ICLG

The International Comparative Legal Guide to:

International Arbitration 2019

16th Edition

A practical cross-border insight into international arbitration work

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

Al Busaidy, Mansoor Jamal & Co Barristers & Legal Consultants
Andersen Tax & Legal
Attorneys at law Ratiolex Ltd
Augusta Ventures
Baker McKenzie
BANI Arbitration Centre
BDO LLP
Boga & Associates
Bomchil
Boss & Young, Attorneys-at-Law
Cases & Lacambra
Concern Dialog Law Firm
Costa Tavares Paes Advogados
CRA – Coelho Ribeiro e Associados
Debarliev, Dameski & Kelesoska Attorneys at Law
Diana Hamade Attorneys at Law in association with EKP
DLA Piper
Dr. Colin Ong Legal Services
East African Law Chambers
Ellex Raidla Advokaadibüroo OÜ
Eric Silwamba, Jalasi and Linyama Legal Practitioners
Georgiev, Todorov & Co.
GPKLegal
GrahamThompson
HFW
Hogan Lovells
Homburger
JAŠEK LEGAL
Jung & Sohn
Kachwaha and Partners
Kennedys
Linklaters
Luke and Associates
Lund Elmer Sandager LLP
Marxer & Partner Attorneys at Law
Matheson
Montezuma Abogados
Mori Hamada & Matsumoto
Norburg & Scherp
Paul, Weiss, Rifkind, Wharton & Garrison LLP
PIERRE THIELEN AVOCATS S.à r.l
Portolano Cavallo
PUNUKA Attorneys and Solicitors
Quevedo & Ponce
Russian Arbitration Center at the Russian Institute of Modern Arbitration
Shearn Delamore & Co.
Stek
Stephenson Harwood
SyCip Salazar Hernandez & Gatmaitan
Taylor Wessing Partnerschaftsgesellschaft mbB
TripleOKLaw, LLP
Weber & Co.
Williams & Connolly LLP
Wilmer Cutler Pickering Hale and Dorr LLP
YKVN

CDR Commercial Dispute Resolution

glg global legal group

global legal group

Contributing Editors
Steven Finizio and Charlie Caher, Wilmer Cutler Pickering Hale and Dorr LLP

Sales Director
Florjan Osmani

Account Director
Oliver Smith

Sales Support Manager
Toni Hayward

Deputy Editor
Oliver Chang

Senior Editors
Caroline Collingwood
Rachel Williams

CEO
Dror Levy

Group Consulting Editor
Alan Falach

Publisher
Rory Smith

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd
August 2019

ISBN 978-1-912509-95-9
ISSN 1741-4970

Strategic Partners

Preface:

General Chapters:

Asia Pacific:

Central and Eastern Europe and CIS:

Western Europe:

Continued Overleaf →

glg global legal group

Western Europe, cont.:

Latin America:

Middle East / Africa:

North America:

Chapter 13

Japan

Yuko Kanamaru

Yoshinori Tatsuno

Mori Hamada & Matsumoto

1 Arbitration Agreements

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

Under the Japanese Arbitration Act (Act No. 138 of 2003, the "JAA"), an arbitration agreement must be in writing, such as a document signed by all the parties, or a letter or telegraph exchanged between the parties (including those sent by facsimile or other communication devices which provide the recipient with a written record of the transmitted contents) (Article 13.2). In this regard, electromagnetic records (i.e., email transmissions) are deemed to be made in writing (Article 13.4).

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

The JAA does not specify the elements that must be incorporated in an arbitration agreement. However, it is typical to incorporate (i) the parties, (ii) the scope of the submission to arbitration, (iii) the seat of arbitration, and (iv) the applicable arbitration rules, and practical to incorporate (i) the number of arbitrators, (ii) the language of the proceedings, (iii) the qualification of the arbitrators, and (iv) confidentiality.

