

ABHANDLUNGEN / ARTICLES

Arbitration Law Reform in Japan

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INTRODUCTION

Arbitration law in Japan was part of the Code of Civil Procedure (CPC) until 1997. The former CPC, enacted in 1890, was generally influenced by the German *Zivilprozessordnung* (ZPO) of 1877. The German influence was particularly conspicuous in the part on arbitration, which was almost a copy of the ZPO. While the other parts of the CPC have undergone a number of changes since enactment, the part on arbitration has remained more or less the same. In 1997, Japan's civil procedure was extensively reformed and the CPC totally amended in this regard. All that remained of the previous CPC were the parts on reminder by public notice proceedings (*Aufgebotsverfahren*) and arbitration. These became the subject of a separate law, but their content remained unchanged.

One of the reasons why Japan has long been unpopular as a place of arbitration, despite the existence of established arbitral institutions such as the Japan Commercial Arbitration Association (JCAA) and the Tokyo Maritime Arbitration Commission (TOMAC), may have been this rather obsolete arbitration law. At the time of the civil procedure reform, it was generally agreed that the arbitration law needed modernizing too. However, priority was given to reforming the insolvency law, which was necessary

in light of the increasing number of corporate failures in the aftermath of the 1997/98 financial crisis.

The reform of the arbitration law was eventually put on the agenda as part of the major drive for comprehensive judicial reform in 2001. The development of the system for alternative dispute resolution (ADR) was envisaged as part of this reform, and it was recommended that the arbitration law (including international commercial arbitration) be modernized.¹ It was specifically noted that the reform should take into consideration “international developments such as the work of UNCITRAL”.

The task of preparing the draft arbitration law was entrusted to the Office for the Promotion of Judicial Reform. This was unusual, as major amendments to basic codes are traditionally dealt with by the Legislative Advisory Council, which is a consultative body of the Ministry of Justice. The reason for this departure was that the reform needed to be achieved quickly, that is to say in the space of a year. A study group on arbitration, comprising academics, ministry officials, practising lawyers and representatives of arbitration institutions, was set up within the Office for the Promotion of Judicial Reform. The draft law was compiled within a year, became law on 25 July 2003 and entered into force on 1 March 2004.

The common understanding among those who took part in preparing the new law was that it should be as far as possible in line with the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law).² For this reason, the new German arbitration law of 1997 (still part of the ZPO) and the Korean arbitration law, which were also based upon the UNCITRAL Model Law, were used as references in the legislative process.³ It should be noted that, while in Germany the decision to follow the UNCITRAL Model Law was part of a conscious effort to attract international commercial arbitration,⁴ in Japan the arbitration reform was a component of a larger programme of judicial reform.

In the present article, the new arbitration law will be examined by comparing it with the UNCITRAL Model Law and, if necessary, with the German and Korean laws, and with particular regard to international commercial arbitration.⁵

1 The Law on the Promotion of ADR was enacted in November 2004.

2 M. KONDO / T. KATAOKA, The Outline of the Arbitration Law [in Japanese], in: JCA Journal, October 2003, 9.

3 M. AOYAMA, Reflection on the Enactment of the Arbitration Law [in Japanese], in: JCA Journal, October 2003, 5.

4 K.H. SCHWAB / G. WALTER, Schiedsgerichtsbarkeit, Kommentar (6th ed., Munich 2000) 419.

5 The official English translation of the new law is now available on the Internet at <www.kantei.go.jp/jp/singi/sihou/hourei/tyusaieiyaku.html>.

I. GENERAL RULES

1. *Applicability of the New Law*

The new law is applicable both to arbitration proceedings and to court proceedings relating to arbitration in Japan (Art. 1). In general, its provisions apply to cases where the place of arbitration is in Japan (Art. 3, para. 1).

