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Global Legal Group

The International Comparative Legal Guide to:

International Arbitration 2007

A practical insight to cross-border International Arbitration work

Published by Global Legal Group with contributions from:

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Japanese arbitration law (Chusai-Ho, Law No. 138 of 2003, the "Arbitration Law") is based on the UNCITRAL Model Law. A semi-official English translation is available at:

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

Except where otherwise indicated, article numbers and chapter numbers mentioned below are those of the Arbitration Law.

1 Arbitration Agreements

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

(See also question 3.1)

Arbitration agreements must be in writing (Art. 13(2)). Facsimiles and electronic records (e.g., e-mail) also satisfy this requirement (Art. 13(2), (4)). Valid arbitration clauses are severable (Art. 13(6)).

In order to be valid and applicable, each arbitration agreement must define the scope of disputes, in that the subject of the arbitration agreement must be certain disputes that have arisen or which may arise in respect of a defined legal relationship (whether contractual or not) (Art. 2(1)). Arbitration agreements that do not sufficiently specify the subject disputes (e.g., any and all disputes that may arise between party X and party Y) are null and void.

Arbitration agreements are contracts, so the elements of a contract must exist for each arbitration agreement. An arbitration agreement may be invalid or may be revoked in accordance with the general rules of contract law, for example, due to lack of capacity or authority to enter into an agreement.

1.2 Are there any special requirements or formalities required if an individual person is a party to a commercial transaction which includes an arbitration agreement?

No. About consumer and employee protection, see question 2.3.

1.3 What other elements ought to be incorporated in an arbitration agreement?

Arbitration agreements generally refer to: (a) place of arbitration; (b) applicable arbitration rules; (c) number and method of appointment of arbitrators; and (d) language.

Elements such as the following may also be incorporated: (e) confidentiality; (f) substantive law applicable to the dispute; (g) procedural rules, especially rules on the taking of evidence; (h) costs and fees; (i) arbitrators' special skills or qualifications; (j) interim measures; and (k) waiver of sovereign immunity.

For an example, please see:

http://www.jcaa.or.jp/e/arbitration-e/jyoukou-e/clause.html.

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

Where a party to a valid arbitration agreement files a lawsuit with a court, the other party may move to dismiss the lawsuit (on a "without prejudice" basis) based on the existence of such arbitration agreement, before pleading on the merits. Courts have generally favoured arbitration agreements by interpreting the scope of the arbitration agreements relatively broadly. Courts will simply dismiss the actions, and will not issue orders to compel arbitration or to stay the litigation (Art. 14(1)). This is one deviation from the UNCITRAL Model Law, under which courts refer the parties to arbitration.

Arbitral tribunals may commence or continue arbitral proceedings and make arbitral awards even while lawsuits are pending before courts (Art. 14(2)).

1.5 What has been the approach of the national courts to the enforcement of ADR agreements?

In certain circumstances, the national courts may (1) suspend court procedures, (2) toll the period of the statute of limitation, and (3) exempt mandatory mediation in the national courts (Arts. 25, 26 and 27 of the ADR Law (effective from April 1, 2007)).

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration agreements in your country?

The Arbitration Law.

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

Yes (Arts. 1 and 3).

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

The Arbitration Law is based on the UNCITRAL Model Law in general. Primary exceptions are as follows: (see also questions 1.4, 2.2, 3.1, 4.2, 5.1, 6.4 and 12.3)

Consumer and Employee Protection

A consumer as a respondent is given an opportunity to understand and cancel the consumer arbitration agreement unless it was entered into after the commencement of arbitration (Art. 3 of Supplementary Provisions). All arbitration agreements regarding individual labour-related disputes are null and void unless entered into after the disputes have arisen (Art. 4 of Supplementary Provisions).