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

Japanese courts are generally pro-arbitration. If an action is filed for a civil dispute which is subject to an arbitration agreement, the court will generally dismiss the action without prejudice upon the petition of the defendant (Article 14.1 of the JAA).

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

The JAA governs the enforcement of arbitration proceedings seated in Japan. The JAA was enacted on March 1, 2003, and patterned after the UNCITRAL Model Law.

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

Yes, the JAA applies to both domestic and international arbitration.

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

Yes, the JAA is based on, and is generally the same (or has similar effect) as, the UNCITRAL Model Law.

However, there are some provisions which are not included in the UNCITRAL Model Law but are in the JAA, among which the following are worth noting. One, under the JAA, labour-related disputes (as described in Article 1 of the Act on Promoting the Resolution of Individual Labour Disputes (Act No. 112 of 2001)) are excluded from the scope of arbitrable cases (Article 4 of the Supplementary Provisions to the JAA). Two, there are special rules on arbitration agreements between a consumer and a business operator which allow the consumer to cancel the arbitration agreement (*id*., Article 3.2 of the Supplementary Provisions to the JAA). These rules stem from the fact that arbitration involving individuals is not common in Japanese culture. On the assumption that arbitration is much more expensive than going to court and an arbitration agreement will deprive an individual to choose court litigation, these rules seek to protect individuals in dispute resolutions.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

There are no mandatory rules under the JAA which specifically govern international arbitration proceedings sited in Japan.

3 Jurisdiction

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

An arbitrable case under the JAA is a "civil dispute that may be resolved by settlement between the parties (excluding disputes regarding divorce or separation)" (Article 13.1). Thus, a case is not

"arbitrable" if the final decision on the dispute may bind third parties. In practice, it is usually considered that the following are not arbitrable: (i) the validity of intellectual property rights granted by the government (such as patents and trademarks); (ii) a shareholders' action seeking the revocation of a shareholders' meeting resolution; (iii) administrative decisions of government agencies; and (iv) decisions on the enforcement procedure for decisions in insolvency and civil cases. Please also note that labour-related disputes are not arbitrable under the JAA (see question 2.3 above).

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

Yes. Under the JAA, an arbitral tribunal may rule on an allegation made regarding the existence or validity of an arbitration agreement or its own jurisdiction (meaning the authority to carry out arbitration proceedings and to make an arbitral award) (the so-called competence-competence doctrine, Article 23.1).

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

The court will dismiss the case without prejudice upon the petition of the defendant (Article 14.1 of the JAA). Note, however, that if the defendant fails to file such a petition before she/he presents oral arguments on the merits or makes statements on the merits in preparatory proceedings, the court will proceed to hear the merits of the case.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

Based on the competence-competence doctrine (Article 23.1 of the JAA), the arbitral tribunal will primarily review its own jurisdiction. If it affirms its jurisdiction, then either party may, within 30 days of the receipt of the ruling, request the relevant court to review such ruling (Article 23.5 of the JAA).

Separately from the above, a court may review the issue of jurisdiction of the arbitral tribunal when a petition to set aside or enforce the arbitral decision is made. At this juncture, a court will review the tribunal's jurisdiction on that case independently from the tribunal's own decision.

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

As a general rule, an arbitration agreement is binding only on the parties to the arbitration agreement. However, there is a Supreme Court decision, issued on September 4, 1997, which held that the representative officer of a party to the arbitration agreement was also bound by that arbitration agreement (Sup. Ct., Sept. 4, 1997, 51 Minshu 3657, *Nihon Kyoiku-sha K.K. v. Kennethe J. Feld*). In this case, the parties agreed to New York State as the seat of the arbitration, and the court held that the Federal Arbitration Act of the United States was the governing law of the arbitration agreement and decided the issue pursuant to that law.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

There is no provision stipulating the limitation period for the commencement of arbitrations in the JAA (see Article 29.2 which stipulates that a claim in an arbitration procedure shall generally have the effect of interrupting prescription periods). Under Japanese law, rules regarding limitation periods are substantive, rather than procedural, and which law should govern will be determined by the Act on the General Rules on Application of Laws (Act No. 78 of 2007).

