GAR KNOW HOW COMMERCIAL ARBITRATION

Japan

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Infrastructure

1 The New York Convention

Is your state a party to the New York Convention? Are there any noteworthy declarations or reservations?

Japan is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention), and reserves the principle of reciprocity.

2 Other treaties

Is your state a party to any other bilateral or multilateral treaties regarding the recognition and enforcement of arbitral awards?

Japan is a party to the Geneva Protocol on Arbitration Clauses 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards 1927. Japan has also ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).

3 National law

Is there an arbitration act or equivalent and, if so, is it based on the UNCITRAL Model Law? Does it apply to all arbitral proceedings with their seat in your jurisdiction?

The Arbitration Law (Law No. 138 of 2003) governs arbitration procedures in Japan and relates to both domestic and foreign matters. In addition, court proceedings under the Arbitration Law are ruled by the Supreme Court Rules on Procedures (Rules of the Supreme Court No. 27 of 2003) (article 11 of the Arbitration Law). The Arbitration Law basically follows the UNCITRAL Model Law (1985), with some adjustments for consistency with other regulations or to handle social changes over the intervening years, including technological change. The Arbitration Law also applies to non-commercial arbitration and contains some criminal provisions.

4 Arbitration bodies in your jurisdiction

What arbitration bodies relevant to international arbitration are based within your jurisdiction? Do such bodies also act as appointing authorities?

When parties agree to the use of international arbitration in Japan, the Japan Commercial Arbitration Association (JCAA) is generally chosen as the forum for arbitrating on general commercial cases. If the parties agree, the JCAA or these other bodies can act as an appointing authority.

5 Foreign institutions

Can foreign arbitral providers operate in your jurisdiction?

Yes. There is no restriction on foreign arbitral institutions conducting arbitral proceedings under their own arbitration rules in Japan. For example, the ICC can and does operate in Japan.

6 Courts

Is there a specialist arbitration court? Is the judiciary in your jurisdiction generally familiar with, and supportive of, the law and practice of international arbitration?

There is no specialist arbitration court in Japan. Japanese courts are familiar with and supportive of the law and practice of international arbitration. Courts in Japan are also increasingly being exposed to handling international arbitration cases.

Agreement to arbitrate

7 Formalities

What, if any, requirements must be met if an arbitration agreement is to be valid and enforceable under the law of your jurisdiction? Can an arbitration agreement cover future disputes?

For an arbitration agreement to be valid, the Arbitration Law requires that the agreement must be in writing, be stated clearly in a document signed by all the parties (including by counterpart via facsimile or email) (article 13, paragraph 2 of the Arbitration Law). The object of the arbitration must be a civil dispute that the parties are entitled to settle peremptorily. (See question 8.)

An arbitration agreement can cover future disputes in the Arbitration Law in Japan.

8 Arbitrability

Are any types of dispute non-arbitrable? If so, which?

All civil disputes that private parties can settle can also be resolved via arbitration, except divorce or separation cases (article 13, paragraph 1 of the Arbitration Law). The Arbitration Law also stipulates that an arbitration agreement between a consumer (as defined under the Consumer Contract Act) and a business operator may be cancelled (article 3 of the supplementary provisions to the Arbitration Law) and that an arbitration agreement between an individual employee and their employer in relation to labour disputes is considered invalid (article 4 of the supplementary provision of Arbitration Law).

9 Third parties

Can a third party be bound by an arbitration clause and, if so, in what circumstances? Can third parties participate in the arbitration process through joinder or a third-party notice?

In principle, an arbitration clause does not bind third parties (including parent companies, subsidiaries, directors and employees) that did not sign the contract incorporating the arbitration clause. However, under exceptional circumstances, where a third party can be considered to be the same entity as the party that agreed on the arbitral clause under general law, like a successor or assignee of contract including the arbitration clause, then that party can be compelled to arbitrate the dispute.

Issues regarding the participation of a third party are in practice resolved through consultation and agreement among the parties, the third party and the arbitrators based on the specific circumstances. JCAA rules allow third-party participation and the joinder of parties in certain conditions, such as, for example, when all claims are made under the same arbitration agreement (article 56 of JCAA rules).

