Arbitration

Contributing editors
Gerhard Wegen and Stephan Wilske

2019

GETTING THE DEAL THROUGH

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Arbitration 2019

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Gleiss Lutz

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Arbitration 2019

Fourteenth edition

Getting the Deal Through is delighted to publish the fourteenth edition of *Arbitration*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Armenia, Chile and Pakistan.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Gerhard Wegen and Stephan Wilske of Gleiss Lutz, for their continued assistance with this volume.

GETTING THE DEAL THROUGH

London
January 2019

Japan

Aoi Inoue
Anderson Mōri & Tomotsune

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your jurisdiction a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Japan acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards on 20 June 1961, which took effect on 18 September 1961. A declaration was made under article I of the Convention, such that Japan, on the basis of reciprocity, will only apply the Convention to the recognition and enforcement of awards made in the territory of another contracting state.

Other multilateral conventions relating to international commercial and investment arbitration to which Japan is a party are:

- the Protocol on Arbitration Clauses, Geneva, 24 September 1923 (ratified by Japan in 1928);
- the Convention on the Execution of Foreign Arbitral Awards, Geneva, 26 September 1927 (ratified by Japan in 1952);
- the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, 18 March 1965 (ratified by Japan in 1967); and
- the Energy Charter Treaty, Lisbon, 17 December 1994 (ratified by Japan in 2002).

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

Japan is a party to 31 bilateral investment treaties (BITs) as follows:

Country	Signed	Entry into force
Armenia	14 February 2018	-
Bangladesh	10 November 1998	25 August 1999
Cambodia	14 June 2007	31 July 2008
China*	27 August 1988	14 May 1989
Colombia	12 September 2011	11 September 2015
Egypt	28 January 1977	14 January 1978
Hong Kong	15 May 1997	18 June 1997
Iran	5 February 2016	26 April 2017
Iraq	7 June 2012	25 February 2014
Israel	1 February 2017	5 October 2017
Kazakhstan	23 October 2014	25 October 2015
Kenya	28 August 2016	14 September 2017
Korea*	22 March 2002	1 January 2003
Kuwait	22 March 2012	24 January 2014
Laos	16 January 2008	3 August 2008
Mongolia	15 February 2001	24 March 2002
Mozambique	1 June 2013	29 August 2014
Myanmar	15 December 2013	7 August 2014
Oman	19 June 2015	21 July 2017
Pakistan	10 March 1998	29 May 2002
Papua New Guinea	26 April 2011	17 January 2014
Peru	21 November 2008	10 December 2009
Russia	13 November 1998	27 May 2000
Saudi Arabia	30 April 2013	7 April 2017
Sri Lanka	1 March 1982	4 August 1982
Turkey	12 February 1992	12 March 1993
UAE	30 April 2018	-
Ukraine	5 February 2015	26 November 2015
Uruguay	26 January 2015	14 April 2017
Uzbekistan	15 August 2008	24 September 2009
Vietnam	14 November 2003	19 December 2004

*Japan, China and Korea entered into a trilateral investment treaty on 13 May 2012, which took effect on 17 May 2014.

Additionally, Japan has entered into the following economic partnership (EPA) agreements and free trade agreements (FTAs) that have sections addressing investment:

Country	Signed	Entry into force
Australia*	July 2014	January 2015
Brunei	June 2007	July 2008
Chile	March 2007	September 2007
India	February 2011	August 2011
Indonesia	August 2007	July 2008
Malaysia	December 2005	July 2006
Mexico	September 2004	April 2005
Mongolia	February 2015	June 2016
Philippines*	September 2006	December 2008
Singapore	January 2002	November 2002
Switzerland	February 2009	September 2009
Thailand	April 2007	November 2007

*The investment chapters of the Japan–Australia EPA and the Japan–Philippines EPA do not provide for investor–state dispute settlement.

Further, 12 Pacific Rim countries, including Japan, signed the Trans-Pacific Strategic Economic Partnership Agreement (TPP) on 4 February 2016. Although the United States withdrew its participation, the other signatories agreed in May 2017 to revive it and reached agreement in January 2018. In March 2018, the remaining 11 countries signed the revised version of the agreement, called the Comprehensive and

Progressive Agreement for Trans-Pacific Partnership (CPTPP), which is also known as TPP11.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

The primary domestic source of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards in Japan is the Arbitration Act (Act No. 138 of 2003) (English translation at www.japaneselawtranslation.go.jp/law/detail/?printID=&id=2784&re=02&vm=02). Although the Arbitration Act governs both domestic and international arbitral proceedings, the scope of its application (except for the recognition and enforcement of foreign arbitral awards in Japan) is generally limited to arbitration taking place in the territory of Japan (article 3(1)).