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

There is no provision stipulating the effect of pending insolvency proceedings in the JAA, the Japanese Bankruptcy Act (Act No. 75 of 2005), the Japanese Civil Rehabilitation Act (Act No.225 of 2000), or the Japanese Corporate Reorganization Act (Act No. 154 of 2002). There is also no precedent court judgment in this regard. However, academic authorities argue that arbitration proceedings should be suspended upon the commencement of insolvency proceedings for either of the parties, and will resume once an insolvency trustee is appointed.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

As a primary rule, the arbitral tribunal must apply the law agreed by the parties to govern the substance of a dispute (Article 36.1 of the JAA). If the parties failed to agree on such law, the arbitral tribunal shall apply the law of a state which has the closest relationship to the dispute and which should be directly applied to the case (Article 36.2 of the JAA).

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

The JAA has no provision stipulating the application of mandatory laws; but if regulatory issues (such as anti-bribery or anti-monopoly laws) are involved, laws on those issues would generally prevail.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

Under the JAA, the law agreed by the parties will govern the formation, validity and legality of the arbitration agreement (*cf.* Article 44.1(ii)). If the parties failed to agree on such a law, then Japanese law will govern.

5 Selection of Arbitral Tribunal

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

There is no specific provision stipulating the limits to a party's autonomy to select arbitrators. In other words, the parties are free to agree on the number of arbitrators (Article 16.1 of the JAA), the qualification of arbitrators (Article 17.6(i) of the JAA), and method of selecting arbitrators (Article 17.1 of the JAA).

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

Yes. The JAA stipulates a default procedure for selecting arbitrators, which is almost identical to the one under the UNCITRAL Model Law.

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

Yes. A court will intervene and select the arbitrators upon the request of either party where there is no agreement between the parties for selecting arbitrators, or where there is an agreement but the parties or the party-selected arbitrators fail to select the chair (Articles 17.2 to 17.5 of the JAA).

In selecting arbitrators, the court will pay due consideration to: (i) the requirements regarding arbitrators under the arbitration agreement; (ii) the impartiality and independence of the persons to be appointed; and (iii) where more than one arbitrator has been agreed, or where the two arbitrators appointed by the parties are to appoint another arbitrator, whether or not it is appropriate to appoint a person whose nationality is different from those of both parties (Article 17.6 of the JAA).

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

Article 18.1(ii) of the JAA stipulates that doubt on the impartiality or independence of arbitrators is a reasonable ground to challenge them. Articles 18.3 and 18.4 of the JAA further stipulate the obligation of arbitrators and candidates to disclose without delay all the facts that would likely give rise to doubts as to their impartiality or independence (excluding those which have already been disclosed).

The rules issued by the main arbitration institution in Japan, the Japanese Commercial Arbitration Association ("JCAA"), relate to the impartiality and independence of arbitrators (Article 24.1 of the JCAA Commercial Arbitration Rules). These rules provide for the obligation of arbitrators and candidates to disclose promptly any circumstances which may give rise to justifiable doubts as to their impartiality or independence, or to declare that there are no such circumstances, before and during the arbitral proceedings (Articles 24.2 and 24.4 of the JCAA Commercial Arbitration Rules).

6 Procedural Rules

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

Yes. Article 26.1 of the JAA stipulates the rules governing the procedure of arbitration. Having said that, the JAA gives the parties very broad autonomy with regard to procedural rules and the parties can agree on any rules they want unless those rules violate the provisions of the JAA concerning public order.

If the parties failed to agree on the procedural rules to be applied, an arbitral tribunal may carry out the arbitration procedure in any manner it finds appropriate, unless that manner violates the provisions of the JAA (Article 26.2 of the JAA). In any event, the mandatory rules of "equal treatment of parties", "due process" and "public order" (Articles 25 and 26.1 of the JAA) will apply. The foregoing rules apply to all arbitral proceedings sited in Japan.

