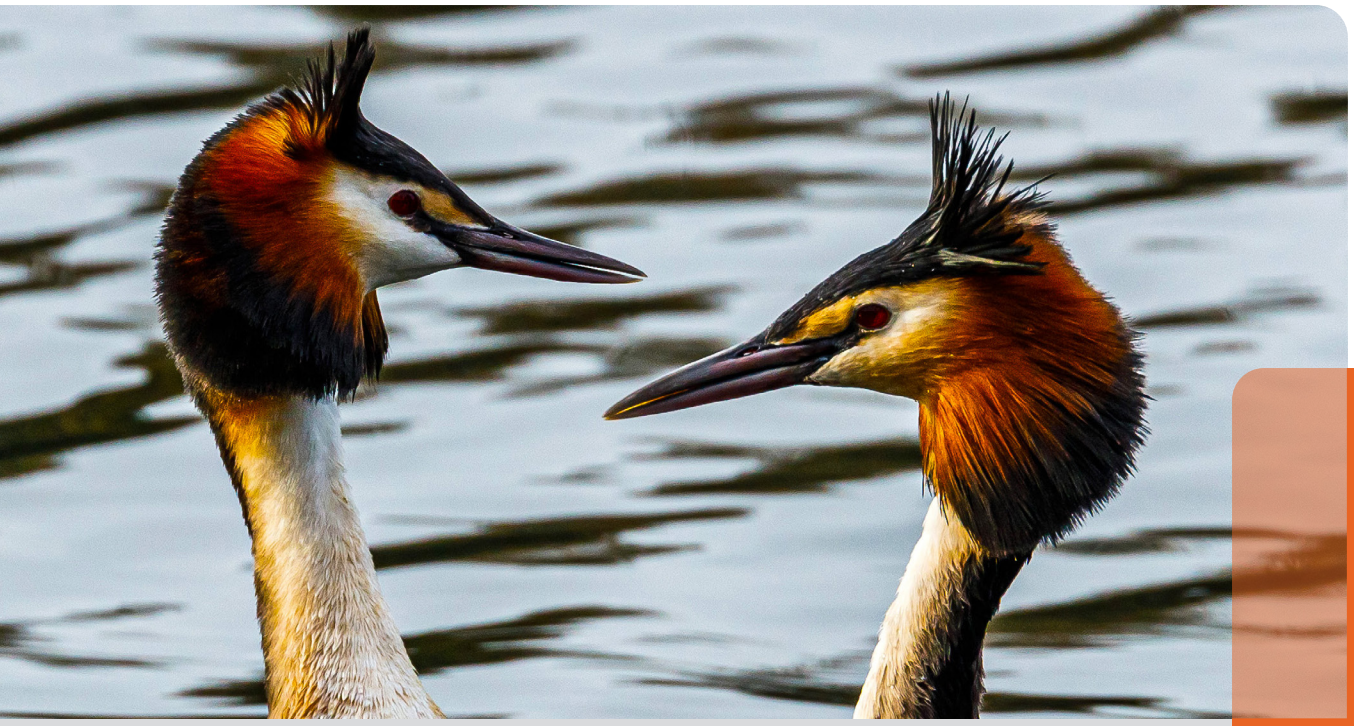
International
Comparative
Legal Guides



International Arbitration

2024

21st Edition

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

CDR Commercial Dispute Resolution
glg Global Legal Group

Preface

Expert Analysis Chapters

Q&A Chapters

Q&A Chapters Continued

International Comparative Legal Guides

Japan


Shinya Tago


Takuya Uenishi


Landry Guesdon

Iwata Godo

1 Arbitration Agreements

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

The arbitration agreement must be in writing (Article 13(2) of the Arbitration Act, Act No. 138 of 1 August 2003 (Arbitration Act)). Documents signed by all the parties or letters exchanged between the parties, including documents exchanged by fax or other communication devices, and other written instruments, are acceptable. The agreement can be made by means of electronic record, i.e., records produced by electronic, magnetic or any other means not recognisable by natural senses and used by a computer. For instance, an e-mail would satisfy the written form requirement (Article 13(3) and (4) of the Arbitration Act).

In addition, if a request for arbitration submitted by a party contains the contents of an arbitration agreement and the written response submitted by the other party does not contain anything to dispute it, such arbitration agreement shall be deemed to have been made in writing (Article 13(5) of the Arbitration Act). Article 13(1) provides that the agreement is valid only when the subject matter relates to a civil dispute (excluding divorce, etc.) that can be resolved by settlement between the parties.

In line with the 2006 UNCITRAL Model Law, the amended Arbitration Act (see our response to question 2.1) enables an arbitration agreement to meet the writing requirement even where it is part of a contract that has been concluded orally, by conduct, or by other means. A newly added Article 13(6) provides that if a non-written contract incorporates a written or electromagnetic record of arbitration agreement by reference as part of such contract, the arbitration agreement incorporated in such non-written contract is deemed to have been made in writing.

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

The Arbitration Act does not specify the elements that ought to be incorporated in the agreement. Typically, the following would be included: the parties; the scope of the arbitration agreement (i.e., the type of disputes that can be referred to arbitration); the seat of arbitration, which can be different from the venue and determines the procedural law of the arbitration; the governing law of the agreement, which can differ from the law of the substantive contract; the choice of rules if the rules of an arbitral institution govern the proceedings or in case of *ad hoc* arbitration (the number and appointment of arbitrators and their characteristics and qualification); the language of the arbitration; and a clause dealing with confidentiality.

