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ARBITRATION

Arbitration procedures and practice in Japan: overview

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USE OF ARBITRATION AND RECENT TRENDS

1. How is commercial arbitration used and what are the recent trends?

Use of commercial arbitration and recent trends

Commercial arbitration is used less frequently than court proceedings in Japan as a means to settle domestic and international disputes. However, since the Arbitration Law (Law No. 138 of 2003) came into force on 1 March 2004, (replacing the old Civil Procedure Code and the Law Concerning Procedure for General Pressing Notice and Arbitration Procedure (Law No. 29 of 1890)), international commercial arbitration has become increasingly common.

Economic growth in developing countries, especially in Asia, has resulted in increased trade between Japan and those countries, and Japanese companies have been finding arbitration preferable to litigation, because:

- Arbitration is considered more reliable than litigation in developing countries.
- Arbitral awards are generally more easily enforceable than foreign court judgments.

These changes have given rise to a paradigm shift among practitioners and in-house counsel and established a general awareness of alternative dispute resolution mechanisms.

According to the Japan Commercial Arbitration Association (JCAA) annual report in 2017, there were 17 Requests for Arbitration filed in 2017 (compared with 14 cases in 2014, 21 cases in 2015 and 16 cases in 2016). Although the number of requests filed has not increased, the cases have become increasingly large and complex, both in terms of their legal issues and the high awards sought.

The number of ICC cases seated outside Japan involving Japanese companies has gradually increased (21 cases in 2015, 23 cases in 2016 and 29 cases in 2017). The number of Singapore International Arbitration Centre (SIAC) cases involving Japanese companies has also been increasing significantly (eight cases in 2015, 13 cases in 2016, and 27 cases in 2017).

Recently, there has been discussion about reform of the Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers (Foreign Lawyers Act) with respect to the definition of "international arbitration case" (*Article 2(xi), Foreign Lawyers Act*). Article 72 of the Attorney Act generally prohibits a person who is not qualified as a Japanese lawyer from handling, for the purpose of gaining fees, legal business (which includes arbitration). The Foreign Lawyers Act provides significant exceptions to this general rule and specifically allows both:

- A registered foreign lawyer in Japan to represent a party in an international arbitration case (*Article 5-3*).
- A non-registered foreign lawyer who is engaged in providing legal services in a foreign state (excluding a person who is employed and is providing services in Japan, based on their knowledge of foreign law) to represent a party in an international arbitration case which he/she undertakes in a foreign state (*Article 58-2*).

"International arbitration case" is defined as a civil arbitration case which is conducted in Japan and in which all or some of the parties are persons who have an address or a principal office or head office in a foreign state (*Article 2(xi)*). Issues arise, for example, where all parties reside in Japan: in this case a foreign lawyer, regardless of whether they are registered in Japan, cannot represent a party in an arbitration seated in Japan even if one or all of the parties are a subsidiary/subsidiaries wholly owned by foreign entities. The Japanese Ministry of Justice has been considering these issues, and reform of laws related to international arbitration is expected.

Advantages/disadvantages

The main advantages of using arbitration are:

- Japan is a contracting state to the New York Convention, and enforcement of arbitral awards in other contracting states is possible.
- The parties to the arbitration can choose arbitrators who are neutral and who have expertise in the disputed issues.
- Since Japanese court procedure adopts a three-tiered court system, choosing arbitration should result in a speedier final disposition of disputes.

Some disadvantages are:

- Arbitration can be more costly than court litigation (taking account of costs such as arbitrators' remuneration, filing fees at the arbitration institution, and hearing facility fees).
- Document disclosure procedures can be a heavy burden on parties (compared with court litigation, where the Japanese Code of Civil Procedure does not provide for "discovery" as understood in common law countries).
- Japanese laws do not provide procedures for compulsory enforcement of an arbitral tribunal's orders for injunctive relief.

LEGISLATIVE FRAMEWORK
Applicable legislation

2. What legislation applies to arbitration? To what extent has your jurisdiction adopted the UNCITRAL Model Law on International Commercial Arbitration 1985 (UNCITRAL Model Law)?