10 Consolidation

Would an arbitral tribunal with its seat in your jurisdiction be able to consolidate separate arbitral proceedings under one or more contracts and, if so, in what circumstances?

In principle, arbitration matters do not bind third parties that did not sign the contract incorporating the arbitral clause. In practice, consolidation issues would be resolved through consultation and agreement among the parties, the third party and the arbitrators based on the specific circumstances. JCAA rules allow consolidation in certain conditions, such as, for example, when all parties have agreed in writing; all claims are made under the same arbitration agreement, etc (article 57 of JCAA rules).

11 Groups of companies

Is the “group of companies doctrine” recognised in your jurisdiction?

No; neither the “group of companies doctrine” nor any other method of piercing the corporate veil is recognised in Japan.

12 Separability

Are arbitration clauses considered separable from the main contract?

The Arbitration Law includes the principle of the separability of arbitration clause (article 13 paragraph 6 of the Arbitration Law) so an arbitration clause is generally treated as an agreement independent of the other terms of the contract. However, in limited cases, such as, for example, if a party entered the contract under duress, the included arbitration agreement would also be considered to be invalid or revocable.

13 Competence-competence

Is the principle of competence-competence recognised in your jurisdiction? Can a party to an arbitration ask the courts to determine an issue relating to the tribunal's jurisdiction and competence?

The principle of competence-competence is recognised in Japan.

An arbitral tribunal can address issues of whether its authority is legitimate before starting the procedure (article 23, paragraph 1 of the Arbitration Law), although even after an arbitral tribunal decides that it has jurisdiction, a party can still ask a court for judicial review of that decision (article 23, paragraph 5 of the Arbitration Law); but such a judicial review does not necessarily interrupt the arbitral procedure (article 23, paragraph 5 of the Arbitration Law).

14 Drafting

Are there particular issues to note when drafting an arbitration clause where your jurisdiction will be the seat of arbitration or the place where enforcement of an award will be sought?

Arbitration clauses must be in writing (article 13, paragraph 2 of the Arbitration Law). Therefore, drafting the clauses using clear wording is obviously preferable.

However, clauses that are ambiguous as to the parties' intention to opt out of court proceedings should be excluded. For example, it is perhaps worth noting that optional clauses can be invalidated by a court because the optional clause does not mean a final solution by arbitration under Japanese law so the agreement does not satisfy the requirements for an arbitration agreement under the Arbitration Law.

15 Institutional arbitration

Is institutional international arbitration more or less common than ad hoc international arbitration? Are the UNCITRAL Rules commonly used in ad hoc international arbitrations in your jurisdiction?

While we do not have statistical data on ad hoc international arbitrations, we believe that institutional arbitration – whether from the JCAA or from a foreign arbitration institutions (ICC being the most popular in Japan) – is more common than ad hoc international arbitration. Nevertheless, ad hoc international arbitration does take place, and in such cases the UNCITRAL rules are predominantly used.

16 Multi-party agreements

What, if any, are the particular points to note when drafting a multi-party arbitration agreement with your jurisdiction in mind? In relation to, for example, the appointment of arbitrators.

The Arbitration Law does not stipulate any particular rules for a multiparty arbitration clause so in multiparty agreements arbitration clauses should be drafted carefully. Basically, the parties may agree freely on how to proceed with the arbitration, including the appointment of arbitrators. However, the JCAA rules contain stipulations on the appointment of arbitrators in the case of multiparty arbitration (article 29 of the JCAA rules).

Commencing the arbitration

17 Request for arbitration

How are arbitral proceedings commenced in your jurisdiction? Are there any key provisions under the arbitration laws of your jurisdiction relating to limitation periods of which the parties should be aware?