It is widely recognized internationally that the law of the place of arbitration (*lex loci arbitri*) should govern the arbitration procedure. Some jurisdictions, however, allow the parties to choose the procedural law.⁶ The English Arbitration Act and the German law have adopted the former position. In Japan, there was no provision on this matter in the previous law, but the latter view was predominant. It was thought reasonable for the parties to choose whatever law they are familiar with, even if the place of arbitration was in Japan, and that there was no reason to prohibit this. Party autonomy thus prevailed,⁷ although it was very rare for the parties to designate the procedural law in advance.

In contrast, the UNCITRAL Model Law adopted the territorial principle, which the Japanese legislature has followed in the new law. Thus, Japanese arbitration law shall be applicable to any arbitration, the place of which is in Japan. The parties are not allowed to choose the law applicable to the arbitration, insofar as the place of arbitration is Japan.

By way of exception to this principle, the duty of the courts to dismiss an action in the presence of an arbitration agreement and the provision concerning interim measures by the court are applicable regardless of the place of arbitration.

The parties may determine the place of arbitration, which can be different from the place where the arbitration proceedings take place (Art. 28). In the new law, as in the UNCITRAL Model Law, the definition of the place of arbitration has been left open.

2. *Scope of the New Law*

While the UNCITRAL Model Law is designed for international commercial arbitration (although it does not exclude the possibility of accommodating domestic arbitration) and indicates when an arbitration qualifies as international, the new law in Japan is in no way limited to international commercial arbitration. Like the previous law, it is applicable to both domestic and international arbitration.⁸ The same approach was

6 A. REDFERN / M. HUNTER, *Law and Practice of International Commercial Arbitration* (3rd ed., London 1999) 148-154.

7 Y. AOYAMA, in: Y. Taniguchi *et al.* (eds.), *New Commentary with Cases on the Code of Civil Procedure* [in Japanese], vol. 6 (Tokyo 1995) 681-682; Y. AOYAMA, *The Significance and Effect of the Place of Arbitration* [in Japanese], in: Y. Aoyama *et al.* (eds.), *Problems of Modern Arbitration Law* [in Japanese] (Tokyo 1998) 270.

8 In the case of domestic arbitration, other laws in addition to the new arbitration law, such as those concerning the settlement of pollution disputes and telecommunication activities, may apply.

adopted in the new German and Korean laws, although in Germany there was a proposal to adopt the UNCITRAL Model Law *en bloc* as a special law on international commercial arbitration.⁹

The fact that the new law is applicable to domestic arbitration has created some problems. In the legislative process, consumer organisations and trade unions expressed concern over submitting consumer and labour disputes to arbitration. As the bargaining power of the parties is disproportionate in such disputes the exclusion of court jurisdiction in favour of arbitration was regarded with some apprehension. In the end, 'transitional' rules were added to the new law, to be applied in place of the provisions of the new law in these fields for an unspecified period of time.

The new Japanese arbitration law does not distinguish between commercial and other types of arbitration either and therefore does not give a definition of commercial or civil disputes. A clear distinction between the two was considered impossible and not particularly meaningful.

3. *Arbitrability*

Under the new statute, unless otherwise provided by law, an arbitration agreement is valid only when the subject of the arbitration is a civil dispute that can be settled by the parties (Art. 13, para. 1). The key therefore is whether the dispute concerns a matter that is at the parties' disposal.

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) limits disputes that may be submitted to arbitration to matters 'capable of settlement by arbitration'. This is somewhat of a tautology and is not the same as capability of settlement by the parties. Under the former German arbitration law, only disputes that could be settled between the parties were arbitrable. Modifying this approach, the new German law reads:¹⁰

Any claim involving an economic interest (*vermögensrechtlicher Anspruch*) can be the subject of an arbitration agreement. An arbitration agreement concerning claims not involving an economic interest shall have legal effect to the extent that the parties are entitled to conclude a settlement on the issue in dispute.

The Korean law, on the other hand, limits arbitration to 'disputes in private law'. In recent years, the US Supreme Court has allowed arbitration in areas hitherto excluded, such as anti-trust and securities law.¹¹ The German Federal Supreme Court has acknowledged the arbitrability of a dispute involving the validity of a resolution at a

9 K.H. SCHWAB / G. WALTER (*supra* note 4) 419. For the English text of the Korean law, see <www.arbiter.net/KoreaLaw1999.htm>.

