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Japan

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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

On 1 February 2014, the JCAA issued new Rules of Commercial Arbitration, which included many significant revisions from the prior 2008 Rules.⁶ Many of these revisions were intended to make JCAA arbitrations more efficient and effective. Certain rule changes, for example, aimed to speed up the process of commencing arbitration. New Rule 7.3 allows the tribunal chair to decide procedural matters if the other arbitrators or all parties agree. New Rules 39.2 and 40.1 require the tribunal, “as early as practicable,” to consult with parties to make a written schedule for the proceedings and to identify the issues to be decided in the arbitration. Under new Rule 40.2, the tribunal may prepare terms of reference setting forth the major issues in dispute, after allowing the parties an opportunity to comment.

The new Rules also included important amendments concerning multiple parties, joinder, and consolidation. For instance, new Rule 29 makes clear that, where there are more than two parties and the

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⁶ The JCAA made two further amendments to its Rules in 2015. The first was a change to the appointment procedure in multiparty arbitrations, while the second was additional language regarding apportionment of costs between parties.

number of arbitrators is three, the claimants' side and respondents' side are each to appoint one arbitrator, with the two party-appointed arbitrators appointing the third arbitrator. New Rule 52 provides that a party may request the joinder of a third party as respondent, or a third party may join an arbitration as claimant, if all parties and the third party have agreed in writing, or if the claims are made under the same arbitration agreement (albeit the third party's written consent is required if it is requested to join as respondent after constitution of the tribunal). And under new Rule 53, the tribunal may consolidate pending claims with other claims as to which no tribunal has been constituted if: (i) all parties have so agreed in writing; (ii) all of the claims arise under the same arbitration agreement (provided there is written consent by the party to the other claims if that party has not been a party to the pending claims); or (iii) all of the claims are between the same parties and such claims raise the same or similar questions of fact or law and the arbitration agreements are compatible.

In addition, new Rules 66 and 67 expressly authorize the tribunal to order specific interim measures, including preservation of assets and relevant evidence, as well as provision of appropriate security. Further, under new Rules 70, 71, and 72, where the tribunal has not yet been constituted and upon a party's request, the JCAA may appoint an emergency arbitrator to make emergency interim measures. These Rules stipulate that the JCAA is to appoint the emergency arbitrator within two business days of a request, and that the emergency arbitrator is to decide on the interim measures sought within two weeks of being appointed.

Other amendments to the new Rules make helpful clarifications. While the prior Rules provided that parties were to bear equally the costs of arbitration unless the tribunal decided otherwise, new Rule 83.2 makes clear that the tribunal may apportion such costs in light of the parties' conduct during the proceedings, the determination on the merits, and other relevant circumstances. Moreover, whereas under the previous Rules, an arbitrator could try to settle an arbitration if all parties consented (thus effectively assuming the role of a mediator),

new Rule 54.1 provides that, as a matter of principle, no arbitrator is to serve as mediator in the same dispute. As new Rules 55.1 and 55.2 state, however, an arbitrator may do so if the parties agree in writing and on the condition that an arbitrator who serves as mediator in the same dispute is not allowed to consult separately with the parties without the parties' written agreement.

In sum, even before the revisions to the Rules, the authors had found JCAA arbitrations to be administered and to proceed in an efficient and effective manner. The 2014 and 2015 amendments have enhanced these characteristics and put the JCAA's Rules on a par with the rules of major arbitral institutions elsewhere.

B. Cases

In recent years, Japan's courts have issued an increasing number of arbitration-related decisions, with most of the publicly available decisions thus far being pro-arbitration.

For example, courts considering the law applicable to an arbitration agreement absent the parties' express agreement have decided this question based either on the place of arbitration or the law governing the underlying contract, which is the approach of courts in many other jurisdictions in support of the arbitral process. In 2011, for instance, the Tokyo District Court addressed the issue of the law governing the scope of an arbitration agreement.⁷ The dispute arose between a Japanese company and a Monaco firm concerning an agreement under which the Japanese company was to act as distributor for the Monaco firm. The Japanese party brought an action against the Monaco firm in the Tokyo District Court, alleging that the dispute fell outside of the arbitration agreement in the parties' contract. In its ruling, the court observed that there was no express agreement on the law governing the scope of the arbitration clause. The court, however, found there was an implied agreement that Monaco law should govern the arbitration because Monaco would be the seat if the Japanese party

⁷ *X v. Y*, District Court of Tokyo, 10 March 2011 (Case No. 2009 (Wa) 11437).

initiated proceedings.⁸ Applying the law of Monaco, the court ruled that the dispute fell within the arbitration agreement and dismissed the case.