Substantive Law

Like the UNCITRAL Model Law, the arbitral tribunal shall decide the dispute in accordance with such rules of law as are agreed by the parties as applicable to the substance of the dispute (Art. 36(1)). Failing such an agreement, unlike Art. 28(2) of the UNCITRAL Model Law (under which the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable), the Arbitration Law provides that the arbitral tribunal shall apply the substantive law of the State with which the civil dispute subject to the arbitral proceedings is most closely connected (Art. 36(2)).

Amicable Settlement

An arbitral tribunal or one or more of the arbitrators designated by the tribunal may attempt an amicable settlement, if consented to by the parties (Art. 38(4)). Many arbitration cases have been amicably settled with the active involvement of the arbitrators. In Japan, courts may, at any time and without consent of the parties, attempt an amicable settlement (Code of Civil Procedure Art. 89).

Correction of Award

The arbitral tribunal may, on its own authority, correct any clerical errors in the award (Art. 41(1)). Unlike under Art. 33(2) of the UNCITRAL Model Law, there is no time limit for correction by the arbitral tribunal.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your country? What is the general approach used in determining whether or not a dispute is "arbitrable"?

Civil (including commercial) disputes where the matter can be settled by the parties are arbitrable (Art. 13(1)), whether they are contract claims or tort claims (although disputes on divorce or dissolution of adoption are not arbitrable) (Art. 13(1)).

In general, disputes under administrative proceedings (such as claims seeking the invalidation of patents or trademarks) and bankruptcy proceedings are not arbitrable.

3.2 Is an arbitrator permitted to rule on the question of his or her own jurisdiction?

The Arbitration Law expressly acknowledges "competence-competence" of the arbitral tribunal and provides that the arbitral tribunal may rule on the question of its own jurisdiction (Art. 23(1)).

Where the arbitral tribunal makes a ruling in a separate decision prior to rendering the arbitral award, that it has jurisdiction, any party may, within thirty days after having received notice of that ruling, request the court to decide whether the arbitral tribunal has jurisdiction. While such a request is pending before the court, the arbitral tribunal may continue the arbitral proceedings and make an arbitral award (Art. 23(5)).

3.3 What is the approach of the national courts in your country towards a party who commences court proceedings in apparent breach of an arbitration agreement?

See questions 1.4 and 3.4.

3.4 Under what circumstances can a court address the issue of the jurisdiction and competence of the national arbitral tribunal?

In general, courts may address the issue of jurisdiction and competence whenever a party brings matters relating to arbitration proceedings to court. This is typically when a party: (1) files a lawsuit before a court and the other party moves to dismiss such claim based on an arbitration agreement (see question 1.4); (2) files a request for a court's decision about jurisdiction (see question 3.2); (3) seeks to set aside an award (see question 9.1); or (4) seeks an enforcement decision of an award (see question 10.3).

3.5 Under what, if any, circumstances does the national law of your country allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

Generally, an arbitral tribunal cannot assume jurisdiction over a non-party to an arbitration agreement. Exceptionally, a lower court has expanded an arbitration agreement to include board members of a party, although they were not signatories (Judgment of the Nagoya District Court dated October 27, 1995, *Kaijiho-kenkyukai-shi* 150-33). Where a non-party succeeds the contractual status of the original party (e.g., M&A; an insurance company which has succeeded the insured's rights under the contract by way of subrogation), such succeeding party is also bound by the arbitration agreement.

4 Selection of Arbitral Tribunal

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

Under the Arbitration Law, there are no citizenship, residency or professional requirements for arbitrators, unless otherwise agreed to by the parties. Parties generally avoid appointing legal entities as arbitrators.

The Arbitration Law provides that the parties are, in principle, free to agree on procedures for appointing an arbitrator or arbitrators and for challenging an arbitrator (Arts. 17(1) and 19(1)).

Art. 72 of the Japanese Practicing Lawyers Law generally prohibits anyone other than Japanese lawyers from handling, for the purpose of gaining fees, "legal business" (*horitsu jimu*, which includes arbitration). However, acting as an arbitrator in Japan for fees without a qualification as a Japanese lawyer does not violate this prohibition so long as it is considered "legitimate business conduct"

(*seito gyomu kooi*), and it is generally accepted that foreign lawyers, law professors and other professionals who would normally act as arbitrators in international arbitration elsewhere can also act as arbitrators in international arbitrations conducted in Japan for fees without violating this provision.

