Japan

Nishimura & Asahi Hiroyuki Tezuka & Yutaro Kawabata

1. EXECUTIVE SUMMARY

1.1.1 What are the advantages and disadvantages relevant to arbitrating or bringing arbitration related proceedings in your jurisdiction?

The advantages of bringing arbitration proceedings in Japan are:

- the Japanese Arbitration Law is based on the UNCITRAL Model Law (the 'Model Law');
- Japan is a Contracting State to the New York Convention;
- the Japanese courts have taken a fairly pro-arbitration approach and respect arbitrators' broad discretion; and
- the Japanese courts have the power to grant interim measures in support of arbitration before or during proceedings.

The disadvantages of bringing such proceedings in Japan are:

- the lack of organisations providing 'state of the art' hearing facilities and support services; and
- the fact that only a small number of cases related to arbitration have been brought to the Japanese courts: there are no 'specialist judges'.

1.1.2 How would you rate the supportiveness of your jurisdiction to arbitration on a scale of 1 to 5, with the number 5 being highly supportive towards arbitration and 1 being unsupportive of arbitration? Where your jurisdiction is in the process of reform, please add a + sign after the number.

We rank the supportiveness of our jurisdiction to arbitration as 4.

2. GENERAL OVERVIEW AND NEW DEVELOPMENTS

2.1.1 How popular is arbitration as a method of settling disputes? What are the general trends and recent developments in arbitration in your jurisdiction?

As far as the number of cases is concerned, commercial arbitration is much less frequently used in Japan as a method of settling either domestic or international disputes than litigation in the courts. In its fiscal year 2010, the Japan Commercial Arbitration Association (JCAA), the Japanese counterpart of the American Arbitration Association, handled 48 cases (25 new cases and 23 carried forward cases). The vast majority of commercial disputes have been resolved by litigation in the courts. However, practitioners and arbitration institutions have made efforts to promote the practice of arbitration in Japan. A number of Japanese local Bar Associations have set up arbitration centres. Established to make arbitration more accessible, these centres have modest fee schedules and accept the filing of arbitration requests even in the absence of an arbitration agreement (on the basis that

if and when an arbitration agreement is reached in the course of discussions between the parties, the tribunal will proceed to render an arbitral award). Most of the cases handled by these centres are domestic cases, typically using hybrid 'med-arb' procedures, and many cases are settled rather than going to a final arbitral award. In the fiscal year 2010, a total of 988 new cases were filed with the centres. Among the 381 cases that were resolved during that fiscal year, 370 cases (97.1 per cent) were settled, four cases (1 per cent) ended with arbitral awards based on settlement and only seven cases (1.8 per cent) ended with arbitral awards without settlement. In the area of international commercial disputes, there is a trend whereby large, international commercial disputes are increasingly resolved through arbitration, partly because non-Japanese parties often prefer arbitration to the Japanese courts and partly because an increasing number of international contracts contain arbitration clauses. Arbitral institutions such as the JCAA have attempted to update their arbitration rules and practices (for example, amendment of the Regulations for Arbitrator's Remuneration to increase the maximum hourly rate of each arbitrator from JPY 40,000 to JPY 80,000), so as to bring arbitral practice into conformity with the arbitral practice of other modern jurisdictions. The modernisation of Japanese arbitration law has also helped to make commercial arbitrations in Japan more reliable and globally compatible. The use of arbitration within Japan in resolving commercial disputes is expected to increase.

2.1.2 Are there any unique jurisdictional attributes or particular aspects of the approach to arbitration in your jurisdiction that bear special mention?

The Japanese Arbitration Law is based on the Model Law so as to be compatible (to the greatest extent possible) with the arbitration laws of modern arbitration jurisdictions. In addition, it is the policy of Japanese legislators to promote arbitration in Japan in order to make Japan into one of the world's major arbitration centres, and therefore, it is expected that the Japanese courts will liberally interpret the law in conformity with this legislative purpose.

2.1.3 Principal laws and institutions

2.1.3.1 What are the principal sources of law and regulation relating to international and domestic arbitration in your jurisdiction?

