

GUIDE TO ARBITRATION PLACES (GAP)

JAPAN

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There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline any and all responsibility.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Japan provides an arbitration-friendly legal framework and hospitable environment for international arbitration. The Japanese Arbitration Law (Law No. 138 of 2003, the “**Arbitration Law**”), which is based on the UNCITRAL Model Law, applies to arbitrations seated in Japan and the recognition/enforcement of arbitral awards in Japan. The Japan Commercial Arbitration Association (“**JCAA**”) is a well-known arbitral institution with modern arbitration rules (the latest amendment taking effect in January 2019). Japan is also committed to attracting users of arbitration as a dispute resolution and arbitration hub, as illustrated by the launch of new hearing facilities in Tokyo and Osaka.

Key places of arbitration in the jurisdiction?	Tokyo and Osaka.
Civil law / Common law environment? (if mixed or other, specify)	<p>Civil law. However, Japanese civil procedure incorporates elements of both civil law and common law, utilizing US-style adversarial procedures, such as cross-examination, while keeping elements from the civil law tradition, such as limited scope of document production.</p> <p>With respect to the binding authority of precedents, the doctrine of <i>stare decisis</i> is not applicable in Japan. However, in practice, the decisions of the upper courts are often referred to by lower courts.</p>
Confidentiality of arbitrations?	<p>The Arbitration Law does not provide for express confidentiality obligations related to arbitral proceedings (in contrast, the JCAA Rules expressly stipulate confidentiality obligations applicable to arbitrators, institution, parties and their representatives).</p> <p>Hearings are generally private and awards are not publicly disclosed. Under the Arbitration Law, access to case records of court proceedings in connection with arbitral proceedings is granted only to those who have a legal interest in such court proceedings.</p>
Requirement to retain (local) counsel?	<p>Parties may choose to retain counsel or to represent themselves without the assistance of attorneys.</p> <p>In Japan, those who are not admitted to practice law in Japan are generally prohibited from providing legal services. However, under the legislation relating to legal services by foreign lawyers (<i>i.e.</i> the Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers), foreign-qualified lawyers may represent parties with regard to international arbitration proceedings in the following circumstances: (i) those in which all or some of the parties to the case have main or head offices in a foreign jurisdiction, including, for example, the case where a person such as one that holds a majority of the issued shares (with voting rights) of a party to the case has a main or head office in a foreign country, (ii) those in which the governing law that the parties have established by agreement is law other than Japanese law, or (iii) those in which the place of arbitration is a foreign country.</p>

Ability to present party employee witness testimony?	Parties may present their employees as witnesses.
Ability to hold meetings and/or hearings outside of the seat?	Parties are free to agree on the location of meetings and/or hearings. Unless otherwise agreed upon by the parties, the arbitral tribunal has discretion to conduct proceeding at any place considered appropriate.
Availability of interest as a remedy?	<p>The Arbitration Law does not provide for awards for interest, which is a matter of the applicable substantive law.</p> <p>If Japanese law applies as the substantive governing law, the default interest rate that may be awarded for commercial claims is 3 per cent per annum (as will be explained in detail below, the applicable rate is subject to change under the current Civil Code in Japan). Unless otherwise agreed by the parties, simple interest is charged on the principal amount.</p>
Ability to claim for reasonable costs incurred for the arbitration?	The Arbitration Law does not provide that the unsuccessful party should bear the costs of the arbitration. In accordance with the parties' agreement on the costs of the arbitration (including the applicable arbitration rules), the arbitral tribunal will have discretion to determine the allocation of costs in an arbitral award or in an independent ruling.
Restrictions regarding contingency fee arrangements and/or third-party funding?	There is no restriction on the use of contingency fee arrangements, which can be freely agreed between lawyers and clients. While third-party funding is not specifically prohibited, uncertainty remains as to whether such funding arrangements are allowed for arbitrations in Japan.
Party to the New York Convention?	Japan has been a party to the New York Convention (" NYC ") since 1961, subject to the Convention's reciprocity reservation.
Party to the ICSID Convention?	Japan has been a party to the ICSID invention since 1967.
Compatibility with the Delos Rules?	The Arbitration Law is compatible with the Delos Rules.
Default time-limitation period for civil actions (including contractual)?	Under the current Civil Code (applicable to the transactions executed after April 1, 2020), contractual claims are subject to the general statute of limitations, namely five years from the time the claimant became aware of the fact that the claim becomes exercisable or ten years from the time the claim becomes exercisable, whichever is earlier. The right to demand compensation for damages in tort shall be extinguished by the operation of prescription if it is not exercised by the victim or his/her legal representative within five years for tortious acts which injure someone and within three years for other tortious acts from the time when he/she comes to know of the damages and the

	identity of the perpetrator. The same shall apply when twenty years have elapsed from the time of the tortious act.
Other key points to note?	In addition to arbitration, mediation now attracts growing attention as an alternative to resolve international disputes. In line with a nation-wide initiative to promote resolution of international disputes in Japan, The Japan International Mediation Center in Kyoto (JIMC-Kyoto) was established in November 2018 in Kyoto as the first international mediation center in Japan to offer both institutional mediation and ad hoc mediation. See https://www.jimc-kyoto.jp/ . JIMC has signed a Memorandum of Understanding with Singapore International Mediation Centre (SIMC) on 12 September 2020 to operate a joint online mediation protocol. This protocol is expected to provide cross-border businesses with better access to online mediation as an economical, expedited and effective route for resolving commercial disputes amid the COVID-19 pandemic.
World Bank, <i>Enforcing Contracts: Doing Business</i> score for 2020, if available?	65.3
World Justice Project, <i>Rule of Law Index: Civil Justice</i> score for 2020, if available?	0.78 – Japan ranks 15 th out of 126 countries.

ARBITRATION PRACTITIONER SUMMARY

The Arbitration Law is based on the UNCITRAL Model Law (1985 version), but amendments to the Arbitration Law are currently being discussed and the 2006 version may be followed. Japanese courts have a positive track record of dismissing challenges against arbitral awards.

