THE ASIA-PACIFIC ARBITRATION REVIEW 2015

Published by Global Arbitration Review
in association with

Nagashima Ohno & Tsunematsu

gar
The international journal of commercial and treaty arbitration

www.GlobalArbitrationReview.com

Japan

Yoshimi Ohara
Nagashima Ohno & Tsunematsu

This chapter introduces the new rules of the Japan Commercial Arbitration Association (JCAA) that came into force on 1 February 2014; the recent court decision involving arbitration; and developments on free trade agreements.

New JCAA Rules – ready to offer up-to-date services

The 2014 JCAA Commercial Arbitration Rules came into effect on 1 February 2014 (the New Rules).[1] For the first time in a decade, the JCAA has comprehensively amended its rules to meet the demands and expectations of arbitration users. International arbitration institutions currently compete with each other by improving their rules, practices and facilities and providing better services to users. Given the number of institutions eager to help prospective disputants, it is a good time to be an arbitration user. Since 1 February 2014, JCAA users may also enjoy arbitration governed by a set of the most sophisticated arbitration rules.[2] The aim of the New Rules is to provide efficient and effective arbitration and to reflect the best practice in international arbitration.

Key changes at a glance

Efficiency and effectiveness of procedures

- The 'Basic Date' system has been abolished.
- Awards must now be issued within six months from the formation of the tribunal (rule 39.1).
- The tribunal must fix a schedule (rule 39.2) and identify issues (rule 40) in the early stages of the proceedings.
- Electronic filing (rules 2 and 5) has been introduced.

Arbitrators

- The JCAA has introduced new screening of arbitrators (rule 25.3).
- The authority of the chair arbitrator on procedural issues (rule 7.3) has been clarified.
- The JCAA's practice of respecting a party's request that a sole or chair arbitrator not have the nationality of either party (rule 27.4) has been codified.

Dealing with uncooperative parties

- Constructive receipt of notices and submissions by a party refusing receipt (rule 5.4) has been introduced.
- Cost allocation taking into account the parties' conduct during the arbitration proceedings (rule 83.2) has been introduced.
- The treatment of a defaulting party (rule 48) has been clarified.

A single proceeding for multiple claims and multiple parties

- New requirements for bringing multiple claims in a single proceeding (rule 15) have been implemented.
- Scope of counterclaims (rule 19) and amendment to claims (rule 21) have been clarified.
- New requirements for consolidating proceedings (rule 53), appointment of arbitrators in multiple party arbitration (rule 29), and third-party joinder (rule 52) have been established.

Interim measures and emergency arbitrators

- The scope, requirements and effect in respect of interim measures (rules 66-69) have been clarified.
- Emergency arbitrators provisions (rules 70-74) have been implemented.

Others

- Med-arb proceedings (rules 54, 55) have been refined.
- Expedited procedures: at the parties' choice, monetary thresholds are no longer applicable (rule 75.1).
- The scope of confidentiality obligations have been expanded to include confidentiality obligations of any persons involved in the arbitration proceedings, and exceptions from confidentiality obligations in the case of justifiable reason (rule 38.2) have been clarified.

Provisions to expedite the arbitration proceedings

The JCAA has abolished the Basic Date system whereby the counting of time limits set forth in the rules, such as the time limit for submissions, commenced on the the date immediately following the expiry of three weeks from the date on which the JCAA sent a notice of the request for arbitration.[3] Under the previous rules, the clock did not start ticking until three weeks had passed from the date on which the JCAA sent a notice of request for arbitration, even when the respondents had already received the request for arbitration. Under the New Rules, the counting of the time limit commences on the date when the respondents receive or are deemed to receive the notices in order to move things forward as soon as the respondents receive a proper notice for arbitration.