The Arbitration Law (Law No. 138 of 2003), which came into force on 1 March 2004, replaced Japan's old arbitration law (Law Concerning Procedure for General Pressing Notice and Arbitration Procedure, Law No. 29 of 1890). The Arbitration Law governs both domestic and international arbitrations and applies without distinction to both commercial and non-commercial arbitrations. Japan is not a federal state and the Law is the only law that generally governs arbitration in Japan. The Supreme Court Rules on Procedures of Arbitration Related Cases (Supreme Court Rules No. 27, 26 November 2003) set forth the particulars of procedural rules for court cases related to arbitration. Japan is a Contracting State to the New York

Convention. Japan has declared that it will apply the New York Convention to the recognition and enforcement of awards made only in the territory of another Contracting State.

The Japanese Arbitration Law is based on the Model Law. One of the law's major deviations from the Model Law is special treatment for arbitration agreements involving consumers and individual employees (see section 3.6.4 below). In addition, Article 38(4) of the Arbitration Law provides that, if agreed by both parties, the arbitral tribunal or one or more of the arbitrators selected by the tribunal may attempt an amicable settlement. This provision reflects the practices in arbitrations (especially domestic arbitrations) in Japan, where many of the arbitration cases are settled amicably with active involvement by the arbitrators.

2.1.3.2 What are the principal institutions that are commonly used and/or government agencies that assist in the administration or oversight of international and domestic arbitrations?

The JCAA is the leading permanent commercial, non-maritime arbitration institution in Japan, handling both international and domestic commercial arbitrations. The International Chamber of Commerce (ICC) maintains a Japan national committee (ICC Japan). However, ICC Japan does not provide secretarial or administrative services for ICC arbitrations in Japan, and parties wishing to initiate an ICC arbitration in Japan must contact the Secretariat of the International Court of Arbitration of the ICC in Paris or its Hong Kong office directly. The arbitration centres maintained by local Japanese Bar Associations have been increasing their presence in Japan as forums for commercial and non-commercial arbitrations.

2.1.3.3 Which courts or other bodies have judicial oversight or supervision of the arbitral process?

The district courts have jurisdiction over the arbitral process (as provided under the Japanese Arbitration Law) and oversee or supervise arbitral proceedings with respect to specific matters, such as the default appointment of arbitrators (sections 3.1.2 and 3.1.3), the removal of arbitrators (section 3.1.6) and the granting of interim relief (see section 4.1.3).

3. ARBITRATING IN YOUR JURISDICTION – KEY FEATURES

3.1 The appointment of an arbitral tribunal

3.1.1 Are there any restrictions on the parties' freedom to choose arbitrators?

The Arbitration Law provides that the parties are, in principle, free to agree on a procedure for appointing an arbitrator. There are no citizenship, residency or professional requirements for arbitrators (arbitrators are not required to be a member of the local Bar).

3.1.2 Are there specific provisions of law regulating the appointment of arbitrators?

The Arbitration Law provides that a party may make a request to the court, if an arbitrator cannot be appointed due to failure to act as requested under

the procedure agreed by the parties or for any other reason.

3.1.3 Are there alternative procedures for appointing an arbitral tribunal in the absence of agreement by the parties?

In the absence of agreement by the parties, the Arbitration Law provides that the default number of arbitrators is three, when the are only two parties. However, in multi-party arbitrations (when the number of parties is three or more), the Arbitration Law provides that the court shall determine the number of arbitrators. When there are two parties and three arbitrators are to be appointed, each party shall appoint one arbitrator, and the party-appointed arbitrators shall appoint the third arbitrator; however, (a) if a party fails to appoint an arbitrator within 30 days after receiving a request to do so from the other party that has appointed an arbitrator, the appointment of the arbitrator shall be made by the court upon the request of that party, or (b) if the party-appointed arbitrators fail to appoint a third arbitrator within 30 days of their appointment, the court shall appoint the third arbitrator upon the request of a party. 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 shall appoint an arbitrator upon the request of a party. With respect to multi-party arbitrations, the Arbitration Law provides that the court shall appoint arbitrators upon the request of a party. In relation to the appointment of arbitrators by the courts, the court is required to have due regard for the following: (a) the qualifications required of the arbitrators by the agreement of the parties; (b) the impartiality and independence of the appointees; and (c) in the case of a sole arbitrator or in the case where the two arbitrators appointed by the parties are to appoint a third arbitrator, whether or not it would be appropriate to appoint an arbitrator of a nationality other than those of the parties.

3.1.4 Are there requirements (including disclosure) for 'impartiality' and/or 'independence', and do such requirements differ as between domestic and international arbitrations?

