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The International Comparative Legal Guide to:

Investor-State Arbitration 2019

1st Edition

A practical cross-border insight into investor-state arbitration.

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

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URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Stephens & George Print Group
November 2018

ISBN 978-1-912509-41-6
ISSN 2631-6307

Strategic Partners

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PEFC/16-33-254
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General Chapters:

Country Question and Answer Chapters:

Japan

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1 Treaties: Current Status and Future Developments

1.1 What bilateral and multilateral treaties and trade agreements has your country ratified?

(1) Japan has ratified the following 32 bilateral and multilateral investment treaties:

- Japan-Armenia BIT (ratified in Japan, but not yet in force).
- Japan-Bangladesh BIT (in force since 1999).
- Japan-Cambodia BIT (in force since 2008).
- Japan-China BIT (in force since 1989).
- Japan-China-Korea TIT (in force since 2014).
- Japan-Colombia BIT (in force since 2015).
- Japan-Egypt BIT (in force since 1978).
- Japan-Hong Kong BIT (in force since 1997).
- Japan-Iran BIT (in force since 2017).
- Japan-Iraq BIT (in force since 2014).
- Japan-Israel BIT (in force since 2017).
- Japan-Kazakhstan BIT (in force since 2015).
- Japan-Kenya BIT (in force since 2017).
- Japan-Korea BIT (in force since 2003).
- Japan-Kuwait BIT (in force since 2014).
- Japan-Laos BIT (in force since 2008).
- Japan-Mongolia BIT (in force since 2002).
- Japan-Mozambique BIT (in force since 2014).
- Japan-Myanmar BIT (in force since 2014).
- Japan-Oman BIT (in force since 2017).
- Japan-Pakistan BIT (in force since 2002).
- Japan-Papua New Guinea BIT (in force since 2014).
- Japan-Peru BIT (in force since 2009).
- Japan-Russia BIT (in force since 2000).
- Japan-Saudi Arabia BIT (in force since 2017).
- Japan-Sri Lanka BIT (in force since 1982).
- Japan-Turkey BIT (in force since 1993).
- Japan-Ukraine BIT (in force since 2015).
- Japan-Uruguay BIT (in force since 2017).
- Japan-Uzbekistan BIT (in force since 2009).
- Japan-Vietnam BIT (in force since 2004).
- Energy Charter Treaty (in force for Japan since 2002).

(2) Japan has ratified the following 13 bilateral or multilateral trade agreements that have investment chapters:

- Japan-Australia Economic Partnership Agreement (in force since 2015).
- Japan-Brunei Economic Partnership Agreement (in force since 2008).
- Japan-Chile Strategic Economic Partnership Agreement (in force since 2007).
- Japan-India Comprehensive Economic Partnership Agreement (in force since 2011).
- Japan-Indonesia Economic Partnership Agreement (in force since 2008).
- Japan-Malaysia Economic Partnership Agreement (in force since 2006).
- Japan-Mongolia Economic Partnership Agreement (in force since 2016).
- Japan-Mexico Economic Partnership Agreement (in force since 2005).
- Japan-Philippines Economic Partnership Agreement (in force since 2008).
- Japan-Singapore Economic Partnership Agreement (in force since 2002).
- Japan-Switzerland Free Trade and Economic Partnership Agreement (in force since 2009).
- Japan-Thailand Economic Partnership Agreement (in force since 2007).
- The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (ratified in Japan, but not yet in force).

Note: The investment chapters of the Japan-Philippines EPA and the Japan-Australia EPA do not provide for investor-state dispute settlement.

1.2 What bilateral and multilateral treaties and trade agreements has your country signed and not yet ratified? Why have they not yet been ratified?

Japan signed a bilateral investment treaty with the UAE (Japan-UAE BIT) on 30 April 2018, and a trade agreement with the European Union (Japan-EU Economic Partnership Agreement) on 17 July 2018. Japan has not ratified these agreements yet. However, it is expected that the Diet will have given its approval soon, likely in late 2018.

Note: the Japan-EU EPA does not include investment protection provisions and investor-state dispute settlement, the conclusion of which was left to future negotiation.

1.3 Are your BITs based on a model BIT? What are the key provisions of that model BIT?

Japan does not have a model BIT.

The most recent example of Japan's BIT practice is the Japan-Armenia BIT. The Japan-Armenia BIT has been approved by the Japanese Diet, and it is now awaiting ratification by Armenia.

1.4 Does your country publish diplomatic notes exchanged with other states concerning its treaties, including new or succeeding states?

