

IN-DEPTH

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JAPAN

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In-Depth: International Arbitration (formerly The International Arbitration Review) provides an analytical overview of what has occurred in each of the important arbitration jurisdictions during the past year, capturing recent developments while putting them in the context of each jurisdiction's legal arbitration structure and selecting the most important matters for comment.

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Japan

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Introduction

Structure of the law in Japan

The Japanese Arbitration Act (JAA) was enacted in 2003 and came into effect in 2004 based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (the UNCITRAL Model Law).

By conforming to the globally recognised UNCITRAL Model Law, the JAA aims to make the Japanese arbitration system more transparent and more likely to be used by domestic and foreign companies. Furthermore, the Act Partially Amending the JAA was enacted in 2023 and came into effect on 1 April 2024. This amendment reflects the latest amendment to the UNCITRAL Model Law in 2006. The finer points of the amendment are illustrated in detail below.

Most of the provisions of the JAA are consistent with those of the UNCITRAL Model Law but for a few exceptions. Examples of the exceptions under the JAA include the right of a consumer to terminate the arbitration agreement between the consumer and a business operator without any cause and the invalidation of arbitration agreements concerning individual labour-related disputes.

The JAA applies to arbitral proceedings where the place of arbitration is in Japan (Articles 1 and 3).^[2] The parties may agree on the rules that are applicable to the proceedings, provided that such agreement is not contrary to the JAA's provisions concerning public order (Article 26(1)). Thus, in most arbitrations, particularly institutional arbitrations, the arbitral proceedings are conducted in accordance with the Arbitration Rules chosen by the parties, and there are not many situations in which the application of the provisions of the JAA directly becomes an issue. The Arbitration Rules of the leading arbitration organisation in Japan are described below.

Because Japan is a signatory to the New York Convention, the New York Convention applies to the recognition and enforcement of foreign arbitral awards in Japan (Article 1(1) of the New York Convention). Thus, foreign arbitral awards can be enforced in Japan once the party obtains a final and binding enforcement order issued by the Japanese courts, which will be issued under substantially the same requirements as those in Article 5 of the New York Convention.

Japan has made a reservation that it will apply the New York Convention to the recognition and enforcement of awards made only in the territory of another contracting state. However, since Articles 45 and 46 of the JAA allow the recognition and enforcement of an arbitral award regardless of the place of arbitration under the same requirements as Article 5 of the New York Convention, this reservation has little meaning.

Distinctions between international and domestic arbitration law

Under the JAA, there is basically no distinction between domestic arbitration and international arbitration. However, the qualifications for representation differ between domestic arbitration cases and international arbitration cases. The Act on the Handling of Legal Services by Foreign Lawyers (the Foreign Lawyers Act) permits registered

foreign lawyers to act as legal representatives in certain international arbitration cases, even though they are not qualified to practise law in Japan.^[3] Further, the Act permits foreign lawyers who are not even registered as a foreign lawyer in Japan to act as legal representatives in international arbitration cases that meet certain requirements.

An international arbitration case is defined in Article 2(xiv) of the Foreign Lawyers Act as a civil arbitration case that falls under any of the following situations:

1. some or all of the parties have an address or a principal office or head office in a foreign jurisdiction (including cases in which persons who hold more than 50 per cent of the number of issued shares in some or all of the parties have an address or a principal office or head office in a foreign jurisdiction);
2. the governing law of the arbitral award (limited to the law agreed between relevant parties) is not Japanese law; or
3. the place of arbitration is in a country other than Japan.

Before the amendment to the Foreign Lawyers Act, which came into effect on 29 August 2020, an international arbitration case was defined as 'a civil arbitration case which is conducted in Japan and in which all or some of the parties are persons who have an address or a principal office or head office in a foreign jurisdiction'. As such, it required at least one of the parties to be located in a foreign jurisdiction. However, there were some problems with this definition; for example, in the case of a dispute between Japanese corporations, both of which were subsidiaries of foreign corporations, such dispute did not fall within the definition of an international arbitration case, and registered or unregistered foreign lawyers could not represent the parties in such a dispute, even if the relevant contract and evidence were written in a foreign language and the arbitration case had substantial international aspects. In light of this, the definition of international arbitration case in the Foreign Lawyers Act was amended in 2020, as described above, to expand its scope.

