Written by leading practitioners in the field, this fifth edition of *Arbitration World* provides readers with a single reference guide to over 50 different arbitration regimes and institutions around the world.

Arbitration World provides an informative, comparative and balanced overview of the key issues and is an essential resource for parties and lawyers engaged in arbitration, or considering arbitration as an option.

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General Editors: Karyl Nairn QC & Patrick Heneghan
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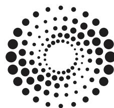
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FOREWORD

Karyl Nairn QC & Patrick Heneghan | Skadden, Arps, Slate, Meagher & Flom (UK) LLP

We are delighted to have been invited once again by Thomson Reuters to edit this fifth edition of *Arbitration World*, published by its widely recognised legal arm, Sweet & Maxwell (and forming part of their new *International Series*).

Following the success of the previous publication, we are hoping that this revised and extended fifth edition will serve as an invaluable reference guide to the key arbitration jurisdictions, rules and institutions across the globe.

In the three years since the last edition was published, the arbitral landscape has continued to evolve, with important developments in both the law and practice of arbitration. For example, new arbitration centres have opened in New York, Seoul, Moscow and Mumbai; established institutions such as the LCIA, AAA, HKIAC, ICDR, SIAC, VIAC, UNCITRAL and WIPO have published revised arbitration rules; new arbitration legislation has been enacted in Hong Kong, Australia, Belgium and Austria; while other jurisdictions, such as India, have sought through case law to improve their "arbitration-friendly" credentials.

The global status and popularity of arbitration has also grown since the last edition of *Arbitration World*. From 2012 to 2014, ICSID saw the highest annual number of filings in its history, notwithstanding the criticisms in certain quarters about the legitimacy of the existing system of investment treaty arbitration. Arbitration is also extending its global reach – arbitral institutions are reporting that the parties to arbitration are more diversified than ever; 156 state parties have now adopted the New York Convention.

To reflect this trend of expansion, we have continued to broaden the scope of *Arbitration World*. This latest edition has 55 chapters, including 38 jurisdictions and 16 arbitration institutions. We feature 11 new chapters, comprising Belgium, Cayman Islands, Colombia, Egypt, Korea, Malta, Peru, Scotland and the arbitral institutions of CIETAC, SIAC and the SCC.

Arbitration World aims to provide a simple and practical guide to arbitration law and practice for parties and practitioners, enabling its readers to assess the comparative benefits and challenges of arbitrating in various jurisdictions and/or under the auspices of different institutions.

We should like to take this opportunity to express our gratitude to all the authors of *Arbitration World*, old and new. The popularity of this publication is testament to the quality and expertise of the leading law firms, practitioners and institutions who have committed their time to the project.

We should also like to thank Emily Kyriacou and her team at Thomson Reuters, including Katie Burrington, Nicola Pender and Chris Myers, for their superb management and coordination efforts. We also extend our gratitude to Michele O'Sullivan for commissioning the project all those years ago.

Finally, we wish to pay tribute to our hard-working colleagues at Skadden, Gulnaar Zafar, Ben Jacobs, Sabeen Sheikh, Bing Yan, Anna Grunseit, Judy Fu, Nicholas Lawn, Kam Nijar, Laura Feldman, David Edwards, Ekaterina Churanova, Calvin Chan, Ross Rymkiewicz, Catherine Kunz, Melis Acuner, Emma Farrow, Devika Khopkar, Sara

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Patrick Heneghan and Karyl Nairn QC, July 2015

JAPAN

Yoshimi Ohara, Atsushi Yamashita, Junichi Ikeda & Hironobu Tsukamoto | Nagashima Ohno & Tsunematsu

1. EXECUTIVE SUMMARY

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

Japan is an arbitration-friendly jurisdiction and has the following general advantages:

- The Arbitration Act (Act No. 138 of 2003) (Arbitration Act), the principal source of law for arbitration in Japan, is consistent with UNCITRAL Model Law on International Arbitration 1985 (Model Law). An unofficial English translation of the Arbitration Act can be found at *http://www.jcaa.or.jp/e/arbitration/civil.html*.
- Japan is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention).
- The rules of the Japan Commercial Arbitration Association (JCAA), the principal institution for arbitration in Japan, have been updated to reflect current international arbitration practices. The 2014 JCAA Rules (JCAA Rules) can be found at *http://www.jcaa.or.jp/e/arbitration/rules.html*.
- Japanese courts have consistently taken a pro-arbitration approach.