Japan has never published diplomatic notes exchanged with other states concerning its treaties.

1.5 Are there official commentaries published by the Government concerning the intended meaning of treaty or trade agreement clauses?

The Japanese government has never published official commentaries concerning the intended meaning of a bilateral investment treaty or trade agreement. However, some materials on the website of the Ministry of Economy, Industry and Trade indicate the Government's general understanding on the meaning of clauses in its investment treaties (see, http://www.meti.go.jp/policy/trade_policy/epa/investment/ (in Japanese)).

2 Legal Frameworks

2.1 Is your country a party to (1) the New York Convention, (2) the Washington Convention, and/or (3) the Mauritius Convention?

Japan is a party to the New York Convention and the Washington Convention. It acceded to the New York Convention in 1961, and ratified the Washington Convention in 1967. It has not yet signed the Mauritius Convention.

2.2 Does your country also have an investment law? If so, what are its key substantive and dispute resolution provisions?

No, Japan does not have an investment law to promote foreign investment.

2.3 Does your country require formal admission of a foreign investment? If so, what are the relevant requirements and where are they contained?

Japan does not require formal admission of foreign investments. However, it should be noted that Article 27 of the Foreign Exchange and Foreign Trade Law sets out a prior notification requirement and screening procedures for inward direct investments in certain sectors. Depending on the screening result, the investor may be required to alter the content of the investment or discontinue the investment process. The screening of inward direct investment is conducted from the viewpoint of whether the investment is likely to cause a situation in which:

(1) a significant adverse effect is brought to the smooth operation of the Japanese economy; or

(2) the national security is impaired, the maintenance of public order is disturbed, or the protection of public safety is hindered.

3 Recent Significant Changes and Discussions

3.1 What have been the key cases in recent years relating to treaty interpretation within your jurisdiction?

There have been no arbitration cases where the tribunal addressed the interpretation of one of Japan's bilateral investment treaties. As for domestic court cases, there is one court judgment that addressed the interpretation of a most-favoured nation clause in the Japan-Hong Kong BIT (Judgment of Tokyo High Court, 30 August 2011).

3.2 Has your country indicated its policy with regard to investor-state arbitration?

The Japanese government has repeatedly indicated that investor-state arbitration is essential for the protection of Japanese businesses investing overseas. This is because the option to settle an investment dispute with the host state by way of international arbitration enhances the predictability and legal stability of the business environment of the host state. The Government has also expressed its intention to continue to pursue inclusion of investor-state arbitration clauses in the future negotiation of BITs.

In a House of Representatives Committee on Foreign Affairs session of 16 May 2018, Foreign Minister Kono stated, in response to questions concerning the EU's investment court approach, that he considers that investor-state arbitration remains the best option for Japan despite the concerns raised by the EU and other stakeholders. Minister Kono further stated that Japan should contribute to the discussion about a reform of investor-state arbitration (rather than pursuing the investment court approach proposed by the EU).

3.3 How are issues such as corruption, transparency, MFN, indirect investment, climate change, etc. addressed, or intended to be addressed in your country's treaties?

As for corruption, Japanese BITs generally provide for a state's obligation to endeavour to take appropriate measures and make efforts to prevent and combat corruption regarding matters covered by the respective BIT in accordance with its laws and regulations (e.g., Article 10 of Japan-Armenia BIT).

Regarding transparency, Japanese BITs generally provide an obligation on the state to promptly publish, or otherwise make publicly available, its laws, regulations, administrative procedures, administrative rulings and judicial decisions of general application as well as international agreements which pertain to or affect the implementation and operation of the respective BIT (e.g., Article 8 of Japan-Armenia BIT). As for the transparency of investor-state arbitration, Japan's recent approach has been to leave the issue to the applicable arbitration rules, however, Japanese BITs do generally allow a respondent state to make available to the public all documents submitted or issued by an arbitral tribunal (e.g., Article 24.17 of Japan-Armenia BIT). Therefore, the UNCITRAL Rules on Transparency in Treaty-based investor-state arbitration may apply when an investor chooses to bring a claim to arbitration under the UNCITRAL Arbitration Rules. In contrast, the CPTPP is a rare example in that it provides for the application of advanced

transparency rules to any investor-state arbitration regardless of the applicable arbitration rules (see, Article 9.24 of TPP).

In terms of MFN, Japan's recent approach is to confirm that MFN shall not be applied to international dispute settlement procedures or mechanisms (Article 3 of the Japan-Armenia BIT).