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

In general, Japanese courts are pro-arbitration and will terminate (as opposed to simply staying) court proceedings in favour of arbitration if the arbitration agreement is valid and the dispute is arbitrable and falls within the scope of the arbitration agreement. Article 14(1) of the Arbitration Act provides that if an action is filed for a civil dispute subject to an arbitration agreement, the court must dismiss the action without prejudice upon the petition of the defendant, unless the court finds that the arbitration agreement is null and void, cancelled or for some reason invalid, or that arbitral proceedings are inoperative or incapable of being performed based on the arbitration agreement.

2 Governing Legislation

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

The Arbitration Act is applicable to arbitral proceedings whose seat of arbitration is in Japan. It is based on the 2006 UNCITRAL Model Law. On 21 April 2023, the Japanese Diet approved the Act Partially Amending the Arbitration Act (Act No. 15 of 2023) and the Act for Implementation of the United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention) (Act No. 16 of 2023) (the "Implementation Act"). The amendments incorporate changes made in the 2006 UNCITRAL Model Law. The amended Arbitration Act came into force in April 2024 and the Implementation Act came into force in April 2024 at the same time as the entry into force of the Singapore Convention. In addition, the Supreme Court Rules on Procedures of Arbitration Related Cases (Supreme Court Rule No. 27 of 26

November 2003) prescribe procedural rules for court cases relating to arbitration.

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

No distinction is drawn between domestic and international arbitration. The Arbitration Act sets out procedural rules, but should the parties specifically agree on other procedural rules (for example, the Japan Commercial Arbitration Association (JCAA)'s Commercial Arbitration Rules or the ICC Arbitration Rules), these rules will override the Arbitration Act, which will only fill the gaps.

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

The Arbitration Act is based on the 2006 UNCITRAL Model Law but the main differences are as follows:

- It applies to arbitration regardless of whether it is international or commercial, while the 2006 UNCITRAL Model Law applies explicitly to international commercial arbitration.
- It includes special provisions for the protection of consumers and individual employees in arbitration. With respect to the latter, the Act on Promoting the Resolution of Individual Labour-Related Disputes (Act No. 112 of 11 July 2001) promotes the swift resolution of individual labour disputes between employees and employers through mediation.
- It provides that if an arbitration agreement is made by way of electronic or magnetic record (such as e-mail), it will be deemed to have been made in writing.

Revisions to bring the Arbitration Act in line with the latest 2006 UNCITRAL Model Law came into force in 2024 (see our response to question 2.1).

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

There are no mandatory rules under the Arbitration Act, except for certain mandatory procedural rules affecting procedural public policy that may not be contracted out, and most of its provisions dealing with procedural aspects can be modified through an agreement between the parties.

3 Jurisdiction

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

Article 13(1) of the Arbitration Act provides that a matter is arbitrable where the subject matter relates to a civil dispute that can be resolved by settlement between the parties (disputes concerning divorce and separation being expressly excluded based on the premise that referring those disputes to a third party should be limited to the national courts). Unlike the 2006 UNCITRAL Model Law, the Arbitration Act includes specific provisions for the protection of consumers and individual employees (Appendix, Articles 3 and 4). A consumer can unilaterally terminate an agreement with a business operator to submit future disputes to arbitration. An arbitration agreement relating to labour disputes that may arise in the future between an individual employee and their employer is null and void. Disputes generally not arbitrable include, for instance: those pertaining to intellectual property rights granted by the government such as patent and trademark rights; taxation disputes that would bind the tax authorities; insolvency proceedings; and criminal and certain family law matters.

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

Article 23 of the Arbitration Act adopts the principle of competence-competence. An arbitral tribunal may rule on its on its own jurisdiction to decide the dispute. It may make a decision on this preliminary issue either in a ruling on the existence or validity of an arbitration agreement separate from the final award or in the final award. Where an arbitral tribunal rules that it has jurisdiction in the former case, any party who is dissatisfied with the decision can request, within 30 days of receiving notice of that ruling, that a Japanese court decide whether the tribunal has jurisdiction; and, in the latter case, that the court set aside the award. If the arbitral tribunal rules that it has no jurisdiction, the decision will result in the termination of the arbitral proceedings.

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

In principle, a valid arbitration agreement constitutes a bar to court proceedings. According to Article 14(1) of the Arbitration Act, if the defendant petitions a court before which an action is brought in a civil dispute that is the subject of an arbitration agreement, the court must dismiss the action, except when:

- The arbitration agreement is null and void, rescinded or invalid for some other reason.
- Arbitration proceedings are inoperative or incapable of being performed based on the arbitration agreement.
- The petition is filed by the defendant after their presentation on the merits in the oral hearing or in preparatory proceedings.

Article 14(2) provides that the arbitral tribunal may commence or continue the arbitration proceedings and make an arbitral award even while an action is pending before the court.

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

As explained in our response to question 3.2, courts have limited power to intervene to address the issue of the jurisdiction and competence of an arbitral tribunal. Where an arbitral tribunal rules that it has jurisdiction, any party who is dissatisfied with the decision can request, within 30 days of receiving notice of that ruling, that a Japanese court decide whether the tribunal has jurisdiction (Article 23(5) of the Arbitration Act). A party who is dissatisfied with the decision entrenched in the final award may request that the court set aside the award.