There is no particular disadvantage in having an arbitration seated in Japan, although some effort may be required to satisfy certain logistical matters in Japan, such as services offering real-time transcript text and live video streaming.

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 and 1 being unsupportive of arbitration? Where your jurisdiction is in the process of reform, please add a + sign after the number

We would rate the supportiveness of our jurisdiction to arbitration as 5.

2. GENERAL OVERVIEW AND NEW DEVELOPMENTS

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

Commercial arbitration is much less frequently used in Japan as a method of settling either domestic or international disputes as compared with litigation in the courts. For example, 26 new cases were filed with the JCAA in the fiscal year ending March 2014, all involving international disputes, while 1,524,026 civil and administrative cases were filed with the Japanese district courts in the same period. It is expected that this trend will continue with respect to the resolution of domestic disputes.

However, parties engaged in cross-border transactions are now making increasing use of arbitration clauses, so an increase in the number of arbitrations is anticipated in the near future.

The JCAA recently amended its rules, and the new rules took effect on 1 February 2014. The amendments were made to update the arbitration rules and improve arbitration procedures so as to make arbitration faster and more efficient. The amendments include, among others, the introduction of emergency arbitrator procedures, the introduction of joinder and consolidation provisions, the clarification of requirements for handling multiple claims in a single proceeding and the streamlining arbitration–mediation proceedings.

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

There are no unique jurisdictional attributes or particular aspects of the approach to arbitration in Japan that bear special mention.

2.3 Principal laws and institutions

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

The principal source of law relating to both domestic and international arbitration is the Arbitration Act, which came into force in March 2004. The Arbitration Act is based on the 1985 version of the Model Law with some minor modifications. The modifications include the following:

- Special provisions for the protection of consumers and employees in consumer disputes and employment disputes that are not found in the Model Law.
- Provisions relating to the ability of the arbitration tribunal or arbitrators to attempt to settle the disputes subject to the arbitration, upon agreement of the parties, that do not exist in the Model Law.

Japan is a party to the New York Convention, with the reservation that it will only recognise and enforce awards made in the territory of another contracting state. The Arbitration Act, however, essentially renders this reservation moot by obligating the courts to recognise and enforce awards regardless of whether or not awards are issued in another contracting state of the New York Convention. Even before the enactment of the Arbitration Act, the Japanese courts had a long tradition of enforcing arbitral awards made in contracting and non-contracting states.

2.3.2 Which 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 principal institution that is commonly used for both international and domestic arbitrations in Japan. The Tokyo Maritime Arbitration Commission of The Japan Shipping Exchange, Inc primarily administers arbitration over domestic and international maritime disputes.

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

The Arbitration Act restricts court intervention in arbitration proceedings and does not authorise the Japanese courts to supervise arbitration proceedings except for the specific exceptions set forth in the Act. The court's supervision under the Arbitration Act is limited to the review of the tribunal's jurisdiction, decisions on the challenge of arbitrators and the review of arbitral awards in court proceedings setting aside or recognising awards. There is no special division within the Japanese courts for arbitration related cases.

3. ARBITRATION 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 Act does not restrict the parties' right to choose arbitrators, subject to the challenge provisions discussed in *Section 3.1.5 and 3.1.6* below. Arbitrators are not required to be members of the local bar.