In addition, the JAA provides for some default rules which may, however, be subject to the parties' agreement, such as waiver of the right to object (Article 27), place of arbitration (Article 28), commencement of arbitral proceedings and interruption of limitation (Article 29), language (Article 30), time restriction on parties' statements (Article 31), hearings (Article 32), default of a party (Article 33), appointment of an expert by the arbitral tribunal (Article 34), and court assistance in taking evidence (Article 35).

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

The JAA provides that the arbitral award must be made in writing and signed by the arbitrators (Article 39.1). Other than that, there are no particular procedural steps that are required by law, and the parties are free to agree in this regard.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

Other than the general rules that govern legal practice in Japan, there is no particular rule that governs the conduct of counsel from Japan in arbitral proceedings sited in Japan.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

The JAA gives arbitrators a range of powers and duties, which include (i) the ability to determine their own jurisdiction and the duty to handle the parties' allegations against them (competence-competence rule, Article 23), (ii) the power to issue orders to take interim measures or provisional measures as the arbitral tribunal

may consider necessary (Article 24), (iii) duties of "equal treatment of parties", "due process" and compliance of "public order" (Articles 25 and 26.1), (iv) the power to decide the arbitral proceedings subject to the parties' agreement (Article 26.2), (v) the power to hold oral hearings (Article 32.1), and (vi) the power to appoint an expert witness (Article 34).

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

The Attorneys Act (Act No. 205 of 1949) prohibits non-lawyers (including lawyers admitted in foreign jurisdictions) from performing legal business in Japan (Article 72). However, a foreign lawyer registered in Japan may handle legal business in Japan to the extent allowed by the Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers (Act No. 66 of 1986, the Foreign Lawyers Act). The Foreign Lawyers Act explicitly sets out exceptions to the general restrictions. Under one of these exceptions, lawyers admitted in foreign jurisdictions (whether or not registered in Japan) may represent clients in international arbitration proceedings, including settlement procedures (Articles 5-3 and 58-2 of the Foreign Lawyers Act).

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

There is no stipulation on providing for arbitrator immunity under Japanese law.

However, the JCAA provides for rules on arbitrator immunity, i.e., "(n)either the arbitrators nor the JCAA (including its directors, officers, employees and other staff members) shall be liable for any act or omission in connection with the arbitral proceedings unless such act or omission is shown to constitute wilful misconduct or gross negligence" (Article 13 of the JCAA Commercial Arbitration Rules; and Article 13 of the JCAA Interactive Arbitration Rules).

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

No. Once an arbitral tribunal is created, all procedural issues arising during the arbitration should be handled by the tribunal, unless otherwise requested by the parties to the arbitration.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

Yes. Article 24.1 of the JAA provides that the arbitral tribunal may, upon the request of a party, order any party to take such preliminary or interim measures as the arbitral tribunal considers necessary. The JCAA Rules further set out examples of interim measures, such as orders to maintain or restore the *status quo*, take action that would prevent any action that is likely to cause current or imminent harm or prejudice to the arbitral proceedings, preserve assets out of which a subsequent arbitral award may be satisfied, or preserve evidence that may be relevant and material to the resolution of the dispute. The arbitral tribunal does not need any court order to issue those interim measures, although there is a separate issue regarding the enforcement of those interim orders (see question 7.6 below).

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

Yes. Article 15 of the JAA provides that an arbitration agreement does not preclude the parties from filing a petition before a Japanese court, before or during arbitration proceedings, for interim measures in respect of the dispute subject to the arbitration agreement.