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

The Arbitration Act does not provide for circumstances under which an arbitral tribunal would assume or assert jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate. In principle, a contract containing an arbitration clause or an arbitration agreement does not apply to third parties who are not a party thereto. There is, however, a case in which the Tokyo High Court found that the scope of an arbitration agreement could be extended with respect to the parties to arbitration proceedings as a result of the application of the US Federal Arbitration Act, which is the law applied in New York, the agreed place of arbitration; New York law, having been determined to be applicable pursuant to Article 7(1) of the Act on General Rules of Application of Laws (Act No. 78 of 2007, *Horei*), the Japanese statutory conflict of law rules (*KK Nihon Kyoiku-sha v. Kenneth J. Feld* (Tokyo High Court, 30 May 1994)); appeal to the Supreme Court was denied (*Ringling Circus* case, Supreme Court, 4 September 1997). In addition to this landmark case on international arbitration agreements is a lower court decision, in which the Nagoya District Court held that the arbitration clause in a contract entered into by a company would extend to individuals closely associated with said company (Nagoya District Court, 27 October 1995, *Kaijiho Kenkyu*).

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

The Arbitration Act does not prescribe any limitation periods for the commencement of arbitration proceedings. Under Japanese law, the rules governing limitation periods are substantive rather than procedural. Accordingly, the parties may select the statute of limitations pursuant to the Act on General Rules of Application of Laws. For instance, under the recently amended Civil Code, civil and commercial claims will generally be time-barred if they are not made within five years after the obligee has come to know of the exercisable rights, or 10 years after the rights have become exercisable (Article 166(1), Civil Code).

The commencement of arbitration proceedings will toll the prescriptive period. However, this does not apply to cases where the arbitration proceedings have been terminated without an arbitral award (Article 29(2) of the Arbitration Act).

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

Article 44(1) of the Bankruptcy Act (Act No. 75 of 2005) provides that, when an order of commencement of bankruptcy proceedings is issued, all legal proceedings relating to the bankruptcy estate in which the bankrupted stands as a party must be discontinued. Other insolvency laws, such as the Civil Rehabilitation Act (Act No. 225 of 2000) and the Corporate Reorganisation Act (Act No. 154 of 2002) contain similar provisions. In the absence of a court decision in this connection, whether these articles apply to arbitration is still a moot point, as the original wording used in Japanese for legal proceedings in the article usually refers to court proceedings. Therefore, it is still difficult to assess the effect of ongoing insolvency proceedings on arbitration proceedings. Certain legal scholars argue that arbitration proceedings should be suspended upon the commencement of insolvency proceedings and resume once a bankruptcy trustee is appointed.

4 Choice of Law Rules

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

Under the Arbitration Act, the substantive law applied to the dispute by the arbitral tribunal is the law agreed upon by the parties. Absent an agreement on the applicable law, the tribunal applies the law of the state with which the dispute is most closely connected (Article 36(1) and (2)). Notwithstanding these provisions, the tribunal will decide *ex aequo et bono* if it has been expressly authorised to do so by the parties (Article 36(3)). In case of contractual dispute, the tribunal will decide in accordance with the terms of the contract and take into account applicable usages, if any (Article 36(4)).

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

The Arbitration Act does not provide for mandatory rules that would prevail over the parties' express choice of law. In general, where regulatory issues (e.g., relating to labour law, antitrust and patent law) are involved, mandatory laws may prevail over the law chosen by the parties to the arbitration.

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

According to Article 44(1), item 2 of the Arbitration Act, the validity and legality of an arbitration agreement is governed by the law agreed upon by the parties as the applicable law, or absent such an agreement, by the laws of Japan.

5 Selection of Arbitral Tribunal

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

There are no specified limits to the parties' autonomy to select arbitrators, and in the same way as the 2006 UNCITRAL Model Law, the Arbitration Act allows the parties extensive autonomy in relation to the selection of arbitrators, and the parties are free to determine the number of arbitrators and the procedure for appointing them (Articles 16(1) and 17(1), Arbitration Act). If the parties fail to agree on the number of arbitrators, the number is fixed at three as the default rule. In multi-party arbitration (i.e., arbitration involving three or more parties), the court will also determine the number of arbitrators based on the parties' requests (Article 16(2) and (3), Arbitration Act). Where the parties have agreed on institutional arbitration, the rules of the institution generally include detailed procedures which will supersede those set forth in the Arbitration Act.

Under the Arbitration Act, there are no nationality, residence or professional requirements for arbitrators, unless otherwise agreed by the parties (e.g., Article 17(6), item 1 for qualification).

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

The parties are free to agree on the procedure for the appointment of arbitrators (see question 5.1). In the absence of agreement on the appointment procedure, the Arbitration Act provides for the default rules as follows:

- If there are two parties and three arbitrators to be appointed, each party must appoint one arbitrator, and those arbitrators will in turn appoint the third arbitrator.
- If a party fails to appoint an arbitrator within 30 days of receiving a request to do so from the other party that has appointed an arbitrator, the court must appoint the arbitrator at the request of that party.
- If the two arbitrators fail to appoint a third arbitrator within 30 days of their appointment, the court must appoint the third arbitrator at the request of either of the parties (Article 17(2) of the Arbitration Act).
- If there are two parties and a sole arbitrator is to be appointed but the parties are unable to agree on the arbitrator, the court shall appoint an arbitrator at the request of either of the parties (Article 17(3)).
- In multi-party arbitration (involving three or more parties), the court shall appoint arbitrators at the request of a party (Article 17(4)).

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

See question 5.2. The courts can select arbitrators upon the petition of a party if there is no agreement on the selection of arbitrators, or the parties' party-appointed arbitrators fail to select arbitrators. In selecting arbitrators, the court shall consider the following factors: (i) the requirements applicable to the arbitrators under the agreement of the parties; (ii) the impartiality and independence of the appointees; and (iii) whether it would be appropriate to appoint an arbitrator of a nationality other than that of the parties (Article 17(6)).

