GAR KNOW HOW COMMERCIAL ARBITRATION

Japan

Sachiko Taniguchi and Joshua M Bennett

Paul Hastings LLP

JUNE 2023

GAR

Infrastructure

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

Japan signed and ratified the New York Convention in 1961, subject to the "reciprocity" reservation (ie, Japan will apply the New York Convention to the recognition and enforcement of awards made only in the territory of another contracting state).

2 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 and the Geneva Convention on the Execution of Foreign Arbitral Awards 1927. Japan signed the ICSID Convention in 1965. In 2021, the Japan International Dispute Resolution Center (JIDRC) and the ICSID signed an Agreement on General Arrangements, allowing ICSID hearings to be held at JIDRC's facilities in Japan.

3 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 Act (Act No. 138) governs arbitration proceedings in Japan, and is based on the 1985 UNCITRAL Model Law. In 2021, the government of Japan, led by the Ministry of Justice, proposed revisions to the Arbitration Act to incorporate the amendments made in the 2006 UNCITRAL Model Law, with a focus on modernising the Act such that it meets current international standards. On 28 February 2023, Japan's Cabinet adopted this bill and sent it to Congress to pass it into law.

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

The Japan Commercial Arbitration Association (JCAA), instituted in 1950, is one of the oldest international arbitration institutions in the world. It acts as an appointing and administrative authority in arbitrations under its own Rules or the UNCITRAL Rules. A majority of cases handled by the JCAA involve one or more non-Japanese parties.

JCAA's own rules include the Commercial Arbitration Rules 2021 and the Interactive Rules 2021. The Commercial Arbitration Rules 2021 are commensurate with the UNCITRAL Rules, with a few unique provisions regarding expedited procedures, emergency arbitrator measures, multi-party or multi-contract arbitrations, and explicit rules on tribunal secretaries. The Interactive Rules 2021 adopts rules and concepts that are prominent in civil law jurisdictions, with a goal to provide maximum predictability and efficiency in arbitration proceedings.

5 Can foreign arbitral providers operate in your jurisdiction?

Yes, and they choose any city in Japan, such as Tokyo, Kyoto or Osaka, as the seat of arbitration, and conduct the arbitration under the rules of arbitral institutions based outside of Japan, including the ICC, Singapore International Arbitration Centre, AAA/IDRC and other bodies.

6 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, but the judiciary in Japanese courts is familiar with and supportive of the law and practice of international arbitration.

Agreement to arbitrate

7 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?

An arbitration agreement must be "in writing" under article 13 of the Arbitration Act (Act No. 138). Under article 13, an arbitration agreement made "in writing" includes an agreement signed in counterparts and an agreement in writing that incorporates by reference a document containing an arbitration agreement. An arbitration agreement can cover future disputes.

The government of Japan published proposed amendments to the Arbitration Act in March 2021, which await a vote by Congress), and would revise, among other provisions, article 13, to permit oral arbitration agreements in certain circumstances.

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

Unless otherwise provided in other laws or regulations, the Arbitration Act (Act No. 138) clarifies that parties can submit any civil disputes that they can otherwise settle or resolve (excluding cases related to divorce or dissolution of adoption) to arbitration. Such civil disputes can be either contractual or non-contractual.

With respect to any arbitration agreement that post-dates the 2003 enactment of the Arbitration Act, and that is entered between a consumer and a business operator for the purposes of resolving future disputes, the consumer may terminate such agreement at will. Further, any arbitration agreement that post-dates the 2003 enactment of the Arbitration Act, and that is entered for the purpose of resolving a future employment dispute, is invalid.

9 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?

Under Japanese law, a third party cannot be bound by an arbitration clause without its consent. The Arbitration Act (Act No. 138) does not contain provisions concerning joinder or third-party notice. However, with regard to certain court proceedings provided under the Arbitration Act, which include proceedings relating to evidentiary hearings and challenging or enforcing awards, third parties whose interests may be in conflict with the court decision may appeal within two weeks from receiving a notice or the decision. See article 7 of the Act.

Further, both the JCAA's Commercial Arbitration Rules 2021 and the Interactive Rules 2021 provide that third parties may participate in the arbitration process through joinder if all parties, including the third parties, consent in writing, and all claims are made under the same arbitration agreement. See article 56 of the Commercial Arbitration Rules 2021 and article 57 of the Interactive Rules 2021.

10 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?