4.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

In cases of such failure, the court will appoint an arbitrator (or arbitrators) upon the request of a party (Art. 17(5)).

Two-party Arbitration: If there is no agreement, the parties must follow the default procedure for appointing arbitrators (Art. 17(2), (3)), which is based on the UNCITRAL Model Law. The number of arbitrators will be three unless otherwise agreed by the parties (Art. 16(2)).

Arbitration among Three or More Parties: If there is no agreement, the court shall determine the number of arbitrators and shall appoint arbitrators (or an arbitrator) upon the request of a party (Arts. 16(3) and 17(4)).

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

Appointment of arbitrators: (See also question 4.2).

Challenge of arbitrators: An arbitrator may be challenged if (a) he or she does not satisfy the qualifications as arbitrator that are agreed to by the parties; or (b) circumstances exist that give rise to justifiable doubts as to his or her "impartiality" or "independence" (Art. 18(1)). Challenges are primarily ruled on by the arbitral tribunal unless the parties agree on alternative procedural rules of challenge (Art. 19(1), (2)). If the tribunal dismisses the challenge, the challenging party may file a request with the court for challenge of arbitrators within thirty days (Art. 19(4)).

Removal of arbitrators: If an arbitrator becomes de jure or de facto unable to perform his or her functions, or for any other reason causes undue delay in performing his or her functions, a party may apply to the court for removal of such arbitrator (Art. 20).

Appointment, challenge, and removal of arbitrators is resolved through a procedure for which an oral hearing before open court is not required (Art. 6). The court's decision cannot be appealed to a higher court (Art. 7), which ensures quick resolution.

4.4 What are the requirements (if any) as to arbitrator independence, neutrality and/or impartiality?

An arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his or her "impartiality" or "independence" (Art. 18(1), see also question 4.3). The Arbitration Law imposes a continuing obligation on an arbitrator to disclose any circumstances that could give rise to justifiable doubts as to his or her "impartiality" or "independence" (Art. 18(3), (4)).

Arbitrators are prohibited from taking bribes (Chap. 10).

5 Procedural Rules

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

The parties are free to agree on the procedure to be followed by the arbitral tribunal, subject to the provisions of the Arbitration Law concerning public policy (Art. 26(1)). In the absence of such an agreement, the arbitral tribunal may, subject to the provisions of the Arbitration Law, conduct the arbitration in such manner as it considers appropriate (Art. 26(2)).

The Arbitration Law applies to all arbitration proceedings where the place of arbitration is in Japan (Arts. 1 and 3(1)). The parties may agree on the place of arbitration (Art. 28(1)). In the absence of such an agreement, the arbitral tribunal shall determine the place of arbitration (Art. 28(2)). Even where arbitrators are not appointed, courts may assist the parties in the appointment of arbitrators (Art. 8(1)).

5.2 In arbitration proceedings conducted in your country, are there any particular procedural steps that are required by law?

Some mandatory procedural steps are established that are similar to those provided for in the UNCITRAL Model Law. For example, the arbitral tribunal must provide the parties with sufficient advance notice of any hearing (Art. 32(3)). Similarly, all statements (pleadings), evidentiary documents and other records supplied to the arbitral tribunal by one party shall be made available to the other party, and the arbitral tribunal shall arrange to make available to all parties all expert reports and other evidence on which it might rely in making its award or rulings (Art. 32(4), (5)).

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

The parties shall be treated with equality and each party shall be given a full opportunity to present its case (Art. 25). Of course, rules on time restrictions on pleadings and rules on default of a party apply, unless otherwise agreed by the parties (Arts. 31 and 33).

Arbitral tribunals may, unless otherwise agreed by the parties, meet at any place they consider appropriate for consultation among their members, for hearing parties, experts or witnesses, and for inspection of goods and documents (Art. 28(3)).