The Arbitration Law governs arbitration seated in Japan. In addition, the Supreme Court Rules on Procedures of Arbitration Related Cases (Supreme Court Rules No. 27, 26 November) provides the

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specific procedural rules applicable to court cases related to arbitration proceedings.

The Arbitration Law incorporates most of the provisions of the UNCITRAL Model Law on International Commercial Arbitration 1985 (before the amendments adopted in 2006) and it:

- Expressly acknowledges the separability and *kompetenz-kompetenz* of arbitration.
- Provides that no court can intervene in arbitral proceedings except where so provided in law.
- Provides narrow grounds for setting aside or refusing recognition and enforcement of an arbitral award, by adopting the grounds of the Model Law almost verbatim.

The Arbitration Law does deviate from UNCITRAL Model Law in that it:

- Governs both domestic and international arbitrations.
- Provides special treatment for arbitration agreements involving consumers and individual employees (*see Question 4*).
- Provides that, if agreed by both parties in writing, the arbitral tribunal or one or more of the arbitrators selected by the tribunal can attempt to assist negotiations towards an amicable settlement.

The Arbitration Law further provides that where an arbitration agreement is made by way of electronic or magnetic record (such as e-mail), it will be deemed to have been made in writing.

The Arbitration Law does not reflect the 2006 amendments to the UNCITRAL Model Law, which came in effect after the Arbitration Law became effective in 2004. There has been recent discussion among practitioners about the need to implement the 2006 amendments into the Arbitration Law.

Mandatory legislative provisions

3. Are there any mandatory legislative provisions? What is their effect?

Most of the provisions of the Arbitration Law regarding arbitral procedures can be modified by agreement between the parties, but certain mandatory procedural rules affecting procedural public policy are fixed, such as the limited availability of court intervention and the equal and fair treatment of the parties. If the parties and/or an arbitral tribunal do not follow such mandatory provisions, it constitutes grounds to apply for the arbitral award to be set aside.

4. Does the law prohibit any types of disputes from being resolved via arbitration?

The Arbitration Law provides that an arbitration agreement is valid only when the subject matter relates to a civil dispute that can be resolved by settlement between the parties (disputes concerning divorce and dissolution of adoptive relations are expressly excluded) (*Article 13(1), Arbitration Law*). A consumer can unilaterally terminate an agreement with a business operator to arbitrate disputes that may arise in the future (*Appendix Article 3(2)*). Also, an arbitration agreement relating to disputes that may arise in the future between an individual employee and a business employer will be null and void (*Appendix Article 4*).

Limitation

5. Does the law of limitation apply to arbitration proceedings?

A request in an arbitration procedure interrupts the limitation period. However, this does not apply to cases where the arbitration procedure has been terminated without an arbitral award (*Article 29(2), Arbitration Law*).

ARBITRATION ORGANISATIONS

6. Which arbitration organisations are commonly used to resolve large commercial disputes?

Large commercial disputes involving Japanese parties are commonly referred to arbitration administered by the:

- Japan Commercial Arbitration Association (JCAA) (*www.jcaa.or.jp/e/index.html*).
- International Chamber of Commerce (ICC).
- Singapore International Arbitration Centre (SIAC).

Other main arbitration organisations include the:

- Tokyo Maritime Arbitration Commission (TOMAC) of the Japan Shipping Exchange (*www.jseinc.org/en/tomac/index.html*).
- Alternative Dispute Resolution Centres of Bar Associations (ADR Centres) (*www.nichibenren.or.jp/contact/consultation/conflict.html*).

JURISDICTIONAL ISSUES

7. What remedies are available where one party denies that the tribunal has jurisdiction to determine the dispute(s)? Does your jurisdiction recognise the concept of kompetenz-kompetenz? Does the tribunal or the local court determine issues of jurisdiction?

The Arbitration Law specifically addresses the concept of *kompetenz-kompetenz*. An arbitral tribunal can rule on its own jurisdiction, including a ruling on any allegations on the existence or validity of an arbitration agreement (*Article 23(1)*). Where an arbitral tribunal rules that it has jurisdiction, any party can request, within 30 days of receiving notice of that ruling, that a Japanese court decides whether or not the tribunal has jurisdiction (*Article 23(5)*). The arbitral tribunal can continue the arbitral proceedings and render an award while such a request is pending in court (*see Question 24*).