Under Japanese law, a tribunal cannot consolidate proceedings without the consent of all the parties concerned. The Arbitration Act (Act No. 138) does not have provisions concerning consolidation.

The JCAA's Commercial Arbitration Rules 2021 and the Interactive Rules 2021 both provide tribunals with the authority to consolidate separate arbitral proceedings under certain conditions. These conditions include:

- all parties consent in writing;
- the pending claims and the other claims arise from the same arbitration agreement are between the same parties, and pertain to similar issues;
- JCAA is the chosen arbitration institute or JCAA's rules are chosen as the governing rules, and
- the consolidation will not create any undue prejudice. See article 57 of the Commercial Arbitration Rules 2021 and article 58 of the Interactive Rules 2021.

11 Is the "group of companies doctrine" recognised in your jurisdiction?

Japanese law does not recognise the "group of companies doctrine". Group companies must be parties to an arbitration agreement to be bound by it. An award based on this doctrine may be subject to a challenge as exceeding the scope of an arbitration agreement. However, the corporate veil may be "pierced" to bind a third-party group company to an arbitration agreement where a separate corporate entity is found to be merely a façade. See Saikō Saibansho [Sup. Ct.] Feb. 27, 1969, Sho 43 (o) No. 877, 551 Hanrei Taimuzu [Hanta] 80 (Japan).

12 Are arbitration clauses considered separable from the main contract?

Yes. An arbitration agreement is still valid even if the other parts of the contract are invalid or ineffective. See article 13(6) of the Arbitration Act (Act No. 138).

13 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?

Yes, but as an initial matter, a tribunal may rule on its own "substantive jurisdiction" (ie, whether it has the authority to conduct arbitral proceedings and render arbitral decisions for the case submitted to it). See article 23(1) of the Arbitration Act (Act No. 138). A party may challenge such a ruling by no later than the submission of its first memorial unless it persuade the tribunal that there is a legitimate reason for the delay. See article 23(2) of the Act.

A party may apply to a court to determine the tribunal's substantive jurisdiction within 30 days of receiving the notice of the tribunal's ruling (article 23(5) of the Act). However, the tribunal may proceed with the arbitral proceedings and render its arbitral award during the pendency of such an application. Id.

14 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?

An arbitration agreement must be in writing. See question 7. To avoid any uncertainty, parties should study a few sample arbitration clauses and clearly word their own. See, for example, JCAA's sample arbitration clauses. At a minimum, parties should specify (i) their intent to arbitrate disputes for a final resolution and the scope of such disputes that will be subject to arbitration; (ii) which arbitration institution will be the appointing and administrative authority; (iii) applicable arbitration rules; (iv) the seat of arbitration; and (v) the number of arbitrators.

15 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?

Institutional international arbitration is more common than ad hoc international arbitration particularly for complex and/or high-stakes cross-border commercial disputes. If parties chose the JCAA as the appointing and administrating authority but did not choose the governing arbitration rules, the JCAA's Commercial Arbitration Rules 2021 will automatically apply. Parties to entirely ad hoc international arbitrations often adopt rules that are viewed as most standard (eg, the UNCITRAL Rules).

16 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 Act (Act No. 138) does not contain any provision regarding multi-party arbitration agreements or proceedings. In drafting a multi-party arbitration agreement, the parties should ensure they have an equal opportunity to participate in the constitution of the tribunal. To do so, the parties may wish to agree that each of the claimant parties collectively and the respondent parties collectively nominate one arbitrator, and the chair of the tribunal shall be elected either jointly by the two party-nominated arbitrators or by the relevant institution.

The JCAA's Commercial Arbitration Rules 2021 and Interactive Rules 2021 both have provisions pertaining to the appointment of arbitrators in a multi-party arbitration. See article 29 of either of these Rules.

Commencing the arbitration

17 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?

Unless the parties agree otherwise (eg, by adopting institutional arbitration rules that provide otherwise), arbitral proceedings are commenced in Japan by written notice to the other party/parties. See article 29(1) of the Arbitration Act (Act No. 138). If the parties adopt the JCAA's Commercial Arbitration Rules 2021 or Interactive Rules 2021, arbitral proceedings are commenced on the date on which the Request for Arbitration has been received by the JCAA.

Filing of an arbitration interrupts a running limitation period. However, such interruption will be deemed to have not occurred if the arbitral proceedings are concluded without an arbitral award. See article 29(2) of the Act.