Date of arbitration law?	The Arbitration Law was enacted on August 1, 2003 and came into force on March 1, 2004.
UNCITRAL Model Law? If so, any key changes thereto? 2006 version?	The Arbitration Law is based on the UNCITRAL Model Law (1985 version), containing minor deviations.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	There are no specialized courts or judges in Japan for arbitration-related cases. With the key places of arbitration in Japan being Tokyo and Osaka, most arbitration-related cases are filed in the Tokyo or Osaka District Courts. According to statistics published by the former senior court clerk in the Civil Division of the Tokyo District Court, ¹ among arbitration-related cases filed in Japanese courts during the period between March 1, 2004 and December 31, 2016, 74 out of 144 cases were filed in the Tokyo District Court and 20 cases were filed in the Osaka District Court.
Availability of <i>ex parte</i> pre-arbitration interim measures?	A party may request the court to order a pre-arbitration interim measure of protection with respect to any civil dispute that is the subject of an arbitration agreement. The court may order such measures <i>ex parte</i> in accordance with the Japanese Civil Provisional Remedies Act.
Courts' attitude towards the competence-competence principle?	Following the UNCITRAL Model Law, the Arbitration Law acknowledges the competence-competence principle. The arbitral tribunal may rule on assertions made in respect to the existence or validity of an arbitration agreement or its own jurisdiction (Article 23(1) of the Arbitration Law). If an arbitral tribunal issues a preliminary independent ruling that it has jurisdiction, any party may, within thirty days of receipt of notice of such ruling, challenge that ruling by requesting that the court decide the matter. In such an event, while such a request is pending before the court, the arbitral tribunal may continue with the arbitral proceedings and make an arbitral award (Article 23(5) of the Arbitration Law).
May an arbitral tribunal render a ruling on jurisdiction (or other issues) with reasons to follow in a subsequent award?	Where a party asserts that the arbitral tribunal does not have jurisdiction, the arbitral tribunal may give: <ul style="list-style-type: none"> (i) a preliminary independent ruling or an arbitral award if it considers it has jurisdiction; or (ii) a ruling to terminate arbitral proceedings if it considers it has no jurisdiction (Article 23(3)).

¹ Hidenobu Nagasue, Survey on Arbitration-related Cases Handled by the Tokyo District Court (JCA Journal, July 2017).

	Also, there are no restrictions to the issuance of interim awards on other issues with reasons to follow in a subsequent award.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	The Arbitration Law provides for grounds of annulment of awards that are the same as those for refusing recognition and enforcement of arbitral awards under the New York Convention.
Do annulment proceedings typically suspend enforcement proceedings?	If annulment proceedings are pending at the place of arbitration, Japanese court may, if it considers it necessary, suspend enforcement proceedings. In such case, the court may, upon request of the party, order the other party to provide security (Article 46(3) of the Arbitration Law).
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	If an arbitral award is set aside by a court at the seat of the arbitration, Japanese courts may refuse to recognize and enforce the award. However, Japanese courts have discretion to recognize and enforce awards that have been set aside. There has been no precedent in the Japanese courts on this matter.
If an arbitral tribunal were to order a hearing to be conducted remotely (in whole or in part) despite a party's objection, would such an order affect the recognition or enforceability of an ensuing award in the jurisdiction?	Unless such an order makes the objecting party unable to present its case in the arbitral proceedings, or such order is not in accordance with the law of the place of arbitration or the parties' agreements, it would not affect the recognition or enforceability of the arbitral award.
Key points to note in relation to arbitration with and enforcement of awards against public bodies at the jurisdiction?	N/A
Is the validity of blockchain-based evidence recognised?	In general, there is no limitation on digital evidence under the Code of Civil Procedure. Future cases will show how courts recognize the validity and the value as evidence in specific cases.
Where an arbitration agreement and/or award is recorded on a blockchain, is it recognised as valid?	Under the current Arbitration Law, an arbitration agreement made in an electromagnetic record recording the contents thereof is recognized as valid. An arbitration agreement and/or award recorded on a blockchain is therefore likely to be recognised as valid.
Would a court consider a blockchain arbitration agreement and/or award as originals for the purposes of recognition and enforcement?	A court is likely to consider a blockchain arbitration agreement and/or award as originals.
Other key points to note?	As part of an initiative to promote international arbitration in Japan, the Japan International Dispute Resolution Center ("JIDRC") (Osaka), which provides state-of-the art facilities for hearings of ad-hoc or institutional arbitration or other types of ADR, started its

operation on May 1, 2018. The JIDRC opened similar facilities in Tokyo (JIDRC-Tokyo) on March 30, 2020 to accommodate sports disputes in connection with the Tokyo Olympic Games among other disputes. See <http://idrc.jp/en/>.

In addition, the International Arbitration Center in Tokyo (“**IACT**”) opened on September 1, 2018 to resolve intellectual property disputes, especially those disputes involving standard essential patents (*i.e.* patents essential in implementing standards in certain fields such as wireless communications). See <https://www.iactokyo.com/>.

JURISDICTION DETAILED ANALYSIS

1. The legal framework of the jurisdiction

1.1 Is the arbitration law based on the UNCITRAL Model Law? 1985 or 2006 version?

The Arbitration Law² is based on the UNCITRAL Model Law (1985 Version). The Arbitration Law also contains unique provisions which are not in the 1985 Model Law.

1.1.1 If yes, what key modifications if any have been made to it?

One such modification is an express provision that provides for the court's ability to assist in the constitution of arbitral tribunal for an arbitration case in which the place of arbitration has not been agreed upon. Even if the place of arbitration has not been designated by the parties, when there is the possibility that the place of arbitration will be in the territory of Japan and the applicant or counterparty's general forum (excluding designations based on the last address) is in the territory of Japan, courts may determine the number of arbitrators and appoint arbitrators upon a party's application.³

Other modifications include special provisions for consumer arbitration (See 2.5.2 below for details).⁴ The Arbitration Law also has criminal penalties with regard to bribery (See 4.6.2 below for details).⁵

1.2 When was the arbitration law last revised?

The Arbitration Law was enacted on August 1, 2003 and came into force on March 1, 2004. Apart from minor revisions in 2004 and in 2017 accompanying the revisions of the Japanese Civil Code, the Arbitration Law has not been revised extensively since its enactment. Currently amendments of the Arbitration Law are being discussed and may follow the 2006 version of the UNCITRAL Model Law.

