Japan

Arbitration Guide

IBA Arbitration Committee

Contacts

Hiroyuki Tezuka
Yutaro Kawabata

Nishimura & Asahi
Ark Mori Building
1-12-32 Akasaka
Minato-ku, Tokyo 107-6029
Japan

h_tezuka@jurists.co.jp
y_kawabata@jurists.co.jp

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I. Background

(i) How prevalent is the use of arbitration in your jurisdiction? What are seen as the principal advantages and disadvantages of arbitration?

Arbitration is much less frequently used in Japan as a method of settling either domestic or international disputes as compared with litigation in the courts. However, in a growing number of cases, Japanese parties to international commercial contracts agree to include arbitration clauses.

The private and confidential nature of arbitration is regarded as one of its principal advantages; however, arbitration is not necessarily regarded by Japanese users as a fast and inexpensive method of resolving disputes.

(ii) Is most arbitration institutional or ad hoc? Domestic or international? Which institutions and/or rules are most commonly used?

Among the relatively small number of large international commercial arbitration cases with Japan as their seat, the Japan Commercial Arbitration Association (JCAA) handles more cases than other institutions. In its fiscal year 2010, JCAA handled 48 cases (25 new cases and 23 carried-forward cases). Most of the arbitration cases handled by JCAA are conducted under the Arbitration Rules of JCAA, but some cases have been conducted under the UNCITRAL Rules with JCAA's administration. Other institutional rules, such as the ICC rules, are less frequently used in international commercial arbitrations seated in Japan. However, in international arbitration cases involving Japanese parties with their seat outside of Japan, the ICC appears to be the most frequently chosen institution. According to ICC's 2009 Statistical Report, 26 Japanese parties were involved in ICC arbitrations (ICC ICArb Bull Vol 21 No 1, 2010).

Arbitration centres established by the local bar associations are frequently used for resolving domestic disputes; however, they are not commonly used for international dispute resolution. The Med–Arb process is used in most of the disputes handled by local bar associations' arbitration centres. Most cases are resolved by the parties' agreement to settle.

In addition, the Tokyo Maritime Arbitration Commission (TOMAC) of the Japan Shipping Exchange, Inc. handles maritime arbitration. A number of domestic construction disputes are also resolved through the Med-Arb process before the Construction Dispute Review Boards established pursuant to the Construction Business Act.

(iii) What types of disputes are typically arbitrated?

Disputes related to distribution agreements, construction agreements, license agreements and joint venture agreements are typically arbitrated in international arbitrations in Japan under the JCAA rules.

(iv) How long do arbitral proceedings usually last in your country?

According to JCAA, arbitral proceedings under its rules usually last approximately 14 months.

(v) Are there any restrictions on whether foreign nationals can act as counsel or arbitrators in arbitrations in your jurisdiction?

There are no restrictions on nationality for counsel in arbitrations. The Japanese Arbitration Law does not impose any formal requirements for party representatives who act as counsel. Article 72 of the Practicing Attorneys Law generally prohibits anyone other than attorneys licensed to practice law in Japan from handling, for the purpose of gaining fees, 'legal business', which includes arbitration. However, the Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers (Law No 66 of 1986) sets forth significant exceptions to this general rule. First, a foreign lawyer who is registered in Japan as a special foreign member of the Japan Federation of Bar Associations ('Registered Foreign Lawyer') may handle certain legal business, such as legal business concerning the law of the country of their primary qualification. Article 5–3 of the Foreign Lawyers Law further provides that a Registered Foreign Lawyer may represent a client in international arbitration proceedings regardless of whether the subject matter concerns Japanese law. Secondly, Article 58(2) of the Foreign Lawyers Law provides that a foreign lawyer (who is not a Registered Foreign Lawyer) qualified to practice law in a foreign country (excluding a person who is employed and is providing services in Japan, based on their knowledge of foreign law) may, notwithstanding the provision of Article 72 of the Practicing Attorneys Law, represent clients in international arbitration cases which they were requested to undertake or undertook in such foreign country.

There are no restrictions in relation to the nationality of arbitrators. Moreover, an individual does not need to be qualified to practice law in order to act as an arbitrator in Japan: law professors and architects are permitted to act, and have frequently acted, as arbitrators in Japan.

II. Arbitration laws

(i) What law governs arbitration proceedings with their seat in your jurisdiction? Is the law the same for domestic and international arbitrations? Is the national arbitration law based on the UNCITRAL Model Law?

The Arbitration Law (Law No 138 of 2003, the 'Japanese Arbitration Law', the 'law', or the 'New Law') governs arbitration proceedings with their seat in Japan. The New Law, promulgated on 1 August 2003, to replace Japan's old arbitration law (the 'Old Law'), came into force on 1 March 2004. The New Law is based on the UNCITRAL Model Law. It was the legislators' intention to make the new arbitration law as compatible as possible with the Model Law, so as to encourage international arbitrations in Japan.

In addition, the Supreme Court Rules on Procedures of Arbitration Related Cases (Supreme Court Rules No 27, 26 November 2003) set forth particulars of procedural rules for court cases related to arbitration.

(ii) Is there a distinction in your arbitration law between domestic and international arbitration? If so, what are the main differences?

There is no distinction.

(iii) What international treaties relating to arbitration have been adopted (eg, New York Convention, Geneva Convention, Washington Convention, Panama Convention)?

Japan is a contracting state to the New York Convention and the Washington Convention. Japan has signed Bilateral Investment Treaties with 26 countries as of April 2011. Japan is also a signatory to the Energy Charter Treaty.