Choice of law

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

A tribunal will decide the dispute in accordance with the law chosen by the parties. See article 36(1) of the Arbitration Act (Act No. 138). Unless otherwise specified by the parties in a choice-of-law agreement, the parties' choice-of-law will be the substantive law of a country, as opposed to such country's conflict of law rules. Id. In the absence of a choice-of-law agreement, the tribunal will typically apply the law of the country that is most closely connected to and that should be directly applicable to the dispute (article 36(2) of the Act.) Notwithstanding the absence of a choice-of-law agreement, if the parties express their preference, the tribunal can exercise its fair and good faith judgement to consider it. See article 36(3) of the Act. In appropriate cases, and notwithstanding the parties' choice of law, foreign mandatory laws may be considered and/or applied through article 90 of the Civil Code.

Appointing the tribunal

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

The Arbitration Act (Act No. 138) places few limitations on a party's choice of arbitrator, other than requiring the arbitrator be independent and impartial to be qualified (article 18 of the Act). If the tribunal rules on a challenge and a party wishes to appeal, the party may apply to the court to remove an arbitrator (article 19(4) of the Act).

20 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?

Non-nationals can act as arbitrators where the seat is in Japan or hearings are held in Japan. Non-national arbitrators are common in cases pending before the JCAA.

Foreign arbitrators may be subject to standard immigration requirements, including to obtain a work visa. See the Ministry of Foreign Affairs of Japan's website for more detail.

21 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?

Article 17 of the Arbitration Act (Act No. 138) provides the procedure for appointing arbitrators where no nomination is made by a party or parties. If two parties have agreed to appoint three arbitrators but have not agreed to a procedure to appoint arbitrators, each party nominates one arbitrator and the two party-nominated arbitrators will appoint the third arbitrator. If either party fails to timely nominate one arbitrator, the other party may apply to the court to appoint one arbitrator. If two party-nominated arbitrators fail to timely nominate the third arbitrator, either party may apply to the court to appoint the third arbitrator. If two parties have agreed to appoint one arbitrator but have not agreed to a procedure to appoint an arbitrator, and have failed to agree to a procedure to appoint an arbitrator, either party may apply to the court to appoint an arbitrator. If more than three parties are involved, and the parties have not agreed to a procedure to appoint an arbitrator, the parties may apply to the court to appoint an arbitrator.

That said, the main institutional rules, including the JCAA's rules all include default procedures for the appointment of arbitrators and the proper constitution of the tribunal.

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

The Arbitration Act does not provide for the immunity of arbitrators from suit in Japan. Therefore, arbitrators may be liable for contractual breaches or illegal action as a matter of theory.

Article 13 of the JCAA's Commercial Arbitration Rules 2021 and Interactive Rules 2021 both provide that arbitrators are not liable for anything done or omitted in the course of conducting the arbitration unless the act or omission is shown to have been in bad faith or grossly negligent.

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

The tribunal may specify a payment schedule and require an advance payment of fees and expenses unless otherwise agreed by the parties. If parties fail to make an advance payment in accordance with the payment schedule, unless the parties have agreed otherwise, the tribunal may pause or cancel the arbitral proceedings. See article 48 of the Arbitration Act (Act No. 138).

Similarly, under article 82 of the JCAA's Commercial Arbitration Rules 2021 and article 83 of JCAA's Interactive Rules 2021, the tribunal may specify a payment schedule and require the parties to make an advance payment of fees and expenses. If the parties fail to make an advance payment in accordance with the payment schedule, the JCAA must pause or cancel the arbitral proceedings.

Challenges to arbitrators

24 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?

Arbitrators are required to fully disclose all facts and circumstances that may potentially raise a doubt as to his or her impartiality or independence during the pendency of the arbitration. See Art. 18(4) of the Arbitration Act (Act No. 138).

A party may challenge an arbitrator if (i) the arbitrator does not qualify under the parties' agreement, or (ii) the circumstances give rise to a legitimate doubt as to the impartiality and independence of the arbitrator. After the tribunal rules on the challenge, the party may apply to a court to appeal. See article 19 of the Act.

Further, if circumstances show that an arbitrator (i) has become legally or factually incapable of fulfilling his or her duties as an arbitrator, or (ii) unreasonably delays the arbitral proceedings, a party may apply to a court to challenge the arbitrator. If the court finds the challenge is valid, the court must terminate the arbitrator. See article 20 of the Act.