ARBITRATION AGREEMENTS

Validity requirements

8. What are the requirements for an arbitration agreement to be enforceable?

Substantive/formal requirements

Formal requirements. Arbitration agreements must be in written form (*Article 13(2), Arbitration Law*). Documents signed by all parties, letters or telegrams exchanged between the parties (including faxed documents) 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 electronic or magnetic record (for example, by e-mail) also satisfies the written form requirement (*Article 13(3)-(4)*).

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In addition, if a request for arbitration submitted by either party contains the contents of an arbitration agreement and the written response submitted by the other party does not contain anything to dispute it, such arbitration agreement is deemed to have been made in writing (*Article 13(5)*).

Substantive requirements. See *Question 4*.

Separate arbitration agreement

Under the Arbitration Law, there is no need for an arbitration agreement to be a separate agreement. A clause in the main contract is sufficient.

A reference in a written agreement to a separate document containing an arbitration clause will satisfy the written form requirement (*Article 13(3)*).

Unilateral or optional clauses

9. Are unilateral or optional clauses, where one party has the right to choose arbitration, enforceable?

There are no provisions in the Arbitration Law that specifically stipulate whether unilateral or optional clauses, where one party has the right to choose arbitration, are enforceable. We are not aware of any published court decisions on this subject.

10. In what circumstances can a party that is not a party to an arbitration agreement be joined to the arbitration proceedings?

The Arbitration Law does not specifically stipulate whether and in what circumstances a party that is not a party to an arbitration agreement can be joined to arbitration proceedings.

An arbitration clause does not generally apply to third parties that are not signatories to the contract containing an arbitration clause.

There are precedents under the old arbitration law (*see Question 1*), under which an arbitration agreement could bind non-signatories in circumstances where the contract containing the arbitration clause is assigned by an arrangement or subrogation. There are also cases where the Japanese court has found that an arbitration agreement entered into by a company extends to individuals closely associated with that company, such as the representative director of a closely-held company.

Under such circumstances, non-signatories to an arbitration agreement can be allowed to be joined to arbitration proceedings, a position preserved by the current Arbitration Law as well.

The Arbitration Law does not restrict joinder of parties under institutional rules.

11. In what circumstances can a party that is not a party to an arbitration agreement compel a party to the arbitration agreement to arbitrate disputes under the arbitration agreement?

The Arbitration Law does not stipulate whether and in what circumstances a party that is not a party to an arbitration agreement can compel a party to the arbitration agreement to arbitrate. We are not aware of any published court decisions on this subject.

Separability

12. Does the applicable law recognise the separability of arbitration agreements?

The Arbitration Law recognises the separability of arbitration agreements.

If any or all of the contractual provisions (excluding the arbitration agreement) in a contract are found to be null and void, cancelled or for other reasons invalid, the validity of the arbitration agreement is not necessarily affected (*Article 13(6)*).

Breach of an arbitration agreement

13. What remedies are available where a party starts court proceedings in breach of an arbitration agreement or initiates arbitration in breach of a valid jurisdiction clause?

Court proceedings in breach of an arbitration agreement

Where a party to a valid arbitration agreement files a lawsuit in a Japanese court, the other party can move to dismiss the claim based upon the existence of that arbitration agreement.

A court before which an action is brought in a civil dispute which is the subject of an arbitration agreement must dismiss the action if the defendant so requests, except when (*Article 14(1)*):

- The arbitration agreement is null and void, cancelled or for other reasons invalid.
- Arbitration proceedings are inoperative or incapable of being performed based on the arbitration agreement.
- The request is made by the defendant after the presentation of its statement in the oral hearing or in the preparations for argument proceedings on the substance of the dispute.

If a Japanese court deems the arbitration agreement to be valid under Article 14, it simply dismisses the claims that have been brought before the court and does not issue an order to compel arbitration or to stay the litigation. This is one deviation from the UNCITRAL Model Law, under which the court will refer the parties to arbitration.