The arbitral proceedings commence when one party gives the other party notification regarding the arbitral proceeding (article 29 of the Arbitration Law). If, however, the party files for arbitration with the JCAA, its rules provide that the proceedings commence upon this filing. The claimant must state the relief or remedy sought, the facts supporting its claim and the points at issue within the time limits prescribed by the arbitral tribunal. The claimant may submit any documentary evidence it considers to be relevant and may add reference materials in relation to this evidence (article 31, paragraph 1 of the Arbitration Law). The respondent follows the same rules as for the claimant (article 31, paragraph 2 of the Arbitration Law). Each party may make amendments or additions to their statements during the course of the arbitral proceedings. However, the arbitral tribunal may refuse to allow the amendments or additions if they are made after the permitted time period (article 31, paragraph 3 of the Arbitration Law). These submissions may be made orally or in writing.

Choice of law

18 Choice of law

How is the substantive law of the dispute determined? Where the substantive law is unclear, how will a tribunal determine what it should be?

The parties to an arbitration proceeding may agree on the substantive law applicable to the case (article 36, paragraph 1 of the Arbitration Law). If the parties designate the laws to be applied by an arbitral tribunal this is construed as referring to substantive law rather than conflict of laws rules unless stated otherwise (article 36, paragraph 1 of the Arbitration Law).

If the parties fail to agree on the substantive law to be applied to the case (or the choice of substantive law is unclear), then the arbitral tribunal will apply the substantive law of the state with which the civil dispute subject to the arbitral proceedings is most closely connected (article 36 of the Arbitration Law).

Appointing the tribunal

19 Choice of arbitrators

Does the law of your jurisdiction place any limitations in respect of a party's choice of arbitrator?

Except for the principle of independence and impartially for the arbitrator, the Arbitration Law does not place any limitations in respect of a party's choice of arbitrator. If the candidate arbitrators and arbitrators have doubts over their own impartiality or independence, they must disclose the relevant information or circumstances (article 18, paragraphs 3 and 4 of the Arbitration Law). Practitioners in Japan often refer to IBA Guidelines on conflicts of interest when considering impartiality and independence.

20 Foreign arbitrators

Can non-nationals act as arbitrators where the seat is in your jurisdiction or hearings are held there? Is this subject to any immigration or other requirements?

Foreign arbitrators may be appointed without any restrictions. There are no special immigration requirements applicable only to foreign arbitrators working in Japan.

21 Default appointment of arbitrators

How are arbitrators appointed where no nomination is made by a party or parties or the selection mechanism fails for any reason? Do the courts have any role to play?

The procedure for appointing arbitrators is as specified by the agreement between the parties (article 17, paragraph 1 of the Arbitration Law). In cases where there are two parties and three arbitrators are required, but the parties fail to agree upon a process for appointment of the arbitrators, the parties will each appoint one arbitrator, and the two arbitrators appointed by the parties will then appoint the third arbitrator (article 17, paragraph 2 of the Arbitration Law). The court will appoint arbitrators if requested by a party, in cases where there are two parties and one arbitrator, and the parties have not agreed on a process for the appointment of arbitrators, or either party fails to comply with the agreed process for appointment of its arbitrator (article 17, paragraph 3 of the Arbitration Law). The court will appoint arbitrators if requested by a party, where there are three or more parties, and there is no arbitration agreement (article 17, paragraph 4 of the Arbitration Law).

22 Immunity

Are arbitrators afforded immunity from suit under the law of your jurisdiction and, if so, in what terms?

The Arbitration Law does not contain specific rules on the immunity of arbitrators. Under Japanese law generally, arbitrators may be liable for contractual breaches or illegal action. However, it is possible to limit or immunise liabilities from arbitrations under an arbitrators agreement, unless otherwise provided under other laws, such as the Consumer Contract Act.

23 Securing payment of fees

Can arbitrators secure payment of their fees in your jurisdiction? Are there fundholding services provided by relevant institutions?

The Arbitration Law does not contain any provisions on securing arbitrators' fees. However, JCAA has rules on such matters and requires advance payment upon commencement of the arbitral proceedings (and at later stages, if such advance payment is not sufficient). The JCAA rules require the parties to pay the JCAA a sum calculated to cover necessary expenses, including the arbitrators' fee, in a manner and within a time limit fixed by the JCAA (article 82, paragraph 1 of the JCAA rules). If a party fails to make the payment the arbitral tribunal will, at the JCAA's request, suspend or terminate the arbitral proceedings until the party makes the payment (article 82, paragraph 2 of the JCAA rules). Other than this, the relevant institutions in Japan do not provide or arrange professional fundholding services.