(iv) 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 Law provides guidance to the arbitral tribunal concerning the substantive law to be applied to the merits of the dispute. The parties are free to choose the rules of law applicable to the substance of the dispute. The Law also provides that, unless otherwise expressed, the parties' designation of a law or legal system of a given State shall be interpreted as to directly refer to the substantive law of that State and not to its conflict of laws rules (Article 36(1)).

If the parties fail to make such choice, the Law directs the arbitral tribunal to apply 'the substantive law of the State with which the civil dispute subject to the arbitral proceedings is most closely connected' (Article 36(2)). This is one of the limited number of deviations of the Law from the Model Law.

Under the Japanese Arbitration Law, the arbitral tribunal may decide *ex aequo et bono* only if the parties have expressly authorised it to do (Article 36(3)).

Moreover, the importance of contracts and usages is emphasised under Article 36(4) of the Law: '[w]here there is a contract relating to the civil dispute subject to the arbitral proceedings, the arbitral tribunal shall decide in accordance with the terms of such contract and shall take into account the usages, if any, that may apply to the civil dispute'.

In addition, the Act on General Rules for Application of Laws (Act No 78 of 21 June 2006), which is the law providing conflict of laws rules in Japan, provides that parties to a tort may, after the tort occurs, change the law applicable to the formation and effect of a claim arising from tort (Article 21). This provision is interpreted to mean that parties are restricted from making prior agreements regarding the substantive law on tort claims. However, this restriction does not apply to tort claims that are related to a contract in which the parties agree to resolve their future disputes by arbitration.

III. Arbitration agreements

(i) Are there any legal requirements relating to the form and content of an arbitration agreement? What provisions are required for an arbitration agreement to be binding and enforceable? Are there additional recommended provisions?

Arbitration agreements must be in written form (Article 13(2)). Documents signed by all the parties, letters or telegrams exchanged between the parties (including documents exchanged by facsimile) and other written instruments satisfy the writing requirement. Reference in a written agreement to a separate document containing an arbitration clause and an arbitration agreement made by way of electronic or magnetic records (eg, emails) also satisfy the written form requirement (Article 13(3) (4)).

An arbitration agreement is valid only when the subject matter relates to a civil dispute that can be resolved by settlement between the parties (civil disputes concerning divorce and dissolution of adoptive relations are expressly excluded) (Article 13(1)). In addition, in order for an arbitration agreement to resolve future disputes to be binding and enforceable, such agreement must be made in respect of a defined legal relationship.

(ii) What is the approach of courts towards the enforcement of agreements to arbitrate? Are there particular circumstances when an arbitration agreement will not be enforced?

Japanese courts have consistently shown a pro-arbitration approach towards the enforcement of agreements to arbitrate. In accordance with Article 14(1) of the Law, Japanese courts, upon a petition by the defendant, must dismiss (on a 'without prejudice' basis) any claim related to a civil dispute that is subject to an arbitration agreement. There are only three particular circumstances where the court proceeds with the litigation without dismissing a claim that is subject to an arbitration agreement: (i) when the arbitration agreement is null and void, cancelled, or for other reasons invalid; (ii) when arbitration proceedings are inoperative or incapable of being performed based on the arbitration agreement; or (iii) when the objection of the defendant to the jurisdiction of the court is made after the defendant's pleading on the merits.

(iii) Are multi-tier clauses (eg, arbitration clauses that require negotiation, mediation and/or adjudication as steps before an arbitration can be commenced) common? Are they enforceable? If so, what are the consequences of commencing an arbitration in disregard of such a provision? Lack of jurisdiction? Non-arbitrability? Other?

Multi-tier clauses are frequently seen in dispute resolution clauses in contracts that involve Japanese individuals or entities. Such clauses are considered enforceable. The consequences of commencing an arbitration in light of the existence of a multi-tier clause would depend on the actual wording and the content of the specific clause.

(iv) What are the requirements for a valid multi-party arbitration agreement?

There are no special requirements under the Law for a multi-party arbitration agreement to be valid.

(v) Is an agreement conferring on one of the parties a unilateral right to arbitrate enforceable?

An agreement conferring on one of the parties a unilateral right to arbitrate would be considered against public policy and consequently invalid under Japanese Law.

(vi) May arbitration agreements bind non-signatories? If so, under what circumstances?

In light of precedents under the Old Law, an arbitration agreement may bind non-signatories in circumstances where the main contract containing the arbitration clause is assigned by way of a contractual arrangement or subrogation. There is also a case under the Old Law in which the Japanese court found that the

arbitration clause in the contract entered into by a company extends to individuals closely associated with that company, such as the representative director of the company.

The Japanese courts may find it appropriate to bind non-signatories in cases where extending the effect of an arbitration agreement entered into by one company to other companies in the same group is at issue. Although there have been no Japanese court decisions on this issue, it appears that the Japanese courts will likely rely on generally accepted legal theories under Japanese law, such as agency, piercing the corporate veil and alter ego to bind the non-signatory, and would not rely on the 'Group of Companies' doctrine.

IV. Arbitrability and jurisdiction

(i) Are there types of disputes that may not be arbitrated? Who decides – courts or arbitrators – whether a matter is capable of being submitted to arbitration? Is the lack of arbitrability a matter of jurisdiction or admissibility?

Civil disputes that cannot be resolved by settlement between the parties and civil disputes concerning divorce and dissolution of adoptive relations are excluded from the types of disputes that may be arbitrated. A consumer may unilaterally terminate an agreement with a business operator to arbitrate disputes that may arise in the future; and an arbitration agreement with respect to disputes that may arise in the future between an individual employee and a business employer shall be null and void. The law does not refer to the concept of admissibility and the lack of arbitrability is considered a matter of jurisdiction.