Arbitration in breach of a valid jurisdiction clause

An arbitral tribunal can rule on its own jurisdiction, including a ruling on any allegations regarding the existence or validity of an arbitration agreement (*Article 23(1)*) (*see Question 7*). If an objection is made to the arbitral tribunal regarding its jurisdiction, Article 23(4) provides that the tribunal must do either of the following:

- Make a preliminary independent ruling or an arbitral award, if it considers it has jurisdiction.
- Make a ruling to terminate the arbitral proceedings, if it considers it has no jurisdiction.

14. Will the local courts grant an injunction to restrain proceedings started overseas in breach of an arbitration agreement?

There are no Japanese court precedents that grant an injunction to restrain proceedings started overseas in breach of an arbitration agreement. Even if the courts find their jurisdiction and grant such an injunction under the Civil Provisional Remedies Law (Law No. 91 of 1989), the enforcement of such an injunctive order in a foreign

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country is often problematic and timely enforcement is unlikely to be realised.

ARBITRATORS

Number and qualifications/characteristics

15. Are there any legal requirements relating to the number, qualifications and characteristics of arbitrators? Must an arbitrator be a national of, or licensed to practice in your jurisdiction in order to serve as an arbitrator there?

The parties are free to agree on the number of and the procedure for appointing arbitrators (*Article 16(1), 17(1)*). In the absence of such agreement, the rules concerning the appointment of arbitrators under the Arbitration Law apply. The default rule is that there must be three arbitrators appointed when there are two parties (*Article 16(2)*). In multi-party arbitrations, the court must determine the number of arbitrators.

Under the Arbitration Law, there are no nationality, citizenship, residency or professional requirements for arbitrators, unless otherwise agreed by the parties. An individual does not need to be qualified to practice law in order to act as an arbitrator in Japan. For example, law professors and architects are permitted to act, and have frequently acted, as arbitrators in Japan.

Independence/impartiality

16. Are there any requirements relating to arbitrators' independence and/or impartiality?

The Arbitration Law imposes an obligation on the arbitrator candidate or the arbitrator to disclose all facts that could give rise to doubts as to their impartiality and independence (*Article 18(3)*). This disclosure obligation continues while the arbitral proceedings are pending (*Article 18(4)*). Arbitrators can be challenged where circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence (*Article 18(1)*).

Appointment/removal

17. Does the law contain default provisions relating to the appointment and/or removal of arbitrators?

Appointment of arbitrators

The parties are free to agree on the procedure for appointing arbitrators (*Articles 16(1)* and *17(1)*). However, in the absence of agreement on the procedure for appointing arbitrators, the Arbitration Law provides default rules on appointment (*see also Question 15*).

When there are two parties and three arbitrators are to be appointed, each party must appoint one arbitrator and those arbitrators must then appoint the third arbitrator.

If a party fails to appoint an arbitrator within 30 days of receiving a request to do so from the other party that has appointed an arbitrator, the court must appoint the arbitrator at the request of that party.

If the party-appointed arbitrators fail to appoint a third arbitrator within 30 days of their appointment, the court must appoint the third arbitrator at the request of a party (*Article 17(2)*).

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

In multi-party arbitrations (three or more parties), the court must appoint arbitrators at the request of a party (*Article 17(4)*).

In addition, even if the parties have agreed on the procedure for appointing arbitrators, where an appointment cannot be made for any reason (*Article 17(5)*), a party can request that the court appoint an arbitrator or arbitrators.

Removal of arbitrators

Under the Arbitration Law, if an arbitrator becomes legally or practically unable to perform his or her duties, or for other reasons causes undue delay in performing those duties, a party can apply to the court for the removal of such arbitrator. If the court finds these grounds established in relation to the arbitrator, it must dismiss the arbitrator (*Article 20*).

PROCEDURE

Commencement of arbitral proceedings

18. Does the law provide default rules governing the commencement of arbitral proceedings?

Unless otherwise agreed by the parties, an arbitration in respect of a particular civil dispute commences on the date on which one party gives the other party notice to refer that dispute to the arbitral proceedings (*Article 29 (1)*).