Challenges to arbitrators

24 Grounds of challenge

On what grounds may a party challenge an arbitrator? How are challenges dealt with in the courts or (as applicable) the main arbitration institutions in your jurisdiction? Will the IBA Guidelines on Conflicts of Interest in International Arbitration generally be taken into account?

An arbitrator may be challenged if (i) he or she does not for some reason meet the requirements agreed by the parties, or (ii) there is reasonable doubt over his or her impartiality or independence (article 18, paragraph 1 of the Arbitration Law). The parties may also agree on procedures for challenging an arbitrator (article 19, paragraph 1 of the Arbitration Law). In the case of no agreement, the arbitral tribunal can adjudicate challenges at the request of the challenging party (article 19, paragraph 2 of the Arbitration Law). A court can be requested to remove an arbitrator due to (i) the arbitrator's de jure or de facto inability or (ii) undue delay in performing his or her arbitration duties (article 20 of the Arbitration Law).

The IBA Guidelines on Conflicts of Interest in International Arbitration are generally followed when international arbitration tribunals make decisions on challenges, although Japanese court precedents have not clearly or directly taken these guidelines into consideration.

Interim relief

25 Types of relief

What main types of interim relief are available in respect of international arbitration and from whom (the tribunal or the courts)? Are anti-suit injunctions available where proceedings are brought elsewhere in breach of an arbitration agreement?

Before or during an arbitral proceeding, a party may file a court petition for a restraining order with regard to a civil dispute that may be the subject of the arbitration agreement (article 15 of the Arbitration Law). The Arbitration Law does not include procedures for specific interim measures and these are handled in accordance with the Civil Preservation Law (Law No. 91 of 1989).

On the other hand, the Arbitration Law stipulates that the arbitral tribunal may order any party, upon the request of another party, to take such interim measures or preservative measures as the arbitral tribunal may consider necessary for the protection of the subject matter of the dispute (article 24, paragraph 1 of the Arbitration Law) and to provide appropriate security in connection with those interim measures or preservative measures (article 24, paragraph 2 of the Arbitration Law). The JCAA has recently set out detailed interim measures that the arbitrator can order, subject to some conditions being satisfied; these include appointment of an emergency arbitrator in urgent situations (JCAA Rules 75 through 79).

26 Security for costs

Does the law of your jurisdiction allow a court or tribunal to order a party to provide security for costs?

A court or an arbitral tribunal may order a party to provide security for costs to the extent deemed necessary (articles 15 and 24 of the Arbitration Law, article 14 of the Civil Preservation Law).

Procedure

27 Procedural rules

Are there any mandatory rules in your jurisdiction that govern the conduct of the arbitration (eg, general duties of the tribunal and/or the parties)?

In principle, most matters related to the conduct of the arbitration can be agreed between the contracting parties. This includes, for example, matters such as jurisdiction, the appointment of arbitrators, the arbitration rules and standards. The Arbitration Law has mandatory provisions requiring the equal treatment of all parties and to give full opportunity to present their cases (article 25) and that the procedure is in accordance with public policy (articles 26 and 44 of the Arbitration Law).

28 Refusal to participate

What is the applicable law (and prevailing practice) where a respondent fails to participate in an arbitration?

The respondent must state its defence with respect to claims made by the claimant within the period of time determined by the arbitral tribunal (article 31, paragraph 2 of the Arbitration Law). If the respondent fails to provide a defence, the arbitral tribunal will continue the arbitral proceedings, unless otherwise agreed by the parties (article 33, paragraph 2 of the Arbitration Law). If the respondent fails to appear at an oral hearing or to submit required documentary evidence, then, unless agreed otherwise by the parties or the respondent has reasonable grounds for failure to do so, the arbitral tribunal may render the arbitral award based upon the evidence that has been presented to it up to that time (article 33, paragraph 3 of the Arbitration Law).

29 Admissible evidence

What types of evidence are usually admitted, and how is evidence usually taken? Will the IBA Rules on the Taking of Evidence in International Arbitration generally be taken into account?