The JCAA now obligates the tribunal to use its reasonable efforts to render an award within six months from the date of constitution of the tribunal (rule 39.1). To achieve such time limit, the tribunal is also required to fix a schedule of the proceedings through consultation with the parties as soon as practicable (rule 39.2). The tribunal is encouraged to identify issues at an early stage of the proceedings upon consultation with the parties and may prepare terms of reference if it finds it appropriate (rule 40). Fixing a schedule in Procedure Order No. 1 and identifying the issues at an early stage of the proceedings are representative of the best practice in international arbitration, and the JCAA has codified such best practice to facilitate expeditious and efficient arbitration proceedings.

Arbitrators

The arbitrators chosen by the parties are at the core of party autonomy, one of the fundamental principles of international

arbitration. The New Rules continue to respect party autonomy; however, the appointment of an arbitrator will not become effective unless and until the JCAA confirms the appointment (rule 25.3). This confirmation requirement applies equally to the appointment of an arbitrator by a party or by the agreement of parties or party arbitrators, and has been introduced to exclude an arbitrator the selection of whom is apparently inappropriate due to obvious conflicts,[4] lack of availability or lack of competence at the outset of the proceedings. Since this is an exception to party autonomy, the JCAA's refusal to confirm the appointment of the arbitrators chosen by the parties is limited to extreme situations, and the JCAA may not refuse to confirm the appointment of an arbitrator without consulting with the parties and other party arbitrators (rule 25.3).

Means to deal with uncooperative parties

A party may protract a given case by failing to appear in the proceedings. In the event that a party fails to appear without sufficient cause, the tribunal may continue the arbitration proceedings and render an award based on the evidence submitted (rule 48). On some occasions, a party may become even more disruptive by refusing to receive any notices or submissions from the other party or from the arbitration institution. This could cause serious issues should the arbitration law or arbitration rules require that notices or submissions be received by an intended recipient party to put such notices and submissions into effect. An obstructionist party may deploy such tactics to frustrate the arbitration proceedings. In order to tackle those tactics, the JCAA has introduced the concept of constructive receipt of notices and submissions by an intended recipient in the event such intended recipient refuses receipt, whereby such party is deemed to have received the notices and submissions on the fourth day after the notices or submission were dispatched, or on the date when the intended recipient refused receipt, if such date is known (rule 5.4).

The concept of constructive receipt was also introduced to a party whose address is not ascertainable in spite of reasonable efforts exerted by a sending party. In this event, a party is deemed to have received the notices and submissions on the fourth day after the notices or submission were dispatched to the party's last known address (rule 5.5).

The New Rules further confirm the tribunal's authority to allocate the costs of arbitration, including attorneys' fees of the parties, taking into account a party's conduct during the arbitration. For example, should a party fail to comply with interim orders issued by the tribunal or disrupt the proceedings, the tribunal may, in essence, sanction the party by imposing a higher allocation of costs on the party regardless of the outcome of the proceedings (rule 83.2).

A single proceeding for multiple claims and multiple parties

The New Rules offer the option of a single proceeding for multiple claims if:

- all parties to the multiple claims have agreed in writing;
- the multiple claims are subject to the same arbitration agreement; or
- the multiple claims arose between the same parties; and
  - the same or similar question of fact or law arises from such claims;
  - the arbitration agreements refer all such claims to be arbitrated at the JCAA or under the rules of the JCAA; and
  - a single proceeding for such claims is feasible in light of the arbitration agreements, considering factors such as the seat, the number of arbitrators, and languages prescribed in each of the arbitration agreements (rule 15.1).

Under the previous rules, the scope of claims that could be brought into a single proceeding was dictated by an arbitration agreement; namely, multiple claims may be arbitrated in a single proceeding if those claims arose from the same arbitration agreement. This principle remains the same; however, the New Rules introduced some flexibility such that a party may arbitrate multiple claims governed by separate arbitration agreements in a single proceeding when it is sensible and practicable to do so. For example, a party may now bring multiple claims governed by separate arbitration agreements in a single proceeding if such claims arise from separate but virtually identical individual contracts that involve similar and repeated transactions and are subject to one single master agreement. The New Rules apply essentially the same requirements as mentioned above to counterclaims (rule 19), amendment of claims (rule 21), third-party joinder (rule 52), and consolidation (rule 53), in each case, aiming to achieve efficient dispute resolution in one single proceeding.