10 §1030 ZPO.

11 See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, which involved a claim relating to antitrust law.

shareholders' meeting. Amongst German academics, the prevailing tendency seems to be towards acknowledging arbitrability in a fairly broad manner.¹²

Under the former Japanese arbitration law, which adopted the criterion of whether the parties had the 'right to settle', the arbitrability of disputes was discussed in various areas including intellectual property law, company law, and competition law. Although there does not appear to be any case law in this regard, the arbitrability of disputes was generally acknowledged in areas previously excluded.¹³ For instance, in the field of patent law, it is generally considered that disputes should be arbitrable, provided the dispute involves the relationship between the parties and not the effect of the patent *per se*.¹⁴ During preparation of the new law, opinions on arbitrability differed. Some advocated broadening its scope, while others preferred to maintain a more clear-cut basis, such as capability of settlement by the parties. The latter coincides with party autonomy which is the very basis of arbitration. In the end, the latter position prevailed.¹⁵

The significance of the concept of 'arbitrability' in demarcating the scope of arbitration should not, however, be exaggerated. It is questionable whether the concept of proprietary law claims is any broader than the 'capability of settlement' criterion. In any case, it was agreed during the preparation of the new law that the concept of capability of settlement should be broadly interpreted.¹⁶ On the other hand, the new law does include a notable innovation by allowing arbitrability to be acknowledged by law, that is to say a law other than the arbitration law.

4. *Court Intervention*

The basic rule regarding the role of the courts in arbitration is set out in the new law as follows (Art. 4):

The courts are entitled to exercise their power in relation to arbitration proceedings only in cases provided by the present law.

This echoes the UNCITRAL Model Law provision on the extent of court intervention. Similar provisions can be found in the Korean and German laws. There was no such provision in the former Japanese law.

Pursuant to the above principle, the law provides for specific instances in which a court may become involved in arbitration. The new law has introduced a number of

12 K.H. SCHWAB / G. WALTER (*supra* note 4) 36-41.

13 Y. AOYAMA, in: Y. Taniguchi *et al.* (*supra* note 7) 624.

14 T. NAKAMURA, Q&A on the New Arbitration Law [in Japanese] (Tokyo 2004) 28.

15 Comment by a government official (Round Table Discussion on the new arbitration law, Part 1), in: JCA Journal, October 2003 [hereinafter Round Table Discussion 1] 26. See also Supplementary Comments on the Interim Report concerning the Arbitration Law, in: NBL Plus, No. 71, 2002, 43 and Results of the Questionnaire on the Arbitration Law, in: NBL Plus, No. 67, 2002, 71-72.

16 Round Table Discussion 1 (*supra* note 15).

changes concerning the manner in which courts may intervene. First, they may now render a decision without holding an oral hearing (Art. 6), whereas an oral hearing was compulsory under the previous law, which often created delays. Second, interested parties are entitled to appeal against court decisions, but only by presenting an instant appeal within two weeks of the decision and when there is a specific provision in the law which allows an appeal (Art. 7). In the past, matters such as challenges of arbitrators and the setting aside of awards were handled in court following the procedure applicable to judgments, which meant that appeals had to take the form of a formal appeal against the judgment. The new arrangement is therefore simpler and easier. Under the previous arbitration law, both the summary courts and the district courts had jurisdiction over arbitration matters. The new law has limited this to district courts (Art. 5, para. 1),¹⁷ whose jurisdiction covers:

- service of documents (Art. 12, para. 2);
- appointment of arbitrators (Art. 17, paras. 2-4);
- challenge of arbitrators (Art. 19, para. 4);
- determination of *Kompetenz-Kompetenz* (Art. 23);
- examination of evidence (Art. 35, para. 1);
- setting aside of the arbitral award (Art. 44);
- enforcement of arbitral awards (Art. 46).