Japanese arbitration organisations

The Japan Commercial Arbitration Association

One of the main Japanese arbitration organisations is the Japan Commercial Arbitration Association (JCAA), which was established in 1950. The JCAA prepares three sets of Arbitration Rules for the parties to choose from: the UNCITRAL Arbitration Rules, the Commercial Arbitration Rules and the Interactive Arbitration Rules. If the parties did not choose one of the above and the arbitration agreement provides only that the arbitration will be conducted under the rules of the JCAA, the Commercial Arbitration Rules will automatically apply.

The Commercial Arbitration Rules are based on the provisions of the UNCITRAL Arbitration Rules and reflect the latest international practice. Specifically, there are procedures for accelerated dispute resolution, such as provisions regarding orders for interim measures by emergency arbitrators (Articles 75 to 79) and provisions regarding expedited arbitration procedures (Articles 83 to 90).

In addition, the Commercial Arbitration Rules expressly stipulate that arbitral proceedings and records are not open to the public (Article 42(1)). The Rules prohibit the parties, arbitrators, officers and employees of the JCAA and other persons involved from disclosing facts relating to or learnt through the arbitral proceedings unless there are justifiable grounds for doing so (Article 42(2)). In cases where listed companies are obliged to disclose information based on the rules of the stock exchange, it is considered that there are justifiable grounds for such disclosure.^[4]

Furthermore, a person who is not a party to the arbitral proceedings may join as a party to the proceedings on the condition that all parties agree (Article 56(1)).

In the 2021 amendment to the Commercial Arbitration Rules, the scope of cases eligible for the expedited arbitration procedures was expanded. The amount in dispute eligible for the expedited arbitration procedures was raised from less than ¥50 million to ¥300 million or less (Article 84(1)(a)).

Other institutions

There are some institutions other than the JCAA that handle international arbitration. For example, the Tokyo Maritime Arbitration Commission is the only Japanese permanent maritime arbitration institution in existence since 1926. The International Arbitration Centre in Tokyo is an arbitration institution that was established in September 2018 and that is specialised in arbitration regarding intellectual property matters.

Arbitration handled by foreign arbitration institutions such as the ICC International Court of Arbitration and arbitrations under foreign Arbitration Rules can be conducted in Japan if the parties designate Japan as the place of arbitration.

Involvement of the courts

As a general rule, parties cannot bring a dispute subject to an arbitration agreement before the Japanese court. If an action that is subject to an arbitration agreement is filed with the court, the court must dismiss the action without prejudice upon the petition of the defendant (Article 14(1) of the JAA).

Under the JAA, there are certain proceedings that the Japanese courts may handle, such as the challenge or dismissal of arbitrators (Articles 19(4) and 20), the determination of the jurisdiction of the arbitral tribunal (Article 23(5)), assistance in the examination of evidence (Article 35(1)), the setting aside of an arbitral award (Article 44) and the enforcement order of an arbitral award (Article 46). Some of these procedures are described below in more detail.

Competence of the arbitral tribunal to rule on its jurisdiction

If a party argues that the arbitral tribunal does not have jurisdiction, the tribunal may rule on its own jurisdiction (Article 23(1)). If the arbitral tribunal rules that it does not have jurisdiction, it will issue the decision to terminate the arbitral proceedings (Article 23(4)(ii)). The parties cannot appeal to the court regarding this decision. If the arbitral tribunal rules that it has jurisdiction, a party may, within 30 days of the receipt of the notice of this decision, file a petition with the court to rule on the jurisdiction of the tribunal (Article 23(5)). If the

court decides that the arbitral tribunal lacks jurisdiction, although the court's decision on the jurisdiction is not binding, the tribunal is expected to respect the court's decision and to terminate the arbitral proceedings on the ground that it is impossible to continue with the proceedings (Article 40(2)(iv)). A petition to the court challenging the jurisdiction of the arbitral tribunal does not prevent the tribunal from continuing the arbitral proceedings (Article 23(5)). Therefore, the arbitral tribunal may either continue or suspend the arbitral proceedings. If the arbitral tribunal renders an arbitral award while the court's review of the petition for jurisdictional challenge is pending, the petition will be dismissed for lack of merit. In such a case, the party may argue the lack of jurisdiction in the petition for setting aside the arbitral award or in the proceedings in the petition for the enforcement order of the arbitral award.