(ii) What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an arbitration agreement? Do local laws provide time limits for making jurisdictional objections? Do parties waive their right to arbitrate by participating in court proceedings?

The Law provides that a court, upon a petition by the defendant, must dismiss (on a 'without prejudice' basis) a claim related to a civil dispute that is subject to an arbitration agreement, with only three limited exceptions as explained in III(ii) above. When a court proceeding is initiated despite an arbitration agreement, the defendant must object to the court's jurisdiction over the dispute before pleading on the merits or risk waiver. The Law specifically provides that the arbitral tribunal may commence or continue arbitral proceedings and make an arbitral award even while the court's decision on its jurisdiction is pending (Article 14(2)).

(iii) Can arbitrators decide on their own jurisdiction? Is the principle of competence-competence applicable in your jurisdiction? If yes, what is the nature and intrusiveness of the control (if any) exercised by courts on the tribunal's jurisdiction?

An arbitral tribunal may rule on its own jurisdiction. Article 23(1) of the Law expressly provides the principle of competence-competence basically in the same manner as the Model Law, stating that '[t]he arbitral tribunal may rule on assertions made in respect of the existence or validity of an arbitration agreement or its own jurisdiction'. If an objection is made to the arbitral tribunal regarding its jurisdiction, Article 23(4) of the Law provides that, the arbitral tribunal shall: (a) give a 'preliminary independent ruling' or an 'arbitral award', when it considers it has jurisdiction; or (b) give a ruling to terminate arbitral proceedings, when it considers it has no jurisdiction.

If the arbitral tribunal decides to rule affirmatively on its jurisdiction in the form of a 'preliminary independent ruling', 'any party', including a party that has no objection to the tribunal's jurisdiction, may request the court to decide on the jurisdiction of the arbitral tribunal. Such request must be made within 30 days of receiving notice of the tribunal's ruling. The court's decision under this procedure cannot be appealed. The Law further provides that while such request is pending before the court, the arbitral tribunal may continue the arbitral proceedings and render an award. A court's decision under this procedure is generally considered to have no *res judicata* effect. Consequently, even if the court decides that the tribunal has jurisdiction, the party objecting to the arbitral tribunal's jurisdiction may challenge the final award on the grounds that the tribunal had no jurisdiction. Prominent scholars and practitioners argue that such a challenge may be estopped under the good faith principle depending on the specific circumstances surrounding the case; however, the standard for the good faith principle to be applied is unclear, and therefore, it would be difficult for the tribunal to predict whether the principle would apply to the case before it. In order to avoid this difficulty, the tribunal should consider making its decision on jurisdiction in the form of an 'interim' or a 'partial award' instead of a 'preliminary independent ruling' if it views that the parties are in a serious dispute regarding the tribunal's jurisdiction.

Furthermore, the Law allows the arbitral tribunal to wait until the final award to decide on its jurisdiction. If the arbitral tribunal decides to rule on the issue of jurisdiction in its final award, the party objecting to the tribunal's jurisdiction has to wait until the final award to challenge the tribunal's jurisdiction before the court.

While the courts normally interpret the scope of arbitration clauses liberally so as to favour the parties' intention to resolve disputes outside of the court system, the decision of the court on the tribunal's jurisdiction will be made independently from the decision of the arbitral tribunal.

V. Selection of arbitrators

(i) How are arbitrators selected? Do courts play a role?

The parties are free to agree on the number and the procedure for appointing arbitrators (Article 16(1), 17(1)). However, in the absence of the parties' agreement on the number and the procedure for appointing arbitrators, the Law sets forth rules concerning the appointment of arbitrators. The default rule on the number of arbitrators is three when the number of parties is two (Article 16(2)). However, in multi-party arbitrations, the Law provides that the court shall determine the number of arbitrators.

When the number of parties is two and three arbitrators are to be appointed, each party shall appoint one arbitrator and the party-appointed arbitrators shall appoint the third arbitrator; however, (a) if a party fails to appoint an arbitrator within 30 days after receiving a request to do so from the other party that has appointed an arbitrator, the appointment of the arbitrator shall be made by the court upon the request of that party, or (b) if the party-appointed arbitrators fail to appoint a third arbitrator within 30 days of their appointment, the court shall appoint the third arbitrator upon the request of a party (Article 17(2)).

When the number of parties is two and a sole arbitrator is to be appointed but the parties are unable to agree on the arbitrator, the court shall appoint an arbitrator upon the request of a party (Article 17(3)).

With respect to multi-party arbitrations (when the number of parties are three or more), Article 17(4) provides that the court shall appoint arbitrators upon the request of a party.

In addition, even if the parties have agreed on the procedure for appointing arbitrators, a party may request the court to appoint arbitrators if the arbitrators cannot be appointed due to a failure to act as set forth under such procedure or for any other reason (Article 17(5)). In relation to the appointment of arbitrators by the courts, the court is required to have due regard for the following: (a) the qualifications required of the arbitrators by the agreement of the parties; (b) the impartiality and independence of the appointees; and (c) in the case of a sole arbitrator or in the case where the two arbitrators appointed by the parties are to appoint a third arbitrator, whether or not it would be appropriate to appoint an arbitrator of a nationality other than those of the parties (Article 17(6)).

(ii) What are the requirements in your jurisdiction as to disclosure of conflicts? Do courts play a role in challenges and what is the procedure?