It should be noted that in certain cases parties are entitled to apply to a court for assistance even when the place of arbitration has not been determined, so long as there is a possibility that Japan will be the place of arbitration and the Japanese court has common jurisdiction over one of the parties (Art. 8). These cases include applications regarding the determination of the number of arbitrators, the appointment and challenge of arbitrators, and the termination of their mandate.

II. ARBITRATION AGREEMENT

1. *Form*

The previous law did not lay down any requirements regarding the form of the arbitration agreement. The new law requires it to be in writing (Art. 13). This includes facsimile and other means that provide the recipient with a written record of the content of the communication. Agreements made by electronic means of communication, such as e-mail, are deemed to have been made in writing. This is consistent with the approach adopted in the proposed amendments to the UNCITRAL Model Law, presently under discussion, which maintain the concept of ‘writing’ (which is notably a requirement of

¹⁷ Japanese district courts are first-instance courts. On the Japanese court system see H. ODA, *Japanese Law* (2nd ed., Oxford 2000) 64-72.

the New York Convention) but expands it to include data messages transmitted using modern technologies.

2. *Kompetenz-Kompetenz*

Arbitral tribunals are empowered to decide upon the existence or validity of the arbitration agreement (Art. 23, para. 1). This provision is in line with the UNCITRAL Model Law and did not appear in the previous law. Objections to the jurisdiction of the arbitral tribunal must be made before the initial pleadings are submitted, or, if the grounds for making such an objection emerge in the course of the proceedings, without delay, unless the tribunal acknowledges that there were justifiable reasons for the delay (Art. 23, para. 2).

In cases where the arbitral tribunal rules that it has jurisdiction, the objecting party may challenge the ruling in court within 30 days of receiving it. Pending the court's decision, the tribunal is entitled to proceed with the arbitration and make an award (Art. 23, para. 5). No appeal is available, however, in cases where the tribunal finds that it does not have jurisdiction, given that the effectiveness of forcing the tribunal to arbitrate is questionable.

The new law adheres to the principle of the separability of the arbitration clause, but, unlike the UNCITRAL Model Law, deals with it separately from *Kompetenz-Kompetenz* (see Art. 13, para. 6).

3. *Applicable Law*

As was the case with the previous law, the new law does not have an explicit provision on the law applicable to the arbitration agreement. There are differing views on the subject in Japan. One school of thought regards the arbitration agreement as an agreement of a procedural nature and maintains that it should be governed by *lex loci arbitri*. Another regards it as part of substantive law and argues that the applicable law should be left to the choice of the parties. The view that has recently prevailed acknowledges party autonomy and applies conflict rules to arbitration agreements.¹⁸ This view is in line with current thinking in Germany, which attaches little importance to characterizing the legal nature of the arbitration agreement and approaches the problem rather in terms of which law can be most meaningfully applied to the agreement.¹⁹

The Japanese Law on the Application of Laws, which includes conflict rules, states as a general rule that when determining the law governing juristic acts, the parties' intention should prevail, and, if their intention is unclear, the law of the place of performance is applicable. In practice, before using the latter, efforts are made to infer the

18 Y. AOYAMA, in: Y. Taniguchi *et al.* (*supra* note 7) 648-649.

19 K.H. SCHWAB / G. WALTER (*supra* note 4) 76-77.

intention of the parties from the relevant circumstances. For instance, if the contract contains a clause on applicable law, this law will be considered applicable to the arbitration clause too, unless special circumstances suggest otherwise. In a recent case, the Supreme Court held that the rule contained in the statute on the application of laws should indeed be used when choosing the law applicable to the arbitration agreement. In the absence of an explicit agreement between the parties on this matter, the Supreme Court found the law of the agreed place of arbitration (New York) to be applicable to the validity of the arbitration agreement.²⁰

4. *The Courts*

If an action is brought in court relating to a matter that is the subject of an arbitration agreement, the court must dismiss the action at the request of the defendant (Art. 14), unless:

- the agreement is invalid;
- it is impossible to proceed with arbitration in accordance with the agreement; or
- the defendant made its request after pleading on the substance of the case or making a statement in the preparatory proceedings prior to the hearing.