The court's assistance in the examination of evidence

Arbitration is a procedure based on the parties' agreement; therefore, as a general rule, it is the parties' responsibility to present testimony of witnesses and experts and documentary evidence to support their own claims or defences. However, an arbitral tribunal or party may petition the court to implement examination of witnesses and experts and other methods of examination of evidence provided for in the provisions of the Code of Civil Procedure if the arbitral tribunal finds it necessary (Article 35(1)). In addition, a party filing such a petition must obtain the consent of the arbitral tribunal (Article 35(2)). This is required to prevent unnecessary evidentiary hearings and abuse of rights.^[5]

Decisions on the setting aside and enforcement of arbitral awards

The grounds for the setting aside or refusing enforcement of an arbitral award are narrowly limited (Articles 44(1) and 45(2)). The court cannot grant a petition for setting aside if there are no grounds for it or dismiss a petition for enforcement if there are no grounds for refusal. In this sense, the court has no discretion. On the other hand, the court may, at its discretion, dismiss a motion for setting aside, even if it considers that grounds for setting aside exist, in cases where the grounds for setting aside are immaterial.^[6]

Governing law

Governing law of the arbitration agreement

The parties are free to agree on the governing law of an arbitration agreement, which could be determined separately from the governing law of the contract containing the arbitration agreement. The JAA does not provide general rules for determining the governing law of an arbitration agreement in the absence of an express agreement between the parties. Generally, Japanese courts apply the conflict of laws rules of Japan to determine the governing law of an arbitration agreement. First, the court will determine the law that the parties have expressly or impliedly agreed to be the governing law of the arbitration agreement. If there is no such agreement, the court will determine the law of the place most closely connected with the arbitration agreement.

The substantive law to be applied in the arbitral award

The parties may agree on the substantive law to be applied in the arbitral award (Article 36(1)). If the parties have not agreed on the law to be applied by the arbitral tribunal in the award, the tribunal applies the law of the state most closely related to the case referred to arbitral proceedings and directly applicable to the case, in accordance with Article 36(2) of the JAA. The law most closely related to the case is determined by taking into account the habitual residence of the parties and subjective circumstances, such as their intentions.

Trends or statistics relating to arbitration

The number of requests for arbitration filed at the JCAA has generally averaged around 20 per year. Thus, at present, the number of international arbitration cases handled by the JCAA is not as large as that seen in other countries (notably, Singapore), especially in light of the economic scale of Japan.

This may be partly due to the fact that, traditionally, there has been a high level of trust in the courts in Japan, and most Japanese companies have agreed to the jurisdiction of the courts in contracts between them. As a result, there have been only a limited number of cases in which they have agreed to arbitration.

On the other hand, arbitration agreements are often chosen in contracts between Japanese and foreign companies, and the demand for arbitration is increasing. However, even in such cases, the country where the foreign party is located or a third (assumably 'neutral') country is often chosen as the place of arbitration, and Japan is not necessarily chosen as the place of arbitration.

In response to the above situation, the Japanese government has focused on revitalising international arbitration in Japan since 2017. For example, the scope of representation in international arbitration was expanded through amendments to the Foreign Lawyers Act, as discussed above, and the JAA was amended, as discussed above.

Thus, the legal system relating to international arbitration in Japan is well developed to the extent that it compares favourably with those of other advanced countries in international arbitration.