Where the rules of the arbitration have not been agreed, the arbitral tribunal has the power to determine the admissibility of evidence, necessity of examination, and weight of evidence (article 26, paragraph 3 of the Arbitration Law). There are no restrictions in the Arbitration Law as to the types of admissible evidence, whether it be documentary evidence, factual witnesses, or expert witnesses. The IBA Rules on the Taking of Evidence in International Commercial Arbitration are recognised as the primary guideline used for arbitrators in Japan. The Prague Rules are not merely rules on taking evidence but also a framework on how to increase efficiency by empowering a tribunal to take greater control of proceedings. The practical impact of the rules is under discussion.

30 Court assistance

Will the courts in your jurisdiction play any role in the obtaining of evidence?

If the seat of arbitration is in Japan, the arbitral tribunal or a party may request a court to implement the procedures to take evidence provided for in the Code of Civil Procedure and found necessary by the arbitral tribunal. The taking of evidence can relate to the commission of an examination, an examination of witnesses, expert testimony, examination of documentary evidence, observation (article 35 of the Arbitration Law).

31 Document production

What is the relevant law and prevailing practice relating to document production in international arbitration in your jurisdiction?

The Arbitration Law does not contain any provisions concerning document production in arbitration proceedings. Although the Code of Civil Procedure stipulates that the disclosure of specific documents is only permitted in limited circumstances, arbitral tribunals, especially international tribunals tend to employ a broader document disclosure regime than permitted under the Code of Civil Procedure if requested by a party.

32 Hearings
Is it mandatory to have a final hearing on the merits?

Final hearings on merits are not mandatory under the Arbitration Law, so tribunals have the discretion to decide whether to conduct a hearing, unless requested by a party, in which case the tribunal is obliged to hold a hearing, unless otherwise agreed by the parties (paragraph 1 of article 32 of the Arbitration Law).

33 Seat or place of arbitration
If your jurisdiction is selected as the seat of arbitration, may hearings and procedural meetings be conducted elsewhere?

Unless otherwise agreed by the parties, oral hearings, examination of witnesses, experts or the parties themselves, or the review of documents may be conducted in any location (article 28, paragraph 3 of the Arbitration Law).

Award

34 Majority decisions
Can the tribunal decide by majority?

Unless otherwise agreed by the parties, tribunals will decide by a majority vote (article 37, paragraph 2 and article 39, paragraph 1 of the Arbitration Law). Procedural matters may be decided by the presiding arbitrator, if so agreed by all the parties or delegated by all the other arbitrators (article 37, paragraph 3 of the Arbitration Law).

35 Limitations to awards and relief
Are there any particular types of remedies or relief that an arbitral tribunal may not grant?

The Arbitration Law does not stipulate the specific types of remedy available. The arbitral tribunal can award any remedy that would be available in court litigation on the same dispute; this may include damages, injunctions, declarations and payment of interest.

36 Dissenting arbitrators
Are dissenting opinions permitted under the law of your jurisdiction? If so, are they common in practice?

The Arbitration Law does not have any provisions permitting or prohibiting dissenting opinions in arbitration awards. Although statistics are not available, it is considered in the practice of international arbitration that dissenting opinions can be presented as long as they do not impair the confidentiality of a tribunal's discussion and do not raise doubts over the validity of an arbitral award.

37 Formalities
What, if any, are the legal and formal requirements for a valid and enforceable award?

Arbitral awards must be prepared in writing and signed by the arbitrators. If the arbitral tribunal is a panel consisting of more than one arbitrator, the written arbitral award can be signed by a majority of the arbitrators, stating the reasons for omitting the signature of any other arbitrator. The award must state its reasons, its date of preparation and the place of arbitration, unless otherwise agreed by the parties (article 39 of the Arbitration Law).

38 Time frames
What time limits, if any, should parties be aware of in respect of an award? In particular, do any time limits govern the interpretation and correction of an award?