Of course, the arbitration agreements covered by this provision are not limited to those in which the place of arbitration is in Japan. For instance, a court has had occasion to dismiss an action brought in the presence of an arbitration agreement governed by US federal law with New York as the place of arbitration.²¹

The existence of an arbitration agreement does not, on the other hand, preclude a party from applying to a court for interim measures before or during the arbitration proceedings (Art. 15), as was illustrated by a case in which the court granted interim measures in the presence of an arbitration clause.²²

The above provisions are more or less a replica of those in the UNCITRAL Model Law.

III. ARBITRATORS

1. *Formation of the Arbitral Tribunal*

The number of arbitrators may be determined by the parties (Art. 16). In the absence of choice, the tribunal shall consist of three arbitrators if there are two parties and, if there are three or more parties, of a number to be determined by the courts, at a party's re-

20 Supreme Court, September 4, 1997 (an English translation by the present author is available at <www.courts.go.jp>).

21 Tokyo District Court, 10 April 1953, in: Hanrei Taimuzu, 30-58.

22 Tokyo District Court, 19 July 1954, in: Kaminshu, 5-7-1110.

quest. This differs from the previous law, which adopted the unworkable solution of providing for only two arbitrators. If there are two parties, and the number of arbitrators is three, the arbitrators chosen by the parties choose the third arbitrator, unless the parties have agreed otherwise. The UNCITRAL Model Law provides that if a party fails to appoint an arbitrator within 30 days, or if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the appointment will be made by a court or other authority, at the request of one of the parties. By contrast, the new Japanese law grants this power solely to the courts, and not to other authorities (Art. 17). Appointments are also made by the courts, at the request of a party, if two parties are involved and they are unable to agree on the choice of a sole arbitrator, or if three or more parties are involved and they are unable to agree on a procedure for appointing the arbitrators.

When appointing arbitrators, courts must take into consideration the following (Art. 17):

- the requirements of the arbitrators as agreed by the parties;
- the impartiality and independence of the candidates;
- when appointing a sole arbitrator or the third arbitrator, whether or not the appointment of a person of a nationality other from that of the parties is appropriate.

German law provides that if the arbitration agreement gives one of the parties a predominant right in the formation of the tribunal and leaves the other at a disadvantage, the latter may request the court to appoint the arbitrator(s) without resorting to the agreed procedure of appointment.²³ Such an arrangement may be useful in cases of multi-party disputes. The Japanese legislature did not go thus far.

2. *Challenge of Arbitrators*

An arbitrator may be challenged if 1) the arbitrator does not meet the requirements as agreed by the parties, or 2) there are justifiable grounds for doubting the impartiality or independence of the arbitrator (Art. 18). The parties may agree on the challenge procedure, failing which the matter is decided by the arbitral tribunal at a party's request (Art. 19). The challenged arbitrator may take part in the procedure. Should the arbitral tribunal dismiss the challenge, the challenging party is entitled to contest the decision in court. There is no provision for appeal against the court's decision (Art. 19, para. 4, combined with Art. 7), which is thus to be deemed final. The question arises, in the context of institutional arbitration, whether the decision of the institution on a challenge can be overruled by a court. Like the Korean and German laws, the new Japanese law does not refer to arbitration institutions. In Germany, despite case law deciding otherwise, it is generally thought that the institution's decision should be appealable in court. Japanese academics take a similar view, stressing that the right to resort to the courts

23 §1034(2) ZPO.

cannot be waived.²⁴ A similar position is taken over appointments. Here again, the new Japanese law, like the Korean and German laws, makes no reference to arbitration institutions.

The new Japanese law follows the UNCITRAL Model Law in requiring prospective arbitrators to disclose any facts likely to give rise to doubts as to their impartiality or independence (Art. 18). There is no specific criterion for determining impartiality and independence. It is said that the test in Japan is whether there are objective circumstances which would lead ordinary people to be concerned or apprehensive of the possibility of an unfair ruling.²⁵ Practitioners have expressed concern that the scope of disclosure required of potential arbitrators is unclear.²⁶ The previous Japanese law provided that arbitrators could be challenged on the same grounds as judges and that, in addition, arbitrators who caused unjustifiable delay could also be challenged. The new law addresses the latter issue in connection with the termination of the arbitrator's mandate: an application for termination may be made in court if 1) an arbitrator becomes *de jure* or *de facto* unable to perform his or her functions, or 2) is, for other reasons, unjustifiably delayed in performing his or her functions (Art. 20).