The Law imposes an obligation on the arbitrator candidate or the arbitrator to disclose '[a]ll facts that are likely to give rise to doubts as to their impartiality and

independence' (Article 18(3)(4)). This disclosure obligation continues while the arbitral proceedings are pending.

The grounds for challenging an arbitrator are: (a) where the arbitrator does not possess the qualifications agreed to by the parties; or (b) where circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence (Article 18(1)).

As for the procedure to challenge an arbitrator, the Law provides that the parties may agree on the procedure for challenging arbitrators (Article 19(1)). In the absence of such agreement, the Law provides that the arbitral tribunal shall make the decision on any challenge to an arbitrator upon the request of a party. In such a case, the party challenging the arbitrator is required to make a written request to the tribunal stating the grounds for the challenge within 15 days after (a) the composition of the tribunal, or (b) becoming aware of the existence of grounds for challenge, whichever is later (Article 19(2)(3)). If a party requesting the challenge is unsuccessful under the procedure agreed by the parties or the tribunal rejects the challenge, that party may ask a court to render an independent decision on the grounds for the challenge of the arbitrator within 30 days of receiving notice of the decision on the challenge. If the court denies such challenge, there is no further appeal to the higher courts. This ensures that a dispute involving a challenge of an arbitrator is resolved relatively quickly.

The Law also expressly stipulates that the arbitral tribunal may commence the arbitration, continue the proceedings and render an award even while the challenge is pending before the court (Article 19(5)).

(iii) Are there limitations on who may serve as an arbitrator? Do arbitrators have ethical duties? If so, what is their source and generally what are they?

Under the Japanese Arbitration Law, there are no citizenship, residency or professional requirements for arbitrators, unless otherwise agreed by the parties.

(iv) Are there specific rules or codes of conduct concerning conflicts of interest for arbitrators? Are the IBA Guidelines on Conflicts of Interest in International Arbitration followed?

The IBA Guidelines on Conflicts of Interest in International Arbitration have been gradually recognised in Japan since their introduction in 2004. In addition, the Japan Association of Arbitrators (JAA), which was established mainly to provide training to arbitrators and promote arbitration, published a Code of Ethics for arbitrators in 2008.

VI. Interim measures

(i) Can arbitrators enter interim measures or other forms of preliminary relief? What types of interim measures can arbitrators issue? Is there a requirement as to the form of the tribunal's decision (order or award)? Are interim measures issued by arbitrators enforceable in courts?

The Law expressly stipulates that, unless otherwise agreed by the parties, the arbitral tribunal may order any party to take such interim or preliminary measures of protection as the tribunal considers necessary in respect of the subject matter of the dispute and may require any party to provide appropriate security in connection with such measure (Article 24(1)(2)). Under Japanese Law, interim measures issued by arbitrators are not enforceable in courts.

(ii) Will courts grant provisional relief in support of arbitrations? If so, under what circumstances? May such measures be ordered after the constitution of the arbitral tribunal? Will any court ordered provisional relief remain in force following constitution of the arbitral tribunal?

Article 15 of the Law provides that, '[i]t is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure in respect of any civil dispute which is the subject of the arbitration agreement'. Accordingly, a court may order interim measures of protection even after the constitution of the arbitral tribunal (so long as the court considers it necessary) and any court-ordered provisional relief will remain in force following the constitution of the arbitral tribunal.

With respect to the circumstances for courts to grant provisional relief, the requirements stipulated under the Civil Provisional Code must be satisfied. As a practical consideration, the Japanese courts may be reluctant to grant provisional relief in cases where granting such relief would be virtually equal to satisfying the claim in the arbitration (eg, provisional relief ordering delivery of goods to the claimant when the subject matter of the dispute concerns the defendant/respondent's obligation to deliver the goods) and the matter is not urgent. In such case, the Japanese courts would likely view the case as such that the claimant should request the tribunal to order interim measures before requesting the court to grant provisional relief.

(iii) To what extent may courts grant evidentiary assistance/provisional relief in support of the arbitration? Do such measures require the tribunal's consent if the latter is in place?

The arbitral tribunal or a party (with the consent of the arbitral tribunal) may request court assistance in taking evidence, including witness and expert testimony, document production orders and orders of inspection. The court will

then act in accordance with the procedures under the Civil Procedure Code (Article 35(1) of the Arbitration Law). While a judge will preside over the procedures for witness and expert testimony, arbitrators are entitled to attend and ask questions under Article 35(5) of the Arbitration Law.

VII. Disclosure/discovery

(i) What is the general approach to disclosure or discovery in arbitration? What types of disclosure/discovery are typically permitted?

The Law does not provide any detailed rules of evidence. Accordingly, the parties may agree on the procedural rules on disclosure or discovery in arbitration. Failing such agreement, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate.

As a matter of practice, where the arbitral tribunal consists of Japanese lawyers only (which is common in domestic arbitration and can even occur in international arbitrations, particularly where the non-Japanese party appoints a Japanese arbitrator), the arbitral procedure may often be similar to the civil procedure in the Japanese courts, in which only limited document discovery is available.

In recent years, an increasing number of international commercial arbitrations in Japan have been handled by an arbitral tribunal consisting of one Japanese and two non-Japanese arbitrators. The arbitral tribunals in some of these cases have ordered the production of a fairly broad scope of documents from the parties; however, it is increasingly the case that the arbitral tribunal adopts (or uses as a guideline) the IBA's Rules on Taking of Evidence in International Arbitration and limits the scope of document production in accordance with the international norms and standards.