2. The arbitration agreement

2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

To determine the law governing the arbitration agreement, Japanese courts generally follow the two-step "choice of law" approach as set out by the Supreme Court in the *Ringling Circus* case: (i) Primarily, if there is an agreement between the parties regarding the governing law of the arbitration agreement, the courts respect such agreement; and (ii) In the absence of an explicit agreement, the courts determine whether there is an implied agreement on the law governing the arbitration agreement based on various factors, including whether there is any agreement in the place of arbitration, where the agreed place of arbitration is, and the rest of the contract containing the arbitration agreement.⁶

When there is no explicit or implied agreement between the parties, many courts choose the law with which the contract is most closely connected or the law of the place of arbitration.⁷

2.2 In the absence of an express designation of a 'seat' in the arbitration agreement, how do the courts deal with references therein to a 'venue' or 'place' of arbitration?

Japanese courts are likely to interpret a "place" of arbitration to be the same meaning as a "seat" of arbitration. In the absence of an express designation of a "seat" or "place," Japanese courts generally

² English translation is available at http://www.jseinc.org/en/laws/new_arbitration_act.html.

³ Article 8 of the Arbitration Law.

⁴ Article 3 of the Supplementary Provisions of the Arbitration Law.

⁵ Article 51 to 55 of the Arbitration Law.

⁶ Supreme Court, September 4, 1997, Hei 6 (O) No. 1848, 51-8 MINSHU 3657 (Japan).

⁷ See Tokyo High Court, December 21, 2010, Hei 22 (Ne) No. 2785, 2112 HANREI JIHO 36 (Japan). See Article 44.1(ii) and Article 45.2 (ii) of the Arbitration Law.

determine whether there is an implied agreement on seat of the arbitration. Reference to a “venue” of arbitration may be treated as one of the factors to determine the parties’ implied agreement.

2.3 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

Yes. The Arbitration Law expressly provides for the separability of the arbitration agreement.⁸

2.4 What are the formal requirements (if any) for an enforceable arbitration agreement?

An arbitration agreement must be in writing and generally signed by all the parties. One exception to the rule that the agreement must be signed by all the parties is when the arbitration agreement is contained in an exchange of letters, telegrams or other written instruments.⁹ When a written contract refers to a document that contains an arbitration clause and the reference is such as to make that clause part of the contract, such reference satisfies the written requirement.¹⁰ An electromagnetic record recording its contents also satisfies the writing requirement.¹¹ When the parties to the arbitral proceedings exchange written statements in which the existence of an arbitration agreement is alleged by one party and not denied by another, this also constitutes an arbitration agreement in writing.¹²

2.5 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

There is no provision in the Arbitration Law regarding this point. In general, an arbitration agreement only binds the signatory parties.

A general successor of a party to the contract containing the arbitration agreement can be bound by the arbitration agreement, provided that the rights and obligations subject to the arbitration agreement do not have a non-assignable, personal nature and that the parties did not agree otherwise. If the rights and obligations have a personal nature, they cannot be assigned and the successor of a party and the other party will not be bound by the arbitration agreement.

It remains uncertain whether a successor of specific rights and obligations can also be bound by the arbitration agreement contained in the same contract.

The Ringling Circus case dealt with the question whether an arbitration agreement can be extended to a representative of a party to the arbitration agreement.¹³ The Japanese Supreme Court, following its finding that the governing law of the arbitration agreement was the law of New York, found that, according to New York law, the defendant, a representative of a company who initiated a commercial contract between his company and the plaintiff, was bound by the arbitration agreement contained in said contract. It is uncertain whether the Supreme Court would have reached the same conclusion if the court had applied Japanese law as the governing law of the arbitration agreement.

2.6 Are there restrictions to arbitrability?

As will be explained in detail below, there are restrictions to arbitrability which relate to specific domains and to specific persons:

⁸ Article 13.6 of the Arbitration Law.

⁹ Article 13.2 of the Arbitration Law.

¹⁰ Article 13.3 of the Arbitration Law.

¹¹ Article 13.4 of the Arbitration Law.

¹² Article 13.5 of the Arbitration Law.

¹³ Supreme Court, September 4, 1997, Hei 6 (O) No. 1848, 51-8 MINSHU 3657 (Japan).

2.6.1 Do these restrictions relate to specific domains (such as IP, corporate law etc.)?

In general, unless otherwise provided by law, the subject of an arbitration agreement must be a civil dispute (excluding disputes of divorce or separation) that may be resolved by settlement between the parties, or the arbitration agreement shall not be valid.¹⁴

An arbitration agreement shall be null and void if the subject of the agreement constitutes an employment dispute with an individual that may arise in the future.¹⁵ It is uncertain whether this exclusion applies to an arbitration agreement contained in an employment contract wherein the place of arbitration is outside of Japan.¹⁶

As to whether validity of a patent falls within the scope of “a civil dispute” “that may be resolved between the parties” by arbitration, the most widely accepted view is that an action to confirm the validity of a patent does not fall within this scope, as such decisions are typically reserved for the Japan Patent Office. However, a patent infringement claim which deals with the validity of patent as a prerequisite issue does fall within this scope.¹⁷ It remains to be seen whether the newly established IACT, which uniquely lists international retired judges in the panel of arbitrators, could boost resolution of intellectual property disputes by arbitration.

Similarly, there are different theories as to whether a dispute related to competition law violations can be arbitrated. It is widely accepted that any actions for injunctions and damages based on competition law violations can be subject of arbitration.¹⁸

2.6.2 Do these restrictions relate to specific persons (i.e. State entities, consumers etc.)?

While consumer disputes are arbitrable, Japanese law allows consumers to initiate court proceedings even if there is an arbitration agreement in a business to consumer contract. Specifically, a consumer may terminate an arbitration agreement concluded between a consumer and a business operator, the subject of which constitutes civil disputes that may arise between them in the future.¹⁹ In the case where a business operator is a claimant in arbitral proceedings based on an arbitration agreement, the business operator shall request without delay that an oral hearing be concluded. The arbitral tribunal shall explain the right of termination to the consumer in the notice of the oral hearing and at the oral hearing.