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

The approach of the Japanese courts is not different from that in other typical cases regarding interim measures. The Japanese court will grant the interim relief sought by parties to arbitration agreements if the requirements of the Civil Provisional Remedies Act of Japan (the "CPRA") are satisfied.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

In contrast to a main action on the merit before a Japanese court, where the Japanese court will dismiss an action regarding a dispute which is the subject of an arbitration agreement (Article 14.1 of the JAA), a Japanese court will not issue an anti-suit injunction in aid of an arbitration.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

Yes. Article 14.1 of the CPRA and Article 24.2 of the JAA provide that a Japanese court and an arbitral tribunal, respectively, may order any party to provide appropriate security in connection with the interim relief they order.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

Interim orders rendered by arbitral tribunals are not generally considered to be enforceable in Japan. Under Article 45.2(vii) of the JAA, the fact that the arbitral award has not become binding is a ground to deny the enforceability of such an award in Japan. Therefore, the parties usually apply for interim measures to arbitral tribunals with the expectation of voluntary performance by the parties, and it is said that, in practice, in a majority of cases, the parties voluntarily comply with interim orders by arbitral tribunals.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

The JAA does not provide for any specific rules of evidence. Under Article 26.1 of the JAA, the rules of evidence are left to the parties' agreement, and if the parties have no such agreement, Articles 26.2 and 26.3 of the JAA give the arbitral tribunal broad authority on procedural matters including the power to determine the admissibility, relevance, materiality and probative value of any evidence. Generally speaking, the IBA Rules on the Taking of Evidence in International Arbitration or the evidence rules under the Code of Civil Procedure of Japan (the "CCP") are widely used, at least as guidelines. It should be particularly noted that the scope of disclosure/discovery is considered to be relatively limited under the evidence rules of the CCP.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

The arbitral tribunal's power regarding disclosure/discovery is primarily left to the parties' agreement on the procedural rules (Article 26.1 of the JAA), and if the parties have no such agreement, Article 26.3 of the JAA gives the arbitral tribunal broad authority on matters regarding disclosure/discovery. However, under Japanese law, an arbitral tribunal does not have the power of compulsory execution for the production of documents or the attendance of witnesses. Also, the arbitral tribunal has no power to compel any third party to produce any documents or to give testimony as a witness. On such occasions, the arbitral tribunal or a party may apply to a Japanese court for assistance (see question 8.3 below).

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

Article 35.1 of the JAA provides that the arbitral tribunal or a party may apply to a Japanese court for assistance in taking evidence, including document production and examination of witnesses. The procedure being sought shall be governed by the evidentiary rules of the CCP. A party applying for the court's assistance should obtain the approval of the arbitral tribunal in advance (Article 35.2).

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

The rules to be used for the production of written and oral witness testimony are left to the party's agreement (Article 26.1 of the JAA) or the arbitral tribunal's discretion in the absence of such an agreement (Article 26.3 of the JAA). In any event, generally speaking, the importance of having the opportunity for cross-examination is widely acknowledged in Japan.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

Japanese law does not directly or categorically provide for "attorney-client privilege". However, similar to "attorney-client privilege", under Article 197.1(ii) and Article 220(iv)(c) of the CCP, documents detailing facts learned by attorneys in the course of performing their duty which remain confidential are excluded from the obligation to produce documents. The scope of this exemption from document production and its waiver are in principle determined by the scope of the attorney's confidentiality obligation.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

Article 39 of the JAA provides for the formal requirements of an arbitral award. Among others, an arbitral award must be in writing and signed by the arbitrators who made it. The JAA does not require the arbitrators to sign every page. If there is more than one arbitrator, the signatures of a majority of the members of the arbitral tribunal will suffice if the award states the reason for the absence of the signatures of the other members. An arbitral award must also state the reasons upon which it is based, unless otherwise agreed by the parties.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

Under Article 41.1 of the JAA, an arbitral tribunal may, upon the request of a party or by its own authority, correct any miscalculations, clerical errors, or other similar errors in the arbitral award. Under Article 42.1 of the JAA, a party may request the arbitral tribunal to give an interpretation of a specific part of the arbitral award, only if so agreed by the parties. The request for the correction or interpretation of an arbitral award by a party should be made within 30 days of its receipt of the notice of the arbitral award (Articles 41.2 and 42.3 of the JAA).