Applicable rules and powers

19. What procedural rules are arbitrators bound by? Can the parties determine the procedural rules that apply? Does the law provide any default rules governing procedure?

Applicable procedural rules

As a general principle, the Arbitration Law requires the parties to be treated equally and be given a full opportunity to present their cases in an arbitration (*Article 25*).

The Arbitral Tribunal must observe the rules of arbitration as provided by the agreement of the parties (provided, however, that those rules do not violate the provisions of the Arbitration Law concerning public policy (*Article 26 (1)*)). In practice, where parties use an arbitration organisation, they usually agree on the arbitration rules of the organisation as the applicable procedural rules. It is also a common practice for the IBA Rules on the Taking of Evidence in International Arbitration to be used as guidelines.

Default rules

Where the parties have not reached an agreement on the rules, the arbitral tribunal can conduct the arbitral proceedings in any manner it finds appropriate unless that manner violates the provisions of the Arbitration Law (*Article 26 (2)*). Where the parties have not agreed on the rules of arbitration, the tribunal can determine the admissibility of evidence, necessity of examination of evidence and weight of evidence (*Article 26 (3)*).

Other default rules provided by the Arbitration Law are:

Where the parties have not agreed to the language to be used, the tribunal can determine the language and the procedure to be conducted by such language (*Article 30 (2)*).

An arbitral tribunal can hold oral hearings to allow the parties to produce evidence or state their cases. If one party requests oral hearings, the tribunal must hold such hearings at an appropriate stage (*Article 32 (1)*) unless otherwise agreed by the parties (*Article 32 (2)*).

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Evidence and disclosure

20. If there is no express agreement, can the arbitrator order disclosure of documents and attendance of witnesses (factual or expert)?

The Arbitration Law does not explicitly provide that an arbitral tribunal has the power to compel a party to produce documents, but because it can conduct the arbitral proceedings in such manner as it finds appropriate (*Article 26 (2)*), it is understood that an arbitral tribunal has the power to order a party to produce documents.

However, a tribunal cannot compel a non-party to produce evidence. If necessary, an arbitral tribunal or a party (with approval by the arbitral tribunal) can request the court to examine the evidence under the Code of Civil Procedure (including obtaining document production orders from the court), unless the parties have agreed not to request that the court do so (*Article 35 (1)*). A party who wishes to make such a request to the court needs the tribunal's permission to do so (*Article 35 (2)*).

EVIDENCE

21. What documents must the parties disclose to the other parties and/or the arbitrator? How, in practice, does the scope of disclosure in arbitrations compare with disclosure in domestic court litigation? Can the parties set the rules on disclosure by agreement?

Scope of disclosure

The Arbitration Law does not provide default rules on the extent to which parties are required to disclose documents. In practice, it is common for parties to disclose documents pursuant to the parties' agreement or a procedural order by the tribunal. The International Bar Association's Rules on the Taking of Evidence in International Arbitration are commonly used as guidelines. Where there is a dispute regarding the scope of document disclosure between the parties, it will be determined by the arbitral tribunal. As Japan is a civil law jurisdiction and has no broad document discovery proceedings in civil litigation, the scope of disclosure in an arbitration may be broader than that in litigation at a domestic court.

Validity of parties' agreement as to rules of disclosure

Parties can agree on the rules of disclosure. Such an agreement is valid unless it violates the provisions of the Arbitration Law concerning public policy (*Article 26 (1)*).

CONFIDENTIALITY

22. Is arbitration confidential? If so, what is the scope of that confidentiality and who is subject to the obligation (parties, arbitrators, institutions and so on)?

The Arbitration Law has no provision concerning confidentiality or transparency of an arbitration. This means that an arbitration is not required to be open to the public, and, in practice, there is a widely-accepted notion that an arbitration should be treated as confidential unless otherwise agreed by the parties. Where the institutional rules chosen by the parties provide confidentiality obligations, the parties and arbitrators are bound by them. The parties can also separately agree on confidentiality.