In addition to the legal system, state-of-the-art dispute resolution facilities are also being developed. In February 2018, the Japan International Dispute Resolution Centre was established to provide the necessary facilities for international arbitration proceedings. Subsequently, in May 2018, the Japan International Dispute Resolution Centre (Osaka) opened as the first set of facilities specialised for a hearing of international arbitration or other types of alternative dispute resolution in Japan.

The approval rate of an enforcement order of an arbitral award is high, according to publicly available statistics. On the other hand, although the accumulation of arbitration-related judicial precedents is not large, there has been only one case in which a Japanese court set aside an arbitral award and the judgment became final since the JAA came into effect in 2004.

Regarding arbitration cases before the JCAA, more than 90 per cent of the disputes have been resolved in accordance with the arbitral awards issued by the JCAA.^[7] Notably, no JCAA arbitral award has been refused enforcement by a foreign court since 2010.^[8]

These trends clearly indicate that Japan is a pro-arbitration country, not only in terms of legislation but also in terms of actual practice.

Year in review

Developments affecting international arbitration

Amendments to the JAA

The Act Partially Amending the JAA, the Act Partially Amending the Act on Promotion of the Use of Alternative Dispute Resolution, and the new Act on the Implementation of the United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention on Mediation) passed the Diet on 21 April 2023 and came into effect from 1 April 2024. The purpose of these amendments is to integrally enhance dispute resolution procedures by private dispute resolution organisations in accordance with international standards. The main contents of the amendments to the JAA are as follows.

Introduction of the recognition and enforcement of interim measures

The amendment introduced five types of interim measures that an arbitral tribunal may order, in accordance with the UNCITRAL Model Law after its revision in 2006. These five types of interim measures can be classified into two categories: (1) 'an order to take necessary prevention measures or to restore of the status quo' (corresponding to Article 24(1)(iii)) and (2) 'an order to prohibit certain actions' (corresponding to Article 24(1)(i), (ii), (iv) and (v)). Although some of the language in the provisions of the amended JAA on interim measures deviates from that of the UNCITRAL Model Law in 2006 to ensure conformity with the terminology under Japanese law (especially the laws and regulations regarding civil enforcement), the amendment is substantially in line with the UNCITRAL Model Law in 2006 according to the discussion in the Legislative Committee. While the requirements and procedures for civil enforcement of each of the two categories of interim measures differ in some aspects, both of them are enforceable either directly or indirectly via a monetary sanction under Japanese law.

Addition of courts with concurrent jurisdiction

In addition, under the amended JAA, the Tokyo District Court and the Osaka District Court have concurrent jurisdiction over various arbitration-related court cases (see Articles 5(2), 8(2)(ii), 35(3)(iv), 46(4)(iii) and 47(4)(iii)). This means that a petitioner may choose the Tokyo District Court or the Osaka District Court regardless of the location of the respondent. Further, the court where an arbitration-related case is filed may transfer the case to the Tokyo District Court or the Osaka District Court at its discretion if the court finds it appropriate. In addition, since April 2023, arbitration-related cases filed at the Tokyo District Court are handled by the division specialised in disputes related to business matters (the 'Business Court'). Therefore, it is expected that more arbitration-related cases

will be handled by the Tokyo District Court (the Business Court) and the Osaka District Court, which will enable these courts to accumulate more experience to achieve more standardised and sophisticated decisions on arbitration-related cases.

Translation of the arbitral award

Under the JAA before the amendment in 2024, when a party filed a petition with the court for the enforcement order of an arbitral award written in a foreign language, the party was required to submit a full Japanese translation of the award. Because a full translation was uniformly required regardless of whether the counterparty disputes the enforceability of the award, the cost and time required to translate the arbitral award have been a significant burden on the party filing a petition.

The amendment allows the court to decide not to require the submission of the translation if the court considers it appropriate after hearing the respondent's opinion (Article 46(2)). The practical burden of filing a petition for enforcement will be considerably reduced, depending on the operation of the courts. The same treatment applies to the order for interim measures written in a foreign language in a petition for the enforcement approval order of the order for interim measures (Article 47(2)).