Under Article 20 of the Arbitration Act, if an arbitrator becomes *de jure* or *de facto* unable to perform their duties, or, for other reasons, causes undue delay in performing these duties, a party can apply for the removal of the arbitrator and the court must remove the arbitrator on these grounds if they are found to exist.

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

Under the Arbitration Act, all arbitrators, including those appointed by the parties, are required to be impartial and independent. If circumstances exist that give rise to justifiable doubts as to an arbitrator's impartiality or independence, the arbitrator can be challenged (Article 18(1)(ii)). A person who is approached as a potential candidate must disclose all facts that could give rise to justifiable doubts as to their impartiality and independence (Article 18(3)) and the same duty is required with respect to an arbitrator in the course of the arbitral proceedings (Article 18(4)).

6 Procedural Rules

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

Japanese law imposes few limits on the parties' choice of procedural rules for arbitration. The Arbitration Act allows the parties to freely determine the rules of procedure and the arbitral tribunal is bound by these rules. Absent an agreement between the parties, the tribunal has broad discretion to determine the rules and conduct the arbitration in such a manner as it deems appropriate (Article 26(2)). The procedural rules selected by the parties, as well as the rights of each party or the arbitral tribunal, are subject to basic mandatory principles set forth in Article 25 of the Arbitration Act, regarding the equal treatment of the parties and due process/the right of each party to be given full opportunity to present their case in the proceedings, and in Article 26(1), which provides that the rules must not violate public order.

In addition, the Arbitration Act provides for a number of default rules with respect to procedure, including the: appointment of an arbitrator (Article 17); determination of the jurisdiction of the arbitral tribunal (Article 23(5)); waiver of the right to object (Article 27); place of arbitration (Article 28); commencement of arbitral proceedings and tolling of limitation (Article 29); language (Article 30); time limitation on parties' statements (Article 31); oral hearings (Article 32); default of a party (Article 33); expert appointment by the tribunal (Article 34); and taking of evidence (Article 35).

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

Certain procedural steps are required under the Arbitration Act: see our response to question 6.1 on equal treatment and due process (Article 25). In addition, other procedural steps include: considering the tribunal's jurisdiction under the competence-competence rule (Article 23(1)); time limitation for arguing about the tribunal's jurisdiction (Article 23(2)); prior notice of oral hearings (Article 32(3)); access to the other party's brief and documentary evidence (Article 32(4)); court assistance in taking evidence (Article 35); form of the award (Article 39); and termination of arbitral proceedings (Article 40).

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

There are no specific rules that govern the conduct of Japanese counsel in arbitral proceedings in Japan.

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

Duties include the obligation to comply with the overarching principles described in question 6.1. The Arbitration Act vests

a wide range of powers in the arbitral tribunal. It gives the arbitral tribunal the authority to rule on its own jurisdiction (competence-competence) (Article 23(1)), and the power to issue orders to take interim or provisional measures as the tribunal may deem necessary, and to order a party to provide security in relation therewith (Article 24). If there is no agreement between the parties, the tribunal can determine the rules and conduct the arbitration in such a manner as it considers appropriate (Article 26(2)). The tribunal has the power to hold oral hearings (Article 32), to appoint expert witnesses (Article 34) and authorise a party to apply to the court for assistance in witness examination and more generally with the examination of evidence (Article 35(2)).

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

The Arbitration Act does not require any specific qualifications for arbitrators. The Attorneys Act (Act No. 205 of 1949) prohibits non-lawyers (including lawyers admitted in foreign jurisdictions) from conducting legal business in Japan, provided that the foregoing does not apply if there is a provision to the contrary in this Act or another law (Article 72). A foreign lawyer registered in Japan may handle certain legal business in Japan, but only to the extent permitted under the Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers (Act No. 66 of 1986), and this Act provides that lawyers admitted in foreign jurisdictions, whether registered in Japan or not, may represent in international arbitration proceedings (Articles 53 and 59(2)).

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

There are no laws or rules providing for arbitrator immunity in Japan. The Arbitration Act does not contain provisions on the liability of an arbitrator. In institutional arbitration, the provisions of the arbitration rules of the institution apply. For instance, Article 13 of the JCAA's Commercial Arbitration Rules provides that the arbitrators are not liable to anyone for any act or omission in connection with the arbitration, unless such act or omission is shown to constitute wilful or gross negligence.

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

No – Article 4 of the Arbitration Act provides that, with respect to arbitration proceedings, the court may exercise its authority only in the cases provided for in the Act. The courts may intervene or support arbitration proceedings only when requested by the parties to the arbitration, and once the arbitral tribunal is established, procedural issues should be handled by the tribunal (Article 23(1)). For example, a court can assist a party with respect to service of written notice (Article 12), arbitrator appointments, challenges and removals (Articles 17, 19 and 20, respectively), challenging the jurisdiction of an arbitral tribunal (Article 23(5)), examination of evidence by the court (Article 35) and setting aside arbitral awards (Article 44).

7 Preliminary Relief and Interim Measures

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

Yes – unless otherwise agreed by the parties, an arbitral tribunal can order any party to take any interim measures or provisional measures that the arbitral tribunal considers necessary in respect of the subject matter of the dispute, upon the petition of a party (Article 24(1) of the Arbitration Act). In such cases, the arbitral tribunal can require any party to provide appropriate security in connection with such measures (Article 24(2) of the Arbitration Act). The arbitral tribunal can exercise such powers without any assistance from the court. However, an interim order made by the arbitral tribunal may not be enforceable by a Japanese court, and if a party needs enforceability, it may apply to the court for appropriate measures under the Civil Provisional Remedies Act (Act No. 91 of 1989) (see our response to question 7.6 on upcoming changes).