Except for a small number of exceptions, recent Japanese BITs protect investments that an investor of a contracting party owns or controls indirectly (see, Article 1(a) of Japan-Armenia BIT). With regard to an investment indirectly owned or controlled by an investor of a third country, or the host state through a shell company established in the home state, however, recent Japanese BITs allow the host state to deny the benefit of a BIT to such an investment (Article 22.2 of the Japan-Armenia BIT).

3.4 Has your country given notice to terminate any BITs or similar agreements? Which? Why?

Japan has never given notice to terminate any BITs or similar agreements.

4 Case Trends

4.1 What investor-state cases, if any, has your country been involved in?

Japan has never been involved in an investor-state case as a respondent. At this moment, the following three ICSID cases and one UNCITRAL case have been initiated by Japanese investors:

(i) *Eurus Energy Holdings Corporation v. Kingdom of Spain* (ICSID Case No. ARB/16/4);

(ii) *Itochu Corporation v. Kingdom of Spain* (ICSID Case No. ARB/18/25);

(iii) *JGC Corporation v. Kingdom of Spain* (ICSID Case No. ARB/15/27); and

(iv) *Nissan Motor v. India* (UNCITRAL).

Further, the following three cases have been initiated by affiliates of Japanese companies:

(i) *Saluka Investments BV v. The Czech Republic* (UNCITRAL);

(ii) *Nusa Tenggara Partnership B.V. and PT Newmont Nusa Tenggara v. Republic of Indonesia* (ICSID Case No. ARB/14/15); and

(iii) *Bridgestone Americas, Inc. and Bridgestone Licensing Services, Inc. v. Republic of Panama* (ICSID Case No. ARB/16/34).

4.2 What attitude has your country taken towards enforcement of awards made against it?

This is not applicable, as there have been no cases in which awards were rendered against Japan.

4.3 In relation to ICSID cases, has your country sought annulment proceedings? If so, on what grounds?

This is not applicable, as no ICSID cases have been brought against Japan.

4.4 Has there been any satellite litigation arising whether in relation to the substantive claims or upon enforcement?

This is not applicable, as no investor-state arbitration has been brought against Japan.

4.5 Are there any common trends or themes identifiable from the cases that have been brought, whether in terms of underlying claims, enforcement or annulment?

No investor-state arbitration has been brought against Japan. Three out of the four pending cases brought by Japanese investors relate to renewable energy projects in Spain.

5 Funding

5.1 Does your country allow for the funding of investor-state claims?

Japan has not explicitly allowed for the funding of litigation/arbitration in its laws and regulations, official guidelines or official statements. Furthermore, the discussion about whether third-party funding is allowable under the Japanese legal system has not yet been resolved. However, on 25 April 2018, the Inter-ministerial Conference for Vitalising International Arbitration issued a list of possible measures to vitalise international arbitration in Japan, one of which is considering appropriate regulation for third-party funding. Therefore, there is a possibility that the Japanese government will affirm the legality of third-party funding in the future.

5.2 What recent case law, if any, has there been on this issue in your jurisdiction?

This is not applicable.

5.3 Is there much litigation/arbitration funding within your jurisdiction?

It is still rare for disputing parties to use litigation/arbitration funding for litigation before Japanese courts or arbitrations seated in Japan. However, according to well-informed sources, at least one of the investor-state arbitrations initiated by Japanese investors is being funded by a third-party funder.

6 The Relationship Between International Tribunals and Domestic Courts

6.1 Can tribunals review criminal investigations and judgments of the domestic courts?

Yes, they can. The Japanese law does not prohibit arbitral tribunals from reviewing criminal investigations and judgments of domestic courts.

6.2 Do the national courts have the jurisdiction to deal with procedural issues arising out of an arbitration?

The Arbitration Act of Japan (Law No. 138 of 2003), which adopts the 1985 UNCITRAL Model Law on International Commercial Arbitration, grants Japanese courts the jurisdiction to deal with, *inter alia*, the following procedural issues arising out of an arbitration seated in Japan:

(i) determination of number of, and appointment of arbitrators;

(ii) challenge to or removal of arbitrators;

(iii) jurisdiction of arbitral tribunal;

(iv) assistance in the taking of evidence; and

(v) interim measures.

6.3 What legislation governs the enforcement of arbitration proceedings?

The Arbitration Act, Chapter 8 governs the recognition and enforcement of arbitral awards.

6.4 To what extent are there laws providing for arbitrator immunity?

There are no laws providing for arbitrator immunity.