(ii) What, if any, limits are there on the permissible scope of disclosure or discovery?

The Japanese Arbitration Law does not provide for the permissible scope of disclosure or discovery. The parties are free to agree and, in the absence of such agreement, the arbitral tribunal may decide on the scope of disclosure or discovery in such manner as it considers appropriate.

(iii) Are there special rules for handling electronically stored information?

No.

VIII. Confidentiality

(i) Are arbitrations confidential? What are the rules regarding confidentiality?

There are no specific legislative provisions requiring that arbitration be conducted on a confidential basis. In practice, however, there is a widely accepted notion that arbitrations should be regarded as confidential unless otherwise agreed by the parties, since arbitrations are generally held in private.

The Commercial Arbitration Rules of the JCAA, which are most frequently used in international arbitration in Japan, impose confidentiality obligations upon the arbitrators, as well as the parties and their representatives. Where the applicable arbitration rules do not expressly impose confidentiality obligations upon the arbitrators or the parties, the parties may want to agree on confidentiality obligations.

(ii) Are there any provisions in your arbitration law as to the arbitral tribunal's power to protect trade secrets and confidential information?

Although there is no provision in the Japanese Arbitration Law with respect to the arbitral tribunal's power to protect trade secrets and confidential information, the tribunal is allowed to issue orders in relation to confidentially. In addition, it is common for arbitral tribunals to encourage the parties to enter into confidentiality agreements in respect of the arbitration.

(iii) Are there any provisions in your arbitration law as to rules of privilege?

No.

IX. Evidence and hearings

(i) Is it common that parties and arbitral tribunals adopt the IBA Rules on the Taking of Evidence in International Arbitration to govern arbitration proceedings? If so, are the Rules generally adopted as such or does the tribunal retain discretion to depart from them?

The IBA Rules on the Taking of Evidence in International Arbitration (the 'Rules') are increasingly used in international arbitrations where the arbitrator(s) conduct the arbitral proceedings in accordance with international norms and standards. However, in order to ensure the flexibility of the arbitral proceedings to meet the needs of each case and to avoid the risk of an award being set aside or refused recognition and enforcement on grounds that the arbitral tribunal did not strictly follow the Rules, it is frequently the case that the Rules are referred to as guidelines in the procedural orders and the tribunal retains its discretion to depart from them.

(ii) Are there any limits to arbitral tribunals' discretion to govern the hearings?

The arbitral tribunal must follow any procedures agreed on by the parties unless they are contrary to the public policy provisions of the Japanese Arbitration Law. If there is no agreement between the parties on procedure, the arbitral tribunal may, subject to the provisions of the Law, conduct the arbitral proceedings in such manner as it considers appropriate. Therefore, the Law grants arbitral tribunals wide discretion to govern the arbitration proceedings (Article 26).

In respect of hearings, the Law allows the arbitral tribunal to decide on whether to convene oral hearings (if the parties have not agreed on this matter). However, the tribunal must hold oral hearings at an appropriate stage of the arbitral proceedings, if a party to the arbitration requests them (Article 32).

(iii) How is witness testimony presented? Is the use of witness statements with cross examination common? Are oral direct examinations common? Do arbitrators question witnesses?

It is common for witness statements to be submitted prior to the oral hearing. At the oral hearing, oral direct examination of the witness is normally conducted for a relatively short period of time followed by a longer cross examination. Arbitrators normally also question witnesses after the direct, cross and re-direct examinations by the parties' counsel.

(iv) Are there any rules on who can or cannot appear as a witness? Are there any mandatory rules on oath or affirmation?

There are no rules on who can or cannot appear as a witness. There is no legislation to give the arbitral tribunal the authority to have a witness make an oath under the penalty of perjury.

As the legal effect of an oath in arbitrations in Japan is unclear, many arbitral tribunals in Japan do not require witnesses to take an oath and only inform the witness that the tribunal expects the witness to tell the truth. If it is necessary to obtain evidence from a witness under the sanction of prosecution for perjury, the arbitral tribunal or a party should seek court assistance in taking evidence pursuant to Article 35 of the Law.

(v) Are there any differences between the testimony of a witness specially connected with one of the parties (eg, legal representative) and the testimony of unrelated witnesses?

No.

(vi) How is expert testimony presented? Are there any formal requirements regarding independence and/or impartiality of expert witnesses?

Although the Law does not contain provisions in relation to party-appointed experts, it is common for party-appointed experts to provide evidence in the form of an expert report and for direct and cross examination subsequently to be conducted at the oral hearing. In practice, the independence and/or impartiality of party-appointed experts is questioned during cross examination.

In regard to tribunal-appointed experts, Article 34 of the Law provides that, unless otherwise agreed by the parties to the arbitration, (a) the tribunal may appoint experts to appraise any necessary issues and report their finding in writing or orally; (b) if a party requests, or the tribunal considers it necessary, the tribunal-appointed expert must participate in the oral hearing after the expert's report has been delivered; and (c) a party may put questions to the expert, or have persons with special knowledge who the party has appointed testify on the points at issue. There are no formal requirements regarding the independence and/or impartiality of tribunal-appointed expert witnesses.

(vii) Is it common that arbitral tribunals appoint experts beside those that may have been appointed by the parties? How is the evidence provided by the expert appointed by the arbitral tribunal considered in comparison with the evidence provided by party-appointed experts? Are there any requirements in your jurisdiction that experts be selected from a particular list?