The Arbitration Law imposes a continuing obligation on arbitrators to disclose any circumstances that may possibly give rise to doubts as to their impartiality or independence, and moreover, arbitrators may be challenged if there is a good reason that is sufficient to doubt their impartiality or independence. The Arbitration Law does not differentiate between domestic and international arbitrations regarding such requirements.

3.1.5 Are there provisions of law governing the challenge or removal of arbitrators?

The Arbitration Law provides that the parties are free to agree on a procedure for challenging an arbitrator. Where the parties have not agreed to such procedure, the Arbitration Law stipulates that the party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances which for the basis of a challenge under the Arbitration

Law, whichever is later, submit to the arbitral tribunal a written application for challenge stating the reason for such challenge. Under the Arbitration Law, if an arbitrator becomes *de jure* or *de facto* unable to perform his or her functions, or for other reasons causes undue delay in performing those functions, a party may apply to the court for the removal of such arbitrator.

3.1.6 What role do national courts have in any such challenges?

The Arbitration Law provides for the party's right to apply to the court for the challenge of an arbitrator within 30 days of receiving notice of the decision of the arbitral tribunal rejecting the challenge. If the court denies such challenge, there is no further appeal to the higher courts. This ensures that the disputes involving a challenge of an arbitrator will be resolved relatively quickly. The Arbitration Law also expressly stipulates that the arbitral tribunal may commence the arbitration, continue the proceedings and render an award even while the challenge is pending before the court.

3.1.7 What principles of law apply to determine the liability of arbitrators for acts related to their decision-making function?

Japanese legislation is silent on the civil liability of arbitrators. Commentators argue that Article 644 of the Japanese Civil Code, which imposes a duty of care as a good manager upon the person who handles matters for the other person under an *inin* agreement (for example, consultants, lawyers or other professionals), also applies to arbitrators. There is no statutory immunity under Japanese law for arbitrators. However, a court would likely hold that the arbitrators have broad discretion in their functions.

3.2 Confidentiality of arbitration proceedings

3.2.1 Is arbitration seated in your jurisdiction confidential? What are the relevant legal or institutional rules which apply?

While litigation proceedings in Japanese courts must be, in principle, open to the public, arbitrations need not be open to the public and, practically, there is a widely accepted notion that arbitrations should be regarded as confidential unless otherwise agreed by the parties. However, there are no specific legislative provisions requiring that arbitration be conducted on a confidential basis. Article 40 of the Commercial Arbitration Rules of the JCAA imposes confidentiality obligations upon the arbitrators, as well as the parties and their representatives. Articles 17 and 19 of the Rules of Arbitration of the Tokyo Maritime Arbitration Commission (TOMAC) of the Japan Shipping Exchange, Inc also impose confidentiality obligations upon both the arbitrators and the parties. Where the applicable arbitration rules do not have such provisions expressly imposing confidentiality obligations upon the arbitrators or the parties (such as the ICC Rules of Arbitration), the parties may want to agree on confidentiality obligations. There is no Japanese legislation that stipulates what remedies will be available if there is a breach of the confidentiality obligations owed by a party. Some commentators have argued that such a breach may give rise to a separate claim for relief (such as injunction or damages) only in the courts. However, an increasingly

prevalent view appears to be that an arbitral tribunal may grant such remedies as it considers appropriate (for example, ordering the breaching party to refrain from further disclosure of confidential information, warning that further breaches may result in a default award or damages claim in the same arbitration proceedings).

3.2.2 To what matters does any duty of confidentiality extend (eg does it cover the existence of the arbitration, pleadings, documents produced, the hearing and/or the award)?

There are no specific provisions in the Arbitration Law requiring that arbitration be conducted on a confidential basis, and therefore, the Arbitration Law does not provide for matters to which a duty of confidentiality extends. Article 40 of the Commercial Arbitration Rules of the JCAA impose a confidentiality obligation upon the arbitrators, parties and their representatives with respect to 'facts related to arbitration cases or facts learned through arbitration cases.'

3.2.3 Can documents or evidence disclosed in arbitration be used in other proceedings or contexts?

There are no specific provisions in the Arbitration Law requiring that arbitration be conducted on a confidential basis, and therefore, the Arbitration Law is silent on whether documents or evidence disclosed in arbitration can be used in other proceedings or contexts. Article 40 of the Commercial Arbitration Rules of the JCAA, which imposes a confidentiality obligation upon the arbitrators, parties and their representatives, provides that such obligation shall not apply 'where disclosure is required by law or required in court proceedings.'