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

Japan's Arbitration Act is based on the UNCITRAL Model Law (original 1985 version: the 1985 Model Law). Although many of the provisions of the Arbitration Act are nearly identical to the 1985 Model Law, there are some differences, such as article 13(4) of the Arbitration Act, which allows for arbitration agreements to be made by way of electromagnetic record (ie, email), in contrast to the 1985 Model Law, which allows for agreements by facsimile but not electromagnetic record. Some of the other differences between Japan's Arbitration Act and the 1985 Model Law are described in subsequent questions.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

The mandatory Arbitration Act provisions on procedures from which parties may not deviate include article 5, which outlines the jurisdiction of courts, article 13(2), which describes that arbitration agreements must be in written form and article 25, which stipulates the equal treatment of all parties.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

The parties to an arbitration may freely decide on the substantive law applicable to the case (Arbitration Act, article 36(1)). If the parties designate the laws of a given state as the law to be applied by an arbitral tribunal, unless otherwise expressed, this is construed as referring to substantive law rather than conflict of laws rules. However, if the parties fail to agree on the substantive law to be applied to the case, the arbitral tribunal will apply the substantive law of the state with which the civil dispute subject to the arbitral proceedings is most closely connected (Arbitration Act, article 36(2)). This rule differs from that under the 1985 Model Law, in which the arbitral tribunal applies the law determined by the conflict of laws rules that it considers applicable.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your jurisdiction?

The Japan Commercial Arbitration Association (JCAA) is the most prominent arbitration institution in Japan (www.jcaa.or.jp/e/index.html). The JCAA has its own arbitration rules, the JCAA Commercial Arbitration Rules (JCAA Rules), the latest amendments to which took effect on 1 January 2019. Parties may also elect to use the International Chamber of Commerce to arbitrate a dispute. In addition, Japan has several bar associations that maintain their own arbitration systems and may be used by parties.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

The scope of disputes that are considered to qualify for arbitration include all civil disputes where there exists a possibility of settlement between the parties, excluding those relating to divorce or separation (article 13(1)). Arbitration is not permitted for actions relating to personal status, such as cases requesting confirmation of paternity, or confirmation that a patent is invalid, as these cases are not generally capable of settlement. In addition, an arbitration agreement between a consumer and a business for future civil disputes can be cancelled by the consumer (article 3 of the supplementary provisions to the Arbitration Act). Furthermore, an arbitration agreement between an individual worker and his or her employer for future labour disputes is null and void (article 4 of the supplementary provisions to the Arbitration Act).

9 Requirements

What formal and other requirements exist for an arbitration agreement?

The Arbitration Act stipulates that an arbitration agreement must be in writing and may be in the form of a document signed by all parties, letters or telegrams sent between the parties, including facsimile, or other written instrument (article 13(2)). It is not necessary that the document is 'a document signed by all parties', and to fulfil the requirement that the arbitration agreement is documented, it is considered sufficient if there is some type of evidence subsequent to the document recording the arbitration agreement (eg, a bill of lading). In addition, an arbitration agreement may be made by way of an electromagnetic record (eg, email) (article 13(4)), which distinguishes the Arbitration Act from the 1985 Model Law.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

The circumstances in which an arbitration agreement is no longer enforceable are generally the same as those under contract law. Termination or cancellation of the arbitration agreement itself, and legal incapacity or death of a party to the arbitration agreement (although in the case of death there is the possibility of succession) are the most common circumstances in which an arbitration agreement may become unenforceable.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

The general contract law dictates the cases in which a third party can be bound by an arbitration agreement. For example, third parties or non-signatories can be bound by an arbitration agreement in cases of succession and assignment. In addition, some commentators opine that when a legal person, such as a stock corporation, is a party to an arbitration agreement, the legal representatives and other executive officers of such legal person should also be bound by the arbitration agreement if the arbitration agreement would otherwise not make any sense in resolving a dispute.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

The Arbitration Act does not make any provisions with respect to third-party participation in arbitration. This issue is open for debate and is, in practice, resolved through consultation and agreement among the existing parties, the arbitrators and the third party in question on a case-by-case basis, unless the applicable arbitration rules that the parties have agreed to stipulate otherwise.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

Where Japanese law governs an arbitration agreement, neither a parent company nor subsidiary companies of a signatory company can be bound by the arbitration agreement, regardless of whether they were involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine. However, it could be possible that the parent company or subsidiary companies of a signatory company be construed as the real signatory company that should be bound by the arbitration agreement depending on the specific circumstances surrounding the case under the doctrine of 'piercing the corporate veil' or otherwise.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

The Arbitration Act does not exclude the possibility of multiparty arbitration agreements. There are no special requirements for multiparty arbitration agreements to be valid.