Article 34 of the Law provides for tribunal-appointed experts; however, the Law does not provide any rules as to how the tribunal should weigh a tribunal-appointed expert's evidence in comparison with the evidence provided by a party-appointed expert. The Law does not require experts to be selected from a particular list.

(viii) Is witness conferencing ('hot-tubbing') used? If so, how is it typically handled?

Witness conferencing has been used in an international arbitration in Japan. The tribunal in one commercial dispute involving complex technical issues used witness conferencing to hear multiple experts simultaneously. In that case, the Chairman of the tribunal advised the party-appointed experts that the tribunal regarded them as independent, impartial experts to resolve the technical issues. The Chairman then briefly explained the major legal issues and the technical issues and their relationship to allow the experts to have a common basic understanding as to the necessity of their respective testimonies. After the Chairman's explanation, the first expert (out of seven experts in total) was asked to make a brief presentation. Subsequently, the experts questioned each other and questions from the parties' representatives and the arbitral tribunal followed. This

procedure was used for each expert. It contributed to making the hearing much shorter than expected.

(ix) Are there any rules or requirements in your jurisdiction as to the use of arbitral secretaries? Is the use of arbitral secretaries common?

There are no rules or requirements in Japan as to the use of arbitral secretaries. Although the use of arbitral secretaries is not yet an established practice, its efficiency is being gradually recognised.

X. Awards

(i) Are there formal requirements for an award to be valid? Are there any limitations on the types of permissible relief?

Awards must be in writing and signed by the arbitrators. Awards must also be dated and indicate the place of arbitration. An award is deemed to have been made in the place of arbitration. Unless otherwise agreed by the parties, awards must state the reasons and a copy of the award signed by the arbitrators must be sent to each party.

The Law has no provisions expressly addressing limits on the types of permissible relief. Where the substantive law applicable to the subject matter of the arbitration provides for the remedies in question (such as injunctive remedies, rectification and interest for delayed performance), the arbitrators may grant such remedies to the extent permitted under the applicable substantive law, unless they are in violation of Japan's public policy (such as punitive damages).

(ii) Can arbitrators award punitive or exemplary damages? Can they award interest? Compound interest?

Arbitrators may not award punitive damages in Japan as the Supreme Court of Japan's judgment dated 11 July 1997 denied the enforceability of punitive damages in a judgment of a state court of California as a violation of Japan's public policy. The Law does not restrict the arbitral tribunal from awarding interest and compound interest.

(iii) Are interim or partial awards enforceable?

Interim awards are not enforceable. Partial awards may be enforceable depending on their content. For example, a partial award would not be enforceable if it was only in respect of liability in a bifurcated arbitration. On the other hand, a partial award would be enforceable, for example, if, in its substance, it is a separate award on merits made in relation to one of a party's multiple claims.

(iv) Are arbitrators allowed to issue dissenting opinions to the award? What are the rules, if any, that apply to the form and content of dissenting opinions?

There is no restriction under the Law in respect of arbitrators issuing dissenting opinions.

(v) Are awards by consent permitted? If so, under what circumstances? By what means other than an award can proceedings be terminated?

Article 38(1) of the Law expressly provides that '[i]f, during the arbitral proceedings, the parties settle the civil dispute subject to the arbitral proceedings and the parties so request, the arbitral tribunal may make a ruling on the agreed terms'. Therefore, awards by consent are permitted under the Japanese Arbitration Law.

Arbitral proceedings may be terminated pursuant to the arbitral tribunal's ruling to terminate the arbitral proceedings when: (a) the arbitral tribunal determines that it lacks jurisdiction; (b) the claimant fails to state the relief or remedy sought and the facts supporting its claim and points at issue within the period of time determined by the arbitral tribunal without a sufficient cause for the failure; (c) the claimant withdraws its claim; (d) the parties agree on the termination of the arbitral proceedings; (e) the parties settle the civil dispute subject to the arbitral proceedings; and (f) the arbitral tribunal finds that the continuation of the arbitral proceedings has become unnecessary or impossible.

(vi) What powers, if any, do arbitrators have to correct or interpret an award?

Under the Japanese Arbitration Law, the arbitral tribunal has the power to (a) correct any errors in computation, any clerical or typographical errors or any errors of a similar nature in the arbitral award (Article 41); and (b) give an interpretation of a specific part of the arbitral award when requested by a party (Article 42).

Unless otherwise agreed by the parties, a party may, with notice to the other party and within 30 days of receipt of the notice of the award, request the arbitral tribunal to make an additional award as to claims presented in the arbitration proceedings, but omitted from the award (Articles 43(1), 41(2)(3)). The arbitral tribunal must make its decision on such request within 60 days from the request, provided that, where it considers it necessary, the arbitral tribunal may extend such period (Article 43(2), 41(5)).

XI. Costs

(i) Who bears the costs of arbitration? Is it always the unsuccessful party who bears the costs?

The Law provides that the costs of arbitration shall be apportioned between the parties in accordance with the parties' agreement (Article 49(1)). If there is no such agreement between the parties, the Law provides that each party shall bear the costs it has disbursed with respect to the arbitral proceedings (Article 49(2)). The Japanese Arbitration Law does not provide that the unsuccessful party should always bear the costs of the arbitration.

(ii) What are the elements of costs that are typically awarded?

Fees and costs for party representation by lawyers, fees and costs of experts, translation/interpretation costs and transportation costs are elements of the costs that are typically awarded.

(iii) Does the arbitral tribunal have jurisdiction to decide on its own costs and expenses? If not, who does?

Yes.

(iv) Does the arbitral tribunal have discretion to apportion the costs between the parties? If so, on what basis?