3.2.4 When is confidentiality not available or lost?

There are no specific provisions in the Arbitration Law requiring that arbitration be conducted on a confidential basis, and therefore, the Arbitration Law does not provide for circumstances where confidentiality is not available or lost.

3.3 Role of (and interference by) the national courts and/or other authorities

3.3.1 Will national courts stay or dismiss court actions in favour of arbitration?

Where a party to a valid arbitration agreement files a lawsuit with a national court in Japan, the other party may move to dismiss the claim (on a 'without prejudice' basis) based upon the existence of such an arbitration agreement, before pleading on the merits. Japanese courts have generally favoured arbitration agreements through relatively broad interpretations of their scope. However, a Japanese court will simply dismiss the claims that have been brought before the court and will not issue an order to compel arbitration or to stay the litigation. This is one deviation from the Model Law, under which the court refers the parties to arbitration.

3.3.2 Are there any grounds on which the national courts will order a stay of arbitral proceedings?
No.

3.3.3 What is the approach of national courts to parties who commence court proceedings in your jurisdiction or elsewhere in breach of an agreement to arbitrate?
See section 3.3.1 above.

3.3.4 Is there a presumption of arbitrability or policy in support of arbitration? Have national courts shown a willingness to interfere with arbitration proceedings on any other basis?
The Arbitration Law provides that no court shall intervene in arbitral proceedings except where so provided in law. This is substantially the same as Article 5 of the Model Law and is interpreted to mean that even the parties may not agree to expand the court's power to intervene beyond that which is set forth under the Arbitration Law. For example, the parties cannot agree to expand the grounds for setting aside an arbitral award beyond that which is set forth in the Arbitration Law.

3.3.5 Are there any other legal requirements for arbitral proceedings to be recognisable and enforceable?
No.

3.4 Procedural flexibility and control

3.4.1 Are specific procedures mandated in particular cases, or in general, which govern the procedure of arbitrations or the conduct of an arbitration hearing? To what extent can the parties determine the applicable procedures?
The Arbitration Law provides that the parties are free to agree on the procedure to be followed by the arbitral tribunal, subject to the provisions of the law that concern public policy. Failing such agreement, the arbitral tribunal may, subject to the provisions of the Arbitration Law, conduct the arbitration in such manner as it considers appropriate. While many provisions of the Law regarding arbitral procedures may be changed by agreement, certain mandatory procedural rules are established which are similar to those provided for in the Model Law. For example, the arbitral tribunal must provide the parties with sufficient advance notice of any hearing. Similarly, all pleadings, evidentiary documents or 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 the parties any expert report or other evidentiary document on which it may rely in making its decision.

3.4.2 Are there any requirements governing the place or seat of arbitration, or any requirement for arbitral hearings to be held at the seat?
The Arbitration Law provides that the parties are free to agree on the place

of the arbitration; and further provides that, failing such agreement, the arbitral tribunal shall determine the place of arbitration, having regard to the circumstances of the case, including the convenience of the parties. The tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing parties, experts or witnesses or for inspection of goods or documents.

3.4.3 What procedural powers and obligations does national law give or impose on an arbitral tribunal?

The Arbitration Law stipulates that the arbitral tribunal has the power to conduct the arbitral proceedings in such manner as it considers appropriate; provided that the parties shall be treated with equality and are given a full opportunity of presenting its case in the arbitration proceedings. Notably, the Arbitration Law expressly provides that the power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence unless the parties to the arbitration agree otherwise.

3.4.4 Evidence

3.4.4.1 What is the general approach to the gathering and tendering of written evidence at the pleading stage and at the hearing stage?

The Arbitration Law does not provide any detailed rules of evidence. Thus, the parties may agree on the procedural rules on the gathering and tendering of evidence, and failing such agreement, the arbitral tribunal may conduct the arbitration in a manner as it considers appropriate.

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

The Arbitration Law does not provide any detailed rules of oral evidence. However, it is common for witness statements to be submitted prior to the oral hearing. At the oral hearing, oral direct examination of the witness is normally conducted for a relatively short period of time followed by a longer cross-examination. Arbitrators normally also question witnesses after the direct, cross and re-direct examinations by the parties' counsel.

