Global Arbitration Review

# The Guide to M&A Arbitration

Editor
Amy C Kläsener

Third Edition

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For further information please contact Natalie.Clarke@lbresearch.com

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# Publisher's Note

Global Arbitration Review is delighted to publish *The Guide to M&A Arbitration*.

For those unfamiliar with GAR, we are the online home for international arbitration specialists, telling them all they need to know about everything that matters. Most know us for our daily news and analysis service. But we also provide more in-depth content: books and reviews; conferences; and handy workflow tools, to name just a few. Visit us at www.globalarbitrationreview.com to find out more

Being at the centre of the international arbitration community, we regularly become aware of fertile ground for new books. We are therefore delighted to be publishing the third edition of this guide on mergers and acquisitions within the world of arbitration. It is a practical know-how text in two parts. Part I identifies the most salient issues in M&A arbitration, while Part II surveys substantive principles from select regional perspectives.

We are flattered to have worked with so many leading firms and individuals to produce *The Guide to M&A Arbitration*. If you find it useful, you may also like the other books in the GAR Guides series. They cover energy, construction, mining, challenging and enforcing awards and (soon) IP, in the same practical way. We also have books in the series on advocacy in international arbitration and the assessment of damages, and a citation manual (*Universal Citation in International Arbitration*). Our thanks to the Editor, Amy C Kläsener, for her vision and energy in pursuing this project and to our colleagues in production for achieving such a polished work.

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# Part II

## Survey of Substantive Laws

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# Japan

**Hiroki Aoki**[1]

## Frequency of M&A disputes

In Japan disputes relating to M&A transactions only rarely lead to commencement of formal legal proceedings. In recent times, in many large M&A transactions, after careful and lengthy discussions and negotiations, the parties usually prepare elaborate documentation with the support of legal and other professionals. In the course of this, many of the seeds of future disputes tend to be removed and well-conceived preventive measures with respect to potential future conflicts are also included. Further, a 'good faith consultation lause'[2] is typically put in place, and any dispute arising after the execution of the agreement is usually amicably settled privately.[3] That being said, where parties cannot arrive at a mutually agreeable settlement to a dispute, the matter does proceed to formal legal proceedings.

This is more often the case where small or medium-sized companies, particularly family owned companies, are involved. Pre-existing conflict among the stakeholders is often envisaged when the company seeks to reorganise, including through M&A transactions. The minority dissenting shareholder may exit the company and request a fair price for its stake.[4] If the party cannot reach an agreement on the fair price, the dissenting shareholder may file a petition to the court for the determination of such price.[5] As a consequence, disputes over the fair price of shares are particularly common in Japanese courts, compared with other forms of M&A disputes.

1 Hiroki Aoki is a partner at Nagashima Ohno & Tsunematsu Singapore LLP.

2 An example is as follows: 'Any matter not stipulated in this agreement or any doubt arising from or in connection with any provision of this agreement shall be resolved upon mutual consultation between the parties.'

3 Mediation, however, is not currently a very popular method for resolving disputes in Japan.

4 Article 785(1) of the Companies Act.

5 Article 786(2) of the Companies Act.

More recently, Japan has seen a fairly large number of disputes pertaining to price determination in squeeze-out procedures.[6] Many minority shareholders have raised issues with respect to the squeeze-out price offered. This has resulted in several court decisions, with the 2015 Supreme Court decision in the *Jupiter Telecom* case[7] being one of the most relevant. The Supreme Court held that an evaluation of whether appropriate and generally accepted fair procedures had been employed in determining the fair price was required.

Further, with Japanese companies rapidly expanding overseas, and outbound M&A transactions on the rise, cross-border disputes have steadily increased.

## Form of dispute resolution

Overwhelmingly in M&A transactions between domestic parties, dispute resolution before domestic courts (especially the Tokyo District Court as the exclusive first-instance court), rather than arbitration, is provided for. Court proceedings in Japan are generally regarded as reliable, quick and economical. In the Tokyo District Court, a division specifically focuses on corporate law issues and is generally viewed as being able to effectively resolve domestic M&A-related disputes.