IV. ARBITRATION PROCEDURE

1. *Interim Measures and Measures of Protection*²⁷

Unless otherwise agreed by the parties, the arbitral tribunal is empowered to oblige either party to take any interim measures or measures of protection it considers necessary in respect of the subject matter of the dispute, if requested to do so by one of the parties (Art. 24). In such cases, appropriate security may be ordered too. This power, like that of deciding on its own jurisdiction, is regarded as inherent to the arbitral tribunal. This marks a clear distinction from the previous law, under which the tribunal was not thought to have the inherent power to order interim measures. On the contrary, such a power was considered to be unnecessary, given that parties were able to apply to the courts for interim measures. In practice, it was reportedly rare for tribunals to order interim measures in international commercial arbitrations conducted in Japan.²⁸ The situation was the same in Germany under its former law.

24 Y. KAISE, Challenge of Arbitrators, in: Y. Aoyama *et al.* (*supra* note 7) 218-219.

25 N. IDEI / T. MIYAOKA, Q&A on the New Arbitration Law [in Japanese] (Tokyo 2003) 94.

26 See comment by an attorney in Round Table Discussion 1 (*supra* note 15) 34.

27 Measures of protection are intended to maintain and preserve the status quo of the subject matter. Interim measures order a party to do or not to do something, or create a certain legal relationship while the arbitration is pending. An example is the order to continue the supply of products by the supplier and corresponding payment by the distributor in an ongoing supply agreement. See M. KONDO ET AL., Commentary on the Arbitration Law [in Japanese] (Tokyo 2003) 116-117

28 Round Table Discussion on the new arbitration law, Part 2, in: JCA Journal, November

Under the new Japanese law, the scope of the measures available to the tribunal is unclear, which may be due to a lack of clarity in the equivalent provision of the UNCITRAL Model Law. UNCITRAL is currently working on a new version of this provision, which is more specific on the measures available to the arbitration tribunal.

Under the current German law, courts may enforce measures ordered by arbitral tribunals, if requested to do so by a party.²⁹ The new Japanese law, on the other hand, does not provide for any means of enforcing such measures.

The question of whether or not such measures should be made enforceable by national courts is being discussed at UNCITRAL, but no conclusion has so far been reached. One of the reasons given to explain why the new Japanese law did not go as far as German law is concern that the adopted measures may not always be compatible with the Japanese system of enforcement of civil judgments and decisions.³⁰ It is envisaged that supplementary measures, such as the payment of a penalty in case of non-compliance, should be used to ensure the effectiveness of the orders.

2. *Procedural Rules*

The new law provides that the procedural rules to be followed by the tribunal may be chosen by the parties, insofar as they are not contrary to a provision of the new law concerning public policy. Such provisions should be understood in this context as meaning mandatory provisions of the new law. Those provisions of the new law that are optional are indicated by the phrase 'unless the parties agree otherwise'. If the parties opt for institutional arbitration, the rules of the institution chosen by them in their arbitration agreement will apply in such instances. If the parties have not agreed on the procedural rules, the tribunal may conduct the arbitration as it sees fit, so long as it does not contravene the new law (Art. 26).³¹

The place of arbitration may be agreed by the parties, failing which the arbitral tribunal decides on the venue in light of the convenience for the parties and other circumstances of the dispute. The members of the arbitral tribunal may nonetheless meet at any place to consult with each other, hear parties, experts or third parties, or inspect goods or documents (Art. 28).

The language or languages of the arbitration may also be determined by the parties, failing which the arbitral tribunal will decide (Art. 30). The tribunal may order that any documentary evidence be produced with a translation into the language(s) agreed between the parties or designated by the tribunal.