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

The Arbitration Act provides for the appointment process of the arbitrator, which applies to situations where parties are otherwise unable to agree on the process. Under the Arbitration Act, the default rule sets the number of arbitrators at three (*Article 16.2*). The court will appoint either a sole arbitrator or the third arbitrator, should the parties or party appointed arbitrators fail to agree (*Article 17*). If the parties have agreed to particular arbitral institutional rules, those rules prevail.

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

The Arbitration Act provides that where there are two parties to an arbitration, the default number of arbitrators is three (*Article 16*). If there are more than two parties to an arbitration, the court shall decide the number of arbitrators (*Article 16*). If there are two parties to an arbitration, each party shall appoint one arbitrator and the two arbitrators shall then appoint the third. If a party fails to appoint an arbitrator within 30 days of a request to do so by the other party who has appointed an arbitrator, the court shall appoint a party arbitrator upon request. The court will also appoint the third arbitrator upon the request of a party should the two party arbitrators fail to agree on the third arbitrator within 30 days of their appointment (*Article 17*).

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

Under the Arbitration act arbitrators are required to be impartial and independent throughout the proceedings (*Article 18.1,*). Arbitrators are required to disclose any circumstances that might give rise to justifiable doubts as to their impartiality or independence without delay throughout the arbitration proceeding (*Articles 18.3 and 18.4*).

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

The Arbitration Act sets out the grounds for challenges. These are if:

- An arbitrator does not meet the qualifications to be an arbitrator as agreed to between the parties.
- There are circumstances that give rise to justifiable doubt as to an arbitrator's impartiality or independence (*Article 18.1*).

Absent an agreement between the parties, a party who intends to challenge an arbitrator shall, within 15 days of the later of either the day on which it became aware of the constitution of the arbitral tribunal or the day on which it became aware of any grounds for the challenge, file an application for the challenge of an arbitrator specifying the ground(s) of the challenge with the arbitral tribunal (*Article 19.3*).

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

Where the parties have not agreed to the procedure for the challenge, the Arbitration Act provides that the arbitral tribunal will determine an application for challenge in the first instance. If the arbitral tribunal rejects the application for challenge, an applicant can file an application for challenge to a Japanese court within 30 days from the date of notice of the determination by the tribunal dismissing the challenge request. The tribunal may continue the arbitration proceedings while the challenge application is pending at the court (*Article 19.4*). The court may remove the challenged arbitrator if it finds sufficient grounds to do so (*Article 19.5*).

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

The Arbitration Art is silent with respect to the potential civil liability of arbitrators. However, the JCAA Rules provide immunity for arbitrators in connection with any act or omission made during the proceedings, unless such act or omission is wilful or grossly negligent (*rule 13*).

In terms of criminal liability, the Arbitration Act provides penal provisions for arbitrators if they are found to have engaged in criminal conduct, such as bribery (*Articles 50–54*). Criminal penalties include fines and imprisonment for a period not exceeding five years.

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?

The Arbitration Act does not provide for confidentiality of the arbitration proceedings. However, the JCAA Rules provide that arbitral proceedings shall be held in private and all records of the proceedings shall be kept confidential (*rule 38*). The JCAA rules impose confidentiality obligations upon the arbitrators, the JCAA, the parties, their counsel and assistants except where disclosure is required by law or in court proceedings, or based on any other justifiable grounds.

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

The JCAA Rules provide that facts related to the arbitration or learned through the arbitration proceedings are subject to confidentiality obligations (*rule 38*). It is understood that not only the hearings, but also written or oral submissions and arbitral awards, should be kept in confidence (*rule 38.1*).

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

Again, the Arbitration Act is silent on this point. To the extent that the arbitration is governed by the JCAA Rules, unless such disclosure is justifiable based on the law or other grounds, documents and evidence disclosed in the arbitration may not be used in other proceedings or contexts without the consent of the other party (*rule 38*). The JCAA commentary notes that voluntary disclosure of confidential information in response to an investigation by government representatives, or in due diligence conducted in the course of M&A negotiations, is permitted so long as adequate measures to protect the confidentiality of the information are implemented. The JCAA commentary also provides that the scope of disclosure should be proportionate to the grounds justifying such disclosure. Parties

therefore need to consider whether the circumstances justify the scope of disclosure even when there are justifiable grounds to disclose.