Interim measures

Interim measures have been provided in the JCAA rules; however, the New Rules have clarified the scope, requirements and effect for the interim measures by essentially incorporating Article 17 of 2006 UNCITRAL Model Law and Article 26 of the 2010 UNCITRAL Arbitration Rules (rules 66-69). A major difference between the UNCITRAL rules and the New Rules is that the New Rules explicitly exclude the option of ex parte interim measures, while the UNCITRAL Rules are silent on this point (rule 66.4). Please note that the Japanese Arbitration Act, which is consistent with the 1985 UNCITRAL Model Law, has not incorporated the 2006 UNCITRAL Model Law. As such, interim measures issued by the tribunal are not enforceable in a Japanese court as yet. However, the failure to comply with the interim measure could be sanctioned by way of an unfavorable allocation of costs and, at minimum, a non-compliant party is likely to be found in breach of an arbitration agreement, which constitutes another cause of action.

Emergency arbitrators

Following the trend of institutional arbitration rules, the JCAA has introduced emergency arbitrator (EA) proceedings, which are equally robust to those provided for by other institutional rules with respect to:

- a party being able to apply for EA proceedings even before filing a request for arbitration;[5]
- no person being able to be appointed as an EA if there are any circumstances likely to give rise to doubts as to impartiality or independence (unlike an arbitrator, who is disqualified only when there are any circumstances likely to give rise to justifiable doubts as to impartiality or independence)[6] of the EA;
- the JCAA, in principle, appointing an EA within two business days from its receipt of the application;
- an EA setting the procedural schedule immediately after the appointment and issuing an interim decision within two weeks from the appointment; and
- any such interim decision issued by an EA being treated as an interim measure issued by the full tribunal unless and until the

tribunal amends, suspends or terminates such interim decision (rules 70-74).

Again, EA's interim decision is not yet enforceable in a Japanese court, a breach of an interim decision issued by an EA could be sanctioned in the course of apportionment of costs and constitute another cause of action. The fees for an EA are subject to cap of ¥2 million.[7]

ArbMed proceedings

The JCAA has refined its rules on mediation conducted in the course of arbitration such that an arbitrator may not act as a mediator without a written agreement between the parties (rule 54.1). Once the parties agree to have an arbitrator serve as a mediator, such parties may not challenge the arbitrator on the ground that he or she acted as a mediator (rule 55.1). Furthermore, an arbitrator acting as a mediator is required to inform the parties of the existence of ex parte communications with either party (rule 55.2). The JCAA does not require an administration fee for mediation when an arbitrator of the pending arbitration is acting as a mediator (rule 55.4). The JCAA rules now clearly set forth a 'settlement negotiation privilege' (rule 54.3); namely, unless otherwise agreed to between the parties, communications made during the mediation proceedings or any settlement proposal made by a mediator are excluded from evidence in the arbitration proceeding.

Expedited procedures

Expedited procedures at the JCAA were originally intended for small claims below ¥20 million whereby a sole arbitrator would render an award within three months from the appointment, having only a one-day hearing if necessary. This procedure is now open to all parties irrespective of the size of the claim so long as the parties agree in writing and notify the JCAA of their agreement within two weeks from the date of receipt of the arbitration request by the respondent (rule 75).

By incorporating the best practice in international arbitration into its New Rules, the JCAA is now better positioned to meet the needs and expectations of JCAA users.

Japanese courts – too friendly for arbitration?

The Japanese courts have been consistently arbitration-friendly and have rarely intervened in arbitration proceedings or set aside, or refused to enforce an arbitration award even before Japan adopted the 1985 UNCITRAL Model Law in 2003.

Last year, the Tokyo District Court restated its basic approach by dismissing a claim based on an arbitration agreement. However, this case involved a 'pathological' arbitration agreement, and the court decision to uphold the pathological agreement should be questioned.