The arbitral tribunal shall hold an oral hearing at an appropriate stage of the arbitral proceedings upon request by a party, unless otherwise agreed by the parties (Art. 32(1), (2)).

Regarding counsels' qualifications, only Japanese lawyers can represent clients in domestic arbitration conducted in Japan (Art. 72 of the Japanese Practicing Lawyers Law). However, foreign lawyers who are special members of the Japan Bar may represent clients in "international" arbitration (Art. 5-3 of the Foreign Lawyers Law). Also, foreign lawyers who are practicing in foreign countries (but who are neither employed nor providing services in Japan) may represent clients in "international" arbitration that they undertook in such foreign country (Art. 58-2 of the Foreign Lawyers Law).

5.4 What powers and duties does the national law of your country impose upon arbitrators?

See questions 2.3, 3.2, 4.1, 4.3, 4.4, 5.2, 5.3, 5.7, 6.1, 6.4, 7.1, 7.2, 7.4, 7.5, 8.1 and 11.1.

5.5 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

See questions 3.4, 4.2, 4.3, and 7.3.

5.6 Are there any special considerations for conducting multiparty arbitrations in your country (including in the appointment of arbitrators)? Under what circumstances, if any, can multiple arbitrations (either arising under the same agreement or different agreements) be consolidated in one proceeding? Under what circumstances, if any, can third parties intervene in or join an arbitration proceeding?

Regarding the appointment of arbitrators, the court shall determine the number of arbitrators and appoint them upon the request of a party, if parties do not agree (Arts. 16(3) and 17(4)). The Arbitration Law is silent on multiparty arbitrations. Unless the parties have agreed otherwise, the arbitral tribunal may permit third parties to intervene in or join an arbitration proceeding.

5.7 What is the approach of the national courts in your country towards ex parte procedures in the context of international arbitration?

If the arbitral tribunal deprives one party of its due process rights by *ex parte* procedures, a national court may set aside the arbitration award on the basis that the arbitral proceedings involved major procedural defects. (Arts. 44, 45, 46) (See also question 5.3.)

6 Preliminary Relief and Interim Measures

6.1 Under the governing law, is an arbitrator permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitrator seek the assistance of a court to do so?

Unless otherwise agreed by the parties, the arbitral tribunal may order any party to take such interim measure of protection as the arbitral 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 interim measure (Art. 24). Interim measures are not enforceable.

(See also question 6.4)

6.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

The courts are entitled to grant preliminary or interim relief under the Civil Provisional Remedy Law (*Minji-hozen Ho*), like other provisional remedies in civil cases. Arbitration agreements do not prevent Japanese courts from granting any preliminary or interim relief before or during the arbitration proceedings, whether the place of arbitration is inside or outside Japan (Arts. 3(2), and 15).

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

Generally speaking, in making decisions on requests for provisional or interim relief, the courts do not care whether there is an arbitration agreement between the parties, because the arbitral tribunal generally does not have the power to award enforceable provisional or interim relief. In order for the courts to grant provisional or interim relief, there must be preliminary proof of (i) the merits of the claim; and (ii) the necessity for provisional or interim relief (e.g., urgent need for such relief to avoid irreparable harm).

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

The arbitral tribunal may order the parties to deposit an amount for the costs of the arbitral proceedings within an appropriate period of time, unless otherwise agreed. Such amount may be roughly estimated by the arbitral tribunal (Art. 48(1)).

7 Evidentiary Matters

7.1 What rules of evidence (if any) apply to arbitral proceedings in your country?

No legislation stipulates the details of rules of evidence. In general, rules of evidence are agreed upon by the parties, and if they fail to agree, the arbitral tribunal determines the rules, including the admissibility, relevance, materiality and weight of all evidence (Art. 26). The arbitral tribunal shall arrange to make available to all the parties any expert report or other evidence on which it may rely in making its award or rulings (Art. 32(5)).

