide to:

International Arbitration 2016

13th Edition

A practical cross-border insight into international arbitration work

Published by Global Legal Group, in association with CDR, with contributions from:

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London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd
August 2016

ISBN 978-1-911367-06-2
ISSN 1741-4970

Strategic Partners

Preface:

■ **Preface** by Gary Born, Chair, International Arbitration Practice Group, Wilmer Cutler Pickering Hale and Dorr LLP

General Chapters:

1 **Class, Collective and Mass Claims in Arbitration** – Charlie Caher & Jonathan Lim, Wilmer Cutler Pickering Hale and Dorr LLP 1

2 **Complex DCF Models and Financial Awards: The Components and Where They Go Wrong** – Gervase MacGregor & David Mitchell, BDO LLP 8

3 **The Toolbox of International Arbitration Institutions: How to Make the Best of It?** – Professor Dr. Eckart Brödermann & Dr. York Zieren, Brödermann Jahn RA GmbH 14

Asia Pacific:

4 **Overview** Dr. Colin Ong Legal Services: Dr. Colin Ong 19

5 **Brunei** Dr. Colin Ong Legal Services: Dr. Colin Ong 33

6 **China** Boss & Young, Attorneys-at-Law: Dr. Xu Guojian 42

7 **India** Kachwaha & Partners: Sumeet Kachwaha & Dharmendra Rautray 54

8 **Indonesia** Ali Budiardjo, Nugroho, Reksodiputro: Sahat A.M. Siahaan & Ulyarta Naibaho 65

9 **Japan** Anderson Mori & Tomotsune: Yoshimasa Furuta & Aoi Inoue 76

Central and Eastern Europe and CIS:

10 **Overview** Wilmer Cutler Pickering Hale and Dorr LLP: Franz T. Schwarz & Krystyna Khripkova 84

11 **Austria** Weber & Co.: Stefan Weber & Katharina Kitzberger 91

12 **Belarus** Sysouev, Bondar, Khrapoutski Law Office: Timour Sysouev & Alexandre Khrapoutski 100

13 **Croatia** Divjak, Topić & Bahtijarević Law Firm: Linda Križić & Sara Al Hamad 112

14 **Hungary** Lendvai Partners: András Lendvai & Gergely Horváth 119

15 **Romania** Popovici Nițu Stoica & Asociații: Florian Nițu & Raluca Petrescu 127

16 **Russia** Freshfields Bruckhaus Deringer LLP: Noah Rubins & Alexey Yadykin 137

17 **Turkey** Moroglu Arseven: Orçun Çetinkaya 153

18 **Ukraine** CMS Cameron McKenna: Olexander Martinenko & Olga Shenk 162

Western Europe:

19 **Overview** DLA Piper UK LLP: Ben Sanderson 171

20 **Andorra** Cases & Lacambra: Sheila Muñoz Muñoz 175

21 **Belgium** Linklaters LLP: Joost Verlinden 185

22 **Cyprus** Patrikios Pavlou & Associates LLC: Stavros Pavlou & Eleana Christofi 195

23 **England & Wales** Wilmer Cutler Pickering Hale and Dorr LLP: Charlie Caher & John McMillan 204

24 **Finland** Attorneys at law Ratiolex Ltd: Timo Ylikantola & Tiina Ruohonen 220

25 **France** Lazareff Le Bars: Benoit Le Bars & Joseph Dalmasso 228

26 **Germany** DLA Piper UK LLP: Dr. Frank Roth & Dr. Daniel H. Sharma 238

27 **Ireland** Matheson: Nicola Dunleavy & Gearóid Carey 248

28 **Italy** Chiomenti Studio Legale: Andrea Bernava & Silvio Martuccelli 258

29 **Liechtenstein** König Rebholz Zechberger: MMag. Benedikt König & Dr. Helene Rebholz 268

30 **Luxembourg** Loyens & Loeff Luxembourg S.à r.l.: Véronique Hoffeld 277

31 **Portugal** Cuatrecasas, Gonçalves Pereira: Rita Gouveia & Frederico Bettencourt Ferreira 286

Continued Overleaf →

Western Europe, cont.:

32	**Spain**	Olleros Abogados, S.L.P.: Iñigo Rodríguez-Sastre & Elena Sevila Sánchez	295
33	**Sweden**	Advokatfirman Vinge: Krister Azelius & Lina Bergqvist	303
34	**Switzerland**	Homburger: Felix Dasser & Balz Gross	311

Latin America:

35	**Overview**	Baker & McKenzie LLP: Luis M. O'Naghten	322
36	**Bolivia**	Salazar & Asociados: Ronald Martin-Alarcon & Sergio Salazar-Machicado	334
37	**Brazil**	Costa e Tavares Paes Advogados: Vamilson José Costa & Antonio Tavares Paes Jr.	341
38	**Colombia**	Holland & Knight Colombia: Enrique Gómez-Pinzón & Daniel Fajardo Villada	349
39	**Dominican Republic**	Medina Garrigó Abogados: Fabiola Medina Garnes & Jesús Francos Rodríguez	356
40	**Mexico**	Von Wobeser y Sierra, S.C.: Diego Sierra & Adrián Magallanes	365
41	**Venezuela**	D'Empaire Reyna Abogados: Pedro Perera & Jose Humberto Frías	376