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

There are no limits to the parties' autonomy to select arbitrators under Japanese law.

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

Yes, there is. Article 17.5 of the Arbitration Act provides that when the parties' chosen method for selecting arbitrators fails, one of the parties can request the court to select the arbitrators. Article 17.6 sets out that the court, in appointing an arbitrator, shall have due regard to: (i) any qualifications required of the arbitrator by the agreement of the parties; (ii) the independence and impartiality of the arbitrators; and (iii) in the case of a sole or third arbitrator, the advisability of appointing an arbitrator of a nationality other than those of the parties.

6.7 Can a domestic court intervene in the selection of arbitrators?

Yes, but the court can only intervene in the selection of arbitrators in the following limited circumstances:

(i) failure of selection of arbitrators by the parties' chosen method (as described in the answer to question 6.6 above);

(ii) challenge to arbitrators, in the case where a challenge is rejected by the arbitral tribunal or in the procedures as otherwise agreed by the parties (Article 19.4 of the Arbitration Act); and

(iii) decision on the termination of an arbitrator's mandate, in the case where a party requests the court to decide on the termination of the mandate due to: (a) an arbitrator's inability to perform his functions; or (b) an arbitrator's failure to act without undue delay for other reasons.

7 Recognition and Enforcement

7.1 What are the legal requirements of an award for enforcement purposes?

Domestic and foreign arbitral awards will automatically be recognised in Japan. No court proceedings for recognition are necessary. Article 46.2 of the Arbitration Act requires an applicant in enforcement proceedings to submit:

(a) a certified copy of the arbitral award; and

(b) a Japanese translation of the award, if the award is not in Japanese. This translation need not be certified.

Article 45.2 of the Arbitration Act sets forth the circumstances for which enforcement of an arbitral award may be refused, four of which concern the arbitral award itself. Article 45.2 (5), (7), (8) and (9) provide that enforcement of an arbitral award, irrespective of the country in which it was made, may be refused, where:

(a) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced;

(b) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made;

(c) the subject matter of the dispute is not capable of settlement by arbitration under the law of Japan; and

(d) the recognition or enforcement of the award would be contrary to the public policy of Japan.

7.2 On what bases may a party resist recognition and enforcement of an award?

Article 45.2 (1)-(7) of the Arbitration Act sets forth the circumstances in which recognition or enforcement of an arbitral award may be refused at the request of a party, as follows:

(1) a party to the arbitration agreement was under some incapacity;

(2) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;

(3) a party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings;

(4) a party was unable to present his case;

(5) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced;

(6) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(7) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made.

7.3 What position have your domestic courts adopted in respect of sovereign immunity and recovery against state assets?

Japan signed the United Nations Convention on Jurisdictional Immunities of States and Their Property in 2007. To ratify the Convention, the Japanese Diet enacted the Act on the Civil Jurisdiction of Japan with respect to a foreign state, etc. (Law No. 24 of 2009). Although there are no court cases that have addressed the issue of sovereign immunity and recovery against state assets, the Act will apply when a court deals with the enforcement of arbitral awards against state assets.

Articles 17 and 18 of the Act provide that a foreign state shall not be immune from jurisdiction with regard to proceedings for execution of a temporary order or for civil execution procedure against assets held by the foreign state, where: (i) consent of the foreign state has been given expressly by international agreements, an arbitration agreement or written contracts; or (ii) the assets are in use or intended for government non-commercial use.

7.4 What case law has considered the corporate veil issue in relation to sovereign assets?

There have been no cases before the Japanese court that have considered the corporate veil issue in relation to sovereign assets.

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NISHIMURA & ASAHI

Japan's largest law firm, Nishimura & Asahi was established in 1966 and has been involved in numerous arbitrations over the years, spanning M&A, joint ventures and construction. It has been active in disputes across Asia, taking on cases at major institutions like the ICC, SIAC and CIETAC, as well as the Japan Commercial Arbitration Association (JCAA) the Korean Commercial Arbitration Board (KCAB) and other recognised bodies in Indonesia, Thailand and Vietnam. In 2018, Nishimura & Asahi was Japan's first ever entrant into the *GAR100*, the list of law firms with the busiest arbitration practices globally. Besides its commercial arbitration experience, Nishimura & Asahi also boasts a strong public international law practice, advising companies and governments on issues of international trade and investment. On the basis of that, it is building a specialised investment arbitration practice consisting of several team members with significant prior experience in the field.

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