More recently, the Tokyo District Court had to decide the law of an arbitration agreement where the claimant sought payment of hire against the trustee of the respondent, which was under a time charter party, after proceedings were ordered against the respondent pursuant to Japan's Corporate Reorganization Act.⁹ The trustee moved to dismiss the action on the ground that the charter party contained an agreement providing for the dispute to be referred to arbitration in London and for English law to be the governing law of the charter party.

The court found there was an implied agreement between the parties to apply English law to the arbitration agreement because the governing law of the charter party was English law and London was the designated place of arbitration. In addition, the court relied on English law in ruling that the arbitration agreement was valid, notwithstanding any cancellation of the charter party by the trustee under the Corporate Reorganization Act, thereby upholding the principle of separability (that is, an arbitration clause in a contract is deemed valid notwithstanding that any or all other provisions of the contract may be found null and void). Other Japanese court decisions have also affirmed this principle.¹⁰

A 2015 decision by the Miyazaki District Court¹¹ further illustrates the willingness of Japanese courts to dismiss civil actions in favor of arbitration when they consider it appropriate. In this case, a ship

⁸ The arbitral clause included “finger-pointing” language, whereby the seat would be Monaco if the Japanese party commenced arbitration and Tokyo if the Monaco party did so.

⁹ *Polestar Ship Line, S.A. v. The Sanko Steamship Co., Ltd.*, 2258 Hanrei Jiho 100, Tokyo District Court, 28 January 2015.

¹⁰ See, eg, Tokyo District Court decision on October 21, 2005; 1926 *Hanrei Jiho* 127; 1216 *Hanrei Times* 309, applying Japanese law.

¹¹ *X v. Y1 and Y2, 2012(Wa)#606*, Miyazaki District Court, 23 January 2015.



owned by a Hong Kong shipping company was abandoned off of the coast of Miyazaki city. The vessel was insured under a third-party liability policy with a Russian insurer. A fisheries cooperative association operating where the ship was abandoned was subrogated to the owner's claim against the insurance company. The shipping company did not attend the hearing, and the cooperative association's claim for subrogation against the shipping company was upheld.

Subsequently, the Russian insurer invoked an agreement between itself and the shipping company to refer the dispute under the insurance contract to arbitration in Moscow. As a result, the insurer asked the court to dismiss the fishing cooperative association's claim in favor of arbitration. The association countered that it was not bound by the arbitration agreement because it was not a party to it. Rejecting this argument, however, the court held that the dispute concerning the insurance claim was covered by the arbitration agreement and that this agreement bound subrogees.

As regards decisions on set-aside of awards made in Japan, the Japanese courts have in general proven to be reliably pro-arbitration. One example is a 2009 case regarding a dispute resulting from an accidental fire that destroyed a manufacturing facility in Taiwan to which a Japanese company supplied equipment.¹² The tribunal found that the Japanese company had breached an obligation to warn of potential dangers and such breach caused the fire. The Japanese company resisted enforcement of the arbitral award in the Tokyo District Court, arguing that it had not been able to present its case and that the award violated public policy.

The court dismissed the Japanese company's application on both grounds, stating preliminarily that the Arbitration Act "does not contemplate the appeal procedure and the arbitral award is considered as final ... [I]t goes without saying that an arbitral award should be

¹² Tokyo District Court decision on July 28, 2009, 1304 *Hanrei Times* 292, (2010).

respected as much as possible.”¹³ The court ruled that the Japanese company had not shown it was “unable to present its case” within the meaning of the Act, whereby:

*“the courts set aside an arbitral award only in cases where serious violation of due process exists in arbitral proceedings by which the party was entirely unable to present its case such as a case where the party was unable to appear in arbitral proceedings and the arbitral award was made relying on the materials which the party was unable to recognize.”*¹⁴

As to the second ground, the court found that the Japanese company had not established that the tribunal’s ruling violated Japanese public policy, holding that this part of the Act:

*“does not mean that the court may set aside an arbitral award in cases where it merely finds the fact findings and legal decision by the arbitral tribunal to be unreasonable, but instead means that the court may set it [an award] aside only where it finds that the legal outcome realized by an arbitral award is in conflict with the public policy or good morals of Japan.”*¹⁵

In 2011, however, for the first time as far as the authors are aware, a Japanese court set aside an arbitral award made in a Japan-seated JCAA arbitration (a decision ultimately upheld by Japan’s Supreme Court).¹⁶ The review process adopted by the judge in that case met

¹³ Quoted in (2010) JCAA Newsl. 24 (“*Dismissing the Application for Setting Aside an Award*”), at p. 9.