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

An arbitrator must be an impartial and independent party, possessing the qualifications agreed upon by the parties involved in the arbitration (article 18(1)). If a sole or third arbitrator is appointed by the court, due regard must be had for whether it would be appropriate to appoint an arbitrator of a different nationality from the parties (article 17(6)(iii)). Retired judges may act as arbitrators. Arbitrators need not be selected from a list of arbitrators unless otherwise agreed upon by the parties to arbitration. It is highly likely that courts in Japan will recognise any contractually stipulated requirements for arbitrators based on nationality, religion or gender as a matter of autonomy, although the validity and enforceability of these types of requirements have yet to be judicially tested in Japan.

16 Background of arbitrators

Who regularly sit as arbitrators in your jurisdiction?

With respect to commercial arbitration in Japan, practising lawyers and law professors regularly sit as arbitrators. Although there is more of an interest in (gender) diversity in international arbitration in Japan, to date the author has not seen any notable tendency to provide for more diversity in institutional appointments.

17 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

Under the Arbitration Act, where there are two parties and no agreement has been reached as to the number of arbitrators, the arbitral tribunal will be a panel of three arbitrators (article 16(2)). In the case of multiparty arbitration where the number of arbitrators has not been agreed upon between the parties, upon request, the court will determine the number (article 16(3)). In addition, when the parties fail to agree on the procedure of appointing the arbitrators, and there are two parties in arbitration with three arbitrators, each party may appoint an arbitrator, and the two appointed arbitrators will appoint the third (article 17(2)). If there are two parties and a sole arbitrator and the appointment of such arbitrator cannot be decided between the parties, the court will appoint an arbitrator upon the request of a party (article 17(3)). When the appointment of an arbitrator cannot be decided in multiparty arbitration, the court will appoint the arbitrator upon the request of a party (article 17(4)).

18 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

The Arbitration Act sets out two grounds on which an arbitrator can be challenged: the arbitrator does not possess qualifications agreed to by the parties; or circumstances exist that give rise to justifiable doubt as to the impartiality or independence of the arbitrator (article 18(1)). In addition, when a party appoints or makes recommendations regarding the appointment of an arbitrator, it may only challenge the arbitrator for reasons that it became aware of after the appointment (article 18(2)).

The parties may decide on the procedure for challenging an arbitrator (article 19(1)); failing an agreement, the arbitral tribunal will decide (article 19(2)). Where there is no agreement on the procedure for challenge, the challenging party must request an arbitral tribunal for challenge within 15 days of the later of either the day on which it became aware of the constitution of the arbitral tribunal or the day on which it became aware of the existence of any of the circumstances constituting grounds for challenge. In addition, the party must submit a written request describing the reasons for the challenge to the arbitral tribunal (article 19(3)). If a challenge is denied, the challenging party may request a judicial review of the decision within 30 days of receipt of notice of the decision (article 19(4)). While a review of the challenge decision is pending before the court, the arbitral tribunal may commence or continue the proceedings, and make an arbitral award (article 19(5)).

The removal of an arbitrator may be requested of the court on the grounds of the arbitrator's de jure or de facto inability or undue delay in performing his or her duties (article 20).

An arbitrator's mandate is terminated upon his or her death or resignation, the removal of the arbitrator upon agreement by the parties, a decision ruling that grounds for challenge exist or a decision to remove an arbitrator (article 21(1)).

There is a tendency for practitioners of arbitration who deal with international arbitration in Japan to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration.

19 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration and expenses of arbitrators.

Each arbitrator is considered to have entered into an entrustment contract with all the parties, whether such arbitrator is party-appointed or not. Accordingly, party-appointed arbitrators are also required to be neutral in performing their duties.

The arbitrators are compensated in accordance with the agreement of the parties; however, failing an agreement between the parties, the arbitral tribunal will determine appropriate compensation (article 47).