3.2.4 When is confidentiality not available or lost?

Under the JCAA rules, disclosure of confidential information is permitted if required by law or court proceedings or if there is any other justifiable ground to disclose (*rule 38*). See also *Section 3.2.3*.

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 court action with a national court in Japan, the Japanese courts are required, upon the request of a defendant, to dismiss an action if the subject matter of the dispute is covered by an arbitration agreement (*Article 14*). Unlike in other jurisdictions, a Japanese court does not have the ability to stay proceedings pending the completion of arbitration. The court may only entertain the action if the court finds no arbitration agreement, or if arbitration proceedings are inoperative or incapable of being performed based on the arbitration agreement.

3.3.2 Are there any grounds on which the national courts will order a stay of arbitral proceedings?

Japanese courts have no ability to stay the proceedings but instead will dismiss an action if the subject matter of the dispute is covered by an arbitration agreement.

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?

Japanese courts have generally favoured arbitration agreements and regularly dismiss cases where an arbitration agreement is found.

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?

There is no presumption of arbitrability as such. However, Japanese courts have a long tradition of respecting arbitration agreements and dismissing actions where an arbitration agreement is found. The Japanese court respects party autonomy and tends to broadly construe the scope of arbitration agreements as covering any claims unless the parties intended otherwise.

3.3.5 Are there any other legal requirements for arbitral proceedings to be recognisable and enforceable?

The Arbitration Act adopts the provisions of the New York Convention concerning requirements for recognition and enforcement of arbitral awards. As such, grounds to refuse to recognise and enforce an arbitration award are consistent with those set out in the New York Convention. Except for the grounds enumerated in the Arbitration Act, the Japanese court may not refuse to recognise or enforce arbitration awards regardless of whether the arbitration is domestic or international.

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 Act provides that the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the arbitral proceedings subject to certain mandatory provisions (*Article 26*). These mandatory provisions are similar to those provided for in the Model Law and aim to achieve due process of the proceedings, to treat the parties with equality and to secure sufficient opportunity for the parties to present their cases in the arbitration proceedings.

The newly introduced JCAA Rules provide that arbitrators must fix a procedural schedule in writing to the extent necessary and feasible as early as practicable (*rule 39*), and must use reasonable efforts to identify issues at the early stages of the proceedings (*rule 40*). The rules also suggest that the arbitral tribunal adopts terms of reference when found appropriate after giving the parties an opportunity to comment.

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 Act provides that, absent an agreement between the parties, the tribunal will decide the seat, taking into account the circumstances relevant to the dispute, including the convenience of the parties (*Article 28.2*). Article 28.2 of the Act also provides that the arbitral tribunal may, unless otherwise agreed by the parties, carry out certain arbitration proceedings at any place it considers appropriate including:

- Consultation among the members of the arbitral tribunal.
- Hearing of parties, experts or witnesses.
- Inspection of goods, other property or documents.

The JCAA Rules provide that, if the parties fail to agree on the seat of arbitration, then the city of the office of the JCAA to which the claimant submitted the request for arbitration shall be the seat for arbitration (*rule 36*). The legal seat of arbitration and the physical location of the arbitration hearing are considered separate: the tribunal may decide a different physical location for the hearing from the seat of arbitration, depending on the circumstances and convenience of the parties, counsel and arbitrators.

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

The Arbitration Act provides that, absent an agreement between the parties on the procedure, the arbitral tribunal may conduct the arbitral proceedings in such manner as it considers appropriate (*Article 26.2*). The arbitral tribunal may also determine the admissibility, relevance, materiality and weight of any evidence (*Article 26.3*).