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

The grounds for setting aside an arbitral award are stipulated in Article 44.1 of the JAA; such grounds substantially mirror those under the New York Convention and the UNCITRAL Model Law. In other words, most of the grounds are limited to serious procedural defects such as invalidity of the arbitration agreement, defective composition of the arbitral tribunal, and the failure to give the party the opportunity to appear or present its case in the arbitration proceedings. In addition, conflict of the contents of the arbitral award with public policy or good morals in Japan would constitute another ground to set aside the award (Article 44.1(viii) of the JAA).

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

Probably not. Although the JAA does not explicitly prohibit the parties from making an agreement to exclude any basis of challenge against an arbitral award, considering that the grounds for setting aside an arbitral award under Article 44.1 of the JAA are generally limited to serious procedural defects or conflict with public policy or good morals in Japan, it is unlikely that the parties may freely agree to exclude such grounds.

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

The JAA does not explicitly prohibit the parties from expanding the grounds for setting aside an arbitral award, and there appears to be no established rules on this issue in Japan. However, any expansion of grounds should not jeopardise legal stability and, thus, parties would unlikely be allowed to add any grounds for setting aside the arbitral award which would substantially result in the rehearing of the merit of the dispute. In a judicial precedent, a Japanese court, in an *obiter dictum*, rejected the argument raised by a party to an arbitration agreement who petitioned the court to set aside the arbitral award based on the alleged additional agreement between the parties that the arbitral award should not be "final" and that the parties are at liberty to dispute the same matter before a court (Tokyo Dist. Ct., Jan. 26, 2004, 123 Hanrei Jiho 1847).

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

The unsuccessful party in an arbitration proceeding may file a petition with a competent Japanese court to set aside the arbitral award within three months from the date when it received the copy of the award and before any enforcement decision of a Japanese court has become final and binding (Articles 44.1 and 44.2 of the JAA).

11 Enforcement of an Award

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

Yes. Japan is a member state of the New York Convention, with reservation of reciprocity in accordance with Article 1.3 of the New York Convention. Arbitral awards made in member states of the New York Convention can be enforced directly based on the New York Convention without the aid of national legislation. Arbitral awards made in non-signatory states can be enforced based on Articles 45 and 46 of the JAA and other relevant Japanese legislation.

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

No. Japan is not a party to any other regional conventions on the recognition and enforcement of arbitral awards.

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

For arbitral awards made in member states of the New York Convention, parties can follow the procedural requirements provided in the New York Convention. For arbitral awards to be enforced under the JAA, the parties should follow the JAA's procedural requirements; however, the requirements for the enforcement of arbitral awards set out in Articles 45 and 46 of the JAA substantially mirror those of the New York Convention and the UNCITRAL Model Law.

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

Yes. An arbitral award (irrespective of whether or not the place of arbitration is in the territory of Japan) shall have the same effect as a final and conclusive judgment (Article 45.1 of the JAA).

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

The fact that the content of an arbitral award is contrary to public policy or good morals in Japan is a ground to refuse enforcement of that arbitral award in Japan (Article 45.2(ix) of the JAA). The mere fact that the content of an arbitral award is "unreasonable" is not considered conflicting with public policy or good morals in Japan. Although Article 45.2(ix) of the JAA specifies "content" of an arbitral award as a ground, it is generally considered that even procedural matters are subject to this ground to refuse enforcement of arbitral awards.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

The JAA does not have any specific provision on confidentiality. It is left to the parties' agreement or the rules of the arbitration institution selected by the parties. As for the JCAA, under the JCAA Commercial Arbitration Rules and the JCAA Interactive Rules, arbitral proceedings shall be kept confidential and the arbitrators, the JCAA, the parties (including their counsel) and other persons involved in the arbitral proceedings shall be subject to the confidentiality obligation.