20 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

There are no provisions in the Arbitration Act for the civil liability of arbitrators. Accordingly, pursuant to the general rules of contract law of Japan, an arbitrator may theoretically be liable to pay damages to parties if the arbitrator wilfully or negligently breaches his or her duties under the entrustment contract with the parties, unless otherwise agreed upon by the parties. However, rule 13 of the JCAA Rules stipulates that arbitrators will not be liable for an act or omission related to the arbitration unless such an act or omission can be shown to constitute wilful or gross negligence.

Any arbitrator who accepts or demands bribes, or any party that offers a bribe, will face criminal penalties (articles 50 to 54). Most of these provisions apply even if the crimes are committed outside Japan (article 55).

Jurisdiction and competence of arbitral tribunal

21 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

If an arbitration agreement exists, but court proceedings are initiated despite this, the court proceedings may be dismissed by request of the defendant (Arbitration Act, article 14(1)). The request for dismissal may not be filed with the court after the defendant pleads on the substance of the dispute (article 14(1)(iii)). This contrasts with the 1985 Model Law, which prescribes that the court shall refer the parties to arbitration in the case of a party arguing the existence of an arbitration agreement. Even when an action is pending in court, an arbitral tribunal may commence or continue proceedings and make an arbitral award (article 14(2)).

22 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated, and what time limits exist for jurisdictional objections?

An arbitral tribunal may rule on the existence or validity of an arbitration agreement or its own jurisdiction (article 23(1)). A plea that the arbitral tribunal does not have jurisdiction must be raised early, in most cases before the time at which the first written statement on the substance of the dispute is submitted to the tribunal (article 23(2)). If the arbitral tribunal decides that it has jurisdiction, a party may ask a court for judicial review within 30 days of receipt of notice of the decision (article 23(5)).

Arbitral proceedings

23 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

If there is no agreement between the parties regarding the place (article 28(2)) or language (article 30(2)) of the arbitration, it will be decided by the arbitral tribunal. When deciding the place, the arbitral tribunal will consider the circumstances of the case, including the convenience of the parties.

24 Commencement of arbitration

How are arbitral proceedings initiated?

Under the Arbitration Act, the arbitral proceedings commence by one party giving the other party notice to refer the dispute to the arbitral proceedings (article 29(1)). The claimant must, within the time limit prescribed by the arbitral tribunal, state the relief or remedy sought, the facts supporting its claim and the points at issue. The claimant may submit all documentary evidence it considers to be relevant or may add a reference to the documentary evidence or other evidence it will submit (article 31(1)). The respondent shall follow the same rule as applicable to the claimant (article 31(2)). Each party may make amendments or additions to their statements during the course of arbitral proceedings. However, the arbitral tribunal may refuse to allow the amendments or additions if they are made after the permitted time period (article 31(3)). These submissions may be made orally or in writing.

However, the JCAA Rules require that the claimant submit a written request for arbitration to commence arbitral proceedings to the JCAA, setting forth, in addition to the items required by the Arbitration Act, a reference to the arbitration agreement that is invoked (including any agreement about the number of arbitrators, the procedure for appointing arbitrators, the place of arbitration and the language or languages of the arbitral proceedings), the contact information of the claimant or its counsel and other items (rule 14(1)). The written request for arbitration also may set forth the name, street address and other contact details of an arbitrator appointed by the claimant, if the parties have agreed that the number of arbitrators is three; a statement about the number of arbitrators, the procedure for appointing arbitrators, the place of arbitration, or the language or languages of arbitration; or a statement about the governing law applicable to the substance of the dispute (rule 14(2)). A signature is not required for this filing. The number of copies of the written request to be filed is the number of arbitrators (three if not yet determined) and the other party or parties plus one (rule 22(1)). However, this requirement does not apply to a submission by email, facsimile or any other electronic communication method (rule 22(2)).

25 Hearing

Is a hearing required and what rules apply?

The arbitral tribunal may (or if a party requests, must) hold oral hearings unless otherwise agreed by the parties. An oral hearing may be held for the presentation of evidence or for oral argument by the parties, provided that these are carried out at an appropriate stage of the arbitral proceedings; sufficient advance notice of the time and place of hearings is given to the parties; a party supplying evidence to the tribunal has ensured that the other party is aware of the contents; and the tribunal has ensured that all parties are aware of the contents of any expert report or other evidence (article 32).