Under Article 71 of the JCAA's Commercial Arbitration Rules, a party may apply to the arbitral tribunal for the grant of interim measures. Interim measures include, for example, orders to: (1) maintain or restore the *status quo*; (2) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral proceedings themselves; (3) provide a means of preserving assets out of which a subsequent arbitral award may be satisfied; or (4) preserve evidence that may be relevant and material to the resolution of the dispute. The party requesting measures under Article 71.1(1), (2) and (3) must satisfy the arbitral tribunal that harm not adequately reparable is likely to result if the measure is not ordered and there is a reasonable possibility that the applicant will succeed on the merits of the claim.

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

According to Article 15 of the Arbitration Act, an arbitration agreement does not preclude the parties from filing a petition, before the commencement or during the course of the arbitration proceedings, for a provisional order with the court with respect to a civil dispute referred to arbitration, and the court that has received such petition, from issuing a provisional order.

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

The Japanese courts will apply the Civil Provisional Remedies Act to arbitration proceedings as it would do under other circumstances. The courts will assess whether the requirements for a temporary restraining order are satisfied under the Act. Pursuant to Article 13(1), a petition for a temporary restraining order can be filed, provided the purpose thereof, as well as the right or relationship of rights to be preserved and the necessity to preserve it, can be evidenced by making a *prima facie* showing. The courts may order either party to provide appropriate security for interim relief (Article 24).

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

Japanese courts may not issue an anti-suit injunction in aid of arbitration under any circumstances. In pursuance of Article 14(1) of the Arbitration Act, the courts, upon a petition by a party, must dismiss a claim on the merits relating to a civil dispute that is subject to an arbitration agreement (save in limited circumstances described in our response to question 3.3).

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

Yes – both the courts and arbitral tribunals may order a party to provide appropriate security for the interim measures they order (Article 14(1) of the Civil Provisional Remedies Act and Article 24(2) of the Arbitration Act, respectively).

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

Unless otherwise agreed by the parties, an arbitral tribunal can order any party to take any interim measures or preservative measures that the arbitral tribunal considers necessary in respect of the subject matter of the dispute upon the petition of a party (Article 24(1) of the Arbitration Act). Until April 2024, an interim order made by an arbitral tribunal could not be enforced by a Japanese court, as the order was not a final and binding arbitral award and did not have the same effect as a final and binding judgment. The amended Arbitration Act, which came into force in April 2024, allows Japanese courts to enforce interim or provisional measures that are granted by arbitral tribunals, including measures aimed at preserving assets to satisfy claims, maintaining the *status quo* between the parties, prohibiting conduct harmful to the arbitration process and preserving evidence.

8 Evidentiary Matters

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

The Arbitration Act does not provide for any specific rules of evidence. The parties can agree on procedural rules, including such rules in the arbitration agreement. However, absent an agreement between the parties, the arbitral tribunal can implement the arbitration procedure that it deems fit, and order the parties to disclose documents. The authority conferred upon the arbitral tribunal includes the authority to determine admissibility of evidence, the need to take evidence and its probative value (Article 26(3) of the Arbitration Act). Where the parties have selected institutional arbitration, they usually agree to apply the arbitration rules of the organisation. The arbitral tribunal or a party acting with its consent may apply to a competent court for assistance in taking evidence, as provided for in the Code of Civil Procedure (Law No. 109 of 1996). Importantly, there is no Japanese equivalent to US-style discovery, and the scope of discovery and disclosures is usually limited under Japanese law. The International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration are widely used by practitioners and arbitrators as guidelines.

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

Firstly, see our response to question 8.1.

The parties can agree on rules governing disclosures/discovery in the arbitration agreement; otherwise, the arbitral tribunal has broad powers to implement the procedure it shall deem fit (Article 26(3) of the Arbitration Act), and order the parties to make disclosures. Orders would generally be complied with by the parties on a voluntary basis, but decisions of the tribunal are not binding on third parties: it may not compel a third party to appear at a hearing or give/provide evidence, including through the production of documents. However, the courts can intervene to assist with the taking of evidence upon the request of the tribunal or of a party (see also our response to question 8.3).

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

Where necessary (failure to comply voluntarily), the arbitral tribunal, or a party acting with its consent, can petition the court to examine evidence under the Code of Civil Procedure (including obtaining document production orders from the court against third parties), unless the parties have agreed not to request the court to do so. If the court implements said examination of evidence, an arbitrator may inspect documents, or may ask witnesses or expert witnesses questions by obtaining the permission of the presiding judge (Article 35(1) and (5) of the Arbitration Act). Such a process must comply with the Code of Civil Procedure. The discovery process is very limited under Japanese law (see our response to question 8.1).

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

The Arbitration Act authorises the tribunal, absent an agreement to the contrary between the parties, to determine the rules applicable to the production of written and/or oral witness testimony, and the tribunal can decide whether oral or written evidence is required, pursuant to Article 26(3). Even if written testimonies were admissible, the arbitral tribunal generally allows the other party(ies) to cross-examine the witnesses at the hearing. The JCAA has a "documents-only proceedings" option. Apart from limited exceptions, the Civil Code of Procedure obligates any person appearing as a witness under the jurisdiction of Japan to be sworn under oath (Article 201), but the requirement does not apply to arbitration.