If a consumer agrees to submit an existing dispute to arbitration or if a consumer is a claimant in arbitral proceedings based on the arbitration agreement, the consumer may not terminate the arbitration agreement.

3. Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

A court before which an action is brought with respect to a civil dispute which is the subject of an arbitration agreement shall, if the defendant so requests, dismiss the action, irrespective of whether the seat of the arbitration is within or outside of the jurisdiction, unless:

¹⁴ Article 13.1 of the Arbitration Law.

¹⁵ Article 4 of the Supplementary Provisions of the Arbitration Law.

¹⁶ See Tokyo District Court, February 15, 2011, 1350 HANREI TAIMUZU 189 (Japan). Concerning an employment contract between a U.S. employer and an employee at the Japanese subsidiary that had been signed before the Arbitration Law took effect, the court mentioned that the supplementary provision of the Arbitration Law regarding an employment dispute does not apply to the arbitration agreement contained in the said contract that provides arbitration in Atlanta.

¹⁷ See Hiroko Nihei, Arbitrability of Patent Validity Dispute: For Enhanced Use of International Arbitration in Japan (JCA Journal, May and June 2019).

¹⁸ See Tatsuya Nakamura, Issues in Arbitration Law 58-59 (Seibido 2017).

¹⁹ Article 3.2 of the Supplementary Provisions of the Arbitration Law.

- (i) the arbitration agreement is null and void, cancelled, or for other reasons invalid;²⁰
- (ii) arbitration proceedings are inoperative or incapable of being performed based on the arbitration agreement;²¹ or
- (iii) the request is made by the defendant subsequent to the presentation of its statement in the oral hearing or in the preparations for argument proceedings on the substance of the dispute.²²

3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?

The Arbitration Law does not have any provision regarding courts' treatment of such injunctions. In general, Japanese courts have taken a pro-arbitration stance, but it is unclear how Japanese courts will treat such injunctions because there has been no precedent on this matter.

3.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction? (Relates to the anti-suit injunction/anti-arbitration injunctions or orders, but not only)

Japanese courts cannot intervene in arbitrations seated outside of Japan, including issuing interim relief.²³ There has been no reported case where the anti-suit injunction was at issue.

4. The conduct of the proceedings

4.1 Can parties retain foreign counsel or be self-represented?

Parties may choose to retain outside counsel or to be self-represented.

In Japan, those who are not admitted to practice law in Japan are generally prohibited to provide legal services.²⁴ But under the legislation relating to legal services by foreign lawyers, foreign-qualified lawyers may represent parties in an "international arbitration case", which was formerly defined as an arbitration seated in Japan and in which all or some of the parties are persons who have an address, a principal office, or head office outside Japan.²⁵ As part of an initiative to promote international arbitration in Japan, the Ministry of Justice has worked on the legislative reform to expand the definition of international arbitration cases wherein parties may be represented by foreign lawyers, and the Japanese parliament has passed a bill to amend the relevant act, which came into effect on August 29, 2020. The amendment now allows foreign lawyers to serve as counsel in arbitrations in the following circumstances: (i) those in which all or some of the parties to the case have head offices or other such offices in a foreign jurisdiction, including, for example, the case where a person such as one that holds a majority of the issued shares (with voting rights) of a party to the case has a head office or other such office in a foreign country, (ii) those in which the governing law that the parties have established by agreement is anything other than Japanese law, or (iii) those in which the place of arbitration is a foreign country.²⁶

²⁰ Article 14.1 (i) of the Arbitration Law.

²¹ Article 14.1 (ii) of the Arbitration Law.

²² Article 14.1 (iii) of the Arbitration Law.

²³ Article 3 of the Arbitration Law.

²⁴ Article 72 of the Attorney Act.

²⁵ Former Article 2 (xi) of the Act on Special Measures concerning the Handling of Legal Service by Foreign Lawyers. Based on the regulation, foreign lawyers were not allowed to serve as counsel in an arbitration case in Japan where all parties are Japanese corporations (including Japanese subsidiaries of foreign companies).

²⁶ Article 2 (xi) of the Act on Special Measures concerning the Handling of Legal Service by Foreign Lawyers. The detail of the amendment is available here http://www.japaneselawtranslation.go.jp/common/data/outline/200116134238_9053108.pdf.

4.2 How strictly do courts control arbitrators' independence and impartiality? For example, does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances be of a gravity such as to justify this outcome?

When a person is approached to be appointed as an arbitrator, they shall fully disclose any circumstances likely to give rise to justifiable doubts as to their impartiality and independence.²⁷ An arbitrator bears the obligation to disclose such facts to the parties without delay during the course of arbitral proceedings.²⁸ Failure to disclose such facts could constitute a ground for setting aside the arbitral award.²⁹ According to a recent Supreme Court decision,³⁰ advance declaration by an arbitrator in relation to potential conflicts of interest does not discharge the arbitrator from their ongoing reporting duties with regard to the scope of the facts to be disclosed, including the facts which the arbitrator is aware of and the facts which the arbitrator can discover by conducting a reasonable investigation. Furthermore, according to the recent Osaka High Court decision on remand, when there is a conflict check system established in the arbitrator's firm which is on the same level as those generally used among major law firms, acting upon such conflict check system can be considered as conducting a continuous and reasonable investigation.³¹

If circumstances exist that give rise to justifiable doubts as to the impartiality or independence of an arbitrator, a party may challenge the arbitrator.³² The parties are free to agree upon a procedure for challenging arbitrators.³³ If there is no agreement between the parties on the procedure, the Arbitration Law provides for a default procedure, including its timeframe (that it has to be made within 15 days from the constitution of the Arbitral Tribunal or the day on which a party became aware of the existence of a ground for challenge).³⁴ In the default procedure, upon the request of a party, the arbitral tribunal, including the challenged arbitrator, shall decide on the challenge.³⁵ If a challenge against the arbitrator under the agreed upon procedure or under the default procedure is unsuccessful, the challenging party may, within thirty days after having received notice of the decision rejecting the challenge, have a court decide on the challenge.³⁶ A court may decide on whether a challenge is justified, *i.e.*, whether justifiable doubts as to the impartiality or independence of an arbitrator exist.³⁷ In other words, mere failure to disclose does not suffice for the court to decide that the challenge is justified.