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 Act is silent as to the gathering and tendering of written evidence. In practice, written evidence, including witness statements, is commonly submitted at the same time as the statement of claim and statement of defence are submitted. After the submission of a statement of claim and a statement of defence, the parties are given an opportunity to request document production. Because Japan is a civil law jurisdiction and document production is very limited in court proceedings, so-called privilege laws have not developed. However, in arbitration proceedings, parties may in principle refuse to produce documents to the extent that attorney–client communications are involved or if they are documents prepared in anticipation of or for the arbitration. The scope of the document production order varies depending on the legal background of the arbitrators, and there is no set scope of production in arbitration proceedings seated in Japan.

3.4.4.2 Can parties agree the rules on disclosure? How does the disclosure in arbitration typically differ to that in litigation?

Unlike in arbitration, under the code of civil procedure, parties are required to disclose documents under very limited circumstances. Increasingly in international arbitration proceedings, parties agree to apply to the International Bar Association Rules on the Taking of Evidence in International Arbitration (revised in 2010) (IBA Rules) at the beginning of the procedure or the tribunal decides in its Procedural Order No. 1 that the IBA Rules will be either applied or referred to as a guiding principle in relation to document production.

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

Neither the Arbitration Act nor the JCAA Rules provide particular rules on oral evidence. However, the practice of oral evidence in international arbitration seated in Japan is consistent with international arbitration practice. The parties submit factual witness and expert witness statements. The witness examination in chief in most cases is either very succinct or replaced entirely by the witness statements submitted to the arbitral tribunal and the other party is commonly given the full opportunity to cross-examine a witness or expert whose written statement has been submitted.

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 between orders sought as against parties and non-parties?

Arbitral tribunals do not have the power to compel the attendance of witnesses or the production of documents. A tribunal may draw a negative inference from any failure to attend a hearing or produce documents when an order has been made.

The national court provides assistance to the tribunal and the parties in relation to witnesses or documents kept by third parties. The court may issue a subpoena to a witness and conduct an examination of such witness on behalf of the arbitral tribunal if such witness refuses to appear at the hearing voluntarily. The tribunal is allowed to attend the

cross-examination; however, the cross-examination is conducted by the judge in accordance with the Code of Civil Procedure.

3.4.4.5 Do special provisions exist for arbitrators appointed pursuant to international treaties (that is, bilateral or multilateral investment treaties)?

Investment treaties with investor-state dispute settlement provisions commonly refer to the ICSID or UNCITRAL Arbitration Rules 1976 (revised in 2010) (UNCITRAL Rules) as the applicable arbitration proceedings. However, state-to-state dispute resolution clauses sometimes have bespoke provisions for the appointment of arbitrators.

3.4.5 Are there particular qualification requirements for representatives appearing on behalf of the parties in your jurisdiction?

Officers or employees of a party may appear in the arbitration proceedings on behalf of the party. Counsel must be qualified in their home jurisdiction if they are not qualified to practice either Japanese law or a foreign law in Japan.

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 Arbitration Act is consistent with the Model Law and the arbitral tribunal may not issue a default award simply due to a defaulting party. Instead, the arbitral tribunal must proceed with the arbitration based on the evidence available and issue an award based on that evidence (*Article 33 and rule 48*).

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

Neither the Arbitration Act nor the JCAA Rules limit the arbitrators' powers to fashion appropriate remedies, though such powers are subject to the governing law of the contract and public policy in Japan. First, the governing law of the contract may have its own inherent limitations on the remedies that are available when the contract is breached. Secondly, arbitrators may only grant remedies that are not in violation of Japan's public policy. For example, in Japan damages are limited to compensatory damages and punitive damages are not permitted on account of a judgment of the Supreme Court 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 . The same principle would likely apply to an arbitration award issued in Japan. The JCAA Rules explicitly refer to cost awards, whereas local court practice has no such cost awards per se (*rule 83*).