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

Under Japanese law, there is no clear concept of "attorney-client privilege" with respect to the production of documents.

However, the right to refuse to testify is granted to certain professionals, such as attorneys-at-law, patent attorneys or doctors who are protected by privilege under Article 197(1)(ii) of the Civil Code of Procedure, with respect to facts learned in the course of their duties, which remain confidential. Under Article 220(iv)(c) of this Code, documents detailing facts prescribed in Article 197(1)(ii) are excluded from the disclosure obligation.

9 Making an Award

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

Unless otherwise agreed by the parties, the arbitral award is made by a majority of the arbitrators. It must also be in writing and signed by the arbitrators. Where there is a panel of arbitrators, a majority of arbitrators must sign the award, and the reason for the omitted signatures must be stated. The award must state the reasons on which it is based, unless the parties have agreed otherwise; the date; and the place of arbitration. After the award is made, a copy of the written arbitral award signed by the arbitrator(s) is sent to the parties (Article 39 of the Arbitration Act). There is no requirement that the arbitrators should sign every page.

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

A tribunal can correct miscalculations, clerical errors and similar errors in the arbitral award, upon the petition of the parties, or by the tribunal acting on its own initiative (Article 41 of the Arbitration Act). The parties may ask that the tribunal provide an interpretation of specific parts of the award, provided there is an agreement between the parties regarding this request (Article 42 of the Arbitration Act). The tribunal may make an additional award in respect of a claim that was presented to the tribunal but not dealt with in the award upon the parties' petition (Article 43 of the Arbitration Act). These petitions must be filed within 30 days from the date of receipt of the notice of the arbitral award, unless otherwise agreed by the parties.

10 Challenge of an Award

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

An arbitral award cannot be appealed to the court, but it can be set aside by the court on certain grounds set forth in the Arbitration Act. A party can apply to the court to set aside the arbitral award, provided it does so within three months of the receipt of the award. No application can be filed once an enforcement decision on the award has become final and conclusive. The grounds for setting aside the award are listed in Article 44(1): (i) the arbitration agreement is not valid due to limits to a party's capacity, or for another reason under applicable law; (ii) the party making the application was not given notice as required under Japanese law in the proceedings to appoint arbitrators or during the arbitral proceedings; (iii) the party making the application was unable to present its case in the proceedings; (iv) the arbitral award contains decisions on matters beyond the scope of the arbitration agreement or the claims in the arbitral proceedings; (v) the composition of the arbitral tribunal or the arbitral proceedings were not in accordance with Japanese law (or where the parties have otherwise agreed on matters of law, that do not relate to public policy, this agreement); (vi) the claims in the arbitral proceedings relate to a dispute that cannot be the subject of an arbitration agreement under Japanese law; or (vii) the content of the arbitral award is repugnant to public policy or the good morals of Japan. The court can set aside the award if it finds any of the grounds above do exist, provided that, for grounds (i) through (v), the applicant can prove the existence of such grounds. The court can set aside the award on its own motion for (vi) and (vii), at the request of the parties for the other grounds.

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

No specific provision of the Arbitration Act allows parties to agree to exclude any basis of challenge against an arbitral award. It is generally considered that the parties may not do so.

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

No specific provision of the Arbitration Act precludes parties from expanding the grounds for appealing an arbitral award, but this is unlikely. In a judicial precedent, the court, as *obiter dictum*, rejected a party's argument to set aside the award based on an additional ground set forth in the parties' agreement (*Descente Ltd. v. Adidas-Salomon AG et al.*) (Tokyo District Court, 26 January 2004).

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

No appeal is permitted against an arbitral award, but a party can file a motion to set aside the award with a competent court within three months of the receipt of the award or before any enforcement decision has become final and binding (Article 44 of the Arbitration Act).

11 Enforcement of an Award

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

Yes – Japan acceded to the New York Convention on 20 June 1961, without any domestic legislation to implement it. Japan made a reciprocity reservation, by which it recognises and enforces only foreign arbitral awards made in other Member States. If a party seeks the enforcement of a foreign award made in a New York Convention Member State, the provisions of the Convention will apply with direct effect, and Article 46 of the Arbitration Act only applies to the enforcement procedure. Foreign awards made in a country that is not party to the Convention can be enforced according to the relevant provision of the Arbitration Act (Articles 45 and 46) and other relevant Japanese laws. There is, however, no significant difference between the Convention and the aforementioned Articles in terms of enforcement procedure.

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

No – although Japan has signed and ratified several bilateral treaties and other conventions, including the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, which refer to commercial arbitration, Japan is not a party to any regional Conventions concerning the recognition and enforcement of arbitral awards.

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

The New York Convention has a direct effect in Japan by interpretation of Article 98 of the Constitution of Japan on international treaties. The parties can simply follow the procedural requirements set forth in the Convention.

Under the Arbitration Act, irrespective of whether or not the place of arbitration is in Japan, an arbitral award has the same effect as a final and binding judgment. However, if a party seeks the civil execution of the award, it must obtain an enforcement order from the court pursuant to Article 46(1) of the Arbitration Act. The party seeking enforcement must file an application with the court for an enforcement order, together with a duly certified copy of the arbitral award and a Japanese translation of the award, if it is not in Japanese (Article 46(1) and (2)). The amended Arbitration Act (see our response to question 2.1) alleviates this translation burden by giving the courts the discretion to waive this requirement in whole or in part.

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

Arbitral awards, irrespective of whether or not the arbitration has taken place in Japan, shall have the same effect as a final and conclusive judgment (Article 45(1)), and the arbitral award can therefore be considered as *res judicata*.