4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of *ad hoc* arbitration)?

Parties are free to agree on a procedure of appointing the arbitrators,³⁸ but if parties fail to agree upon a procedure, the Arbitration Law provides the following default rules for the appointment of arbitrators upon a party's request:

- When there are two parties in arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator. In such case, if

²⁷ Article 18.3 of the Arbitration Law.

²⁸ Article 18.4 of the Arbitration Law.

²⁹ Article 44.1 (vi) of the Arbitration Law.

³⁰ Supreme Court, December 12, 2017, Hei 28 (Kyo) No. 43, 71-10 MINSHU 2106 (Japan). For more detail of the Supreme Court decision, Shin Tada and Aiko Hosokawa, Japanese Supreme Court Provides Guidance on Arbitrator's Duty to Disclose a Potential Conflict of Interest in an International Arbitration ([Oh-Ebashi Newsletter 2018 Summer Issue](#), June 2018).

³¹ Osaka High Court, March 11, 2019, Hei 29 (Ra) No. 1552, 1468 HANREI TAIMUZU 65 (Japan).

³² Article 18.1 (i) of the Arbitration Law.

³³ Article 19.1 of the Arbitration Law.

³⁴ Article 19.3 of the Arbitration Law.

³⁵ Article 19.2 of the Arbitration Law.

³⁶ Article 19.4 of the Arbitration Law.

³⁷ Article 19.4 of the Arbitration Law.

³⁸ Article 17.1 of the Arbitration Law.

a party fails to appoint an arbitrator within thirty days of a request to do so by the other party who has appointed an arbitrator, the appointment shall be made by the court upon the request of that party, or if the two arbitrators appointed by the parties fail to agree on the third arbitrator within thirty days of their appointment, upon the request of a party.³⁹

- When there are two parties in an arbitration with a sole arbitrator, the court shall appoint an arbitrator upon the request of a party.⁴⁰
- When there are three or more parties, the court shall appoint arbitrators upon the request of a party.⁴¹
- Where, under an appointment procedure for arbitrators agreed upon by the parties as provided for, an arbitrator cannot be appointed due to a failure to act as requested under such procedure or for any other reason, a party may request the court to appoint such arbitrator.⁴²

4.4 Do courts have the power to issue interim measures in connection with arbitrations? If so, are they willing to consider *ex parte* requests?

Yes. An Arbitration Agreement shall not preclude the parties from filing, before the commencement or during the course of arbitral proceedings, a petition seeking a provisional order from the court with respect to the civil dispute which is subject to the arbitration agreement. Neither shall an Arbitration Agreement preclude a court that has received the petition from issuing a provisional order.⁴³ The interim measures which courts can issue include orders for provisional seizure and provisional disposition. When a party files a petition that sets forth the purpose of the interim measure sought, the right, or relationship of rights to be preserved and the necessity to preserve them, courts can order provisional orders in accordance with the Japanese Civil Provisional Remedies Act.

Major differences from the interim measures granted by an arbitral tribunal are the existence of an appeal system, enforceability, and the *ex parte* procedure for certain provisional orders.⁴⁴ Interim measures granted by a court can be appealed by the parties, and can be enforced by a court, while interim measures granted by an arbitral tribunal cannot be appealed by the parties and cannot be enforced by a court. A court can issue most interim measures, such as provisional seizure, on an *ex parte* basis, without providing an opportunity for the counterparty to respond before the court.

4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

The Arbitration Law guarantees the equal treatment of parties⁴⁵ and that each party is given a full opportunity of presenting their case.⁴⁶ The rules of an arbitration procedure which the arbitral tribunal should observe shall be as provided by the agreement of the parties; provided, however, that such rules shall not violate the provisions concerning public order provided in the Arbitration Law.⁴⁷ If such agreement has

³⁹ Article 17.2 of the Arbitration Law.

⁴⁰ *Id.*

⁴¹ Article 17.3 of the Arbitration Law.

⁴² Article 17.5 of the Arbitration Law.

⁴³ Article 15 of the Arbitration Law.

⁴⁴ In general, a judicial decision relating to procedures for civil provisional remedy may be made without going through oral argument (Article 3 of Civil Provisional Remedies Act). But a provisional disposition to determine a provisional status may not be issued without holding oral argument or holding a hearing which the obligor can attend, provided, however, that this shall not apply when there are circumstances where the objective of the petition for an order of provisional disposition cannot be achieved if such proceedings are held (Article 23.4 of Civil Provisional Remedies Act).

⁴⁵ Article 25.1 of the Arbitration Law.

⁴⁶ Article 25.2 of the Arbitration Law.

⁴⁷ Article 26.1 of the Arbitration Law.

not been reached, the arbitral tribunal may carry out the arbitration procedure in such manner as it finds appropriate, unless such manner violates the provisions of the Arbitration Law.⁴⁸ The power conferred upon the arbitral tribunal if such agreement has not been reached shall, with regard to evidence, include the power to determine its admissibility as evidence, necessity of examination, and its probative value.⁴⁹

4.5.1 Does it provide for the confidentiality of arbitration proceedings?

No. The Arbitration Law does not expressly provide for confidentiality obligations with respect to arbitral proceedings. Whether the arbitrators and parties bear confidentiality obligations is left to any agreement between the parties and the applicable institutional arbitration rules. For example, the JCAA rules stipulate that the arbitrators, the JCAA (including its directors, officers, employees, and other staff), the parties, their counsel and assistants, and other persons involved in the arbitral proceedings shall not disclose facts related to or learned through the arbitral proceedings and shall not express any views as to such facts, except where disclosure is required by law or in court proceedings, or based on any other justifiable grounds.⁵⁰

4.5.2 Does it regulate the length of arbitration proceedings?

No.