Third-party funding

It is difficult to predict the outcome of litigation and arbitration, and international arbitration in particular is enormously expensive and time-consuming. This uncertainty can lead to a reluctance to file a request for international arbitration. As one of the solutions to this problem, third-party funding (TPF) has increased in popularity. TPF is a mechanism whereby a third-party funder provides a party to a dispute with funding for legal fees and other costs and receives a portion of the economic benefits derived from the outcome of the subject dispute.

In Japan, the discussion on the legality of TPF is ongoing, and there are still no guidelines or established interpretations regarding its legality. Therefore, the details of the contract with a third-party funder should be examined carefully, especially from the perspective of the Attorneys Act and the Trust Act. In addition, if lawyers (including foreign lawyers) act in cases involving TPF, they should be careful not to infringe on the rules of legal ethics established by the Japan Federation of Bar Associations.^[9]

Because the discussion regarding TPF is on its way, the use of TPF in arbitration has not been active in Japan. However, given the emergence in Japan of a start-up company managing arbitration funds, it is expected that TPF will be utilised in Japan in the future.

Arbitration developments in local courts

According to a report compiled by a court clerk of the Tokyo District Court on the status of the arbitration-related court cases in the Tokyo District Court and other district courts from 2004 to the end of 2016, approximately 80 per cent of the arbitration-related cases filed in the Tokyo District Court concerned petitions to set aside an arbitral award or petitions for the enforcement order of an arbitral award. The remaining cases included cases regarding the

court's assistance in relation to the service of process and the appointment of arbitrators.-
[10]

Statistically, there are very few cases in which the petition to set aside an arbitral award was granted, whereas there are many cases in which the petition for an enforcement order was granted. This shows that the Japanese court tends to respect the original arbitral award. In this regard, it is safe to call Japan a pro-arbitration country.

In this respect, the judgment of the Tokyo High Court dated 1 August 2018 is noteworthy. The Court vacated the judgment of the first instance, which had ordered the setting aside of the arbitral award. The Tokyo High Court held, as a general principle, as follows:

[I]n a petition to set aside an arbitral award, the court is not allowed to examine the case de novo, in the way that would result in the re-examination of the arbitral award. Even if the court of the place of arbitration finds some errors in the factual or legal findings of the arbitral award from such court's perspective, the court may not intervene and set aside the arbitral award on the grounds that there are such errors in factual or legal findings, unless such errors are significant to the extent that they constitute grounds for setting aside an arbitral award.

This decision is based on the idea that how the court should handle the case of setting aside an arbitral award is fundamentally different from how the court should handle other ordinary cases on appeal.

Furthermore, the Tokyo High Court made the following statements, emphasising that Japanese courts should focus on the pro-arbitration stance and international standards as the basic perspective when handling arbitration-related cases:

The provisions of the JAA should be interpreted so as to harmonise with the international standards on the basic principles of alternative dispute resolution procedures such as arbitration, and not in accordance with the meticulous interpretation of the Code of Civil Procedure in Japan.

If the court of the place of arbitration would apply laws applicable to domestic civil cases handled by the courts of the country or meticulous interpretation of the court precedents to the cases of setting aside an arbitral award beyond the international standards on the basic principles which are accepted in alternative dispute resolution procedures such as arbitration, the places with such domestic courts would be avoided as a place of arbitration in international contracts.

Applying the broad and general standards (equal treatment, guarantee of opportunity to be heard) to individual cases based on the wisdom and common sense of the legal professions, rather than focusing on the detailed rules, would be in line with the legislative intent of the JAA.

Investor–state disputes

For the Japanese government and Japanese companies, investment treaty arbitration (i.e., arbitration between investors and the government) is no longer a matter for others. By way

of illustration, the Japanese government was involved in an investment treaty arbitration filed by a Hong Kong-based investor under the Hong Kong–Japan bilateral investment treaty. The investor claimed that it had suffered damages as a result of the Japanese government's reduction of subsidies for renewable energy.^[11]

This case was the first investment arbitration case filed against the Japanese government. Japan won the case in early 2023.