COURTS AND ARBITRATION

23. Will the local courts intervene to assist arbitration proceedings seated in its jurisdiction?

The court can exercise its authority with respect to an arbitration only in the circumstances specified in the Arbitration Law (*Article 4*). The court can assist a party with respect to written notice (*Article 12*), appointment of an arbitrator (*Article 17*), challenging an arbitrator (*Article 19*), dismissal of an arbitrator (*Article 20*) and jurisdiction of an arbitral tribunal (*Article 23*).

The court proceedings with respect to an arbitration under the Arbitration Law are subject to the exclusive jurisdiction of the:

- District court designated by the parties to the arbitration.
- District court that has jurisdiction over the seat of the arbitration.
- District that has jurisdiction over the general venue applicable to the respondent of the arbitration (for a corporate respondent, the venue is usually determined by the location of its principal office).

24. What is the risk of a local court intervening to frustrate an arbitration seated in its jurisdiction? Can a party delay proceedings by frequent court applications?

Risk of court intervention

The Arbitration Law is based on the UNCITRAL Model Law (1985) with the aim of being consistent with modern arbitration practices. In addition, it is the policy of Japanese legislators to promote arbitration, to allow Japan to become one of the world's major arbitration centres. The Japanese court generally respects and follows the pro-arbitration attitude of the legislators and the Arbitration Law.

Delaying proceedings

The Arbitration Law intends to prevent a party from making frequent court applications to delay an arbitration by restricting a court's authority to intervene in an arbitration to the limited cases explicitly provided by the Act.

Where a court has the authority to intervene in an arbitration, the Arbitration Law does not require the tribunal to stay proceedings pending the court's decision. For example, regarding challenging an arbitrator, the Act provides that an arbitral tribunal can, even while the proceedings based on such challenge are pending at the court, commence or continue the arbitral proceedings and render an arbitral award (*Article 19 (5)*).

Similarly, when an arbitral tribunal, in its independent decision before rendering an arbitral award, has ruled that it has jurisdiction over a case, a party can request that a court, within thirty days of receipt of notice of said decision, rules on whether the tribunal has jurisdiction. However, even where the request is pending before the court, the tribunal can continue the arbitration procedure and render an arbitral award (*Article 23 (5)*).

Further, to expedite court proceedings, a decision by a court under the provisions of the Arbitration Law can be made without oral hearings (*Article 6*). The normal appeal against the court's decision is not allowed, and only in the limited cases provided by law is the special appeal against the court's decision allowed (*Article 7*). The special appeal must be filed within two weeks from receipt of the court's decision (*Article 7*).

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INSOLVENCY

25. What is the effect on the arbitration of pending insolvency of one of more of the parties to the arbitration?

The Bankruptcy Act provides that, when an order of commencement of bankruptcy proceedings is made, any legal proceedings (*Soshotetsuzuki*) relating to the bankruptcy estate in which the bankrupt stands as a party must be discontinued (*Article 44 (1)*).

Other insolvency laws, such as the Civil Rehabilitation Act, have similar provisions.

However, the original Japanese word used in such articles, *Soshotetsuzuki*, usually means court proceedings and therefore there is a debate regarding whether such articles apply to arbitrations as well. In this respect, as a creditor who commences an arbitration cannot receive the distribution of the assets unless it participates in the bankruptcy proceedings commenced against the other party to the arbitration, in practice such creditor usually files a proof of bankruptcy claim with the court and the claim is assessed by the court.

Where the creditor intends to dispute the assessment of the court, there is also a discussion whether such dispute should be resolved through litigation at the court administering the bankruptcy proceedings or by arbitration.

REMEDIES

26. What interim remedies are available from the tribunal?

Interim remedies

Unless otherwise agreed by the parties, an arbitral tribunal can order any party to take any interim measures or preservative measures that the arbitral tribunal considers necessary in respect of the subject matter of the dispute (*Article 24 (1)*). The Act does not restrict the types of interim remedies that are available from the tribunal, but an interim order made by an arbitral tribunal cannot be enforced by a Japanese court.