Occasionally, domestic parties choose arbitration in light of confidentiality or other considerations. In such cases, it would be typical for domestic parties to opt for the rules of the Japanese Commercial Arbitration Association to govern the arbitration.

In 2016, 362 cases were filed in the Commercial Division of the Tokyo District Court, whereas only 16 cases were filed with the Japanese Commercial Arbitration Association.[8]

In cross-border M&A transactions in which a foreign party is involved, arbitration tends to be more frequently used as the dispute resolution mechanism. This is mainly because of ease of recognition and enforceability of the arbitration award, pursuant to the New York Convention, in the jurisdiction where the foreign party or its assets may be located.

Certain forms of disputes between the parties are often subject to and decided by expert determination; for example, in a post-acquisition price adjustment, any disagreement between the parties regarding the price would generally be settled by the parties' agreed third-party accounting firm.

6 Article 179 of Companies Act, the clause introduced by the amendment to the Companies Act in 2014, permits an acquirer acquiring or holding 90 per cent or more of the total voting capital of the company to squeeze out the remaining shareholders without shareholder approval. Squeeze-out can also be achieved by introducing 'shares subject to call' through the amendment of the articles of incorporation of the company pursuant to Article 171 of the Companies Act. (This had been the major method for the squeeze-out transaction until Article 179 was introduced by the 2014 amendment to the Companies Act.)

7 Supreme Court Decision dated 1 July 2016, *Minshu* 70-6, p. 1445.

8 'Overview of Commercial Cases in Tokyo District Court' *Shojihomu* 2041, p. 36, authored by Yoshida Koichi (assistant judge at Tokyo District Court) and the 2016 Japan Commercial Arbitration Association Annual Report.

## Grounds for M&A arbitrations

### Failure to complete the transaction (rare)

Failure to complete the transaction does not often lead to arbitration. In most cases, the contract sets out the consequences if the parties execute but do not complete a contract owing to failure to fulfil conditions precedent, material adverse changes affecting the parties' position, etc. Usually, contracts provide that if parties are unable to complete the transaction, the non-breaching party may elect to terminate it. In situations where parties have incurred substantial costs prior to closing, it is not uncommon for contracts to also provide for break-up fees.

In some cases, to facilitate speedy and effective negotiation with a specific potential buyer, the seller grants an exclusive right to negotiate for a certain period. While it will depend on the wording of the clause, in principle this right is enforceable, and a seller breaching it shall be liable for the damage caused. (Damages do not, however, include loss of profit that the buyer could have earned if the final agreement had been concluded.)[9]

Under Japanese law, even if no binding agreement has been made among the parties, in certain limited circumstances, such as where the negotiations progress to a certain stage but a party unilaterally terminates the negotiation without legitimate cause, parties may be liable for terminating negotiations under the good faith doctrine provided in Article 1(2) of the Civil Code (*culpa in contrahendo*).[10]

### Price adjustment (rare)

As mentioned above, a special dispute resolution mechanism is often provided for in respect of the price adjustment clause. Typically, disputes over price adjustment are resolved by an accounting firm, whose decision is final and binding on the parties. Therefore it is not common that such issue would be settled by arbitration.

If, however, the dispute does not purely pertain to calculation of quantum and involves surrounding factual or legal issues (such as pre-condition of the price adjustment), Japanese courts may interpret the scope of the special dispute resolution mechanism as to the price adjustment narrowly. In such cases, the general dispute resolution mechanism contained in the contract will kick in. For example, where a dispute arose on whether the interim financial statements prepared by the buyer (which is the basis for the price adjustment calculation) actually complied with the accounting principles set out in the agreement, the Tokyo District Court found that it had jurisdiction over the dispute according to the general jurisdiction clause contained in the agreement, despite the existence of the special dispute resolution method provided for in the price adjustment clause.[11]

9 *Sumitomo Trust Bank v. former UFJ Holdings*, Tokyo District Court Decision dated 13 February 2006, *Hanta* 1202, p. 212.