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

Japanese courts may refuse to recognise or enforce an award if the content of the award is contrary to public policy (Article 45.2(ix) of the Arbitration Act). Japanese courts will examine whether the enforcement of the award will be in conformity with the laws of Japan, not only in terms of content, but also as a matter of procedural law.

12 Confidentiality

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

There is no requirement in the Arbitration Act that arbitral proceedings are to be kept confidential or that parties are subject to any duty of confidentiality. This is up to the parties' agreement (the parties generally agree that the proceedings shall remain confidential, either by express agreement or by incorporation of the institutional arbitration rules selected by them). The rules of most arbitration institutions in Japan, such as the JCAA, the Tokyo Maritime Arbitration Commission (TOMAC) of the Japan Shipping Exchange (JSE), or the arbitration centres established by local bar associations, include provisions dealing with confidentiality.

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

The Arbitration Act does not expressly prohibit parties from referring to or relying upon information disclosed during arbitral proceedings. Accordingly, unless otherwise agreed by parties or prohibited under institutional arbitration rules applicable to previous arbitral proceedings, parties may refer to information in subsequent court or arbitral proceedings.

13 Remedies / Interests / Costs

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

No, there are no such limits. However, punitive damages would not be enforceable by Japanese courts as being contrary to public policy in Japan. Under the New York Convention (Article 5(2)(b)) and the Arbitration Act (Articles 45 and 46), courts may refuse the enforcement of an award contrary to Japanese public order. Leave of enforcement of a foreign judgment ordering the payment of punitive damages was denied on the ground that a judgment that contained an institution not compatible with the fundamental principles of the Japanese legal system was contrary to public order (*Northcon I, Oregon Partnership v. Mansei Kôgyô Co., Ltd.* (Supreme Court, 11 July 1997)).

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

This would depend on the applicable substantive law, and be subject to any agreement between the parties. Before the 2020 reform of the Civil Code, where Japanese law was applicable to the merits of the case, the statutory interest used to be 6% *per annum* in commercial matters, and 5% *per annum* in other civil matters. The current rate, which is subject to triennial review, was set at 3% *per annum* for civil and commercial matters from 1 April 2020 (Article 404 of the Civil Code).

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

The Arbitration Act provides that costs incurred by the parties with respect to arbitral proceedings are allocated in accordance with the parties' agreement, and that, absent an agreement, each party bears the costs it has incurred in relation to the arbitral proceedings (Article 49(1)). If it were so agreed between the parties, the arbitral tribunal may determine, in an arbitral award or in a separate decision, the allocation of costs and the amount

one party must reimburse to the other, based on such allocation (Article 49(2)). A separate decision on costs has the same effect as an arbitral award (Article 49(3)).

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

Payments made by virtue of an arbitral award may be subject to tax in Japan. The basis of such taxation may differ depending on the nature of the payment and the underlying dispute, the taxable subjects and tax regime.

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

In general, funding by a third party is not specifically prohibited, although this is still considered to be a moot point. In terms of professional conduct rules, attorneys are not allowed to lend money to clients unless there are special circumstances, such as an emergency, which may justify a loan or advance. Professional funders are not active in the market, neither for litigation nor for arbitration. Contingency fee arrangements are allowed, although attorney fees must always be appropriate, and these arrangements might be deemed inappropriate if the fees are excessively high compared with the resulting benefit to the client.

14 Investor-State Arbitrations

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

Yes – Japan signed the Washington Convention on 23 September 1965, and ratified it on 17 August 1967.

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

Japan has entered into around 40 BITs and 20 free trade agreements and economic partnerships, including investor-state dispute settlement procedures. Japan is a party to the Energy Charter Treaty.

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

Japan does not have noteworthy standard terms or model language that it uses in its investment treaties. Japan's international investment agreements generally provide for national treatment and most-favoured-nation (MFN) treatment, except for Association of Southeast Asian Nations (ASEAN) economic partnership agreements (the MFN standard only applies to compensation for loss or damage) and Singapore (duty to favourably consider a possible MFN treatment) and the Regional Comprehensive Economic Partnership, under which the MFN clause does not apply to certain countries.

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

Under the Act on the Civil Jurisdiction of Japan over Foreign States (Act No. 24 of 24 April 2009), foreign states are immune from the civil jurisdiction of the Japanese courts, except as otherwise stated. It provides that a foreign state is subject to the jurisdiction of the courts in civil suits if it has expressly consented to the exercise of jurisdiction by a Japanese court, or has instituted proceedings before the court regarding the matter. A foreign state is also subject to Japanese court jurisdiction in civil suits regarding commercial transactions, labour contracts, pecuniary compensation for the death or injury of a person, or damage to or loss of tangible property, real estate rights, intellectual property, etc. Japan has jurisdiction over foreign states regarding the procedure for temporary restraining orders and civil execution against the property of a state, as detailed in the Act.

15 General

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

The Arbitration Act is based on the 1985 UNCITRAL Model Law on International Commercial Arbitration. The amendments of the Act, which came into force in 2024, seek to incorporate changes made in the 2006 UNCITRAL Model Law and allow Japan to better compete with popular arbitration destinations in the region, such as Singapore and Hong Kong.