The IBA Guidelines on Conflicts of Interest are likely to be given some weight by the courts in Japan. In Saikō Saibansho [Sup.Ct.] Dec. 12, 2017, Hei 28 (kyo) No. 43, 1447 Hanrei Taimuzu [Hanta] 42 (Japan), the Supreme Court of Japan reviewed whether a failure to timely disclose an actual conflict of interest constituted a violation of an arbitrator's disclosure obligation under Article 18(4) of the Act. The Supreme Court ruled that an arbitrator was not relieved from his disclosure obligation by merely providing an advance waiver or statement in relation to possible conflicts of interest arising from facts and circumstances that may arise in the future. This ruling is considered consistent with 3(b) of the IBA Guidelines.

Interim relief

25 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?

Both tribunals and the courts have the power to grant interim relief in connection with a civil dispute that is subject to arbitration pursuant to the parties' arbitration agreement before or during arbitral proceedings. See article 15 of the Arbitration Act (Act No. 138). The interim relief available from courts can include orders against third parties (eg, requiring a third party to pay). The interim relief available from tribunals can be anything they consider necessary for the subject matter of an arbitration before them, but the power of tribunals may not extend to orders against third parties (article 24(1) of the Act).

The JCAA's Commercial Arbitration Rules 2021 and Interactive Rules 2021 both have detailed provisions regarding the tribunal's power and procedures to grant interim relief.

Anti-suit injunctions are not available in Japan. However, if proceedings are brought to a court in Japan in breach of an arbitration agreement, the court must dismiss the case upon receiving the defendant's application unless one of the following circumstances exists:

- the arbitration agreement is invalid or ineffective;
- the tribunal is unable to conduct the arbitration in accordance with the arbitration agreement; or
- the defendant's application was made after the defendant had already made an oral argument. See article 14 of the Act.

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

Both tribunals and courts can order a party to provide a reasonable security for costs. See articles 15 and 24(2) of the Arbitration Act (Act No. 138), article 14 of the Civil Provisional Remedies Act (Act No. 91).

Procedure

27 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)?

Certain provisions in the Arbitration Act (Act No. 138) are mandatory. For example, tribunals must fully disclose conflicts of interest; treat the parties equally; provide the parties with sufficient opportunities to argue the case; conclude the arbitral proceedings if the claimant fails to timely present its case; and sign the arbitral award, among others. See articles 18, 25, 32, and 39 of the Arbitration Act (Act No. 138). Further, the parties must, for example, present their cases in a timely manner; must make the evidentiary records available to the other parties; and make applications to correct the award in a timely manner. See articles 31, 32, and 41 of the Act.

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

Unless otherwise agreed by the parties, a respondent must argue its defence in accordance with the procedural timetable ordered by the tribunal. See article 31(2) of the Arbitration Act (Act No. 138). If the respondent fails to participate in an arbitration in a timely manner, the tribunal must proceed with the arbitral proceedings without assuming that the respondent accepted the claimant's claims (article 33(2) of the Act). Further, if either party fails to participate in a hearing without a legitimate reason, the tribunal may render an arbitral award based on the evidence presented to it by that time (article 33(3) of the Act).

29 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?

The Arbitration Act (Act No. 138) does not place any limit on the tribunal's power to decide all evidentiary matters, except where the parties have agreed to apply to a court for taking evidence. See article 35 of the Act. The IBA Rules on the Taking of Evidence is recognised as a leading authority in Japan, but the legal community in Japan often espouses the view that parties from common law jurisdictions find the IBA Rules easier to adopt than parties from civil law jurisdictions.

The Prague Rules offer an alternative framework that follows the civil law approach to the taking of evidence with the aim of reducing costs and time, and to achieve more effective and faster arbitral proceedings. Coincidentally, the JCAA also issued the Interactive Rules with the aim of incorporating the civil law approach and increasing efficiency of arbitral proceedings. Despite many differences, they share the same interest. We will wait to see how they become prominent in the future to serve their purposes.

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

Unless otherwise agreed by the parties, the tribunal or the parties may apply to a court for the taking of evidence if the tribunal considers it necessary. If the parties wish to apply to a court, they must obtain the tribunal's consent. The court has the power to order inspection, conduct witness examinations, or take expert testimony and documentary evidence. See article 35 of the Arbitration Act (Act No. 138).

