

11th

Edition

2017-2018

The
Baker McKenzie
International
Arbitration Yearbook

Japan





Japan

Yoshiaki Muto,¹ Joel Greer,² Takeshi Yoshida,³ Yuichiro Omori⁴ and Dominic Sharman⁵

A. Legislation and rules

A.1 Legislation

International arbitration in Japan continues to be governed by the Arbitration Act of 2003, which took effect in 2004, and to which no legislative amendment has been made since.

A.2 Institutions, rules and infrastructure

The major international arbitration institution in Japan is The Japan Commercial Arbitration Association (“JCAA”). The JCAA’s latest Commercial Arbitration Rules became effective on 10 December 2015 and no amendment has been made since.

B. Cases

A recent case involved a challenge to the enforceability of a foreign arbitral award in which the plaintiff (ie, the award debtor) commenced litigation after the defendant (ie, the award creditor) had obtained an enforcement order, but before the defendant had initiated the actual enforcement procedure. In their rulings, the Tokyo District Court and the Tokyo High Court clarified the various procedures that parties can use to challenge an arbitral award and the valid grounds on which they can rely at each stage of such procedures.⁶

¹ Yoshiaki Muto is a partner in Baker McKenzie’s Tokyo office.

² Joel Greer is a partner in Baker McKenzie’s Tokyo office.

³ Takeshi Yoshida is an associate in Baker McKenzie’s Tokyo office.

⁴ Yuichiro Omori is an associate in Baker McKenzie’s Tokyo office.

⁵ Dominic Sharman is an associate in Baker McKenzie’s Tokyo office.

⁶ Tokyo High Court Judgment dated 18 May 2017 (Case No: Heisei 28 (Ne) No. 4041).

Enforcement of an arbitral award in Japan involves several steps. The award creditor first needs to obtain an enforcement order from a Japanese national court,⁷ by which the arbitral award becomes a legally enforceable document (ie, the “title of obligation”) in Japan.⁸ During this procedure, the award debtor may defend itself by relying on one of the limited grounds under Japan’s Arbitration Act, including invalidity of the arbitration agreement.⁹ After obtaining an enforcement order from a Japanese national court, the award creditor then needs to apply for the actual enforcement of the award under Japan’s Civil Execution Act.

In the recent case at issue, after the award creditor had obtained an enforcement order, the losing party initiated a procedure called “Action to Oppose Execution” under Article 35 of the Civil Execution Act, claiming, among other things, that the arbitration agreement was invalid. The key issue which the courts were asked to decide was whether the award debtor was entitled to assert the invalidity of the arbitration agreement as a ground to deny the enforceability of an arbitral award in an Action-to-Oppose-Execution procedure.

The Tokyo District Court held that the award debtor may not do so because such a ground could be asserted through different procedures, such as a set-aside procedure under Article 44 of the Arbitration Act, or a procedure to obtain an enforcement order under Articles 45(2) and 46(8) of the Arbitration Act where the award debtor could assert that the enforcement order sought by the opposing party should not be issued.¹⁰

On appeal, the Tokyo High Court affirmed the District Court’s decision and referred to the above-mentioned procedures available under the Arbitration Act in dismissing the appeal. According to the Tokyo High Court, while a party that opposes establishment of “a title

⁷ Arbitration Act, Articles 45 and 46.

⁸ Civil Execution Act, Article 22(vi)-2.

⁹ Arbitration Act, Articles 45(2) and 46(8).

¹⁰ Tokyo District Court Judgment dated 13 July 2016 (Case No: Heisei 25 (Wa) No. 4919).



of obligation other than a judicial decision” can use an Action-to-Oppose-Execution procedure, this does not apply to circumstances where an award creditor has obtained an enforcement order in Japanese court. Thus, an award debtor may not use an Action-to-Oppose-Execution procedure to challenge the enforceability of an arbitral award. The Tokyo High Court opined that, given that an enforcement order is a type of judicial decision, an arbitral award for which an enforcement order has been obtained cannot be said to be “a title of obligation other than a judicial decision” (*emphasis added*), because such an award under Japanese law is a particular type of title of obligation comprising not only the award itself but also the enforcement order (ie, a judicial decision). The Tokyo High Court further held that, since an award debtor may challenge the enforceability of the arbitral award through different procedures such as those noted above, it is inappropriate to allow the award debtor to use an Action-to-Oppose-Execution procedure to challenge the validity of the arbitral award.

C. Funding in international arbitration

There is no Japanese law expressly authorizing or prohibiting third-party funding. To the best of the authors’ knowledge, there has been little, if any, third-party funding in Japan to date. Unlike in certain other jurisdictions, contingency fee arrangements are permitted in Japan, and therefore parties with lower budgets may use these arrangements rather than third-party funding. However, it is unclear whether or how often contingency fee arrangements have been used by parties in international arbitration in Japan.