¹⁴ Quoted in *Dismissing the Application for Setting Aside an Award*, at p. 9.

¹⁵ Quoted in *Dismissing the Application for Setting Aside an Award*, at p. 9.

¹⁶ Tokyo District Court decision on June 13, 2011, 2009 (Chu) No. 6, opinion published in 2128 *Hanrei Jiho* 58; upheld by the Tokyo High Court, decision of March 13, 2012 (this decision is not publicly available) and Japan Supreme Court, decision of July 25, 2012 (this decision is not publicly available).



with an unfavorable response from commentators, as it allowed the respondent to reopen arguments on liability and determinations of fact. This was essentially on the tenuous ground that a single fact that was disputed was listed as a non-disputed fact (albeit the reasoning in the award showed that it had been treated as disputed). The court held that this put the award in violation of “procedural public policy.” This approach has been criticized for conflating procedural defects with substantive issues of public policy so as to allow a review of the merits which would not otherwise be permissible. This case, however, appears to have been an isolated incident and has not affected Japan’s reputation overall as a pro-arbitration jurisdiction.

One point that should be borne in mind is the importance of to-the-letter compliance with procedural requirements in Japan-seated disputes. In one recent decision,¹⁷ a set-aside of a JCAA award was sought on the ground that the presiding arbitrator was not impartial: he was a partner in the Singapore office of a global firm and an attorney in its US offices represented an affiliate of the respondents in an ongoing case. This fact was not disclosed to the parties when the chair gave his declaration of independence and impartiality, as required both by the Japanese Arbitration Act¹⁸ and international best practice (under the IBA Guidelines, this was an “Orange List” matter for which a conflicts check should have been undertaken¹⁹). The argument made was that this nondisclosure rendered the constitution of the tribunal contrary to Japanese law, triggering the right to seek a set-aside under Article 44(1)(vi)²⁰ of the Act.

¹⁷ *X1 and X2 v. Y1 and Y2*, Osaka High Court, 24 December 2015, Hanrei Times No. 1425, p. 146).

¹⁸ Arbitration Act, arts. 18.3 and 18.4.

¹⁹ IBA Guidelines on Conflict of Interest in International Arbitration, para 3.2.

²⁰ Arbitration Act, art. 44(1)(vi) (“If any of the following grounds exist, the parties may make an application with the court to set aside the arbitral award: [...] the composition of the arbitral tribunal or the arbitration procedure is in violation of Japanese laws and regulations (if the parties have reached an agreement on the matters concerning the provisions unrelated to public orders in such laws and regulations, such agreement”).

At first instance,²¹ the application failed on two grounds. First, the Osaka District Court observed that there would not have been “reasonable grounds” to suspect the impartiality or independence of the arbitrator under Article 18(1)(ii) and that, even had the relevant circumstances been disclosed, they were not such as to affect the outcome of the award: the US matter was completely unrelated and the arbitrator had no access to information regarding the ongoing case (the court took this latter consideration into account in deciding whether the failure to disclose the information justified the setting-aside of the award). Second, had there been any breach of the duty of disclosure, it was “minimal”: the arbitrator had submitted an “advance waiver” to the JCAA and the applicant did not make any objection to it.

On appeal, however, the Osaka District Court’s decision was overturned. The basis of the court’s reasoning was that the range of matters that an arbitrator is bound to disclose is wider than the range of matters which will in fact disqualify him or her, and the purpose of the duty of disclosure is to ensure that the parties are put in a position to judge for themselves whether to make a challenge. The court concluded that: (i) the arbitrator here breached his obligation to disclose the facts concerning his colleague and the US matter; (ii) this disclosure obligation was not discharged merely because the arbitrator was unaware of these circumstances; (iii) and the arbitrator had failed to fulfill his duty to investigate facts that could have been ascertained without difficulty (eg, by running a conflicts check). Therefore, the court ruled that either the constitution of the tribunal was defective or the arbitration procedure was in violation of Japanese laws and regulations and Article 44(1)(iv) was triggered, irrespective of whether the relevant circumstances actually affected the outcome of the award. The court further refused to exercise its discretion to reject the challenge: to uphold the award would be wrong not only from the

²¹ *Companies X1 and X2 v. Y1 and Y2*, Osaka District Court, Case No. 2015 (Chu) No. 3, March 17, 2015.



perspective of ensuring the fairness of that award, it would undermine “confidence in the arbitral system.”