Middle East / Africa:

42	**Overview – MENA**	Freshfields Bruckhaus Deringer LLP: Sami Tannous & Seema Bono	383
43	**Overview – Sub-Saharan Africa**	Baker & McKenzie: Gerhard Rudolph & Michelle Wright	389
44	**Israel**	Ronen Setty & Co. Law Firm: Ronen Setty	392
45	**Kenya**	Njeri Kariuki Advocate: Njeri Kariuki	401
46	**Libya**	Sefrioui Law Firm: Kamal Sefrioui	408
47	**Nigeria**	PUNUKA Attorneys and Solicitors: Anthony Idigbe & Emuobonuvie Majemite	417
48	**Qatar**	Sefrioui Law Firm: Kamal Sefrioui	433
49	**Sierra Leone**	BMT LAW: Glenna Thompson & Selvina Bell	445
50	**South Africa**	Baker & McKenzie: Gerhard Rudolph & Darryl Bernstein	453
51	**UAE**	Freshfields Bruckhaus Deringer LLP: Sami Tannous & Seema Bono	464
52	**Zambia**	Eric Silwamba, Jalasi and Linyama Legal Practitioners: Eric Suwilanji Silwamba, SC & Joseph Alexander Jalasi	476

North America:

53	**Overview**	Paul, Weiss, Rifkind, Wharton & Garrison LLP: H. Christopher Boehning & Julie S. Romm	485
54	**Bermuda**	Sedgwick Chudleigh Ltd.: Mark Chudleigh & Alex Potts	493
55	**Canada**	Burnet, Duckworth & Palmer LLP: Louise Novinger Grant & Romeo A. Rojas	503
56	**Cayman Islands**	Travers Thorp Alberga: Anna Peccarino & Ian Huskisson	511
57	**USA**	Hughes Hubbard & Reed LLP: John Fellas & Hagit Muriel Elul	525

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1 Arbitration Agreements

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

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 this chapter 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 your jurisdiction?

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 (please note that this English translation may not reflect the amendments made after 2003): http://www.japaneselawtranslation.go.jp/law/detail/?id=2155&vm=04&re=02.

2.2 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.

2.3 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 rather 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 into between a consumer and a business entity. Arbitration proceedings may be carried on 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.

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

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 your jurisdiction? 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 **not** be "arbitrable": (i) validity of intellectual property rights granted by the government, e.g. patents, utility models and trademarks; (ii) shareholders' action seeking revocation of a resolution of the shareholders' meeting; (iii) administrative decisions of government agencies; and (iv) 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 your jurisdiction 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. See also question 1.3 above.

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; see also 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 the 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 your jurisdiction 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 your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction 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 your jurisdiction 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 your jurisdiction?

Reasonable doubt as to the impartiality and independence of the arbitrators can be the grounds for challenging them (Art. 18.1[2]). In order to secure the effectiveness of such a '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).

The "IBA Guidelines on Conflicts of Interest in International Arbitration" are widely recognised among international arbitration practitioners in Japan. Further, the Japan Association of Arbitrators ("JAA") published a "Code of Ethics for arbitrators" in 2008. The JAA's Code of Ethics provides a standard for compliance with regard to neutrality and impartiality of arbitrators.

6 Procedural Rules

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

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 arbitral tribunal (Art. 34); and court assistance in taking evidence (Art. 35).

6.2 In arbitration proceedings conducted in your jurisdiction, 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); 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 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 particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

Except for those general rules that govern legal practice in Japan, there are no particular rules that govern the conduct of counsel from Japan in arbitral proceedings sited in Japan.

6.4 What powers and duties does the national law of your jurisdiction 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 your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

The Attorney Act (Act No. 205 of 1949) strictly prohibits non-lawyers (including lawyers admitted in foreign jurisdictions) from performing legal business in Japan (The Attorney 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 international arbitration proceedings, including settlement procedures (Arts. 5-3 and 58-2 of the Foreign Lawyers Act).

6.6 To what extent are there laws or rules in your jurisdiction 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).

7 Preliminary Relief and Interim Measures

7.1 Is an arbitrator in your jurisdiction 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 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?

The courts will assess whether the requirements for the granting of preliminary or interim relief as stipulated in the Civil Provisional Remedies Act (Act No. 91 of 1989, "CPRA") have been satisfied. In order for the courts to grant preliminary or interim relief, (i) the right or relationship of rights to be preserved, and (ii) the necessity for preliminary or interim relief must be evidenced by making a *prima facie* showing. Further, the courts may order either party to provide appropriate security for the preliminary or interim relief. In practice, the arbitral tribunal's ability to order its own effective interim measures may influence the court's decision as regards the necessity requirement of (ii) above.

7.4 Under what circumstances will a national court of your jurisdiction 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 interim measures (Art. 24.2 and relevant provisions of the CPRA).