10 Supreme Court Decision dated 18 September 1984, *Hanji* 1137, p. 51.

11 Tokyo District Court Decision dated 17 December 2008, *Hanta* 1287, p. 168.

### Earn-out (very rare)

Currently, earn-out clauses are not common in M&A transactions in Japan, and disputes relating to such provisions are quite rare.

### Fraud and failure to disclose (relatively frequent)

Pre-contractual failure to disclose is addressed in further detail below.

### Misrepresentations and breach of warranties (frequent)

As is the global practice, it is common in Japanese M&A agreements for the buyer to require the seller to make representations and warranties relating to the business of the target. A buyer can claim compensation by way of damages arising from the breach of such representations and warranties by the seller, pursuant to the indemnity clause in the agreement. The indemnity clause, which tends to be the subject of much negotiation, restrains the ability of the buyer to claim damages by, for example, prescribing time limits to make claims, or placing caps on the amount that can be claimed for breach of a representation or warranty. While representation and warranty insurance has been introduced in Japan, in practice its use is quite limited owing to high costs and exclusions. The lack of appropriate insurance invariably could lead to disputes when a misrepresentation or breach warranty comes to light, and such disputes are relatively common.

The buyer's knowledge of a misrepresentation or breach of warranty at the time of concluding the agreement can be contentious. Case law suggests that if the buyer became aware of a misrepresentation or breach of warranty by the seller, or remained unaware owing to its gross negligence, the seller may be able to avoid liability, even if not actually stipulated in the agreement.[12]

## Fraud and failure to disclose

If a party is induced to take certain action by fraud, the action is voidable pursuant to Article 96(1) of the Civil Code.[13]

In practice, however, it is not very common for a party misled by the other party to claim unwinding of the transaction for fraud under Article 96(1) of the Civil Code, probably because certain irreversible steps may have been taken by a party, or third-party interests may have been created, making it impossible to unwind. Proving fraud (particularly proving the intention of fraud) is also usually difficult. Therefore, what the buyer usually seeks is compensation for damages caused by such fraudulent action, based on the breach of constructive duty of the other party, which arises under the good faith doctrine

12 Tokyo District Court Decision dated 17 January 2006, *Hanta* 1230, p. 206.

13 The substantive standards for fraud under the Civil Code are as follows: (1) intentional fraud including (a) intention to mislead the other party and (b) intention to induce the other party to take certain action based on the misunderstanding caused; (2) fraudulent action including both hiding a fact and making a misrepresentation, which includes being silent; (3) inducement to act; the fraudulent action causes misunderstanding to the other party and such misunderstanding induces that party to take certain actions; and (4) illegality; certain fraudulent action (including silence) is not illegal per se, if the party does not owe any duty to tell the truth to the other party (pursuant to contract or law).

pursuant to Article 1(2), and under tort pursuant to Article 709 of the Civil Code. Under the good faith doctrine, the constructive duty not to mislead includes the duty not to make any intentional misrepresentation.

Whether such constructive duty includes the affirmative duty to disclose the fact that can be considered to have a substantial effect on the decision of the investor, is somewhat controversial. It is generally understood that, particularly in the case of arm's-length M&A transactions between sophisticated parties, the principle of self-governance is applicable and the buyer is responsible for the collection of the relevant information to assess its decision to invest.[14] Accordingly, in principle, the seller does not owe a positive duty to disclose, unless it is specifically questioned by the buyer.