The Arbitration Law does not stipulate any time limits for the tribunal to render its award. There are separate time limits for petitions to set aside an award and for requests to correct an award. Petitions to set aside an arbitration award must be submitted within three months from the date the notice of the award (ie, a copy of the written arbitral award) was sent, or from when an execution order has become final and binding (article 44, paragraph 2 of the Arbitration Law). In the case of

interpretation, an award can only be interpreted if the parties agree to make a request to do so, and the request cannot generally be limited by the tribunal (article 42, paragraphs 1 and 2 of the Arbitration Law). The tribunal may correct the award, upon the petition of the parties or by its own authority (article 41, paragraph 1 of the Arbitration Law). Unless otherwise agreed by the parties, requests by the parties to correct or interpret an award must be made within 30 days from the date of receipt of notice of the award (article 41, paragraph 2 and article 42, paragraph 3 of the Arbitration Law).

Costs and interest

39 Costs

Are parties able to recover fees paid and costs incurred? Does the "loser pays" rule generally apply in your jurisdiction?

The Arbitration Law has only generic provisions on legal fees and no specific legal fee structure is stipulated by law. Parties may agree on how to apportion the cost of the arbitration procedure, including legal fees, between them. If the parties agree on arbitration before the JCAA, the arbitral tribunal may apportion the costs of the arbitration, including reasonable legal fees of the counsel, 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 (article 80 of the JCAA Commercial Arbitration Rules). It is recognised that a large number of arbitral awards under the JCAA rules have adopted the principle of "costs follows the event".

If no agreement exists, each party must bear its own expenses paid in relation to the proceedings (article 49, paragraph 2 of the Arbitration Law); the unsuccessful party is not obligated as a matter of law to pay the successful party's expenses.

40 Interest on the award

Can interest be included on the principal claim and costs? Is there any mandatory or customary rate?

There are no rules in the Arbitration Law that mandate interest rates applicable to arbitral awards. If Japanese substantive law applies, interest may be awarded at a rate of 5 per cent per annum for claims to which the Civil Code (Law No. 89 of 1896) applies, and 6 per cent per annum for claims to which the Commercial Code (Law No. 48 of 1899) applies, unless other rates are agreed to by the parties.

Challenging awards

41 Grounds for appeal

Are there any grounds on which an award may be appealed before the courts of your jurisdiction?

The Arbitration Law does not stipulate an appeal mechanism once an arbitral award is recognised to be final. There are certain grounds on which an award can be challenged in court (see question 42), but this is not considered an appeal against the award, since the court does not re-evaluate the merits of the case.

42 Other grounds for challenge

Are there any other bases on which an award may be challenged, and if so what?

Arbitration awards can be challenged in Japanese courts if the place of the arbitration is in Japan (article 3, paragraph 1 and article 44, paragraph 1 of the Arbitration Law). Article 44, paragraph 1 limits the grounds for challenging arbitral awards to the following:

the arbitration agreement is invalid due to the limited capacity of a party; the arbitration agreement is not valid on grounds other than the limited capacity of a party pursuant to the laws and regulations designated by the agreement of the parties as those which should be applied to the arbitration agreement; the requisite notice under the arbitration proceeding, including the one for appointment of arbitrators, was not given to one party; one party was unable to defend its case; the subject matter of the award is beyond the scope of the arbitration agreement or claims of the arbitration; the composition of the tribunal or arbitration proceeding was not in accordance with the

Japanese Arbitration Law or parties' agreement; the award was based on a dispute not qualifying as a subject for arbitration; or the award is against public policy.

Parties may not challenge an award when an enforcement decision has become final and conclusive or more than three months after receiving notice of the award, whichever comes first (article 44, paragraph 2 of the Arbitration Law). The local court will hold a hearing of the parties to adjudicate on the challenge (article 44, paragraph 5 of the Arbitration Law).

43 Modifying an award

Is it open to the parties to exclude by agreement any right of appeal or other recourse that the law of your jurisdiction may provide?

The Arbitration Law does not stipulate whether it is possible or not to waive any right to challenge an arbitral award by agreement before the dispute arises. Although there do not appear to be any court precedents on the matter, and the Code of Civil Procedure allows parties to waive the right to appeal to the High Court, this kind of agreement to waive the right to challenge an arbitral award is likely to be considered invalid.