4.5.3 Does it regulate the place where hearings and/or meeting may be held, and can hearings and/or meetings be held remotely, even if a party objects?

Parties are free to agree on the location of hearings and/or meetings. Unless otherwise agreed upon by the parties, an arbitral tribunal has discretion to conduct the following procedures at any place it considers appropriate: (i) consultation among the members of the arbitral tribunal; (ii) hearing of parties, experts or witnesses; and (iii) inspection of goods, other property or documents.⁵¹

4.5.4 Does it allow for arbitrators to issue interim measures? If in the affirmative, under what conditions?

Yes. Unless otherwise agreed upon by the parties, an arbitral tribunal may, at the request of a party, order any party to take interim measures of protection, including provisional seizure for claim, the arbitral tribunal considers necessary with respect to the subject matter of the dispute.⁵² An arbitral tribunal may order any party to provide appropriate security in connection with such measure.⁵³

4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence? For example, are there any restrictions to the presentation of testimony by a party employee?

Unless otherwise agreed upon by the parties, an arbitral tribunal has the power to determine the admissibility, relevance, materiality, and weight of any evidence.⁵⁴ In international arbitration cases seated in Japan, arbitral tribunals frequently use the IBA's Rules on Taking of Evidence in International Arbitration as guidance on the admission or exclusion of evidence.

⁴⁸ Article 26.2 of the Arbitration Law.

⁴⁹ Article 26.3 of the Arbitration Law.

⁵⁰ Article 42.2 of the Commercial Arbitration Rules (as amended and effective on January 1, 2019) and Article 42.2 of the Interactive Arbitration Rules.

⁵¹ Article 28.3 of the Arbitration Law.

⁵² Article 24.1 of the Arbitration Law.

⁵³ Article 24.2 of the Arbitration Law.

⁵⁴ Article 26.3 of the Arbitration Law.

4.5.6 Does it make it mandatory to hold a hearing?

In general, no. However, the Arbitration Law requires mandatory oral hearings at an appropriate stage of the arbitration proceedings, if a party makes an application to hold such hearings.⁵⁵ However, this provision shall not apply when the parties agree otherwise.⁵⁶

4.5.7 Does it prescribe principles governing the awarding of interest?

No. This is a matter for the applicable substantive law.

When the laws of Japan are applicable, under the former Civil Code and the Commercial Code, the interest rate applicable to obligations arising from business transactions between companies was six percent per annum.⁵⁷ Unless otherwise agreed by the parties, simple interest is charged on the principal amount. However, due to the reform of the Civil Code which came into effect on April 1, 2020, the current interest rate for such transactions is three percent per annum and the interest rate will be reviewed every three years based on the market interest rate.⁵⁸ In applying the variable interest rate of the new Civil Code, practitioners need to pay attention to the reference time.

4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

Yes. The costs disbursed by the parties with respect to the arbitral proceedings shall be apportioned between the parties in accordance with the agreement between the parties.⁵⁹ If such an agreement has not been reached, each party shall bear the costs it has disbursed.⁶⁰ If the parties have reached an agreement, the arbitral tribunal may, in an arbitral award or in an independent ruling, determine the apportionment of costs and the amount that one party should reimburse to the other based on the agreement.⁶¹

4.6 Liability

4.6.1 Do arbitrators benefit from immunity from civil liability?

Arbitrators can be held liable based on Japanese civil law as a general matter as the Arbitration Law does not provide for arbitrators' immunity. However, arbitrators can benefit from immunity under applicable institutional arbitration rules. For example, the JCAA rules stipulate that arbitrators and the JCAA (including its directors, officers, employees, and other staff) are not held liable unless their acts or omissions are shown to constitute willful misconduct or gross negligence.⁶²

4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

There are offences which arbitrators and parties could potentially commit, such as the acceptance, passing, and giving of bribes.⁶³ Penal provisions for acts of bribery, such as acceptance of bribes, passing of bribes to a third party, or giving bribes, are applicable to a person who has committed the relevant crimes in or outside Japan.⁶⁴

⁵⁵ Article 32.1 of the Arbitration Law.

⁵⁶ Article 32.2 of the Arbitration Law.

⁵⁷ Article 514 of the Commercial Code.

⁵⁸ Article 404 of the Civil Code (effective as of April 1, 2020).

⁵⁹ Article 49.1 of the Arbitration Law.

⁶⁰ Article 49.2 of the Arbitration Law.

⁶¹ Article 49.3 of the Arbitration Law.

⁶² Article 13 of the Commercial Arbitration Rules (as amended and effective on January 1, 2019).

⁶³ Article 50 to Article 54 of the Arbitration Law.

⁶⁴ Article 55.1 of the Arbitration Law.

5. The award

5.1 Can parties waive the requirement for an award to provide reasons?

Yes. If parties do not waive the requirement, the arbitral award shall state the reasons.⁶⁵

5.2 Can parties waive the right to seek the annulment of the award? If yes, under what conditions?

There is no explicit rule or established precedent regarding this point, and it is unclear whether parties can waive the right to seek the annulment of awards under Japanese law. Although there is no rule or precedent which prohibits parties from waiving the right to seek the annulment of the award, such a waiver may be prohibited on the basis that the right to seek an annulment of the award is too important to be waived.

5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

There are no such atypical mandatory requirements.

Although the Arbitration Act is silent on dissenting opinions, the Tokyo District Court has recently dismissed an annulment application that was based on the argument that an award with a dissenting opinion violates the law. The Tokyo District Court reasoned that both the Arbitration Law and the applicable institutional rules (*i.e.* JCAA Rules) do not prohibit the arbitral tribunal from referring to dissenting opinions.⁶⁶ It should be noted, however, that the JCAA amended its arbitration rules and now prohibits arbitrators from disclosing dissenting opinions in any manner, following the decision of the Tokyo District Court.⁶⁷

5.4 Is it possible to appeal an award (as opposed to seeking its annulment)? If yes, what are the grounds for appeal?

No. An arbitral award is final and conclusive.⁶⁸

5.5 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

Japan has been a party to the NYC since 1961, subject to the reciprocity reservation. The Arbitration Law follows Article 3 of the NYC with respect to recognition and enforcement. There is no distinction between local and foreign awards.