However, case law suggests that if the buyer has formed a certain perception about the business or any other material fact as a result of the seller's prior conduct, and the seller knew or should have easily known that the buyer would suffer damages if such misperception was not rectified, the seller owes a duty to affirmatively rectify it.[15]

## Burden of proof

Japan's Arbitration Law[16] does not specifically set out who bears the burden of proof in arbitration proceedings. The parties are free to agree on the procedure to be followed by the arbitral tribunal, and, in theory, the parties may agree on who should bear the burden of proof (although in practice it is rare that the parties agree on this). Similar to other nations following the UNCITRAL Model Law, failing the parties' agreement, the arbitral tribunal has broad discretion to determine the procedure and the admissibility, relevance, materiality and weight of any evidence.[17]

In civil claims before the Japanese courts and under the Civil Procedural Code, who bears the burden of proof is ordinarily determined by the interpretation of the applicable statutory provision. Generally speaking, the party that claims a right bears the burden of proving its existence. Switching of the burden is provided for in statute in limited situations.[18] When a party puts forward an affirmative defence, it bears the burden of proving it.

The standard of proof in civil cases is 'high probability'. This can be a relatively higher standard than 'preponderance of evidence', but in practice, it is unclear how much higher.

## Knowledge sharing

In the case of misrepresentation or breach of warranty, it can sometimes become an issue establishing which individual's knowledge constitutes the seller's knowledge. There is no default rule regarding this in Japan, and the detailed definition as to whose knowledge shall constitute the seller's knowledge is generally provided for in the M&A agreement. The definition sometimes includes the knowledge of not only the seller or its personnel but also the management of the target company who are appointed by or seconded from the seller.

14 Tokyo District Court Decision dated 27 September 2007, *Hanta* 1255, p. 313.

15 Tokyo District Court Decision dated 17 January 2003, *Hanji* 1823, p. 82.

16 Law No. 138 of 2003.

17 Article 26 of the Arbitration Law.

18 e.g., Article 3 of the Automobile Liability Security Act.

## Remedies

The Arbitration Law does not specify the available remedies. The Civil Code suggests an order of specific performance as a primary remedy. Article 414(1) of the Civil Code provides that 'if an obligor voluntarily fails to perform any obligation, the obligee may request the enforcement of specific performance from the court; provided, however, that this shall not apply to the cases where the nature of the obligation does not permit such enforcement'.

Request for specific performance does not preclude the request for compensation by way of monetary damages.[19] Article 415 of the Civil Code further provides that 'if an obligor fails to perform consistent with the purpose of its obligation, the obligee shall be entitled to demand damages arising from such failure'. In practice, the most common remedy requested by parties and granted in M&A arbitrations and Japanese courts are damages.

## Measure of damages

Obligees shall be entitled to demand the compensation for (1) the damage that would ordinarily arise from the breach and (2) the special damage that arises from the circumstances that the party could foresee or should have foreseen.[20]

Punitive damages are not permitted under the public policy and good morals principle set out in Article 90 of the Civil Code. Therefore, even if punitive damages are awarded in foreign arbitration, they would not be enforceable in a Japanese court.[21]

The law does not prescribe any specific method for the calculation of damages and it would be largely at the decision maker's discretion and dependent on the circumstances of the case. Given the difficulty in proving the exact amount of damages suffered, some statutes provide presumption of amount of damages, such as in patent infringement cases[22] or security fraud cases.[23] In other cases where proving the amount of damages is extremely difficult, the court may exercise its discretion and decide the appropriate amount of damages, pursuant to Article 248 of the Civil Procedure Code.

## Special substantive issues

### Synergy effect arising out of M&A

Under the Companies Act, where the court determines the 'fair price' of the share held by the dissenting shareholders, it should include the future synergy effects (if any) arising out of the merger.

19 Article 414(4) of the Civil Code.

20 Article 416(1) of the Civil Code provides that 'the purpose of the demand for the damages for failure to perform an obligation shall be to demand the compensation for damages which would ordinarily arise from such failure'. Article 416(2) further provides that 'the obligee may also demand the compensation for damages which arise from any special circumstances if the party did foresee, or should have foreseen, such circumstances'.