Arbitrators do not have the power to compel the attendance of witnesses. There is no legislation to give the arbitral tribunal the authority to have a witness make an oath under the penalty of perjury. Similarly, the arbitral tribunal itself has no authority to enforce an order to produce documents. The arbitral tribunal may make an adverse inference if a party does not observe such an order. With regard to the party witness, the arbitral tribunal may also make an adverse inference if the party witness called by the counter party refuses to appear or testify without justifiable reason. With respect to the national courts' assistance, the Arbitration Law stipulates that the arbitral tribunal or a party (with the consent of the arbitral tribunal) can

request court assistance in taking evidence (including witness and expert testimony, document production orders and inspection), and that the court will then act in accordance with the procedures under the Code of Civil Procedure. While a judge will preside over the procedures for witness and expert testimony, arbitrators are entitled to attend and pose questions.

3.4.4.2 Can parties agree the rules on disclosure? How does the disclosure in arbitration typically differ to that in litigation?
See section 3.4.4.1 above.

3.4.4.3 What are the rules on oral (factual or expert witness) evidence? Is cross-examination used?
See section 3.4.4.1 above.

3.4.4.4 If there is no express agreement, what powers of compulsion are there for arbitrators to require attendance of witnesses (factual or expert) or production of documents, either prior to or at the substantive hearing? To what extent are national courts willing or able to assist? Are there differences between domestic and international arbitrations or as between orders sought against parties and non-parties?
See section 3.4.4.1 above.

3.4.4.5 Do special provisions exist for arbitrators appointed pursuant to international treaties (ie bilateral or multilateral investment treaties)?
No special provisions exist in the Arbitration Law for arbitrators appointed pursuant to international treaties (ie bilateral or multilateral investment treaties).

3.4.5 Are there particular qualification requirements for representatives appearing on behalf of the parties in your jurisdiction?
Article 72 of the Practicing Attorneys Law generally prohibits anyone other than attorneys licensed to practise law in Japan from handling, for the purpose of charging fees, 'legal business', which includes arbitration. However, the Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers (Law No. 66 of 1986) sets forth significant exceptions to this general rule. First, a foreign lawyer who is registered in Japan as a special foreign member of the Japan Federation of Bar Associations ('Registered Foreign Lawyer') may handle certain legal business, such as legal business concerning the law of the country of their primary qualification. Article 5-3 of the Foreign Lawyers Law further provides that a Registered Foreign Lawyer may represent a client in international arbitration proceedings regardless of whether the subject matter concerns Japanese law. Secondly, Article 58(2) of the Foreign Lawyers Law provides that a foreign lawyer (who is not a Registered Foreign Lawyer) qualified to practice law in a foreign country (excluding a person who is employed and is providing services in Japan, based on their knowledge of foreign law) may, notwithstanding the provision of Article 72 of the Practicing Attorneys Law,

represent clients in international arbitration cases which they were requested to undertake or undertook in such foreign country.

3.5 THE AWARD

3.5.1 Are there provisions governing an arbitral tribunal's ability to determine the controversy in the absence of a party who, on appropriate notice, fails to appear at the arbitral proceedings?

The provisions of the Arbitration Law regarding the default of a party are similar to those set out under the Model Law Article 25. Unless otherwise agreed by the parties:

- if the claimant fails to submit its statement of claim in a timely fashion without justifiable reason, the arbitral tribunal shall terminate the proceedings;
- if the respondent fails to submit its statement of defence in a timely fashion, the arbitral tribunal shall continue the proceedings without treating such failure, in itself, as an admission of the claimant's allegations; and
- if any party fails to appear at a hearing or to produce documentary evidence without justifiable reason, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

3.5.2 Are there limits on arbitrators' powers to fashion appropriate remedies, eg punitive or exemplary damages, specific performance, rectification, injunctions, interest and costs?

The Arbitration Law has no provisions expressly addressing limits on the arbitrators' powers to fashion appropriate remedies. Where the substantive law applicable to the subject matter of the arbitration provides for the remedies in question (such as injunctive remedies, rectification, interests and damages for delayed performance), the arbitrators may grant such remedies to the extent permitted under the applicable substantive law, unless they are in violation of Japan's public policy. Where the parties' agreement or the applicable arbitration rules stipulate the rules regarding the interests and costs, such rules will generally apply. On account of a judgment of the Supreme Court of Japan dated 11 July 1997 (which denied the enforceability of a punitive damages award by the judgment of a state court of California, on the grounds that punitive damages are in violation of Japan's public policy), arbitrators may not award punitive damages.

3.5.3 Must an award take any particular form or are there any other legal requirements, eg in writing, signed, dated, place stipulated, the need for reasons, method of delivery, etc?