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

The JAA does not have any specific provision to prevent parties from referring to or relying on the information disclosed in arbitral proceedings. As for the JCAA, although the JCAA Commercial Arbitration Rules and the JCAA Interactive Rules have provisions

regarding confidentiality, they also provide exceptions where disclosure is required by law or in court proceedings, or based on any other justifiable grounds.

13 Remedies / Interests / Costs

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

Basically, no. However, Japanese courts may reject the enforcement of an arbitral award which grants punitive damages as being contrary to the public policy of Japan (Article 45.2(ix) of the JAA; see question 11.5 above). In a judicial precedent, the Supreme Court of Japan dismissed a petition for an enforcement decision for a foreign judgment containing punitive damages, holding that punitive damages are contrary to "public order" in Japan (Sup. Ct., Jul. 11, 1997, 51 Minshu 2573).

13.2 What, if any, interest is available, and how is the rate of interest determined?

It is up to the applicable substantive law. As for Japanese law, unless otherwise agreed between the parties, the statutory interest rate is 6% *per annum* for commercial matters and 5% *per annum* for other civil matters. It should further be noted that large-scale amendments of the Civil Code of Japan were enacted and will be enforced on April 1, 2020, after which, the statutory interest rate will be 3% for both commercial and other civil matters, and the rate will be subject to periodical review every three years.

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

The apportionment of the fees and costs incurred by the parties in an arbitral proceeding is left to the parties' agreement (Article 49.1 of the JAA). If the parties have no agreement, then each party shall bear its own costs (Article 49.2 of the JAA).

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

An arbitral award is subject to the tax laws of Japan; however, whether or not the parties are liable for taxes depends on the nature and method of the payment.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

Third-party funding is not explicitly prohibited in Japan, although its legality has not yet been fully established. As this concept is still emerging in Japan, "professional" third-party funders are not that active. On a separate note, as a principle of legal ethics, lawyers are not allowed to lend money to their clients unless there are special circumstances to justify the lending. Contingency fees are not categorically prohibited in Japan, but if they result in an extremely large amount of attorney's fees compared with the benefit which the client has acquired, then they may be considered inappropriate or unreasonable in light of legal ethics.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Yes. Japan is a member of the ICSID.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Japan is a signatory to the Energy Charter Treaty, and an agreement with the Republic of Korea and the People's Republic of China for the promotion, facilitation and protection of investment. Further, Japan is a signatory to more than 20 bilateral investment treaties and around 10 economic partnership agreements containing the investor-state dispute settlement procedures.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

Japan does not have any standard or typical model language used in its investment treaties.

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

The Act on the Civil Jurisdiction of Japan with respect to a Foreign State, etc. provides for the sovereign immunity of foreign states in Japanese courts. However, under the Act, unless otherwise explicitly agreed, foreign states are not immune from the Japanese courts' jurisdiction with respect to non-sovereign activities such as commercial transactions. Similarly, with respect to sovereign immunity regarding execution, foreign states are not immune from execution against their property that is used or intended for use exclusively for non-sovereign purposes. The Act further provides for several exceptions to sovereign immunity for specific types of labour disputes, disputes over death or injury of persons, or loss of tangible objects, rights and interests pertaining to real property and intellectual property rights.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

Separate from the JCAA, the Japan International Dispute Resolution Centre ("JIDRC") was established in February 2018, and it opened

JIDRC-Osaka in May 2018 as the first-ever-recorded facility specialised for hearing international arbitration or other types of ADR in Japan. JIDRC-Tokyo is expected to open in the very near future.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

The JCAA amended its previous rules and added new rules from January 2019, as a result of which it now has three types of rules, i.e., Administrative Rules for UNCITRAL Arbitration, Commercial Arbitration Rules, and Interactive Arbitration Rules.