Recognition

An arbitral award shall have the same effect as a final and conclusive judgment, and arbitral awards can therefore be recognized without any further procedure in a Japanese court, unless any of the following grounds, which correspond to Article 5 of the NYC, are present:⁶⁹

(i) the arbitration agreement is not valid due to limits to a party's capacity;

(ii) the arbitration agreement is not valid for a reason other than limits to a party's capacity under the law to which the parties have agreed to subject it (or failing any indication thereon, the law of the country under which the place of arbitration falls);

(iii) a party was not given notice as required by the provisions of the law of the country under which the place of arbitration falls (or where the parties have otherwise reached an agreement on matters

⁶⁵ Article 39.2 of the Arbitration Law.

⁶⁶ See Tokyo High Court, August 1, 2018, Hei (Ra) No. 81, 1551 KINYU SYOJI HANREI 13 (Japan).

⁶⁷ Article 63 of the Commercial Arbitration Rules (as amended and effective on January 1, 2019).

⁶⁸ Article 45.1 of the Arbitration Law.

⁶⁹ Article 45.1 and Article 45.2 of the Arbitration Law.

concerning the provisions of the law that do not relate to public policy, such agreement) in the proceedings to appoint arbitrators or in the arbitral proceedings;

(iv) a party was unable to present its case in the arbitral proceedings;

(v) the arbitral award contains decisions on matters beyond the scope of the arbitration agreement or the claims in the arbitral proceedings;

(vi) the composition of an arbitral tribunal or the arbitral proceedings were not in accordance with the provisions of the law of the country under which the place of arbitration falls (or where the parties have otherwise reached an agreement on matters concerning the provisions of the law that do not relate to public policy, such agreement);

(vii) according to the law of the country under which the place of arbitration falls (or where the law of a country other than the country under which the place of arbitration falls was applied to the arbitral proceedings, such country), the arbitral award has not yet become binding, or the arbitral award has been set aside or suspended by a court of such country;

(viii) the claims in the arbitral proceedings relate to a dispute that cannot constitute the subject of an arbitration agreement under the laws of Japan; or

(ix) the content of the arbitral award would be contrary to the public policy or good morals of Japan.

With respect to the grounds described in items (i) through (vii), the party bringing an annulment application has to prove the existence of the ground in question. With respect to the grounds described in items (viii) and (ix), courts can find that the ground exists even where neither party has proven its existence.

Enforcement

A party seeking enforcement based on the arbitral award may apply to a court for an enforcement decision against the debtor as counterparty.⁷⁰ The party making the application shall supply a copy of the arbitral award, a document certifying that the content of said copy is identical to the arbitral award, and a Japanese translation of the arbitral award (except when composed in Japanese).⁷¹ The court may dismiss the application for enforcement only when it finds any of the aforementioned grounds for non-recognition are satisfied, and the court shall issue an enforcement decision if it does not dismiss the application.⁷² A court may make an enforcement decision following oral proceedings at which the parties may attend.⁷³

There is no time-limit for the recognition and enforcement of awards.

5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

No. The Arbitration Law does not provide for the automatic suspension of enforcement decisions. However, if an application for setting aside or suspending an arbitral award has been made to the court, the court may, if considered necessary, suspend proceedings relating to the application for enforcement. In such case, the court may, upon request of the party who submitted the application, order the other party to provide security.⁷⁴

⁷⁰ Article 46.1 of the Arbitration Law.

⁷¹ Article 46.2 of the Arbitration Law.

⁷² Article 46.7 and Article 46.8 of the Arbitration Law.

⁷³ Article 46.10 and Article 44.5 of the Arbitration Law.

⁷⁴ Article 46.3 of the Arbitration Law.

5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

No. If an arbitral award is set aside by a court at the seat of the arbitration, it is one of the grounds for the Japanese courts to refuse recognition and enforcement of the award.⁷⁵ However, even under these circumstances, neither the NYC⁷⁶ nor the Arbitration Law⁷⁷ require a court to refuse enforcement, as Japanese courts have discretion as to the enforcement of such awards. There has been no precedent in the Japanese courts on this matter.

5.8 Are foreign awards readily enforceable in practice?

Yes, as explained in 5.5, foreign awards are enforceable unless courts find any of the limited grounds to refuse recognition and enforcement.

In practice, Japanese courts have taken a pro-arbitration stance. According to one recent survey published in a private law journal by a clerk from the Tokyo District Court, during the period between March 1, 2004 and December 31, 2016, 70% of the applications for an enforcement decision of an arbitral award had been granted, 20% of the applications had been withdrawn (The reasons for the withdrawals are not public.), and only one application had been declined.⁷⁸

6. Funding Arrangements

6.1 Are there laws or regulations relating to, or restrictions to the use of contingency, alternative fee arrangements or third-party funding at the jurisdiction? If so, what is the practical and/or legal impact of such laws, regulations or restrictions?

There are no restrictions on the use of contingency fee arrangements, which can be freely agreed between lawyers and clients. In domestic litigation, lawyers often act on a fee arrangement consisting of a retainer fee and a success fee (*i.e.* contingency fee based on a certain percentage of the results obtained). In international arbitrations, law firms often work on an hourly rate basis.

While third-party funding is not specifically prohibited, there is still uncertainty as to whether such funding arrangements are allowed for arbitrations in Japan.

Whether a specific funding arrangement is subject to restrictions depends on the details of the arrangement. If third-party funding entails a claim assignment, such an arrangement may violate the Trust Act, which prohibits the creation of a trust for the primary purpose of having another person conduct any procedural act.⁷⁹ This arrangement may also violate the Attorney Act, which prohibits engagement in the business of obtaining the rights of others by assignment and enforcing such rights through lawsuits, mediations, conciliation or any other method.⁸⁰ Also, if third-party funding enables the funder to control or directly influence the conduct of the arbitration, such an arrangement may violate the Attorney Act, which prohibits the providing of legal services by anyone other than those who are admitted to practice law in Japan.⁸¹

⁷⁵ Article 45.2 (vii) and Article 46.8 of the Arbitration Law.