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

3.5.4 Can an arbitral tribunal order the unsuccessful party to pay some or all of the costs of the dispute? Is an arbitral tribunal bound by any prior agreement by the parties as to costs?

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

3.5.5 What matters are included in the costs of the arbitration?

The Arbitration Law provides that the costs of arbitration shall be apportioned between the parties in accordance with the parties' agreement, and therefore, the scope of matters to be included in the costs of arbitration also depend on the parties' agreement.

3.5.6 Are there any practical or legal limitations on the recovery of costs in arbitration?

It should be noted that the Arbitration Law does not provide that the unsuccessful party shall always bear the costs of arbitration. Rather, the default rule is that each party should bear its own costs unless the parties agree otherwise.

3.5.7 Are there any rules relating to the payment of taxes (including VAT) by foreign and domestic arbitrators? If taxes are payable, can these be included in the costs of arbitration?

Japanese tax law does not treat foreign arbitrators differently from any other foreign person earning income through the provision of personal services in Japan. Broadly, if an arbitrator is resident in Japan for Japanese tax purposes, fees earned in respect of their services provided in Japan will be taxed in Japan regardless of nationality. If such fees are paid by a resident of Japan (such as the JCAA), Japanese withholding tax will apply. If the foreign arbitrator is not resident, the fees paid by a resident of Japan will be subject to Japanese withholding tax unless the applicable tax treaty provides for exemption. Indeed, many of the tax treaties to which Japan is a party provide for such exemption. In such cases, the resident payer is exempted from the withholding tax by submitting a notification to the relevant Japanese tax agency.

3.6 Arbitration agreements and jurisdiction

3.6.1 Are there form and/or content or other legal requirements for an enforceable agreement to arbitrate? How may they be satisfied? What additional elements is it advisable to include in an arbitration agreement?

The Arbitration Law limits the permissible subject matter of the arbitration by stipulating that an arbitration agreement is valid only where its subject matter is a dispute that can be resolved by settlement between the parties. The Arbitration Law expressly excludes the arbitration of divorces or

separations. If an arbitration agreement is entered into for future disputes, the agreement should concern disputes related to defined legal relationships. With regard to form, the Arbitration Law requires that the arbitration agreement be in writing, and in addition, expressly provides that documents exchanged by fax satisfy the form requirements. Furthermore, the Arbitration Law provides that where an arbitration agreement is made by way of electronic or magnetic records (such as emails), it is made in writing.

3.6.2 Can an arbitral clause be considered valid even if the rest of the contract in which it is included is determined to be invalid?

The Arbitration Law expressly stipulates the severability of an arbitration agreement and provides that, where there is an agreement containing an arbitration clause, even if any contractual clause other than the arbitration clause is held to be invalid for any reason, the arbitration clause shall not be rendered ipso jure invalid.

3.6.3 Can an arbitral tribunal determine its own jurisdiction ('competence–competence')? When will the national courts deal with the issue of jurisdiction of an arbitral tribunal? Need an arbitral tribunal suspend its proceedings if a party seeks to resolve the issue of jurisdiction before the national courts?

The Arbitration Law, like the Model Law, expressly acknowledges the 'competence-competence' principle and provides that the arbitral tribunal may rule upon any allegations regarding the existence or validity of the arbitration agreement and upon its own jurisdiction to conduct arbitration. Where the arbitral tribunal makes a ruling in a separate decision prior to rendering the arbitral award that it has jurisdiction, any party may request, within 30 days of having received notice of that ruling, the national court (ie the District Court) to decide whether or not the arbitral tribunal has jurisdiction. While such a request is pending in court, the arbitral tribunal may continue the arbitral proceedings and make an award, and therefore, the arbitral tribunal does not need to suspend its proceedings even when the issue of its jurisdiction is pending before the national courts. It must be noted that the national court's ruling on such a request does not constitute *res judicata*, as no appeal to the High Court is permitted and no oral hearing or oral proceeding is mandatory for such a ruling. Therefore, even where the District Court that is asked to decide under this procedure renders a ruling that the arbitral tribunal has jurisdiction, a party may later challenge the arbitral award brought before a Japanese court for setting aside or enforcement on the grounds that the tribunal lacked jurisdiction. In such circumstances, however, prominent commentators have explained that in certain cases the party challenging the award may be estopped from doing so on the grounds of the tribunal's lack of jurisdiction, depending on the particulars of the case (eg, the content of the issue regarding jurisdiction, the reasons provided by the court in its ruling and how the proceedings progressed before the court). Moreover, as a consequence of adopting