It is debatable whether the systemic considerations raised by the court ought to have trumped the interests of the parties in finality, given that the possibility of any actual bias on the part of the arbitrator appeared remote. The responsibility, however, ultimately lies with the arbitrator, who should have conducted the checks and made the relevant disclosures. The lesson to be learned is clear: a safety-first approach should be taken to issues of impartiality and independence, and institutions and party advisers should make this abundantly clear to potential appointees in Japan-seated disputes.

Regarding foreign arbitral awards, the authors are not aware of any decisions to date rejecting enforcement, although it is unclear how many decisions in this respect have been rendered in Japan, as there are very few publicly reported cases concerning arbitral award enforcement under the New York Convention. The most recent case (in July 2016)²² was unambiguously pro-arbitration. A foreign award creditor sought to bring compulsory execution procedures²³ under Japan’s Civil Execution Act. The debtor sought to raise merits-based defences, primarily that the award creditor was seeking to establish its title to a debt otherwise than by a final and binding judicial decision,²⁴ the importance being that execution of such a judgment can only be resisted on the basis of facts arising post-judgment.²⁵ This argument was emphatically rejected by the court: under the Arbitration Act, subject only to the specified grounds for resisting enforcement, an arbitral award “ha[d] the same effect as a final and binding judgment.” A court asked to execute against an award therefore could not make a fresh determination as to the existence or extent of the debt. This decision confirms that, unless one of the narrow grounds spelled out in

²² *X v A*, Tokyo District Court, Decision of 13 July 2016.

²³ That is, proceedings seeking the forcible confiscation or auction of property to satisfy the award.

²⁴ Civil Execution Act, art. 35(1).

²⁵ Civil Execution Act, art. 35(2).

the Arbitration Act is made out, a foreign award creditor will have available to it the full panoply of compulsory execution options available to a successful litigant in ordinary civil litigation.

C. Trends and observations

While Japanese companies and practitioners have been slower to embrace arbitration than their counterparts in a number of other jurisdictions, there has been discernible positive progress over the past decade. For example, between 2005 and 2009, the average number of arbitrations filed annually in the JCAA was around 13. Between 2010 and 2015, that number rose to 21. This figure, of course, is low when judged against comparable averages at SIAC, HKIAC or other major arbitral institutions. Still, it represents an increase in the JCAA's caseload of over 60% from the 2005 to 2009 period.

Further, as discussed above, there is evidence of progress beyond the statistical data. A number of the 2014 and 2015 revisions to the JCAA Rules followed amendments to the rules of the SIAC, HKIAC and ICC. As such, while the JCAA Rules currently may be under-used, there is little question that they are comparable to the rules of major arbitral institutions. Japan also has a mature judiciary with a reputation for impartiality, and although Japanese courts have less experience in addressing arbitration-related issues than courts in certain other jurisdictions, the growing number of publicly available decisions rendered so far have generally been pro-arbitration, as explained above. This development means that Japan is making important headway in establishing itself as a dependable seat of arbitration.

From the authors' own experience working with Japanese companies, it is clear that awareness of, and curiosity about, international commercial arbitration have risen over the past decade. The inquiries we receive from business executives have become better informed and more sophisticated, and, increasingly, these executives have had at least some firsthand experience with arbitration.



Japanese corporations also are beginning to take advantage of their rights under investment treaties to which Japan is a party. In 2015, a Japanese firm filed an arbitration under the International Centre for Settlement of Investment Disputes rules against the Spanish government pursuant to the Energy Charter Treaty. Japan is a party to over 40 investment and other economic treaties, and it will be interesting to see whether more Japanese companies seek to exercise their rights under these agreements.

Finally, efforts in Japan to foster greater understanding and appreciation of arbitration among practitioners are proceeding apace. Most of Japan's leading law schools today include classes on international commercial arbitration, and organizations such as the Japan Association of Arbitrators, the Japan Bar Association and the JCAA are involved in various training and outreach activities to promote arbitration. The Chartered Institute of Arbitrators has established a local presence and coordinates training and speaker events. And at the 2014 International Bar Association annual conference in Tokyo, numerous arbitration-related events were held and attended by participants from Japan and around the world.

All this is not to say that more cannot be done to encourage the use of international arbitration in Japan. However, it is recognized that there have been tangible signs of progress and, with more time and more accumulated positive experiences, it is anticipated that this progress will continue.