⁷⁶ Article 5 of the NYC.

⁷⁷ Article 46.8 of the Arbitration Law.

⁷⁸ Hidenobu Nagasue, Survey on Arbitration-related Cases Handled by the Tokyo District Court (JCA Journal, July 2017). While the applications in this survey include both applications related to domestic awards and foreign awards, it is reasonable to assume that most of the applications related to foreign awards.

⁷⁹ Article 10 of the Trust Act.

⁸⁰ Article 73 of the Attorney Act.

⁸¹ Article 72 of the Attorney Act.

7. Arbitration and technology

7.1 Is the validity of blockchain-based evidence recognised?

In general, there is no limitation on digital evidence under the Code of Civil Procedure⁸². There has been no precedent on this point. Future cases will show how courts recognize the validity and the value as of blockchain-based evidence in specific cases.

7.2 Where an arbitration agreement and/or award is recorded on a blockchain, is it recognised as valid?

Under the current Arbitration Law, an arbitration agreement made in an electromagnetic record is recognized as valid.⁸³ Therefore, an arbitration agreement recorded on a blockchain is likely to be recognized as valid. Amendments to the Arbitration Law are currently being discussed, and the new Arbitration Law is likely to incorporate a similar article as Option I, Article 7(3) of 2006 version of the UNCITRAL Model Law, which states that an arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means. This further expands the forms of a valid arbitration agreement.

In making an arbitral award, a written arbitral award shall be prepared and signed by the arbitrators(s) who has made the arbitral award.⁸⁴ Since there are no limitations on the form of an award, an arbitral award recorded on a blockchain is likely to be recognized as valid so long as it satisfies the signature requirement.

7.3 Would a court consider a blockchain arbitration agreement and/or award as originals for the purposes of recognition and enforcement?

A court is likely to consider a blockchain arbitration agreement and/or award as originals.

7.4 Would a court consider an award that has been electronically signed (by inserting the image of a signature) or more securely digitally signed (by using encrypted electronic keys authenticated by a third-party certificate) as an original for the purposes of recognition and enforcement?

A court would consider an award that has been securely digitally signed (by using encrypted electronic keys authenticated by a third-party certificate) as an authentically established original⁸⁵. A court is also likely to consider an award that has been electronically signed (by inserting the image of a signature) as an original, but the party submitting the document to a court needs to demonstrate the authenticity of the document, if disputed.

8. Is there likely to be any significant reform of the arbitration law in the near future?

On June 21, 2019, Japan Federation of Bar Association published its opinion on proposed amendments to the Arbitration Law and related laws to reflect the 2006 UNCITRAL Model Law.⁸⁶ These proposals include granting enforceability to certain interim measures by arbitral tribunals. The amendments have not been proposed to the Diet yet, but there could be significant reform of the Arbitration Law in the near future.

In December 2018, the JCAA amended its two existing arbitration rules, the Commercial Arbitration Rules⁸⁷ and the Administrative Rules for UNCITRAL Arbitration,⁸⁸ and launched a new third option called the

⁸² Article 231 of Code of Civil Procedure.

⁸³ Article 13.4 of the Arbitration Law.

⁸⁴ Article 39.1 of the Arbitration Law.

⁸⁵ Article 3 of the Act on Electronic Signatures and Certification Business.

⁸⁶ Available at https://www.nichibenren.or.jp/library/ja/opinion/report/data/2019/opinion_190621.pdf (in Japanese).

⁸⁷ Available at http://www.jcaa.or.jp/e/arbitration/docs/Commercial_Arbitration_Rules.pdf.

⁸⁸ Available at http://www.jcaa.or.jp/e/arbitration/docs/UNCITRAL_Arbitration_Rules.pdf.

Interactive Arbitration Rules.⁸⁹ All three rules came into force on January 1, 2019. The Interactive Arbitration Rules are unique in that they require the arbitral tribunal to disclose its non-binding preliminary views at an early stage of the proceedings and again at a later stage before deciding whether or not to hold a hearing. The Interactive Arbitration Rules also require that the arbitral tribunal provide the parties with an opportunity to comment on the tribunal's views. This interactive way of conducting the proceedings is expected to help the parties to present the case efficiently, enhance predictability for the parties, and facilitate the drafting of the final award by the arbitral tribunal.

9. Compatibility of the Delos Rules with local arbitration law

The Arbitration Law is compatible with the Delos Rules.

10. Further reading

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⁸⁹ Available at http://www.jcaa.or.jp/e/arbitration/docs/Interactive_Arbitration_Rules.pdf. For more details about the Interactive Arbitration Rules, Aiko Hosokawa and Miriam Rose Ivan L. Pereira, The New Interactive Arbitration Rules of the Japan Commercial Arbitration Association (*Oh-Ebashi Newsletter 2019 Summer Issue*, June 2019).

ARBITRATION INFRASTRUCTURE AT THE JURISDICTION

As stated above, the JIDRC opened well-equipped arbitration hearing facilities in Osaka and Tokyo as part of an initiative to promote international arbitration in Japan.

Leading national, regional and international arbitral institutions based out of the jurisdiction, <i>i.e.</i> with offices and a case team?	The Japan Commercial Arbitration Association (JCAA)
Main arbitration hearing facilities for in-person hearings?	The Japan International Dispute Resolution Center (JIDRC) JIDRC has facilities in Osaka and Tokyo suitable for hearings for international arbitration and mediation.
Main reprographics facilities in reasonable proximity to the above main arbitration providers with offices in the jurisdiction?	The JIDRC has reprographics facilities available for users.
Leading local providers of court reporting services, and regional or international providers with offices in the jurisdiction?	Planet Depos, LLC
Leading local interpreters for simultaneous interpretation between English and the local language, if it is not English?	Simul International, Inc., Inter Group Corporation.
Other leading arbitral bodies with offices in the jurisdiction?	∅