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

The Arbitration Act (Act No. 138) places no limit on the tribunal's power to decide the scope of document production. The parties or the tribunal may adopt the IBA Rules and Prague Rules. The Japanese Code of Civil Procedure allows a relatively limited scope of document production compared to the scope in common law jurisdictions, such as the US, but international arbitral tribunals seated in Japan may exercise their discretion to determine a much wider scope of document production if doing so equally serves the needs of the parties.

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

No. Unless otherwise agreed by the parties, the tribunal can decide whether to have a final hearing on the merits. However, if either party seeks a final hearing, the tribunal must conduct a hearing at an appropriate time during the arbitral proceedings. See article 32 of the Arbitration Act (Act No. 138).

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

Unless otherwise agreed by the parties, the tribunal may conduct oral hearings, witness examinations, and review of documents or objects in any location. See article 28 of the Arbitration Act (Act No. 138).

Award

34 Can the tribunal decide by majority?

Yes. Unless otherwise agreed by the parties, the tribunal may decide by majority. See article 32(2) of the Arbitration Act (Act No. 138).

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

The Arbitration Act (Act No. 138) does not place any limit on the tribunal's power to grant remedies or relief. The tribunal can award any remedy that would be available under the law that is governing the case.

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

The Arbitration Act (Act No. 138) does not prohibit arbitrators from stating dissenting opinions in their arbitral awards. Japanese courts have ruled that whether to state a dissenting opinion is subject to the arbitrator's discretion. See, for example, Tokyo Kōtō Saibansho [Tokyo Hih Ct.] 1 August 2018, Hei 30 (ra) No. 817, 2415 Hanrei Jihō [Hanji] 24 (Japan).

37 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 each arbitrator who renders the decision. If the tribunal is a panel consisting of more than two arbitrators, a majority of the arbitrators must sign and state the reason for not including the signature of the other arbitrator(s). See article 39(1) of the Arbitration Act (Act No. 138). In addition, the tribunal must state the reason for its decision unless otherwise agreed by the parties, as well as the date and the seat of the arbitration. See article 39(2)(3) of the Act. The tribunal must notify each party of the award by sending a copy (article 39(5) of the Act).

38 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?

If a party wishes to apply for a correction or interpretation, it must do so within 30 days of receiving a notification of the award. The tribunal then must decide on the application within 30 days of the filing of the application. The tribunal may extend the deadline if it considers an extension is necessary. See articles 41 and 42 of the Arbitration Act (Act No. 138). Further, if the tribunal does not decide on any one of the claims filed for arbitration, unless otherwise agreed by the parties, the parties can seek an application for an additional award within 30 days of receiving notification of the award. The tribunal must decide on the application within 60 days of the filing of the application.

The parties may seek an application to challenge the award within three months of receiving a notification of the award (article 44(2) of the Act).

Costs and interest

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

The 'loser pays' rule does not generally apply in Japan, and the Arbitration Act (Act No. 138) requires each party to pay its own cost unless otherwise agreed by the parties. See article 49(2) of the Act. If there is an agreement by the parties, pursuant to that agreement, the tribunal may require one of the parties to bear a certain amount of costs incurred by the other party. See article 49(3) of the Act.

Article 80 of the JCAA's Commercial Arbitration Rules 2021 and article 81 of JCAA's Interactive Rules 2021 provide the tribunal with the authority to allocate the costs among the parties by taking into account the procedural history, the arbitral award, and other facts and circumstances.

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

The Arbitration Act does not address the tribunal's or the parties' ability to grant or claim interest on the principal claim and costs. The parties are not prohibited from agreeing on the tribunal's power to award interest. If the parties' choice of substantive law is Japanese law, the interest rate of 3 per cent applies to interest that is incurred on or after 1 April 2020.

Challenging awards

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

The Arbitration Act (Act No. 138) does not provide for an appeal mechanism. An arbitral award is final, and the arbitral proceedings will conclude when the tribunal renders an award (articles 40(1) and 45(1) of the Act). Question 42 discusses grounds for challenging an award, but these are not appeals, as no adjudicatory body will review the merits of the case again.