Enforcement in your jurisdiction

44 Enforcement of set-aside awards

Will an award that has been set aside by the courts in the seat of arbitration be enforced in your jurisdiction?

Although the court in Japan is not necessarily obliged to refuse to make an enforcement decision for an arbitral award set aside by the courts in the seat of arbitration (article 46, paragraph 8 of the Arbitration Law and article V.1. (e) of the New York Convention), the Arbitration Law as a basic rule prevents the enforcement of a foreign arbitral award that has been set aside at the seat of arbitration (article 45, paragraph 2(7) of the Arbitration Law).

45 Trends

What trends, if any, are suggested by recent enforcement decisions? What is the prevailing approach of the courts in this regard?

Japanese courts are recognised to be pro-arbitration and there are no recent cases of refusal to recognise or enforce foreign awards, though there is one case in which a party sought to revoke a JCAA award.

46 State immunity

To what extent might a state or state entity successfully raise a defence of state or sovereign immunity at the enforcement stage?

According to Act on the Civil Jurisdiction with respect to a Foreign State etc, unless the parties agree otherwise, in the case of arbitration agreements between a foreign state and a citizen of another state, the foreign state is not immune from jurisdiction with respect to judicial proceedings concerning the existence or nonexistence or effect of the arbitration agreement, or arbitration proceedings based on the arbitration agreement (article 16 of the Act on the Civil Jurisdiction, etc). However, to enforce an award against a foreign state, the foreign state must expressly provide consent to civil execution against the property held by the foreign state, in the manner of the arbitration agreement, written contract, treaty or other international agreement, or statements made during the proceedings of the civil execution (article 17, paragraph 1 of the Act on the Civil Jurisdiction of Japan with respect to a Foreign State, etc).

Further considerations

47 Confidentiality

To what extent are arbitral proceedings in your jurisdiction confidential?

The Arbitration Law does not expressly prohibit the disclosure of information regarding arbitral proceedings. However, in practice, binding confidentiality obligations are almost always incorporated in arbitration agreements. In addition, the rules of most arbitration organisation expressly require that arbitral proceedings and records are to be kept confidential from the public (eg, JCAA Rule 42).

48 Evidence and pleadings

What is the position relating to evidence produced and pleadings filed in the arbitration? Are these confidential? Is there any way that they might be relied on in other proceedings (whether arbitral or court proceedings)?

The Arbitration Law does not stipulate the confidentiality of evidence produced and pleadings filed in arbitration and does not expressly prohibit parties from using such evidence and pleadings in other proceedings. Therefore, theoretically, parties can freely use such evidence and pleadings in other proceedings. However, in practice, there are confidentiality agreements or arbitration rules that require confidentiality regarding the arbitration procedure that would restrict the ability to use such evidence and pleadings in other proceedings.

49 Ethical codes

What ethical codes and other professional standards, if any, apply to counsel and arbitrators conducting proceedings in your jurisdiction?

There are no specific ethical rules that are applicable to counsel in international arbitrations in Japan, though some arbitration practitioners in Japan consider the IBA Guidelines on Party Representation in International Arbitration. The Arbitration Law does require arbitrators to have impartially and independence (article 18, paragraph 1(2) of the Arbitration Law).

50 Procedural expectations

Are there any particular procedural expectations or assumptions of which counsel or arbitrators participating in an international arbitration with its seat in your jurisdiction should be aware?

There are no particular procedural expectations or assumptions of note that counsel or arbitrators need to be aware of in relation to international arbitration seated in Japan.

51 Third-party funding

Is third-party funding permitted in your jurisdiction? If so, are there any rules governing its use?

At present, in Japan, we believe that no individuals or organisations are providing third-party funding of commercial arbitration.

In Japan, there is no statute or court precedent that expressly and directly bans third-party funding. However, it is still under discussion whether any statutory provisions shall indirectly prohibit third-party funding. For example, article 72 of the Attorney Act sets forth that no person other than an attorney may for the purpose of obtaining compensation engage in the business of providing legal services. A third-party funder would be exposed to the risk of violating this provision if it significantly influences a party's action in arbitration.

Specific schemes and legal issues related to third-party funding are still under discussion in Japan.

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