In addition, a number of arbitrations have been filed against Spain in recent years, mainly for violations of the Energy Charter Treaty's fair and equitable treatment clause, in relation to the changes to its renewable energy regime in 2013. Several Japanese companies have also filed international arbitration claims against Spain. Some of these cases have already resulted in arbitral awards, and several cases are still pending.^[12]

Outlook and conclusions

The Japanese government has taken an active role in promoting international arbitration. The amendments to the JAA that came into effect on 1 April 2024 are one of such measures and marks the completion of the development of legislation in Japan that conforms to the latest international standards. Japanese courts have also refined their handling of arbitration-related cases as described above.

In addition, from June 2019 to March 2024, the Japan International Dispute Resolution Centre (JIDRC), on the mandate of the government, provided training for arbitrators and parties' counsels, promoted the use of arbitration by businesses, established facilities for arbitral proceedings, and conducted research on more effective measures to promote international arbitration in Japan.

Furthermore, the study group to promote international arbitration in Japan issued a report which recommends that Japan should improve the recognition and reputation of its arbitration institutions in the international community, take measures to increase the recognition and understanding of the arbitration system among domestic companies, and actively participate in the rule-making of international rules at international organisations such as UNCITRAL.

Through such measures and discussions, Japan continuously endeavours to ensure that Japan becomes a popular third-country arbitration venue for overseas business transactions and that more and more domestic companies, including small and medium-sized enterprises, utilise international arbitration as a means of dispute resolution.

Given these developments, there should be no concerns about entering into arbitration agreements where Japan is the place of arbitration, especially in international transactions. The number of arbitrations conducted in Japan and the number of arbitration-related cases in Japanese courts are expected to increase in the future.

Endnotes

- 1 Tsuyoshi Suzuki is a partner, Sho Tanaka is a senior associate and Suzuka Takehara, Yui Takahashi and Yuta Taguchi are associates at Momo-o, Matsuo & Namba. [^ Back to section](#)
- 2 The numbers of the JAA will be changed in accordance with the Act on the Development of Laws to Promote the Utilisation of Information and Communications Technology in Civil Proceedings, which will come into effect by June 2028. [^ Back to section](#)
- 3 A registered foreign lawyer is defined as a person who has obtained approval from the Minister of Justice and has obtained registration in the roster of registered foreign lawyers kept by the Japan Federation of Bar Associations pursuant to Article 25 of the Foreign Lawyers Act. [^ Back to section](#)
- 4 Naoki Idei and Naoki Takahashi, 'Fundamentals of Corporate Disputes and Arbitration/Mediation (first volume)', JCA Journal, Vol. 68, No. 2 (February 2012), 11. [^ Back to section](#)
- 5 [Arbitration Law]: Takeshi Kojima & Takashi Inomata (2014), 359. [^ Back to section](#)
- 6 [Arbitration Law]: Takeshi Kojima & Takashi Inomata (2014), 531–532. [^ Back to section](#)
- 7 <https://www.jcaa.or.jp/en/arbitration/statistics.html>. [^ Back to section](#)
- 8 *ibid.* [^ Back to section](#)
- 9 See Junya Naito and Motomu Wake, 'Third-party Funding in Japan—Possible Application of the Attorney Act and the Basic Rules on the Duties of Practicing Attorneys', JCA Journal, Vol. 68, No. 5 (May 2021), 9–18. [Full disclosure: Messrs Naito and Wake are partners at Momo-o, Matsuo & Namba.] [^ Back to section](#)
- 10 Hidenobu Nagasue, 'Survey on Arbitration-related Cases Handled by the Tokyo District Court', JCA Journal, Vol. 64, No. 7 (July 2017), 9. [^ Back to section](#)
- 11 <https://globalarbitrationreview.com/article/japan-faces-first-treaty-claim>. [^ Back to section](#)
- 12 <https://globalarbitrationreview.com/insight/know-how/investment-treaty-arbitration/report/japan>. [^ Back to section](#)



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