the Model Law in a straightforward manner, the Law has inherited the ambiguity on the following issues under the Model Law: (a) whether or not the arbitral tribunal's ruling on its jurisdiction as a 'preliminary question' under Article 16(3) of the Model Law must be or can be in the form of a preliminary/partial/interim award, and if such ruling is not in the form mentioned above, whether or not a party's failure to challenge such ruling would later bar the party from challenging the jurisdiction when the party seeks to set aside the final award; and (b) whether or not an application for a court declaration that the arbitration agreement is invalid or arbitration is otherwise impermissible may be filed with the court either before or that the tribunal is constituted.

3.6.4 Is arbitration mandated/prohibited for certain types of dispute?

Arbitration is not mandated for any type of dispute in Japan. Disputes on divorce and separation and disputes that cannot be settled by the parties cannot be arbitrated under the Law. With regard to consumer arbitration and individual employment arbitration, an argument was raised during the legislative process that consumers and employees should not be deprived of their right to a fair trial in the national courts. Proponents of this position argued that consumers/employees generally have less information and weaker bargaining power in negotiations with businesses/employers and that many consumers/employees may be unaware of the existence and/or the legal effect of an arbitration agreement when entering into a consumer/employment contract. Accordingly, the Law has special provisions in its Supplementary Provisions to deal with those two types of arbitration, which will apply 'for the time being'. Article 3(1) and (2) of the Supplementary Provisions provides that, for the time being, a consumer may unilaterally terminate an arbitration agreement (a 'Consumer Arbitration Agreement') entered into on or after the Law coming into force with a business to arbitrate disputes that may arise in the future. If a business becomes a claimant in the arbitration pursuant to a Consumer Arbitration Agreement, the arbitral tribunal shall give the consumer respondent a notice of the oral hearing along with the following information explained as simply as possible, namely that:

(i) an arbitral award has the same legal effect as a final and conclusive judgment;
(ii) an arbitration agreement will lead to the dismissal of the consumer's claim brought before a national court regardless of whether it is before or after the arbitral award;
(iii) a consumer can unilaterally terminate a Consumer Arbitration Agreement; and
(iv) if the consumer respondent fails to appear at the oral hearing, the consumer shall be deemed to have terminated the Consumer Arbitration Agreement.

At the oral hearing, the arbitral tribunal must explain to the consumer respondent about the items (i) to (iii) above (Supplementary Provisions, Article 3(6)). Unless the consumer respondent appears at the oral hearing and expressly waives their right to terminate, the consumer shall be deemed

to have terminated the Consumer Arbitration Agreement.

Article 4 of the Supplementary Provisions provides that, for the time being, an arbitration agreement entered on or after the Law coming into force with respect to disputes that may arise in the future between an individual employee and the business employer shall be null and void.

3.6.5 What, if any, are the rules which prescribe the limitation periods for the commencement of arbitration proceedings and what are such periods?

The Arbitration Law does not provide any limitation periods for the commencement of arbitration proceedings. Limitations periods under substantive Japanese law shall apply.

3.6.6 Does national law enable an arbitral tribunal to assume jurisdiction over persons who are not party to the arbitration agreement?

No.

3.7 Applicable law

3.7.1 How is the substantive law governing the issues in dispute determined?

The Arbitration Law provides guidance to the arbitral tribunal concerning the substantive law to be applied to the merits of the dispute. The parties are free to choose the rules of law applicable to the substance of the dispute. The Law also provides that, unless otherwise expressed, the parties' designation of a law or legal system of a given state shall be interpreted as to directly refer to the substantive law of that state and not to its conflict of laws rules. If the parties fail to make such choice, the Law directs the arbitral tribunal to apply the substantive law of the state with which the civil dispute subject to the arbitral proceedings is most closely connected. This is one of the limited number of deviations of the Law from the Model Law, in that under the Model Law, the tribunal would first decide the appropriate rules of conflict of laws and then decide the substantive law applicable to the case by applying such rules of conflict of laws. Under the Law, the arbitral tribunal may decide *ex aequo et bono* only if the parties have expressly authorised it to do so.