A party to an arbitration can file with the Japanese court a petition for a civil provisional remedy for the civil dispute referred to in the arbitration before or after the commencement of the arbitration. Such court order is enforceable by the Japanese court

Ex parte

The current Arbitration Law does not explicitly provide an arbitral tribunal with the power to grant interim relief on an ex parte basis. There is a debate as to whether an arbitral tribunal can grant interim relief on an ex parte basis under the current Arbitration Law.

Security

Under the Arbitration Law, an arbitral tribunal can award security that is appropriate in connection with the interim or preservative measures (*Article 24 (2)*).

27. What final remedies are available from the tribunal?

There are no express provisions limiting a tribunal's power to award appropriate remedies. Where the substantive law applicable to the subject matter of an arbitration provides for remedies such as injunctions, costs, or interests, a tribunal can grant such remedies to the extent permitted under the applicable substantive law, unless they are against public policy.

A tribunal can also award a declaratory relief. However, a tribunal seated in Japan cannot award punitive damages (the Supreme Court of Japan has denied the enforceability of awards for punitive damages rendered by a state court of California, on the grounds that punitive damages are against public policy).

APPEALS

28. Can arbitration proceedings and awards be appealed or challenged in the local courts? What are the grounds and procedure? Can parties waive any rights of appeal or challenge to an award by agreement before the dispute arises (such as in the arbitral clause itself)?

Rights of appeal/challenge

An arbitral award cannot be appealed to the court, but can be set aside by the court on certain grounds provided in the Arbitration Law (*see below*).

Grounds and procedure

Article 44 (1) of the Arbitration Law has narrowed and clarified the grounds for setting aside an arbitral award by adopting almost the same grounds for setting aside or refusing to enforce an arbitral award as those provided under Article 34 of the UNCITRAL Model Law or Article 5 of the New York Convention.

The Arbitration Law adopts a simpler and more efficient setting aside procedure than that available in civil litigation. The court decision can be made without an oral hearing in open court, although the court needs to hold a closed hearing attended by the parties.

Waiving rights of appeal

It is generally considered that the grounds to set aside arbitral awards under the Arbitration Law are so fundamental that the parties cannot waive the right to set aside an arbitral award on those grounds.

29. What is the limitation period applicable to actions to vacate or challenge an international arbitration award rendered?

The application to set aside an arbitral award rendered in Japan cannot be made when:

- More than three months have elapsed from the date of receipt of a written arbitral award.
- An execution order (see *Question 33*) has become final and binding (*Article 44 (2)*).

For an arbitral award rendered outside Japan, the Arbitration Law does not provide any procedure to set aside, vacate, or challenge such award before the Japanese courts.

30. What is the limitation period applicable to actions to enforce international arbitration awards rendered outside your jurisdiction?

The procedure for an execution order applicable to an international arbitral award rendered outside Japan is provided by the Arbitration Law (see *Questions 33* and *35*), but no limitation period is set.

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COSTS

31. What legal fee structures can be used? Are fees fixed by law?

Legal fees are not fixed by the law or by regulations. Parties to an arbitration can use hourly rates or any other fee structures. The law does not prohibit contingency fees. A party and its lawyer can agree on any fee structures, although the Japan Federation of Bar Associations' code of conduct requires that fees are fair and proper.

Japan has a number of laws and regulations that pose obstacles to typical third party funders. For example, Article 28 of the Attorney Act prohibits an attorney from obtaining any rights that are in dispute, and Article 10 of the Trust Act prohibits trusts which are created for the primary purpose of having another person conduct legal proceedings.

Claim management and collection services are regulated by law and only companies that have a government licence and qualified lawyers can engage in such services. Consequently, for the moment, there are no recognised professional third-party funders active in Japan.

32. Does the unsuccessful party have to pay the successful party's costs? How does the tribunal usually calculate any costs award and what factors does it consider?