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

The Arbitration Act does not provide for the enforcement of preliminary relief and interim measures ordered by arbitral tribunals. It is generally considered that Japanese courts will not

enforce preliminary relief and interim measures ordered by arbitral tribunals in Japan or in other jurisdictions.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

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 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. See also 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 or 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 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

Under Japanese law, there is no clear categorical concept of "attorney-client privilege" with respect to the production of documents. As long as the tribunal follows Japanese rules of evidence, attorney-client privilege rarely poses 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? For example, is there any requirement under the law of your jurisdiction that the Award contain reasons or that the arbitrators sign every page?

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). There is no requirement under the Arbitration Act that the arbitrators sign every page.

9.2 What powers (if any) do arbitrators have to clarify, correct or amend an arbitral award?

Under the Arbitration Act, the arbitral tribunal has the power to correct any miscalculation, clerical error or any other similar error in the arbitral award, upon the request of the parties or by its authority (Art. 41). The arbitral tribunal may also interpret a specific part of the arbitral award upon request by a party (Art. 42). If a party requests the correction or interpretation of an award, the request must generally be made within 30 days from the date of the receipt of notice of the arbitral award (Art. 41(2), Art. 42(3)). Unlike the UNCITRAL Model Law, there is no time restriction with respect to corrections made by the arbitral tribunal on its own authority.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

Parties are entitled to request the court to "set aside" an arbitral award 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 party making the application 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 party 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., Jul. 28, 2009).

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

There are no explicit provisions in the Arbitration Act which allow parties to agree to exclude any grounds for challenging an arbitral award. It is generally considered that the parties may not waive their rights to set aside arbitral awards.

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 your jurisdiction?

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 your jurisdiction 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 acceded to the New York Convention on June 20, 1961. The New York Convention became effective in Japan from September 18, 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 your jurisdiction 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 your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

As 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 your jurisdiction? 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 to mean 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 your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? 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 the Japan Commercial Arbitration Association ("JCAA") and TOMAC, have provisions in respect of confidentiality. As 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.

12.2 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.

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 (Arts. 45 and 46), courts may reject the enforcement of an award if it is contrary to the "public order" of Japan. A foreign judgment which contained punitive damages, claimed separately from compensatory damages, has 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?

The Arbitration Act 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.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

In general, funding by a third party is not specifically prohibited. However, attorneys are not allowed to lend money to their client unless there are special circumstances, such as in the event of an emergency, which require the advance payment of litigation costs. "Professional" funders are not active in the market for litigation or arbitration.

Contingency fee arrangements are not specifically prohibited. However, attorneys' fees must always be appropriate and contingency fee arrangements might be considered inappropriate if they result in the amount of the attorneys' fees becoming extremely high in comparison to the benefit obtained by their clients.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Yes. Japan signed it on September 23, 1965 and ratified it on August 17, 1967.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Japan had entered into 42 BITs (including Economic Partnership Agreements with investment sections) as of May 2016, most 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 your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

Japan does not have standard terms or model language that it uses in its investment treaties. As to what types of protection are available and what conditions have to be satisfied under the investment treaty, the provisions of the relevant treaty must be carefully examined.

14.4 What is the approach of the national courts in your jurisdiction 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, liabilities which 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). New legislation with respect to the immunity of a foreign state, which came into effect on April 1, 2010, basically traces the above Supreme Court ruling.

15 General

15.1 Are there noteworthy trends in or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

The use of commercial arbitration has been stable in Japan in recent years. 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. As to international commercial arbitration in Japan, disputes related to distribution agreements, licence agreements and joint venture agreements are typically

referred to arbitration under the JCAA rules. Further, maritime (domestic or international) and construction (mostly domestic) are major areas in which arbitration procedures are frequently used to resolve disputes.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

Recently, the JCAA thoroughly amended the Commercial Arbitration Rules. The amended Rules came into force on February 1, 2014. The changes are generally in line with recent trends in amendments to the arbitration rules of other major international arbitral institutions. The key changes include enhancing the expeditious and proper conduct of arbitral proceedings by the arbitral tribunal. For instance, Rule 39.1 provides that the arbitral tribunal must use reasonable efforts to render an arbitral award within six months of the date on which it is constituted. Rule 39.2 provides that the arbitral tribunal must consult the parties and make a procedural schedule of the arbitral proceedings to the extent necessary and feasible as early as practicable. Moreover, the amended Rules introduced the provisions for interim measures by an emergency arbitrator (Rules 70 to 74).

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ANDERSON MŌRI & 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. Our firm is able to provide a complete dispute resolution service to our clients, 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 among their ranks former judges including a former Supreme Court Justice. In addition to engaging in the day-to-day conduct of dispute resolution, some of our attorneys are also actively involved in imparting their experience and expertise to the next generation of law students through university lecturing.

We have had extensive experience arbitrating and representing clients in arbitrations filed with and administered under the rules of: the Japan Commercial Arbitration Association (JCAA); the International Chamber of Commerce (ICC); the American Arbitration Association (AAA); the London Court of International Arbitration (LCIA); and the Daini Tokyo Bar Association, as well as *ad hoc* arbitrations and other dispute resolution methods.

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