The arbitration proceedings are regarded as having commenced when a party notifies the other party that a specific dispute has been referred to arbitration, unless otherwise

2003 [hereinafter Round Table Discussion 2], 4.

29 §1041 ZPO.

30 Round Table Discussion 2 (*supra* note 28) 2-5.

31 M. KONDO (*supra* note 27) 124-146.

agreed by the parties. It is important to note that a claim in arbitration proceedings now interrupts the limitation period (Art. 29). There was no explicit provision in the previous law stating this to be the case, although it had been acknowledged in case law.

The provisions in the new Japanese law concerning the conduct of arbitration proceedings are more or less identical to those in the UNCITRAL Model Law. The arbitral tribunal may hold an oral hearing for the presentation of evidence or for oral argument. It is required to do so if a party so requests (Art. 32). The timing of submissions of claims and defences is regulated in the new Japanese law in the same manner as in the UNCITRAL Model Law. Default of parties is also dealt with similarly in both.

It should be added that by virtue of the Special Measures Law on the Handling of Legal Matters by Foreign Law Solicitors (*gaikoku-hô jimu bengoshi*), foreign attorneys registered as foreign law solicitors in Japan are permitted to represent parties in arbitrations in Japan.³²

V. COURT ASSISTANCE

1. *Service of Notice*

If notice is to be served in writing in arbitration proceedings and it is difficult for the sender to obtain a record proving delivery, the sender may ask the court to serve the notice. The court will render a decision and serve the document if it considers this necessary (Art. 12). This provision answers a demand practitioners have been making for some time, given that no evidence of attempted delivery is available when, as is often the case nowadays, notice is served by registered mail.³³

2. *Taking of Evidence*

Both arbitral tribunals and parties are entitled to apply to the courts for assistance in taking evidence by any means provided in the Code of Civil Procedure that the arbitral tribunal considers necessary (Art. 35). These include commissioning investigations, examining witnesses and experts, examination of written evidence, and on-site inspections, unless the parties have agreed not to allow such applications. This provision, which is more detailed than that of the UNCITRAL Model Law, allows courts to examine evidence that arbitral tribunals cannot. The underlying idea is that since arbitral awards are binding and final, parties should have equivalent opportunities for fact finding as are available to parties in civil proceedings. The former law contained a simi-

32 Law No. 66, 1986, as amended, Artt. 5-3 and 58-2.

33 M. KONDO / T. KATAOKA (*supra* note 2) 10.

lar provision, but the scope of the means available to the courts was unclear.³⁴ The new law is more specific and provides for the following:³⁵

- entrustment of investigation (CPC Art.186);
- questioning of witnesses (CPC arts.190-206);
- expert examination (CPC arts.212-217);
- entrustment of expert examination (CPC Art.218);
- order for the submission of evidence (CPC arts.220-225, 227);
- entrustment of service of documents (CPC arts.226-227);
- inspection (CPC arts.232-233).

If the application for assistance is made by a party, the arbitral tribunal's consent is required, so as to prevent parties from applying for the examination of unnecessary evidence or in other ways abusing the system.

When courts examine evidence at the request of arbitral tribunals or parties in arbitration proceedings, the arbitrators are entitled to inspect documents and objects and, with the permission of the presiding judge, to question the witnesses and experts. Although administered by the judge, the procedure thereby allows the arbitrators to form their personal view in a direct manner.

VI. ARBITRAL AWARDS

1. *Applicable Substantive Law*

The substantive law to be applied is left to the parties' choice (Art. 36). As a rule, it does not include choice-of-law rules and therefore does not embrace the doctrine of *renvoi*. If the parties have not expressed their choice, the arbitral tribunal will apply the law of the country most closely linked with the dispute that is applicable directly to the case, i.e. the substantive law of that country. In this respect, the new Japanese law differs from the UNCITRAL Model Law, which provides for recourse to conflict of laws rules by the arbitral tribunal when determining the substantive law. The Korean and German laws, on the other hand, refer to the law of the country which has the closest links with the subject matter of the dispute.³⁶ In Japan this was thought to be more in accordance with practice and more conducive to foreseeability and legal stability.³⁷

The new Japanese law also allows 'equity and good conscience' to be applied, but only when explicitly requested by the parties.