Recently, in an increasing number of international arbitration cases conducted in Japan, arbitral tribunals have adopted the International Bar Association's Rules on the Taking of Evidence in International Commercial Arbitration.

Arbitral tribunals may appoint one or more experts, unless otherwise agreed by the parties (Art. 34).

7.2 Are there limits on the scope of an arbitrator's authority to order the disclosure of documents and other disclosure of discovery (including third party disclosure)?

The arbitral tribunal may, unless otherwise agreed by the parties, order the disclosure of documents by the parties. Such orders are not enforceable. However, the arbitral tribunal may make adverse inferences if a party does not observe such orders. If necessary and appropriate, courts may assist the arbitral tribunal in taking evidence for the arbitration proceedings. (See also question 7.3.)

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

A party (with the consent of the arbitral tribunal) or the arbitral tribunal can request court assistance in taking evidence (including entrustment of investigation, witness and expert testimony, document production orders, and inspection), in which case the court will act in accordance with the procedures provided for under the Code of Civil Procedure (Art. 35(1), (2)). While a judge will preside over the procedures for witness and expert testimony, arbitrators are entitled to attend, and with the approval of the presiding judge, put forth questions (Art. 35(5)).

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

Japan is a civil law country, and only limited document discovery is available as compared with U.S.-style discovery. However, in some international arbitration proceedings, the arbitral tribunal has ordered production of a fairly broad scope of documents from the parties. Discovery by way of deposition is extremely uncommon in arbitration in Japan.

7.5 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal? Is cross-examination allowed?

The arbitral tribunal does not have the power to compel the attendance of witnesses. No legislation gives arbitral tribunals the authority to have witnesses make oaths under penalty of perjury. Regarding party witnesses, arbitral tribunals may make adverse inferences if party witnesses who are called refuse to appear or testify without justifiable reason. If necessary and appropriate, courts may assist arbitration proceedings, as mentioned in question 7.3 above.

Use of witness statements prior to witness hearings is fairly common, and opposing parties are commonly given full opportunity to cross-examine witnesses whose written statements have been submitted.

7.6 Under what circumstances does the law of your Country treat documents in an arbitral proceeding as being subject to privilege? In what circumstances is privilege deemed to have been waived?

Attorney-client privilege is generally respected. However, Japan is a civil law jurisdiction, and the legal concept of protection of communications between lawyers and clients from disclosure is not exactly the same as the privilege under common law jurisdictions. In addition, the concept of privilege is not uniform in civil law jurisdictions. In some civil law countries, the protection arises from lawyers' rights and obligations of professional confidentiality, and is given to lawyers, not clients, and as such, the privilege may not be waived by the client. In Japanese civil litigation, lawyers are entitled to refuse to testify about confidential information regarding their clients, but the clients may waive such confidentiality. Thus, the attorney-client privilege may be waived by the client in Japan. Similarly, in Japanese civil litigation, communications between the lawyer and client are protected from disclosure as they are generally considered to fall within the exception to document production orders as being documents created for the "sole use" of the holder (Code of Civil Procedure Art. 220(iv)d), but the client may waive such protection. In any event, the client's waiver of privilege on some privileged documents would not normally extend to other documents.

8 Making an Award

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

Each award must be in writing and be signed by the arbitrators. The signatures of the majority of all members of the arbitral tribunal will suffice if the reason for any omitted signature is stated (Art. 39(1)).

Each award must state the reasons, unless otherwise agreed by the parties or unless it is a ruling on agreed terms of settlement (Arts. 39(2) and 38(3)).

Each award must state its date and place of arbitration (Art. 39(3)). Each award shall be deemed to have been made in the place of arbitration (Art. 39(4)).

Names and addresses of parties and conclusions of each award must be stated.

A copy of each award signed by the arbitrators must be sent to each party (Art. 39(5), (6), (1)).

Awards ruling on the cost of arbitral proceedings can be rendered independently (Art. 49(4), (5)).