3.5.3 Must an award take a particular form? Are there any other legal requirements, for example, in writing, signed, dated, place stipulated, the need for reasons, method of delivery?

The Arbitration Act and the JCAA Rules provide that the essential elements of the arbitration award, which includes reasons, dates and place of arbitration, must be in written form (*Article 39, rule 61*). The award must be signed by at least a majority of the arbitrators if there is more than one arbitrator. If an arbitrator fails to sign the award, the award must include the reason for the failure.

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 Act provides that, if so agreed by the parties, the arbitral tribunal may decide the allocation of costs between the parties (*Article 49*).

Under the JCAA Rules, even without an agreement on cost awards, the arbitral tribunal may apportion the costs between the parties, taking into account the parties' conduct throughout the course of the arbitral proceedings, the determination on the merits of the dispute and any relevant circumstances (*rule 83*). It is not clear whether the arbitral tribunal may override an agreement between the parties.

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

The Arbitration Act, while being silent on the content of the costs, provides that the allocation of the costs in the arbitration should be decided by the agreement between the parties and, absent agreement, the arbitral tribunal shall decide the same (*Article 49*). Under the JCAA Rules, the costs of the arbitration include the administrative fee, the arbitrators' remuneration and expenses, and other reasonable expenses incurred with respect to the arbitral proceedings, together with the parties' legal fees and expenses to the extent that the arbitral tribunal determines they are reasonable (*rule 83*).

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

The Arbitration Act provides as a default that each party bears its own costs (*Article 49.2*). The JCAA Rules provide that costs are awarded only to the extent that the arbitral tribunal determines they are reasonable (*rule 83*). It should be noted that, because there is no cost award per se in Japanese court practice, Japanese parties do not always request a cost award in arbitration proceedings.

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?

There is no law preventing taxes from being imposed on foreign or domestic arbitrators. The amount of tax imposed is determined individually for each case, taking into account whether or not the arbitrator is a Japanese resident.

3.6 Arbitration agreements and jurisdiction

3.6.1 Are there form, 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?

An arbitration agreement is an agreement in which parties agree to finally resolve certain disputes in arbitration proceedings, and such agreements must be made in writing (*Article 13*). If the intent is not clear as to whether or not parties waived their remedies in court proceedings on the merits, an arbitration agreement may be found to be invalid. Parties are recommended to include the seat of arbitration and, whether they choose ad hoc arbitration or institutional arbitration, to select the applicable rules, the language and the number of arbitrators.

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?

Yes, the Arbitration Act stipulates separability of the arbitration agreement consistent with the Model Law. The Arbitration Act provides that the validity of the arbitration agreement shall not automatically be affected even if, in a particular contract containing an arbitration agreement, any or all of the contractual provisions, excluding the arbitration agreement, are found to be null and void, cancelled or invalid for other reasons (*Article 13*).

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?

Yes, the Arbitration Act expressly acknowledges the "competence-competence" of the arbitral tribunal consistent with the Model Law. The arbitral tribunal may rule on assertions made in respect of the existence or validity of an arbitration agreement or its own jurisdiction. A plea for the lack of jurisdiction must be raised prior to the initial written or oral submission on the merits. If the grounds for the assertion arise during the course of arbitral proceedings, a party must raise a plea promptly after such grounds arose (*Article 23*). If the arbitral tribunal determines that it has jurisdiction, a party challenging the jurisdiction may, within 30 days of receipt of notice of such determination, request the court to decide the matter (*Article 23.5*). While court proceedings are pending on the jurisdiction of the arbitral tribunal, the arbitral tribunal may continue the arbitration proceedings and issue an arbitral award (*Article 23.5*).

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

Divorce and separation are specifically excluded from the type of dispute that may be resolved by arbitration (*Article 13*). In addition, arbitration agreements to resolve future disputes with consumers are restricted (*Supplementary provisions Article 3*). Arbitration agreements between employers and employees to settle future employment disputes are void (*Supplementary provisions Article 4*).