26 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

Under the Arbitration Act, each party is guaranteed equality and given a full opportunity to present its case in the arbitral proceedings (article 25). The JCAA Rules further require that written statements setting forth each party's case on the law and facts be submitted (rule 44). In addition, the arbitral tribunal, on its own motion, may examine evidence that a party has not applied to present, which may take place other than at a hearing. Further, the arbitral tribunal, at the written request of a party or on its own motion, may order any party to produce documents in its possession that the arbitral tribunal considers necessary to examine after giving the party in possession an opportunity to comment, unless the arbitral tribunal finds reasonable grounds for the party in possession to refuse the production (rule 54). One or more experts may be appointed by the arbitral tribunal to advise on any necessary issues; if requested, parties will have the opportunity to put the questions to an expert in a hearing (rule 55). There is a tendency for arbitrators or parties who are familiar with international arbitration practice to apply or seek guidance from the IBA Rules on the Taking of Evidence in International Arbitration.

27 Court involvement

In what instances can the arbitral tribunal request assistance from a court, and in what instances may courts intervene?

An application may be made by the arbitral tribunal or a party for a court to assist in taking evidence by any means considered necessary by the arbitral tribunal. The taking of evidence can relate to entrustment of investigation, examination of witnesses, expert testimony, investigation of documentary evidence or inspection (article 35). The court may assist with service of a notice (article 12), appointment of an arbitrator (article 17), challenge of an arbitrator (article 19), removal of an arbitrator (article 20) and jurisdiction of the arbitral tribunal (article 23). A party may also apply to a court to set aside (article 44) or enforce (article 45) an arbitral award.

28 Confidentiality

Is confidentiality ensured?

Arbitral proceedings are generally not disclosed, but it depends on the agreement between the parties. The Arbitration Act does not have any express provisions prohibiting the disclosure of information related to arbitral proceedings, although it is interpreted that an arbitrator

has a confidentiality duty to the parties of arbitral proceedings. The JCAA Rules, however, expressly stipulate that arbitral proceedings and records are to be closed to the public and arbitrators, officers and staff of the JCAA, the parties and their representatives, and other persons involved in the arbitral proceedings may not disclose facts related to arbitration cases except where disclosure is required by law or court proceedings, or based on any other justifiable grounds (rule 42).

Interim measures and sanctioning powers

29 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Before or during an arbitral proceeding, a party may request from a court an interim measure of protection in respect of a civil dispute that is the subject of the arbitration agreement (article 15). The types of interim measures that can be ordered by courts are the same as those permitted by the Civil Provisional Remedies Act (Act No. 91 of 1989) which applies to any types of disputes. These measures include orders of preliminary attachment or preliminary injunction.

30 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

The Arbitration Act does not provide for an emergency arbitrator prior to the constitution of the arbitral tribunal. However, the JCAA Rules set out detailed rules for an emergency arbitrator (rules 75 to 79). Under these rules, the JCAA shall use reasonable efforts to appoint an emergency arbitrator within two business days from its receipt of an application for emergency measures (rule 76(4)) and the emergency arbitrator shall make a decision on the emergency measures within two weeks from his or her appointment (rule 77(4)). The claimant cannot obtain an order of emergency measures from the emergency arbitrator ex parte because the application for emergency measures must be notified to the respondent (rules 16(1) and 75(6)). The applicant must submit a written request for arbitration within 10 days of the application (rule 75(7)). The types of emergency measures that the emergency arbitrator may order are the same as the interim measures that may be granted by the arbitral tribunal (rule 77(1)). The emergency measures shall be deemed to be interim measures granted by the arbitral tribunal when it is constituted (rule 77(5)). However, no determination on emergency measures shall be binding on the arbitral tribunal and the arbitral tribunal may approve, modify, suspend or terminate the emergency measures in whole or in part (rule 78).

31 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

The Arbitration Act stipulates that at the request of a party the arbitral tribunal may order any party to take an interim measure of protection as the arbitral tribunal may consider it necessary in respect of the subject matter of the dispute and may order any party to provide appropriate security in connection with the interim measure ordered (article 24). The JCAA Rules include more detailed provisions for interim measures by the arbitral tribunal (rules 71 to 74). Under these rules, the arbitral tribunal may grant, for example, orders to: maintain or restore the status quo; take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral proceedings themselves; provide a means of preserving assets out of which a subsequent arbitral award may be satisfied; or preserve evidence that may be relevant and material to the resolution of the dispute (rule 71(1)). Neither the Arbitration Act nor the JCAA Rules have any specific provision that addresses whether an arbitral tribunal may order security for costs. However, it is generally understood that an arbitral tribunal is not prohibited from ordering a claimant to provide security for costs at the request of a respondent.