Tokyo District Court decision 23 August 2013

This case involved two sales contracts of silicon wafers for solar panels between a Korean company (the purchaser) and a Japanese company (the seller).[8] The purchaser filed a suit against the seller to seek repayment of the advance payment (approximately US$3.5 million) after terminating the sales contracts based on the alleged breach by the seller. The seller sought dismissal of this claim based on the arbitration clauses in the sales contracts, the dismissal of which the court granted. The arbitration clauses in the two sales contracts provided in essence as follows:

11 Arbitration

11.1 Both Parties shall do their best in order to settle any disputes and/or arguments, which may arise upon or in connection with the present Contract, by means of negotiations.

11.2 Any disputes arisen upon or in connection with the present Contract, including the disputes concerning the quality of the products should be submitted for recourse and final resolution to the International Commercial Arbitration Court.

11.3 The award of the Arbitration Court shall be final and binding for both Parties, but can be substituted by a friendly agreement between Parties, which agreement should be duly drawn up in writing and signed by both Parties. Language of the arbitral proceedings is English.

The arbitration clause refers the disputes to the International Commercial Arbitration Court and, according to the court decision, there were at least three arbitration institutions with the name 'International Commercial Arbitration Court' (ICAC), in Russia, Ukraine and Belgium.[9] The purchaser claimed that it intended to arbitrate under ICC rules (as opposed to the ICAC rules) and the arbitration agreements were entered into by mistake and therefore should be found void. It would be unthinkable and against common business sense for a Korean party and a Japanese party entering into an arbitration agreement whereby either party may initiate arbitration before any of the three institutions in Russia, Ukraine or Belgium in relation to a sales transaction between Japan and Korea. Such a defective arbitration clause should be found void and should not have been permitted to stand even as an ad hoc arbitration agreement. On this point, the seller, although refusing to identify its intent in this arbitration clause (ie, whether or not the seller actually intended to arbitrate under the auspices of any of the three arbitration institutions in Russia, Ukraine or Belgium), argued that it is not uncommon to arbitrate in a neutral country (ie, a country other than the countries of the parties), and the parties should not have made a mistake twice in agreeing to the arbitration clause when the sales contracts involved a large sum of money. In endorsing the arbitration clause as it was, the court held that the minimum requirement for an arbitration agreement under the Japanese Arbitration Act is 'an agreement to arbitrate in writing' and the above arbitration clause unquestionably met such minimum requirement. In denying the 'mistake arguments', the court assumed that the parties must not have reviewed the arbitration clause carefully in entering into two contracts involving a large stake. The court further assumed that the parties may well have chosen to arbitrate in Russia, Ukraine or Belgium because the parties may have preferred to have arbitration in a neutral seat, and Russia, Ukraine or Belgium may well be chosen as the seat because, in particular, Russia and Ukraine had adopted the UNCITRAL Model Law.

The court should understand the business reality

Pathological arbitration clauses are common issues, ironically, among arbitration-friendly countries. The arbitration-friendly court, being eager to respect party autonomy, often rushes to a conclusion that a pathological arbitration clause should survive as it is, or as a simple ad hoc arbitration clause, by removing the terms that frustrate the arbitration clause, or in a modified form after going through a 'surgical process' of interpreting the parties' true intent. There is no single prescription to resolve the issue of a defective arbitration clause. However, as a starting point, the court should understand the business reality that it is quite possible that any party may by mistake execute a pathological arbitration clause

and later either party may take advantage of such defective clause to frustrate the efficient resolution of disputes. Indeed, it is not unusual that dispute resolution is provided for in the miscellaneous provisions section at the very end of an agreement – sometimes referred to as 'a midnight clause' because the parties negotiated it at the very end of a negotiation that lasted days and nights. This is precisely the source of a pathological arbitration clause. The court should not merely assume that the parties should have reviewed and negotiated an arbitration clause carefully simply because the stakes involved are substantial. It is also important for the court to be familiar with arbitration practice, such as the preferred institutions, preferred seats and the fact that adoption of the UNCITRAL Model Law is one thing and arbitration practice up to international standards is quite another thing, and it is very uncommon for parties to have multiple options in choosing arbitration institutions as interpreted by the Tokyo District Court's findings.