The key amendments include the following:

- Enforcing interim and provisional measures: The amendments establish a mechanism allowing the courts to enforce interim or provisional measures ordered by an arbitral tribunal (see our response to question 7.6).
- Validity of the arbitration agreement: Arbitration agreements must be in writing but to deal with contracts concluded through other means, the "in writing" requirement is relaxed (see our response to question 1.1).
- The translation of documents into Japanese can often increase costs and create delays when a party applies for the recognition or enforcement of an arbitral award or for interim or provisional measures. Under the amended Act, the Japanese courts have discretion to waive this translation requirement (see our response to question 11.3).
- Changes to domestic courts' jurisdiction: The Arbitration Act, which only recognises three types of district courts as having jurisdiction in arbitration-related proceedings, allows the Tokyo and Osaka district courts to exercise concurrent jurisdiction over arbitration-related proceedings, including the examination of evidence and the enforcement of arbitral awards. The rationale for this reorganisation is the greater concentration of technical expertise in certain areas such as intellectual property and arbitration expertise in the Tokyo and Osaka courts.

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

In 2021, the JCAA revised provisions on expedited arbitration procedures and administrative fees in its existing Commercial

Arbitration Rules and Interactive Arbitration Rules, in order to build up a more user-friendly arbitration system.

In January 2022, the Japan International Dispute Resolution Centre (JIDRC) released a model agreement for online hearings. The parties can agree to conduct evidentiary hearings using an online video-conferencing platform.

15.3 What is the approach of the national courts in your jurisdiction towards the conduct of remote or virtual arbitration hearings as an effective substitute to in-person arbitration hearings? How (if at all) has that approach evolved since the onset of the COVID-19 pandemic?

Due to the COVID-19 pandemic, almost all arbitral proceedings became virtual. Statistics indicate that in 2022, 72% of arbitration cases at the JCAA were conducted completely online, while 14% were conducted partially online.

Shinya Tago is a Japanese Attorney-at-Law, admitted to the New York State Bar Association, and is the Managing Partner of Iwata Godo. His practice focuses on general corporate and commercial litigation, arbitration (domestic and international), conciliation and mediation, and includes antitrust litigation for domestic and international industry players. Shinya Tago has an LL.B. from Hitotsubashi University and an LL.M. from Cornell Law School.

Iwata Godo
Marunouchi Bldg., 15th Floor
2-4-1 Marunouchi, Chiyoda-ku
Tokyo 100-6315
Japan

Tel: +81 3 3214 6205
Email: stago@iwatagodo.com
LinkedIn: www.linkedin.com/in/shinya-tago-764b16197

Takuya Uenishi is a Japanese Attorney-at-Law (who has passed the New York State Bar Examination) and Partner. He has vast experience representing financial institutions (Japanese mega-banks, regional banks, trust banks, etc.) in litigations and cross-border transactions. He also has extensive experience as a litigator, involved in corporate-related lawsuits, damages suits, competition law-related disputes and labour disputes. He was seconded to the legal department of a Japanese mega-bank from 2014 to 2016. Takuya Uenishi is a member of the International Arbitration Committee of the Dai-ichi Tokyo Bar Association.

Iwata Godo
Marunouchi Bldg., 15th Floor
2-4-1 Marunouchi, Chiyoda-ku
Tokyo 100-6315
Japan

Tel: +81 3 3214 6205
Email: tuenishi@iwatagodo.com
URL: www.iwatagodo.com/lawyers/uenishi_takuya.html

Landry Guesdon is a Registered Foreign Attorney (Tokyo Bar) and Avocat (Paris Bar) and a member of the International Practice Committee of Iwata Godo. With more than 20 years' service in a Magic Circle firm, Landry Guesdon has extensive experience in mergers & acquisitions, joint ventures and general corporate and commercial matters and antitrust spanning numerous industries. Landry Guesdon has a B.A. in Law from the University of Kent in Canterbury and an LL.M. from the University of Paris.

Iwata Godo
Marunouchi Bldg., 15th Floor
2-4-1 Marunouchi, Chiyoda-ku
Tokyo 100-6315
Japan

Tel: +81 3 3214 6205
Email: lguesdon@iwatagodo@com
LinkedIn: www.linkedin.com/in/landry-guesdon-67b071104

Iwata Godo is one of Japan's premier and oldest law firms. It was established in 1902 as one of the first business law firms by Chuzo Iwata, an attorney-at-law who subsequently held various positions, including serving as Minister of Justice and president of the Japan Federation of Bar Associations. It is a full-service firm with around 100 attorneys, and each of its practice areas is highly regarded. The firm's litigation practice is among the most prominent and accomplished in Japan, and the practice handles a broad range of disputes in all sectors. We represent foreign and Japanese corporates in domestic and international dispute resolution proceedings involving diverse industries and various areas of the law. We have assisted clients in resolving complex disputes through litigation, arbitration and mediation involving, for example: contractual disputes; disputes arising out of M&A transactions; directors' breach of duty of care claims; disputes involving joint-venture partners, etc. We represent clients in disputes administered by various arbitral bodies, including the JCAA, the ICC and the Singapore International Arbitration Centre.

www.iwatagodo.com/english

IWATA GODO
Established 1902

International Comparative Legal Guides

The **International Comparative Legal Guide** (ICLG) series brings key cross-border insights to legal practitioners worldwide, covering 58 practice areas.

International Arbitration 2024 features six expert analysis chapters and 32 Q&A jurisdiction chapters covering key issues, including:

- Arbitration Agreements
- Governing Legislation
- Jurisdiction
- Choice of Law Rules
- Selection of Arbitral Tribunal
- Procedural Rules
- Preliminary Relief and Interim Measures
- Evidentiary Matters
- Making an Award
- Challenge of an Award
- Enforcement of an Award
- Confidentiality
- Remedies / Interests / Costs
- Investor-State Arbitrations

The International Comparative Legal Guides are published by: glg Global Legal Group