The arbitration tribunal will have discretion to apportion the costs between the parties if there is an agreement between the parties allowing the tribunal to do so or the institutional rules that the parties have agreed to apply to the arbitral proceedings provide for such discretion.

(v) Do courts have the power to review the tribunal's decision on costs? If so, under what conditions?

The courts have the power to review the tribunal's decision on costs under the grounds and in accordance with the procedure to set aside or refuse recognition and enforcement of an award.

XII. Challenges to awards

(i) How may awards be challenged and on what grounds? Are there time limitations for challenging awards? What is the average duration of challenge proceedings? Do challenge proceedings stay any enforcement proceedings? If yes, is it possible nevertheless to obtain leave to enforce? Under what conditions?

Pursuant to Article 44(1) of the Law, a party may apply to the court to challenge an award. The grounds for setting aside an award are strictly limited to the following grounds:

- The arbitration agreement is not valid due to limits to a party's capacity.
- The arbitration agreement is not valid for a reason other than limits to a party's capacity under the law to which the parties have agreed to subject it (or failing any indication thereon, under the law of Japan).
- The party making the application was not given notice as required by the provisions of the Japanese law (or where the parties have otherwise reached an agreement on matters concerning the provisions of the Japanese law that do not relate to public policy, such agreement) in the proceedings to appoint arbitrators or in the arbitral proceedings.
- The party making the application was unable to present its case in the arbitral proceedings.
- The arbitral award contains decisions on matters beyond the scope of the arbitration agreement or the claims in the arbitral proceedings.
- The composition of the arbitral tribunal or the arbitral proceedings were not in accordance with the provisions of the Japanese law (or where the parties have otherwise reached an agreement on matters concerning the provisions of the Japanese law that do not relate to public policy, such agreement).
- The claims in the arbitral proceedings relate to a dispute that cannot constitute the subject of an arbitration agreement under the laws of Japan.
- The content of the arbitral award is in conflict with the public policy or good morals of Japan.

Article 44(2) of the Law provides that a party must make the application to the court to set aside an award within three months after that party is provided with a copy of the award. A party's application to set aside an award is first made to the district court having jurisdiction over the arbitration. The losing party may make an immediate appeal to the high court within two weeks after that party is notified of the district court's decision. The average duration of the challenge proceedings,

if the lower court's decision is appealed to the high court, would be around several months to one year.

Pursuant to Article 46(3) of the Law, if there is an application to set aside an award, the court where the application to enforce the award has been made may suspend the enforcement proceeding if the court finds it necessary to do so. In such case, the court may, upon the request of the party seeking enforcement of the award, order the other party to provide security.

(ii) May the parties waive the right to challenge an arbitration award? If yes, what are the requirements for such an agreement to be valid?

It is generally considered that the grounds for setting aside arbitral awards under the Law are so serious that the parties may not waive this right to challenge arbitral awards.

(iii) Can awards be appealed in your country? If so, what are the grounds for appeal? How many levels of appeal are there?

No.

(iv) May courts remand an award to the tribunal? Under what conditions? What powers does the tribunal have in relation to an award so remanded?

No.

XIII. Recognition and enforcement of awards

(i) What is the process for the recognition and enforcement of awards? What are the grounds for opposing enforcement? Which is the competent court? Does such opposition stay the enforcement? If yes, is it possible nevertheless to obtain leave to enforce? Under what circumstances?

An arbitral award may be enforced by making an application to the court for an enforcement decision (or '*exequatur*', Article 46(1)). Such application must be accompanied by a copy of the arbitral award, a document certifying the copy of the award and a Japanese translation of the award if the award is not in Japanese (Article 46(2)).

The competent court for the enforcement procedure will be the district court having jurisdiction over the place of the arbitration, the domicile of the counter-party to the enforcement proceedings and the location of the object of the claim or seizable assets.

Under the Japanese Arbitration Law, the grounds for refusing recognition or enforcement of awards are substantially the same as the grounds for setting aside

the awards with one additional ground: 'according to the law of the country under which the place of arbitration falls (or where the law of a country other than the country under which the place of arbitration falls was applied to the arbitral proceedings, such country), the arbitral award has not yet become binding, or the arbitral award has been set aside or suspended by a court of such country', (Article 45(2), 46(8) of the Law).

The courts must issue an enforcement order unless grounds for refusing recognition or enforcement exist (with respect to certain grounds, the burden of proof lies with the counter-party to the enforcement proceedings) and even if such grounds exist, the court has discretion not to dismiss the application for the enforcement of the arbitral award.

The Law does not differentiate grounds for refusal of recognition or enforcement of awards according to the place of the arbitration: strictly limited grounds for refusal of recognition or enforcement of the awards under the Japanese Arbitration Law apply equally to both domestic and foreign awards.

(ii) If an *exequatur* is obtained, what is the procedure to be followed to enforce the award? Is the recourse to a court possible at that stage?

Once the *exequatur* is obtained, the award will be enforced in accordance with the Civil Execution Act (Act No 4 of 30 March 1979). The Act provides that the execution will be carried out by the court or a court execution officer upon petition.

(iii) Are conservatory measures available pending enforcement of the award?

No special measures are available. However, the parties may obtain preliminary attachments and other interim measures generally available to parties to disputes.

(iv) What is the attitude of courts towards the enforcement of awards? What is the attitude of courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

The Japanese courts have consistently taken a pro-arbitration attitude with respect to the enforcement of arbitral awards (for example, Japanese courts have narrowly interpreted 'public policy' in light of the purposes of the Arbitration Law).