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?

Under Japanese law, the statute of limitations is considered part of the substantive law and therefore the substantive governing law dictates the prescription. Once a claim is submitted to the arbitration proceedings, the statute of limitation for the claim is interrupted (*Article 29*).

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

The Arbitration Act does not provide for third party joinder. However, the JCAA Rules set out provisions for third party joinder. The JCAA Rules allow third party joinder if (i) all parties and such third party have agreed to the joinder in writing or (ii) all claims are made under the same arbitration agreement. However, in case of (ii), the third party had to provide written consent to such joinder if such party is requested to join as a respondent after the arbitral tribunal has been constituted (*Article 52*).

3.7 Applicable law

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

The Arbitration Act provides that the arbitral tribunal applies the substantive law chosen by the parties pursuant to the agreement unless there is a compulsory law applicable to the subject matter of the dispute. If the parties fail to agree on the substantive law, the tribunal will apply the substantive law of the jurisdiction with which the subject matter of the dispute is most closely connected (*Article 36*).

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

The most pertinent mandatory law applicable to arbitration seated in Japan is the Arbitration Act. If the application of substantive laws of a foreign state raises a public policy issue in Japan, Japanese law will apply. As noted in *Section 3.5.2*, if the arbitration seat is in Japan, punitive damages are not permitted based on the public policy of Japan.

4. SEEKING INTERIM MEASURES IN SUPPORT OF ARBITRATION CLAIMS

4.1 Can an arbitral tribunal order interim relief? If so, in what circumstances? What forms of interim relief are available and what are the legal tests for qualifying for such relief?

Unless otherwise agreed by the parties, the tribunal may, at the request of a party, order any party to take such interim measures, including preservation measures, as the tribunal considers necessary in respect of the subject matter of the dispute. While the Arbitration Act does not specifically identify the forms of interim measure that may be ordered by an arbitral tribunal, or the legal tests for qualifying for such measures, the JCAA Rules set out typical forms of, and conditions for granting, such measures which are in line with the Model Law and the UNCITRAL Rules. The JCAA Rules also include provisions addressing emergency measures that may be ordered by an emergency arbitrator, which are measures available either before the arbitral tribunal is constituted or when an arbitrator has ceased to perform his or her duties.

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

The Japanese court has no authority to limit the power of an arbitral tribunal in granting interim relief so long as the arbitral tribunal has jurisdiction over the dispute and its ability to issue interim relief is not restricted by the parties agreement (*Article 24*).

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

Before and after the commencement of arbitration proceedings, a Japanese court may, upon the request of a party, grant interim relief in aid of the arbitration in accordance with the Civil Provisional Remedies Act. The interim relief will be granted if the court is satisfied that the requesting party has shown, on a prima facie basis, the likelihood of the existence of a claim on the merits and the necessity of the preservation of such claim.

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

In accordance with the Model Law, a Japanese court's authority to grant interim relief in aid of arbitration applies to any arbitration proceeding regardless of where it is seated and even where the seat of the arbitration has not been determined. However, the court can only exercise such authority if it has jurisdiction over the case, for example, where the property to be provisionally seized or the subject matter of the dispute is located in Japan.

5. CHALLENGING ARBITRATION AWARDS

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

The Japanese national court may set aside an award only on the following limited grounds, as listed in Article 44 of the Arbitration Act:

- The arbitration agreement is invalid due to a party's limited capacity.
- The arbitration agreement is invalid for reasons other than a party's limited capacity under the law that the parties agreed would govern the agreement (or absent an agreement under Japanese law).
- The applicant was not given notice, as required by Japanese law (or agreement between the parties to the extent that non-mandatory provisions are concerned), in the proceedings to appoint arbitrators or in the arbitral proceedings.
- The applicant was unable to present its case in the arbitral proceedings.
- The award contains decisions on matters beyond the scope of the arbitration agreement or the claims filed to the tribunal.
- The composition of the tribunal or the arbitral proceedings violates Japanese law or agreements between the parties to the extent that non-mandatory provisions are concerned.
- The request for the arbitration relates to a dispute that cannot be the subject of an arbitration agreement under Japanese law.
- The content of the award is in conflict with the public policy of Japan.