9 Appeal of an Award

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

Arbitral awards may not be appealed to courts, but may be set aside by courts on certain enumerated grounds (Art. 44), which are almost the same as those listed in Art. 34 of the UNCITRAL Model Law.

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

The Arbitration Law is silent on this point. However, the majority view is that parties cannot agree to exclude a basis of setting-aside against an arbitral award.

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

The Arbitration Law is silent on this point. However, the majority view is that parties cannot agree to expand the scope of setting-aside beyond the available grounds.

9.4 What is the procedure for appealing an arbitral award in your country?

Parties have an opportunity to appear at a hearing before the court makes a decision on whether or not to set aside an award (Art. 44(5)).

10 Enforcement of an Award

10.1 Has your country signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Japan has signed and ratified the New York Convention with a reciprocal declaration.

However, the Arbitration Law's provisions regarding the recognition and enforcement of arbitral awards now apply not only to "domestic" awards but also to "foreign" awards, regardless of whether they are made in another contracting state to the New York Convention (Art. 3(3) and Chap. 8).

10.2 Has your country signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

No.

10.3 What is the approach of the national courts in your country towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

An arbitration award that has no grounds for being refused is

automatically recognised (Art 45(1)). In order to enforce the arbitration award, one must obtain a court enforcement decision (*Shikko-Kettei*, Art. 46(1)). The grounds for refusing recognition and enforcement (Arts. 45(2) and 46(8)) are almost the same as those of Art. 36 of the UNCITRAL Model law and Art. 5 of the New York Convention. In general, courts have respected arbitrators' findings of facts and application of law and would not make a de novo review of the award.

10.4 What is the effect of an arbitration award in terms of res judicata in your country? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Generally, the conclusion (not the reason) of an arbitral award binds parties unless grounds for refusal of recognition are present (Art. 45, Code of Civil Procedure Art. 114). The issues not included in the conclusion of the award can be reheard in a national court, unless raising the issues in the court is barred by estoppel.

11 Confidentiality

11.1 Are arbitral proceedings sited in your country confidential? What, if any, law governs confidentiality?

No legislation exists. However, lawyers have a professional duty of confidentiality and it is common practice that hearings are not disclosed to the public (See Rule 40 of the Commercial Arbitration Rules of the Japan Commercial Arbitration Association (*http://www.jcaa.or.jp/e/arbitration-e/kisoku-e/shouji-e.html*)). Where the applicable arbitration rules do not have provisions expressly imposing confidentiality obligations upon the arbitrators or the parties (e.g., the ICC Rules of Arbitration), it is advisable for the parties to agree upon terms of confidentiality.

There is no legislation that stipulates what remedies will be available if there is a breach of confidentiality obligations owed by a party. Some commentators have argued that such a breach may only give rise to a separate claim for relief (such as injunction or damages) and only in the courts. However, an increasingly prevalent view appears to be that an arbitral tribunal may grant such remedies as it considers appropriate (e.g., ordering the breaching party to refrain from further disclosure of confidential information, or issuing a warning that a further breach could result in a default award or a damages claim in the same arbitration proceedings).

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

There is no legislation regulating this issue.

11.3 In what circumstances, if any, are proceedings not protected by confidentiality?

Where disclosure is ordered by a court or administrative authority, the party subject to such order will not be excused from the disclosure obligations regardless of the confidentiality requirements of the arbitration. Similarly, where securities law requires disclosure of certain information of pending or completed arbitration cases, the party subject to such disclosure requirements would have to make disclosure to the extent required by applicable laws. In addition, disclosure is possible where the parties separately consent thereto.

12 Remedies / Interests / Costs

12.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

There is no legislation on this issue. However, a judgment of the Supreme Court denied the enforceability of punitive damages awarded by the judgment of a state court of California, U.S. (Judgment of Supreme Court dated July 11, 1997, *Minshu* 51-6-2573) on the grounds that punitive damages are in violation of Japan's public policy. Therefore, an arbitration award of punitive damages will be set aside and will not be enforced or recognised in Japan.