Cost allocation

The costs of arbitration must be apportioned between the parties in accordance with the parties' agreement (*Article 49 (1)*) (which includes apportionment of costs in accordance with the institutional rules that the parties agreed to be bound by). If there is no such agreement, each party must bear its own costs for the arbitral proceedings (*Article 49 (2)*). If agreed by the parties, an arbitral tribunal can, in an arbitral award or in an independent ruling, determine the apportionment of the costs and any amount that one party should pay the other party (*Article 49 (3)*). While the act does not explicitly require the unsuccessful party to bear the costs of the arbitration, a tribunal can order the unsuccessful party to pay the successful party's costs, including attorney's fees, pursuant to the above provisions and the parties' agreement.

Cost calculation

The Arbitration Law provides that each party should bear its own costs, unless the parties agree otherwise (*see above*). Where the parties agree that the costs of arbitration will be apportioned between them, a tribunal must calculate costs in accordance with the parties' agreement.

Factors considered

Where the parties reach agreement about the allocation of costs, the factors that will be considered depend on the terms of the agreement.

ENFORCEMENT OF AN AWARD

Domestic awards

33. To what extent is an arbitration award made in your jurisdiction enforceable in the local courts?

The Arbitration Law provides that an arbitral award (irrespective of whether or not the seat of arbitration is in Japan) has the same effect as a final and binding judgment; if a civil execution based on the award requires an execution order (*Article 45(1)*). A party can file an application with the court for an execution order along with a:

- Copy of the arbitral award.
- Document certifying the copy of the award.
- Japanese translation of the award, if the award is not in Japanese (*Article 46 (1) and (2)*).

The competent courts for this procedure are the district court having jurisdiction over the place of the arbitration, the domicile of the counterparty and the location of the object of the claim or sizeable assets (*Article 46 (4)*).

Foreign awards

34. Is your jurisdiction party to international treaties relating to recognition and enforcement of foreign arbitration awards, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention)?

Japan has acceded to the New York Convention, with the reservation that it applies only to recognition and enforcement of an award made in the territory of another contracting state. However, the Arbitration Law does not distinguish awards rendered in contracting states of the New York Convention and in non-contracting states. An award rendered in non-contracting states of that Convention can be enforced in Japan if it meets the requirements of the Arbitration Law, which are almost the same as those in the New York Convention and the Model Law. Therefore, the reservation on the New York Convention has lost meaningful effect when it comes to its recognition and enforcement by Japanese courts under the Arbitration Law.

35. To what extent is a foreign arbitration award enforceable?

There is no difference between the rules for enforcement of domestic awards and foreign awards. A foreign arbitral award can be enforced by making an application to the court for an execution order following the process set out in *Question 33*. A UK or US award is enforceable in Japan, except where an exception under Article 45 (2) of the Arbitration Law relates to the award (for example, if the content of the UK or US award is against public policy).

Length of enforcement proceedings

36. How long do enforcement proceedings in the local court take, from the date of filing the application to the date when the first instance court makes its final order? Is there an expedited procedure?

Enforcement proceedings typically take about one to three months in the first instance, although it may take longer depending on circumstances. In particular, where a foreign respondent who has assets in Japan does not have any business office or representative in Japan, the formal international service of process which may be preferred by some judges can take considerable time.

REFORM

37. Are any changes to the law currently under consideration or being proposed?

On June 2017, the Liberal Democratic Party Policy Research Council announced a proposal to promote Japanese judicial diplomacy, which includes:

- Strengthening the function of the arbitration centre for international commercial arbitration.

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- Establishing infrastructure for the arbitration facility.
- Developing related laws to establish a Japan international arbitration centre.

The Japan Federation of Bar Associations and Japan Association of Arbitrators (JAA) also propose to establish further arbitration-related laws and improve the infrastructure of the arbitration facility.

There is a strong movement for an amendment of the Arbitration Law to reflect the revisions to the UNCITRAL Model Law that were made in 2006.

A minor amendment to Article 29(2) of the Arbitration Law will come into force at the same time the revisions to the Civil Code become effective, which will be no later than 1 June 2020. The purpose of the amendment is to ensure consistency in the wording between the revised Civil Code and the Arbitration Law. Under the amended Article 29(2), as under the current Article 29(2), a claim made in an arbitration interrupts the limitation period, except where the arbitral proceedings are terminated without rendering an arbitral award.

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