Furthermore, in contrast to the Old Law where boundaries of grounds for setting aside an arbitral award and grounds for refusing recognition or enforcement were unclear and therefore may have been broadly construed (for example, the grounds were set forth as '[w]hen an arbitral proceeding should not have been permitted' and '[w]hen there is no reason shown in an arbitral award'), the New Law has adopted almost verbatim the provisions regarding the grounds for refusing recognition and enforcement under the Model Law and the New York Convention.

Under the New Law, the grounds for refusing recognition or enforcement, which are as strictly limited as those of the New York Convention, are applied to arbitration awards irrespective of whether the seat of arbitration is within or outside of Japan.

Although an arbitral award being set aside by the courts at the place of the arbitration is one of the grounds to refuse enforcement of an award, the Japanese courts have discretion over dismissing the enforcement proceedings. While there are no known precedents on this matter, it is likely that the Japanese courts would enforce arbitral awards that are set aside by the courts at the place of the arbitration if the reason for the award being set aside is due to public policy violations at the place of the arbitration that do not constitute public policy violations under Japanese Law.

(v) How long does enforcement typically take? Are there time limits for seeking the enforcement of an award?

Enforcement proceedings typically take about one to three months in the district courts. There are no time limits for seeking the enforcement of an award under the Law.

XIV. Sovereign immunity

(i) Do State parties enjoy immunities in your jurisdiction? Under what conditions?

Japan and Japanese State entities would be bound by an agreement to arbitrate contractual disputes.

(ii) Are there any special rules that apply to the enforcement of an award against a State or State entity?

No special rules are stipulated under the Law.

XV. Investment treaty arbitration

(i) Is your country a party to the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States? Or other multilateral treaties on the protection of investments?

Japan is a contracting state to the Washington Convention.

(ii) Has your country entered into Bilateral Investment Treaties with other countries?

Japan has signed Bilateral Investment Treaties with 26 countries as of April 2011.

XVI. Resources

(i) What are the main treatises or reference materials that practitioners should consult to learn more about arbitration in your jurisdiction?

Books

- M Kondo et al *Chusai-ho Konmentaru* (Shojihomu 2003).
- M Kondo et al *Arbitration Law of Japan* (Shojihomu 2003).
- T Nakamura *Chusai-ho Naruhodo Q&A* (Chuo-Keizaisha 2004).
- T Kojima and A Takakuwa *Chushaku-to-Ronten Chusai-ho* (Seirin Shoin 2007).
- K Yamamoto and A Yamada *ADR Chusai-ho* (Nippon-Hyouronsha 2008).

All of the above-referenced books are in Japanese only except for *Arbitration Law of Japan*.

Journals

- M Kondo and T Kataoka, 'Chusai-Ho no Gaiyo' (2003) 'JCA Journal' 50-10-8, October.
- Y Aoyama, 'Chusai-Ho no Seitei wo Furikaette' (2003) 'JCA Journal' 50-10-2, October.
- K Uchibori and H Maeda, 'Chusai-Ho no Gaiyo' (2003) 'Toki Joho' 503-33, October.
- T Nakamura, 'Salient Features of the New Japanese Arbitration Law Based upon the UNCITRAL Model Law on International Commercial Arbitration', 18 Mealey's International Arbitration Report 9, September 2003.
- Y Taniguchi and T Nakamura 'Arbitration in Asia 2nd edition, Part A Japan' (JurisNet 2008).
- 'Shin Chusai-Ho no Riron to Jitsumu' K Miki and K Yamamoto (eds) Jurist Zoukan April 2006.

With the exception of Mr Nakamura's article and Messrs Taniguchi and Nakamura's article, all of the above-referenced periodicals and articles are in Japanese only.

(ii) Are there major arbitration educational events or conferences held regularly in your jurisdiction? If so, what are they and when do they take place?

The JCAA organises seminars on international arbitration periodically in Tokyo and Osaka. The ICC also holds seminars in Japan in relation to international arbitration.

XVII. Trends and developments

(i) Do you think that arbitration has become a real alternative to court proceedings in your country?

Yes, at least with regard to international commercial disputes.

(ii) What are the trends in relation to other ADR procedures, such as mediation?

An increasing number of large international commercial disputes in Japan have been resolved under the JCAA's International Commercial Mediation Rules.

(iii) Are there any noteworthy recent developments in arbitration or ADR?

One of the noteworthy developments in arbitration in Japan is the recent leading case concerning a petition to set aside an arbitral award rendered in an ICDR-AAA arbitration in Tokyo. This was the first reported case on an application to set aside an arbitral award under the New Arbitration Law in which the Tokyo District Court and the Tokyo High Court both demonstrated their pro-arbitration attitudes. In the case, the petitioner argued that the court should set aside the arbitral award pursuant to Article 44 of the Arbitration Law because (1) it was unable to present its case in the arbitral proceedings, (2) the content of the arbitral award was in conflict with the public policy of Japan and (3) the arbitral proceedings were not in accordance with the agreement of the parties.

However, on 28 July 2009, the Tokyo District Court rejected all three arguments by the petitioner in a fairly pro-arbitration manner. With respect to issue (1), the Court ruled that the inability to defend must be judged narrowly. As to issue (2), the Court also narrowly interpreted public policy. In connection with (3), the Court ruled that a petitioner is not permitted to allege additional grounds for setting aside an arbitral award after the expiration of the deadline for the filing of the petition.

The Tokyo High Court upheld the Tokyo District Court's decision and dismissed the petitioner's appeal on 26 February 2010.