Ad hoc arbitration is not always a solution

One may argue that the Tokyo District Court should have allowed the arbitration clause to survive as a straight forward ad hoc arbitration agreement (ie, sheer agreement to arbitrate). Again, the court should also understand and appreciate the practice of arbitration – which requires extensive cooperative between the parties to pursue – and the court, in allowing a defective arbitration clause to survive as an ad hoc arbitration clause, is not always a proper prescription. While an agreement to arbitrate in writing may be the minimum requirement for an arbitration agreement, when parties agree to an institutional arbitration, the parties have intentionally avoided ad hoc arbitration, and finding an ad hoc arbitration agreement could be a material deviation from parties' true intent. Indeed, a sheer agreement to arbitrate may result in an extremely costly and time consuming process should either party be an obstructionist. This is because every time a party does not cooperate, the other party has to resort to the court of the seat to move the proceeding forward, particularly before the tribunal is constituted. A court finding that there is an ad hoc arbitration clause may well force a party to give up dispute resolution altogether. The court should wisely discern the parties' real intent and whether it is fair and equitable to allow a pathological arbitration clause to survive and, if so, how.

Investment treaties and free trade agreements

One of the key economic policies for the Abe administration is tapping into the growth of emerging markets by promoting economic partnership with emerging countries.[10] Japan is currently aiming to raise its free trade agreement (FTA) ratio (ie, the ratio of trading countries having an FTA with Japan among all trading countries) from 19 per cent to 70 per cent by 2018. As part of this effort, on 8 July 2014, Japan and Australia entered into an economic partnership agreement.[11] On 22 July 2014, Japan and Mongolia came to a basic agreement on major issues in relation to the EPA currently subject to negotiation.[12] Detailed information on the concluded EPAs and ongoing negotiation of EPAs to which Japan is a party can be found at the Ministry of Foreign Affairs' website.[13] The government considers that the investment chapter in FTAs is critical not only to promote trade but also to secure stable supply of mineral and energy sources. As such, the importance of investment treaties and investment chapters in FTAs continue to rise. The Japanese government is now trying to increase awareness of recourses available to Japanese investors under FTAs and BITs to support Japanese investors' negotiation with host states that owe treaty obligations to protect Japanese investors. In principle, Japanese companies continue to take a litigation and arbitration-averse approach, and no publicly available data shows that Japanese investors have initiated investment treaty arbitration since the *Saluka* case in 2006.[14] However, due to the rapid increase of investment in the area of energy and infrastructure, Japanese investors may soon be put in a position of having no choice but to initiate official investment treaty arbitration against host states.

Notes

1 www.jcaa.or.jp/e/index.html. See JCAA Newsletter March 2014 (No. 31) at www.jcaa.or.jp/e/arbitration/newsletter.html. An annotation of the rules is available in Japanese at www.jcaa.or.jp/arbitration/rules.html.

2 The New Rules apply to arbitration filed on and after 1 February 2014 (Supplementary provision of the New Rules).

3 www.jcaa.or.jp/e/arbitration/rules.html. JCAA arbitration rules as amended and effective on 1 January 2008.

4 For example, a case where an arbitrator's disclosure reveals conflicts set forth on the red list of the IBA Guidelines on Conflicts of Interest.

5 An applicant must file a request for arbitration within 10 days from the date of filing an application for EA proceedings (rule 70.7).

6 Rule 31.3 (challenge to arbitrators). The higher standards are imposed on EAs in order to avoid challenges to EAs subsequent to the appointment in light of the emergency nature of the proceeding.

7 The JCAA Regulation for Arbitrator's Remuneration, article 9.

8 2012(wa)24603, 2013WLJPCA08238004.

9 www.tpprf-mkac.ru/en (Russia), www.ucci.org.ua/arb/icac/en/icac.html (Ukraine) and http://chea-taic.be/ (Belgium).