21 Supreme Court Decision dated 11 July 1997, *Minshu* 51, p. 2573.

22 Article 102 of the Patent Act.

23 Article 21-1 of the Financial Instruments and Exchange Act.

### Liquidated damages

In certain M&A agreements, parties provide for liquidated damages to be a fair determination of losses that may be suffered by a party. Currently, under the Civil Code, liquidated damages are generally permissible even if characterised as a penalty. That said, the liquidated damages provision may become null and void in full or in part if the amount is considered to be extremely excessive in light of the circumstances, pursuant to the public policy and good morals doctrine contained in Article 90 of the Civil Code.[24]

## Special procedural issues

### Exclusive jurisdiction of Japanese court

An action concerning the organisation of a company (which includes an action seeking invalidation of issued shares or stock options, seeking invalidation of merger of a company, seeking revocation of a resolution of a shareholder meeting and seeking dissolution of a company) is under the exclusive jurisdiction of the district court having jurisdiction over the location of the head office of the defendant company.[25] Therefore, these claims are not arbitrable.

### No parol evidence rule

Although entire agreement clauses are popular in Japanese M&A practice, there is no rule under Japanese law corresponding to the parol evidence rule in common law jurisdictions. The effect of entire agreement clauses depends on the exact wording of the provision and the circumstances. For robustly drafted entire agreement clauses that expressly prohibit the parties from seeking to rely on any extrinsic evidence other than the contract itself in any legal proceedings, a court precedent has found the entire agreement clause to be effective. It accepted the clause's exact literal effect and excluded the extrinsic evidence when construing the disputed contractual clause in question.[26] On the other hand, there is a court precedent in which the court did take into account external circumstances when construing the meaning of a contractual provision even where there was an entire agreement clause that provided that: 'The basic agreement is the only agreement which constitutes the entire agreement between the parties relating to the purpose of this basic agreement and supersedes all prior or present negotiations or understandings.'[27]

### Attorney–client privilege

Attorney–client privilege as a concept is not clearly recognised under Japanese law, while a concept similar to attorney–client privilege exists under the Civil Procedure Code in the context of document disclosure and evidence production during court proceedings.

24 Supreme Court Decision dated 14 March 1944, *Minshu* 23 p. 147.

25 Article 835 of the Companies Act.

26 Tokyo District Court Decision dated 13 July 1995, *Hanta* 938, p. 160.

27 Nagoya District Court Decision dated 12 November 2007, *Kinyu-Shoji Hanrei* 1319, p. 50.

# Appendix 1

## The Contributing Authors

**Hiroki Aoki**
Nagashima Ohno & Tsunematsu Singapore LLP

Hiroki Aoki is a partner at Nagashima Ohno & Tsunematsu Singapore LLP. He specialises in dispute resolution and has a wide range of experience in international arbitration under various arbitration rules, including those of the ICC, SIAC and JCAA, and litigation in various jurisdictions. He has been working in Singapore since 2013. He graduated from the University of Tokyo (LLB) in 2000 and the University of Michigan (LLM) in 2004. He was admitted to practise law in Japan and joined the Nagashima Ohno & Tsunematsu Tokyo office in 2007. Before being admitted to the Bar, he worked at the Ministry of Land, Infrastructure, Transport and Tourism of Japan (2000–2006).

**Nagashima Ohno & Tsunematsu Singapore LLP**
6 Battery Road #40-06
Singapore 049909
Tel: +65 6654 1760
Fax: +65 6654 1770
hiroki_aoki@noandt.com
www.noandt.com

M&A disputes can be unique in their hostility and complexity. *The Guide to M&A Arbitration* – published by Global Arbitration Review – is a practical guide on what merger parties should think about when it comes to disputes. It pools the wisdom of specialists on how to prevent these disputes arising and how best to resolve them when it is too late. The guide is structured in two sections. Part I consists of eight chapters on planning and procedural issues, covering everything from drafting clauses to how to structure contracts to minimise the potential for disputes. Part II offers a geographical survey of important differences in national laws that may affect the outcome of a dispute. It is written by 38 specialists from a variety of backgrounds and takes a practical approach throughout.

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