Of these three, the Commercial Arbitration Rules are the main rules which apply to arbitrations before the JCAA, unless the parties agree otherwise. Its latest amendments include the application of a flat hourly charge (JPY 50,000 for all arbitrators) and a cap on the total fees (Articles 93 and 94). On the other hand, the Interactive Arbitration Rules provide for faster dispute resolution in accordance with the rules, and provisions on communications from the arbitral tribunal to the parties, and a system of fixed remuneration for arbitrators (Article 94 through to Article 96).

Yuko Kanamaru
Mori Hamada & Matsumoto
Marunouchi Park Building
2-6-1 Marunouchi
Chiyoda-ku
Tokyo, 100-8222
Japan

Tel: *+81 3 6266 8542*
Email: *yuko.kanamaru@mhmjapan.com*
URL: *www.mhmjapan.com*

Yuko Kanamaru is a partner at Mori Hamada & Matsumoto and is admitted in Japan and New York. Ms. Kanamaru deals with a wide range of domestic and international disputes, especially regarding commercial, transactional and labour-related matters, including litigation and labour tribunal proceedings. Her expertise includes advising international clients in a wide range of corporate matters involving the Companies Act and the Financial Instruments and Exchange Act, data protection, and labour and employment. She is fluent in both Japanese and English.

Yoshinori Tatsuno
Mori Hamada & Matsumoto
Marunouchi Park Building
2-6-1 Marunouchi
Chiyoda-ku
Tokyo, 100-8222
Japan

Tel: *+81 3 6266 8785*
Email: *yoshinori.tatsuno@mhmjapan.com*
URL: *ww.mhmjapan.com*

Yoshinori Tatsuno is a senior associate at Mori Hamada & Matsumoto, is admitted in Japan and California, and has extensive experience representing clients in international disputes and transactions, which include international arbitration cases at the ICC and the SIAC, disputes involving litigations in multiple jurisdictions, and pre-litigation negotiations and dispute resolutions in cross-border transactions. He earned his LL.M. from Harvard Law School in 2015 and worked at Weil, Gotshal & Manges LLP, New York office, in 2015–2016 and at MHM's Singapore office in 2016–2017, on multi-jurisdictional litigations and international arbitrations.

MORI HAMADA & MATSUMOTO

Mori Hamada & Matsumoto (MHM) is one of the largest full-service Tokyo-headquartered international law firms. A significant proportion of the firm's work is international in nature, including representing clients in cross-border litigation and other dispute resolution proceedings.

MHM has over 500 lawyers and other professionals and over 500 support staff (including patent attorneys, licensed tax accountants, legal assistants and translators).

MHM is highly recognised by both clients and legal professionals in the following practice areas: mergers and acquisitions; joint ventures; finance; international capital markets (including JREITS); asset management; loans and securitisations; private equity; infrastructure/energy; PFI/PPP; insolvency/restructuring; intellectual property; antitrust; and competition. Other core practice areas include tax and labour laws.

MHM has a strong presence in Asia, with offices in Beijing, Shanghai, Singapore, Yangon, Bangkok, and Ho Chi Minh City, and a Jakarta Desk (AKSET Law MHM Jakarta Desk). The leading law firm in Thailand, Chandler & Thong-ek Law Offices Limited, integrated its operations with our Bangkok office on 1 January 2017 under the name Chandler MHM Limited. MHM also has domestic offices in Fukuoka, Osaka and Nagoya.

Current titles in the ICLG series include:

- Alternative Investment Funds
- Anti-Money Laundering
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Investigations
- Corporate Recovery & Insolvency
- Corporate Tax
- Cybersecurity
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Family Law
- Financial Services Disputes
- Fintech
- Foreign Direct Investment Regimes
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Investor-State Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Investment Funds
- Public Procurement
- Real Estate
- Sanctions
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks
- Vertical Agreements and Dominant Firms

glg global legal group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk

www.iclg.com