3.7.2 Are there any mandatory laws (of the seat or elsewhere) which will apply?

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

4. SEEKING INTERIM MEASURES IN SUPPORT OF ARBITRATION CLAIMS

4.1.1 Can an arbitral tribunal order interim relief? What forms of interim relief are available and what are the legal tests for qualifying for such relief?

Similar to Article 17 of the Model Law, the Arbitration Law expressly stipulates that, unless otherwise agreed by the parties, the arbitral tribunal may order any party to take such interim or preliminary 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 measure.

4.1.2 Have national courts recognised and/or limited any power of an arbitral tribunal to grant interim relief?

With regard to the enforceability of an arbitral tribunal's interim/preliminary order, it should be noted that an interim order granted by an arbitral tribunal seated in Japan does not have a compulsory effect and is subject to voluntary performance by the parties; therefore, Japanese courts do not have the power to enforce interim orders granting interim relief.

4.1.3 Will national courts grant interim relief in support of arbitration proceedings and, if so, in what circumstances?

With regard to the power of a Japanese court to grant interim or preliminary relief in connection with the subject matter of arbitration, the Arbitration Law expressly confirms that an arbitration agreement shall not prevent the court from granting any preliminary relief before or during the arbitration proceedings.

4.1.4 Are national courts willing to grant interim relief in support of arbitration proceedings seated elsewhere?

The provision in the Arbitration Law expressly confirming the Japanese courts' power to grant interim relief in support of arbitration proceedings applies to arbitration seated outside of Japan and where the seat of arbitration has not been determined.

5. CHALLENGING ARBITRATION AWARDS

5.1.1 Can an award be appealed to, challenged in or set aside by the national courts? If so, on what grounds?

An arbitral award may not be appealed to the courts, but may be set aside by the courts on certain enumerated grounds. The Arbitration Law has narrowed and clarified the grounds for setting aside an arbitral award by adopting almost verbatim those for setting aside, or refusing the enforcement of, an arbitral award under the Model Law (Article 34) or the New York Convention (Article 5). The Law provides for a simpler and more efficient procedure in which the court's decision (*kettei*) to set aside an arbitral award may be made without an oral hearing in open court and only with a hearing (*shinjin*) that both parties may attend.

5.1.2 Can the parties exclude rights of appeal or challenge?

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

5.1.3 What are the provisions governing modification, clarification or correction of an award (if any)?

The Arbitration Law now has provisions similar to Article 33 of the Model Law. The arbitral tribunal may, at the request of a party (with notice to the other party) or on its own initiative, correct in the award any errors in computation, any clerical errors or any errors of a similar nature. Unless otherwise agreed by the parties, such party's request for correction shall be made within 30 days from the receipt of the notice of the award. The arbitral tribunal shall make its decision regarding such request for correction within 30 days from the request, provided that the arbitral tribunal may, when it considers it necessary, extend such period of time. Unlike Article 33(2) of the Model Law, there is no time limit under the Law for a correction of an award made by the arbitral tribunal on its own initiative. If so agreed by the parties, a party may, with notice to the other party, request the arbitral tribunal to give an interpretation of a specific point or part of the award. Unless otherwise agreed by the parties, a party may, with notice to the other party and within 30 days of receipt of the notice of the award, request the arbitral tribunal to make an additional award as to claims presented in the arbitration proceedings, but omitted from the award. The arbitral tribunal shall make its decision on such request within 60 days from the request, provided that, where it considers it necessary, the arbitral tribunal may extend such time period.

6. ENFORCEMENT

6.1.1 Has your jurisdiction ratified the New York Convention or any other regional conventions concerning the enforcement of arbitration awards? Has it made any reservations?

Japan has ratified the New York Convention with reservations to apply the Convention only to recognition and enforcement of awards made in the territory of another Contracting State.

6.1.2 What are the procedures and standards for enforcing an award in your jurisdiction?

An arbitral award may be enforced by making an application to the court for an enforcement decision. Such application must be accompanied by (a) a copy of the arbitral award, (b) a document certifying the copy of the award, and (c) a Japanese translation of the award, if the award is not in Japanese. The competent court for the enforcement procedure will be the district court having jurisdiction over the place of the arbitration, the domicile of the counter-party to the enforcement proceedings, and the location of the object of the claim or seizable assets. Enforcement proceedings typically take about one to three months in the district courts; the costs and fees payable to the court for enforcing an award is typically relatively low and not expensive.

6.1.3 Is there a difference between the rules for enforcement of 'domestic' awards and those for 'non–domestic' awards?

No.