32 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

The Arbitration Act stipulates that the claimant shall state the relief or remedy sought, the facts supporting its claim and the points at issue within the period determined by the arbitral tribunal (article 31(1)). If the claimant fails to comply with this, the arbitral tribunal shall make a ruling to terminate the arbitral proceedings, unless there is sufficient cause for such failure or unless otherwise agreed by the parties (article 33(1)(4)). If any party fails to appear at an oral hearing or to produce documentary evidence, the arbitral tribunal may make the arbitral award on the evidence before it that has been collected up until such time, unless there is sufficient cause for such failure or unless otherwise agreed by the parties (article 33(3)(4)). However, the Arbitration Act does not provide the arbitral tribunal with any power to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration or commit gross violations of integrity of the arbitral proceedings.

The JCAA Rules provide that if one or both parties fail to appear, a hearing may be held in its or their absence (rule 52(2)). If one party, without sufficient cause, fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the arbitral proceedings and make the arbitral award based on the evidence before it (rule 45(2)). However, the JCAA Rules also do not provide for any sanctioning powers of the arbitral tribunal against guerrilla tactics or gross violations of integrity.

Awards

33 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Failing party agreement, any decision of the arbitral tribunal may be made by a majority of its members (article 37(2)). If an arbitrator refuses to take part in a vote or sign an arbitral award, the reason for any such omission must be stated in the award (article 39(1), rule 66(6)).

34 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

The Arbitration Act does not make any provisions relating to dissenting opinions. It seems that even if an arbitral award refers to dissenting opinions, this will not violate the Arbitration Act.

35 Form and content requirements

What form and content requirements exist for an award?

The arbitral award must be made in writing and include the signatures of the arbitrators who made the award, the reasons for such award and the date and place of the arbitration (article 39). The JCAA Rules also prescribe that if the parties have agreed that no reasons are to be given, or if the arbitral tribunal records a settlement in the form of an arbitral award on agreed terms, the reasons shall be omitted (rule 66(3)) and that the arbitral award must set out the total amount and allocation of the administrative fee, the arbitrators' remuneration and expenses, and other reasonable expenses incurred with respect to the arbitral proceedings (rules 66(4) and 80(1)).

Update and trends

In June 2017, the Cabinet of Japan approved the Basic Policy on Economic and Fiscal Management and Reform 2017, which aimed to 'develop a foundation to activate international arbitration' in Japan as one of the important policies of the Japanese government. Under the cooperation of the public and private sectors, in February 2018, the Japan International Dispute Resolution Centre (JIDRC) was established. On 1 May 2018, the JIDRC-Osaka, the state-of-the-art facility dedicated to resolving international disputes (international arbitration and alternative dispute resolution (ADR)), started its operations. Also, the JIDRC plans to establish the same facilities for a hearing of arbitration and other types of ADR in Tokyo – the JIDRC-Tokyo – in the near future.

There has been no case of Japan becoming a respondent country in investment treaty arbitration. No BITs have been terminated. Rather, recently, the government has been very active in promoting signing BITs, EPAs and FTAs, and is now engaged in negotiations with several countries. In addition, 12 Pacific Rim countries, including Japan, signed the TPP on 4 February 2016. The TPP contains investor–state dispute settlement clauses addressing investment treaty arbitration. Although the United States withdrew its participation, the other signatories agreed in May 2017 to revive it and reached agreement in January 2018. In March 2018, 11 countries signed the revised version of the CPTPP agreement. It is expected that as the number of BITs, EPAs and FTAs involving Japan increases, Japanese companies will become increasingly involved in investment treaty arbitration.

36 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

No time limit is stipulated for an award to be rendered under the Arbitration Act. However, the JCAA Rules stipulate that the arbitral tribunal shall use reasonable efforts to render an arbitral award within nine months of the date when it is constituted (rule 43(1)). For this purpose, the arbitral tribunal shall consult with the parties, and make a schedule of the arbitral proceedings in writing to the extent necessary and feasible as early as practicable (rule 43(2)).