12.2 What, if any, interest is available?

In general, interest may be included in the conclusions of arbitral awards. Accrual of interest is a matter of substantive law. Arbitration of a dispute will not change the interest rate that applies to the subject matter of the disputed claim, except when a new or revised interest rate is part of an award. Interest will continue to accrue until fully paid, unless otherwise agreed.

12.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Fees and/or costs shall be determined in accordance with the agreement of the parties or applicable arbitration rules and may be included in the award (Arts. 47(1) and 49(1), (3), (4) (see also question 8.1)). In the absence of such an agreement, (a) the arbitral tribunal determines the remuneration of arbitrators (Art. 47(2)); and (b) each party bears its own disbursed costs (Art. 49(2)). In tort cases, however, legal fees may, as a matter of substantive law, be a part of recoverable damages. Thus, tortfeasors may be ordered to bear a certain portion of the victim's legal fees (e.g., 10% of the awarded damages).

12.4 Is an award subject to tax? If so, in what circumstances and on what basis?

This is a matter of tax law. It will depend on what kind of claims are involved (such as license fees or salaries) and how tax law deals with payment for such claims.

13 Investor State Arbitrations

13.1 Has your country signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965)?

Yes.

13.2 Is your county party to a significant number of Bilateral Investment Treaties (BITs) or Multilateral Investment treaties (such as the Energy Charter Treaty) that allow for recourse to arbitration under the auspices of the International Centre for the Settlement of Investment Disputes ('ICSID')?

Japan is a party to some (but not many) Bilateral Investment Treaties that allow for recourse to arbitration under ICSID (e.g., Mexico).

13.3 Does your country have standard terms or model language that it uses in its investment treaties and, if so, what is the intended significance of that language?

Japan does not have such standard terms or model language.

13.4 In practice, have disputes involving your country been resolved by means of ICSID arbitration and, if so, what has the approach of national courts in your country been to the enforcement of ICSID awards?

So far, it appears that disputes involving Japan have not been resolved by means of ICSID arbitration.

13.5 What is the approach of the national courts in your country towards the defence of state immunity regarding jurisdiction and execution?

Generally, Japan takes a restrictive approach for sovereign immunity regarding jurisdiction (i.e. the sovereign is immune except in commercial transactions); and absolute sovereign immunity regarding execution. In an arbitration context, the sovereign may be deemed to have waived the defence of state immunity when the sovereign enters into an appropriately drafted arbitration agreement.

14 General

14.1 Are there noteworthy trends in the use of arbitration or arbitration institutions in your country? Are certain disputes commonly being referred to arbitration?

The JCAA (Japan Commercial Arbitration Association, *http://www.jcaa.or.jp/e/index-e.html*, for commercial disputes) and TOMAC of the Japan Shipping Exchange, Inc. (*http://www.jseinc.org/index_en.html*, for maritime disputes) are well known arbitration institutions in Japan.

In addition, the arbitration centres maintained by local Japanese Bar Associations have been increasing their presence in Japan as forums for commercial and non-commercial arbitrations and ADR with modest fee schedules.

14.2 Are there any other noteworthy current issues affecting the use of arbitration in your country?

The Arbitration Law is modelled on the UNCITRAL Model Law. Japanese legislators promote arbitration in Japan, so as to make Japan one of the world's major arbitration centres. It is therefore expected that the Arbitration Law will be liberally interpreted, in conformity with this legislative purpose.

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Hiroyuki Tezuka is a member partner of Nishimura & Partners, and heads the firm's international litigation and arbitration practice group. He has been involved in a number of international commercial arbitration cases under the rules of the JCAA, ICC and AAA(ICDR). Mr. Tezuka has authored numerous articles in domestic and international legal publications. He served as Secretary to the Arbitration Committee of the IBA Dispute Resolution Section from 2005 to 2006 and has served as Vice-Chair to the same Committee since 2007.

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NISHIMURA &PARTNERS

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