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

If the seat of an arbitration is Japan, the parties can challenge an arbitral award on a few grounds, which are generally commensurate with the grounds stipulated in article V of the New York Convention (articles 3(1) and 44 of the Arbitration Act (Act No. 138)). Grounds for challenge under the Act include:

- the parties to the arbitration agreement were under some incapacity, or the agreement is not valid under the law of the parties' choice (in the absence of such choice of law, under Japanese law);
- a party was not given proper notice under Japanese law of the appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to defend itself;
- the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;
- the composition of the arbitral authority or the arbitral procedure was not in accordance with Japanese law;
- the claims were not capable of settlement by arbitration under Japanese law; and
- the substance of the arbitral award violates the public policy or the good manner and customs under Japanese law.

No party can submit an application to challenge the award after three months have passed since the notice of the award or a court has ordered enforcement of the award (articles 44(2) and 46 of the Act).

43 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 Act (Act No. 138) is silent on this issue. Very few cases have addressed this issue, either. Generally, parties cannot agree to exclude any right to challenge an award before the commencement of the arbitral proceedings or otherwise waive such a right in advance. In particular, parties cannot agree to exclude the right to assert a public policy violation as a ground to challenge an award. See article 44(1)(h) of the Act. However, Japanese courts may consider facts and circumstances to decide the materiality of a procedural violation when they decide whether the parties can waive their right to assert that ground to challenge an award. See eg, Kobe Chihō Saibansho [Kobe Dist. Ct.] 29 Sep. 1993, Hei 2 (wa) No. 103, 863 Hanrei Taimuzu [Hanta] 273 (Japan) (the Kobe District Court ruled that a failure to disclose certain evidentiary records to the representative counsel of the respondent did not constitute a ground to challenge an award based on a finding that parties had waived their right to assert such a procedural violation when it did not object to the non-disclosure). See also Sapporo Chihō Saibansho [Sapporo Dist. Ct.] 20 March 1978, Sho 51 (wa) No. 585, 907 Hanrei Jiho [Hanji] 88 (Japan) (the Sapporo District Court ruled that the parties could no longer assert the arbitrator's bias as a ground to challenge the award after finding that the parties had known the facts and circumstances that brought a legitimate doubt as to the arbitrator's impartiality during the arbitral proceedings).

Enforcement in your jurisdiction

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

If an award is set aside in the seat of arbitration, Japanese courts still maintain their discretion to enforce the award. However, they will review the grounds asserted by the parties for challenging the award, and may refuse to enforce the award if they conclude that such grounds exists (article 46(8) of the Arbitration Act (Act No. 138).

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

Japanese courts are pro-arbitration and favour enforcement absent exceptional circumstances. Recent Japanese court decisions confirm this approach. Japanese courts respect party autonomy in arbitral proceedings and limit their interference to a bare minimum. See, eg, Tokyō Chihō Saibansho [Tokyo Dist. Ct.] June 13, 2011, Hei (21) (chu) No. 6, 2128 Hanrei Jiho [Hanji] 58 (Japan) and Tokyō Kōtō Saibansho [Tokyo High Ct.] August 1, 2018 Hei 30 (ra) No. 817, 2415 Hanrei Jiho [Hanji] 24 (Japan).

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

Unless otherwise agreed by the parties, foreign states are not immune from jurisdiction with regard to the existence or validity of an arbitration agreement or any judicial proceedings in connection with arbitral proceedings (article 16 of the Act on the Civil Jurisdiction of Japan with respect to Foreign States (Act No. 48)). Further, foreign states are not immune from jurisdiction in connection with any proceedings of provisional order or civil execution against the property held by the foreign state if the foreign state has provided consent in writing, either in a treaty, an arbitration agreement, a written contract, or a statement made during the proceedings of the provisional order or civil execution (article 17 of the Act).

Further considerations

47 To what extent are arbitral proceedings in your jurisdiction confidential?

There is no provision relating to confidentiality in the Arbitration Act (Act No. 138). However, confidentiality of arbitral proceedings is key to distinguishing them from court proceedings and, in practice, parties protect the confidentiality of arbitral proceedings by a confidentiality agreement. Further, the JCAA's Commercial Arbitration Rules 2021 and Interactive Rules 2021 provide that arbitral proceedings are confidential and that those who are involved in arbitral proceedings, including arbitrators, parties, representative counsel and their staff, and JCAA's members, owe strict confidentiality obligations (article 42 of the Rules).

48 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)?

There is no provision relating to confidentiality in the Arbitration Act (Act No. 138). However, confidentiality of arbitral proceedings is key to distinguishing them from court proceedings and, in practice, parties protect the confidentiality of arbitral proceedings, including the confidentiality of evidence produced and pleadings filed in the arbitration, by a confidentiality agreement.