37 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

A party may not apply to set aside the arbitral award if more than three months have elapsed since the party received notice of the award or after an enforcement decision (article 46) has become final and conclusive (article 44(2)). A party may request the arbitral tribunal to correct any errors in computation, clerical or typographical errors, or errors of a similar nature generally within 30 days of receipt of notice of the award (article 41(2)). The JCAA Rules amend this time limit from 30 days to four weeks (rule 68(2)).

38 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

There are no specific restrictions applicable to the types of awards or relief to be granted by the arbitral tribunal, provided they are derived from the applicable substantive law. However, the arbitral tribunal may decide ex aequo et bono if the parties have expressly authorised it to do so (article 36(3)). Partial and interim awards are possible. Additionally, a party may request the arbitral tribunal to make an additional arbitral award in relation to claims presented in the arbitral proceedings but omitted from the award within 30 days of receipt of notice of the award (articles 41(2) and 43(1)). The JCAA Rules amend this time limit from 30 days to four weeks (rule 70).

39 Termination of proceedings

By what other means than an award can proceedings be terminated?

Arbitral proceedings can be terminated by a ruling to terminate the proceedings where the claimant withdraws its claim (unless the respondent objects to the withdrawal and the tribunal agrees to such objection), the parties agree to terminate the proceedings, a settlement is reached on the dispute that is the subject of the arbitral proceedings or the arbitral tribunal finds that the continuation of the arbitral proceedings has become unnecessary or impossible (article 40). If parties reach a settlement during the arbitral proceedings, the tribunal may make a ruling on agreed terms, in which case the ruling has the same effect as an arbitral award (article 38).

40 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

Parties may agree on the way in which costs for the proceedings are apportioned between them. Failing an agreement, each party must bear the costs it has disbursed in relation to the proceedings. The parties may agree for the tribunal, in the award or in an independent ruling to determine the apportionment between the parties of the costs disbursed during the course of the proceedings (article 49). The JCAA Rules include more detailed provisions regarding cost allocation in arbitral proceedings (rules 66(4)(5) and 80). The costs of the arbitration to be apportioned between the parties include their legal fees and expenses to the extent the arbitral tribunal determines that they are reasonable (rule 80(1)).

41 Interest

May interest be awarded for principal claims and for costs, and at what rate?

If Japanese substantive law applies, interest may be awarded at a rate of 5 per cent per annum for claims to which the Civil Code (Act No. 89 of 1896) was applied, and 6 per cent per annum for claims to which the Commercial Code (Act No. 48 of 1899) was applied, unless other rates are agreed to by the parties.

Proceedings subsequent to issuance of award

42 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

The arbitral tribunal may correct an award on its own initiative or upon request by a party (article 41, rule 68(1)). The arbitral tribunal may also interpret an award upon request by a party (article 42, rule 69). If a party requests the correction or interpretation of an award, the request must generally be made within 30 days (articles 41(2) or 42(3)) or four weeks (rules 68(2) and 69) of the receipt of notice of the arbitral award. However, there is no time limit for an award corrected upon the initiative of the tribunal, which distinguishes the Arbitration Act from the 1985 Model Law.

43 Challenge of awards

How and on what grounds can awards be challenged and set aside?

If an arbitral award is rendered with the place of arbitration being within the territory of Japan, such an award may be challenged and set aside under the Arbitration Act (articles 3(1) and 44). There are limited grounds on which to set aside or challenge arbitral awards, which include:

- an invalid arbitration agreement;
- required notice to appoint arbitrators was not given to a party;
- a party was unable to present its case;
- the award relates to matters beyond the scope of the arbitration agreement or claims of the arbitration;
- the composition of the tribunal or proceeding was not in accordance with the parties' agreement;

- the award was based on a dispute not qualifying as a subject for arbitration; or
- the award is in conflict with public policy (article 44(1)).

These grounds are substantially identical to those stipulated by article 34(2) of the 1985 Model Law. A challenge may not be made if more than three months has elapsed from the date on which the challenging party received notice of the award or after an enforcement decision (article 46) has become final and conclusive (article 44(2)).

44 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

As a general rule, a court decision on a petition for setting aside or challenging arbitral awards can be appealed only once (article 44(8)). Such an appeal must be filed within two weeks of receipt of the decision (article 7). The challenge proceedings at the first instance usually take six months to one year, and the appeal proceedings usually take up to six months. Court fees for these processes are nominal (in many cases less than US$100) and shall be paid by the parties (as a general rule by a losing party). The parties also have to bear their respective attorneys' fees.