10 'Japan Revitalization Strategy,' 14 June 2013. www.kantei.go.jp/jp/singi/keizaisaisei/pdf/en_saikou_jpn_hon.pdf.

11 www.mofa.go.jp/ecm/ep/page22e_000430.html The EPA between Australia does not contain an ISDS provision. Instead, the two countries have agreed, among other things, to revisit the dispute resolution mechanism between an investor and a host country if Australia enters into any multilateral or bilateral international agreement providing for a mechanism for the settlement of an investment dispute between Australia and an investor of another country or the other party to that agreement, with a view to establishing an equivalent mechanism under the Japan–Australia EPA.

12 www.mofa.go.jp/mofaj/files/000045892.pdf (Japanese only as of the date of this article).

13 www.mofa.go.jp/policy/economy/fta/index.html

14 *Saluka Investments B V v The Czech Republic*, UNCITRAL www.italaw.com/cases/961.

Yoshimi Ohara
Nagashima Ohno & Tsunematsu

Yoshimi Ohara is a partner at Nagashima Ohno & Tsunematsu. Her practice focuses on international arbitration, international complex litigation and mediation. She represents domestic and foreign clients in international arbitration in various venues under ICC, AAA/ICDR, SIAC and JCAA rules. Before launching her international arbitration practice, she was active in the area of corporate transactions and IP disputes. With a strong corporate and IP background, she has extensive experience dealing with disputes covering a wide range of subjects, including joint ventures, M&A, energy, technology transfer, intellectual property, shipping, sales and distribution. She also serves as an arbitrator in international arbitration.

Ms Ohara was appointed to the LCIA as a court member in 2010 and a vice president in 2013. She frequently speaks in international arbitration conferences and has contributed articles on international arbitration. She has contributed to shaping soft law in international arbitration as a member of the IBA Task Force on Professional Conduct of Counsel in International Arbitration and the IBA Conflicts of Interest Subcommittee (2013).

She received her LLB from the University of Tokyo and her LLM from Harvard Law School. She is admitted to practise in Japan and New York.

NAGASHIMA OHNO & TSUNEMATSU

Kioicho Building, 3-12
Kioicho
Chiyoda-ku Tokyo 102-0094
Japan
Tel: +81 3 3288 7000
Fax: +81 3 5213 7800

Yoshimi Ohara
yoshimi_ohara@noandt.com

www.noandt.com

Nagashima Ohno & Tsunematsu is widely known as a leading law firm and a foremost provider of international and commercial legal services in Japan. The firm represents domestic and foreign companies and organisations involved in every major industry sector and every legal service area in Japan. The firm has structured and negotiated many of Japan's largest and most significant corporate and finance transactions, and has extensive litigation strength spanning key commercial areas, including intellectual property, labor and taxation. As of 1 July 2014, the firm comprises 337 lawyers (including 11 foreign attorneys) capable of providing its clients with practical solutions to meet their business needs.

The firm's international arbitration team has a long history representing and advising domestic and overseas companies in complex arbitration proceedings before various bodies, including the JCAA, the ICC, the AAA, SIAC and CIETAC. The firm is currently representing and advising clients before the JCAA, the ICC and CIETAC in a variety of matters such as disputes involving joint ventures, construction projects, licensing, distribution and sales. The vast extent of this experience with such diverse organisations ensures that the firm is well versed in the many issues that arise in complex proceedings.

With one of the largest legal teams in the country, the firm brings a wealth of practical knowledge focused on the singular purpose of providing high-quality legal expertise to develop the optimum solution for any business problem or goal that its clients may have. The firm, with its knowledge and experience across a full range of practice areas, is always prepared to meet the legal needs of its clients in any industry.

ABA Section of International Law
Your Gateway to International Practice

Strategic Research Partner of the
ABA Section of International Law

Law Business Research

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

THE ASIA-PACIFIC ARBITRATION REVIEW 2015 ISSN 1753-917X