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

The Arbitration Act (Act No. 138) does not contain any ethical codes or other professional standards. Counsel and arbitrators conducting arbitral proceedings in Japan are obligated to comply with the ethical codes and professional standards of their home jurisdiction or bars.

50 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?

No. Tribunals seated in Japan are free to adopt the procedures of the parties' preference.

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

Japanese law currently does not address the availability of litigation funding in Japan, nor does it expressly prohibit third-party funding of claims. Given the absence of a legal framework for regulating third-party funding, one might expect Japanese courts to take a conservative approach at this time.

Sachiko Taniguchi

Paul Hastings LLP

OVERVIEW

Sachiko Taniguchi is a senior associate based in New York. Ms. Taniguchi is a member of the firm's Complex Litigation and Arbitration practice group. Ms. Taniguchi's practice focuses on representing multi-national clients in domestic U.S. federal and state court, as well as arbitration proceedings in high- stakes commercial disputes across various industries, ranging from construction machinery, healthcare, pharmaceuticals, biotechnology, and commercial real estate.

Her strong cultural fluency and bilingual skills, coupled with her skills as a U.S.-trained litigator, uniquely qualify Ms. Taniguchi to represent Japanese clients in cross-border disputes. She has extensive experience serving as a core member, representing world-leading Japanese companies, in cross-border commercial disputes.

RECOGNITIONS

- The Legal 500 USA, International Arbitration (2022)
- Recognized as Ones to Watch in Japan, Litigation – The Best Lawyers in Japan (2022, 2023)

EDUCATION

- The University of Chicago Law School, LL.M., 2017
- The Legal Research and Training Institute of the Supreme Court of Japan, 2013
- Waseda University Law School, J.D., 2011
- Waseda University School of International Liberal Studies, B.A., 2007 (First in Class of 2008; Graduation in 3.5 Years)
- Grinnell College, Exchange Program, 2005-2006

Joshua M Bennett

Paul Hastings LLP

OVERVIEW

Joshua Bennett is a Partner in the Litigation Department. He is based in the New York office and a member of the Complex Litigation and Arbitration practice. He handles federal and state court trials and appeals, and domestic and international arbitrations, involving complex business disputes across various industries, jurisdictions, and cultures. He regularly collaborates with the firm's Intellectual Property and Life Sciences practices in high stakes matters, and has represented many of the world's leading companies in pharmaceuticals, biotechnology, healthcare, financial services, private equity, commercial real estate, and national defense.

He has extensive experience in contractual disputes, and is frequently called upon to handle issues involving business torts, damages and other remedies. He has served as a lead member in bench and jury trials throughout the United States, and arbitration hearings domestically and internationally, including under the rules of the AAA, JAMS, ICDR, ICC, and SIAC.

RECOGNITIONS

- Chambers USA, Litigation: "Up and Coming," General Commercial (2021-2022)
- New York Metro Super Lawyers: "Rising Star," Business Litigation (2014-2019)

EDUCATION

- Colgate University, B.A. 2001 (Philosophy)
- Fordham University School of Law, J.D. 2004
- Recipient of The Fordham Legal Writing Award, for receiving highest grade in 1L legal writing section taught by the Honorable Denny Chin, Circuit Judge for the United States Court of Appeals for the Second Circuit
- Member of Fordham International Law Journal
- Competition Director of Brendan Moore Trial Advocacy Center (Fordham's Nationally Ranked Mock Trial Team)
- Externship with the Honorable Leonard D. Wexler, Senior District Judge for the United States District Court for the Eastern District of New York

Paul Hastings LLP

Paul Hastings is a leading international law firm that provides innovative legal solutions to many of the world's top financial institutions and Fortune Global 500 companies. With offices across Asia, Europe and the US, we have the global reach and extensive capabilities to provide personalised service wherever our clients' needs take us.

Ark Hills Sengokuyama Mori Twr,
40th Floor, 1-9-10 Roppongi
Minato-Ku Tokyo, 13
106-0032
Japan
Tel: +81 3 6229 6100
Fax: +81 3 6229 7100

www.paulhastings.com/

Sachiko Taniguchi
sachikotaniguchi@paulhastings.com

Joshua M Bennett
joshuabennett@paulhastings.com