45 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

Domestic and foreign awards have the same effect as a final judgment (article 45) and are enforced in a Japanese court (article 46). A party seeking enforcement based on the arbitral award should apply to a court for an enforcement decision. The grounds for refusing to recognise or enforce domestic and foreign awards are the same as those of article 36(1) of the 1985 Model Law or article V of the New York Convention. Even if an award is granted in a state that has not signed or ratified the Convention, these recognition and enforcement rules apply. In that sense, the location of the arbitration is not an issue in the recognition or enforcement of awards. It is generally considered that Japanese courts look favourably upon recognising and enforcing awards.

46 Time limits for enforcement of arbitral awards

Is there a limitation period for the enforcement of arbitral awards?

The Arbitration Act does not provide for a limitation period for the enforcement of arbitral awards.

47 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Languages employed in the relevant provisions in the Arbitration Act seem to be inconsistent. Article 45 seems to stipulate that foreign awards set aside by the courts at the place of arbitration shall not be recognised or enforced (article 45(1) and (2)(vii)). However, article 46 seems to stipulate that an enforcement decision may be issued for such foreign awards at the discretion of the courts (article 46(8)). Government officers in charge of drafting these provisions have explained that the provisions should be interpreted to mean that courts shall have discretion as to whether such awards will be recognised and enforced, regardless of the language in the provisions. Accordingly, one can say that Japanese courts have discretion to recognise and enforce foreign awards set aside by the courts at the place of arbitration. There has been no court precedent that discusses this issue under the Arbitration Act as yet.

48 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

The Arbitration Act does not provide for the enforcement of orders by emergency arbitrators. No case law seems to have been established for this issue. Under the JCAA Rules, parties shall be bound by, and carry out, the emergency measures ordered by emergency arbitrators, which shall be deemed to be interim measures granted by the arbitral tribunal when it is constituted (rule 77(5)). However, no determination on emergency measures shall be binding on the arbitral tribunal and the arbitral tribunal may approve, modify, suspend or terminate the emergency measures in whole or in part (rule 78). Neither the interim measures granted by the arbitral tribunal nor the emergency measures ordered by emergency arbitrators may be enforced with an enforcement decision granted by a Japanese court.

49 Cost of enforcement

What costs are incurred in enforcing awards?

To enforce an award that has been granted by an arbitral tribunal, but has not been performed voluntarily, a party generally must file a petition for the enforcement decision with the court. The enforcement decision once rendered can be used for compulsory enforcement with the assistance of a judicial authority. The costs required for these procedures are generally borne by the party seeking enforcement of the award.

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Other

50 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your jurisdiction?

There is no US-style discovery in Japan. Rather, the court may allow a limited exchange of documents and evidence. Written witness statements are common before testifying, and party officers may testify. Japanese legal practitioners are familiar with an adversarial witness examination (ie, direct and cross-examination). These features are often reflected in arbitration proceedings conducted in Japan.

51 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your jurisdiction? Does best practice in your jurisdiction reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

There are no specific professional or ethical rules that are applicable to counsel in international arbitration in Japan. However, arbitration practitioners in Japan generally agree that the best practice of party representation reflects the IBA Guidelines on Party Representation in International Arbitration.

52 Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

In Japan, there are no statutes or case law specifically prohibiting third-party funding of arbitral claims. However, since there is also no regulation explicitly permitting third-party funding, there is uncertainty as to whether third-party funding is allowed (and if so, to what extent).

53 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

The Attorney Act (Act No. 205 of 1949) stipulates that any person who is not a practising attorney (which in this context means a licensed Japanese attorney or *bengoshi*), or a special legal entity established by practising attorneys, is prohibited from, for a fee and as an occupation, becoming involved in legal problems by giving legal advice, providing legal representation, arbitrating, etc (article 72).

However, the Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers (Act No. 66 of 1986) provides that a foreign-qualified lawyer registered in Japan may perform representation in regard to the procedures for an international arbitration case (article 5-3), which is defined as a case of civil arbitration conducted in Japan with all or part of the parties composed of persons who have addresses or main offices in foreign countries (article 2-11). In addition, foreign lawyers engaged in legal business in a foreign country (excluding a person who is employed and is providing services in Japan based on his or her knowledge of foreign law) may perform representation in regard to the procedures for an international arbitration case (article 58-2).

Getting the Deal Through

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