The grounds for setting aside an award as set forth under the Arbitration Act are identical to those under the Model Law (*Article 34*) and are consistent with the grounds for refusal to recognise and enforce arbitral awards under the New York Convention (*Article 5*).

5.2 Can the parties exclude rights of appeal or challenge?

A right of appeal is not recognised under the Arbitration Act. Whether parties may opt out from a challenge is untested in the Japanese courts. Given that the Japanese courts may refuse to recognise and enforce arbitration awards for the reasons set out in *Section 5.1* above, it is reasonable to conclude that the parties may not exclude the right to challenge an arbitration award.

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

The Arbitration Act contains provisions for the modification, clarification or correction of an award that is consistent with the Model Law (*Article 33*).

Under Article 41 of the Arbitration Act, the arbitral tribunal may, upon the request of a party or by its own authority, correct any miscalculations, clerical errors or errors of a similar nature in the arbitral award. Unless otherwise agreed by the parties, the request for correction shall be made within 30 days from the receipt of the notice of the arbitral award. The arbitral tribunal shall make a decision on the request for correction within 30 days from such request, although the arbitral tribunal may extend this period of time if it considers it to be necessary. Under the Arbitration Act, unlike under the Model Law, there is no time limit for the correction of the arbitral award to be made by the arbitral tribunal by its own authority. The JCAA Rules provide that a party may request the arbitral tribunal to make a correction of the arbitral award within four weeks from the receipt of the arbitral award (*rule 63*).

Under Article 42 of the Arbitration Act, if so agreed by the parties, a party may request the arbitral tribunal to give an interpretation of a specific part of the arbitral award. The time-frame applicable to the request for interpretation is the same as that for the request for correction mentioned above. The JCAA Rules provide that a party may request the arbitral tribunal to give an interpretation of a specific point or part of the arbitral award within four weeks from the receipt of the arbitral award (*rule 64*).

Under Article 43 of the Arbitration Act, unless otherwise agreed by the parties, a party may request the arbitral tribunal to make an additional award with respect to claims presented in the arbitration proceedings but omitted from the arbitral award. The request for the additional award shall be made within 30 days from the receipt of the notice of the arbitral award. The arbitral tribunal shall make a decision on the request for an additional award within 60 days from such request, although the arbitral tribunal may extend such period of time if it considers such to be necessary. The JCAA Rules provide that a party may request the arbitral tribunal to make an additional arbitral award within four weeks from the receipt of the arbitral award (*rule 65*).

6. ENFORCEMENT

6.1 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 the reservation that it will only recognise and enforce awards rendered in the territories of other contracting states. However, under the Arbitration Act, arbitral awards may be recognised and enforced regardless of where they are rendered.

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

In order to enforce an award, a party must file an application with a competent court for an enforcement decision (that is, a court order authorising civil enforcement of the arbitral award). Such application must be accompanied with a copy of the award, a certificate evidencing the authenticity thereof and a Japanese translation of the award if the award is rendered in a language other than Japanese. An enforcement decision may be rendered without having

a formal hearing, but both parties must be given an opportunity to be heard. The courts have uniformly supported arbitral awards and, to date, no published court decision exists in which a court has denied an application for the enforcement of an award. Enforcement proceedings in the district courts typically conclude within one year. The fee to be paid to the court for the application is JPY 4,000 regardless of the amount of the arbitral award.

6.3 Is there a difference between the rules for enforcement of "domestic" awards and those for "non-domestic" awards?

No. The Arbitration Act does not distinguish between arbitral awards rendered in Japan and those rendered outside of Japan.

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