34 *Ibid.*, 13-14.

35 M. KONDO (*supra* note 27) 187-189.

36 M. KONDO / T. KATAOKA (*supra* note 2) 14.

37 M. KONDO (*supra* note 27) 201.

2. *Settlement*

In Japan, it is common for courts to encourage settlement. The Code of Civil Procedure has a provision allowing judges to do this at any stage of the procedure. Settlement is often encouraged in arbitration as well. Reflecting this practice, the new law provides that an arbitral tribunal may seek to settle the dispute, if the parties agree (Art. 38). This provision is also meant to endorse 'arb-med'.³⁸

If the parties come to a settlement during the arbitral proceedings, the arbitral tribunal may render a decision recording this settlement. The decision has the same effect as an arbitral award and is enforceable.

3. *Setting Aside of Arbitral Awards*

A party may apply to a court to set aside an arbitral award on the following grounds (Art. 44):

- a. the arbitration agreement is invalid due to the incapacity of the party;
- b. in accordance with the agreed law applicable to the arbitration agreement (or, in the absence of such law, Japanese law), the arbitration agreement is invalid for reasons other than incapacity;
- c. the party making the application did not receive notice as required by Japanese law (or, except for matters concerning public policy, alternative provisions agreed by the parties) in the process of appointing arbitrators or in the arbitral proceedings;
- d. the party making the application was unable to make a defence in the arbitral procedure;
- e. the award contains decisions on matters beyond the scope of the arbitration agreement or the submissions made in the course of the arbitration;
- f. the composition of the arbitral tribunal or the arbitral proceedings were contrary to Japanese law (or, except on matters concerning public policy, alternative provisions agreed by the parties);
- g. the claim for arbitration concerned matters that are not arbitrable under Japanese law;
- h. the content of the award is contrary to public policy or good morals in Japan.

The application to set aside must be made within three months of receiving the award. It cannot be made after the decision to enforce the award has taken effect. The court may not make a decision on the application unless an oral hearing or a hearing with both parties present has been held.

The grounds for setting aside awards are now in line with the UNCITRAL Model Law and the New York Convention. Under the previous Japanese law, the setting aside

38 T. SAWADA, *Hybrid Arb-Med: Will West and East Never Meet?*, in: ICC Bulletin, 2003 No. 2, p. 35.

of awards had to be dealt with following the procedure relating to judgments. This could lead to serious delays. In contrast, the new law authorizes the courts to follow the procedure applying to decisions, *i.e.* to procedural matters. Furthermore, appeals against a court's decision do not follow the judgment procedure either, which again helps to ensure a speedy solution.

Whether an award is in fact set aside on one of the grounds listed in Article 44, paragraph 1 is ultimately left to the discretion of the court. Article 44, paragraph 6 provides that the court 'may' set aside the award. This means that, even when there is a ground for setting aside the award, if the actual breach is of minor significance and does not affect the award, it does not have to be set aside.³⁹

4. *Recognition of Arbitral Awards*

Arbitral awards have the same effect as final and conclusive judgments, regardless of whether the seat of the arbitration was in Japan or elsewhere (Art. 45). This is not the case if there is a ground for setting aside the award, or the award is ineffective under the law of the seat of the arbitration, or has been set aside or suspended by a court in the country where the seat of arbitration is located. This provision means that no specific action is required for the recognition of arbitral awards: an award is recognized unless recognition may be refused on one of the grounds listed in the provision.

5. *Enforcement of Arbitral Awards*

A party desirous of enforcing an arbitral award may apply to court for a decision authorizing civil enforcement (Art. 46). The court must be provided with a copy of the award and a document certifying the authenticity of the copy and the Japanese translation of the award. It should be noted that the award is in itself insufficient for enforcement; the court decision is required in addition.

No reference is made to timing of the application, so the question arises as to whether the application for enforcement can be made before the expiry of the period for filing an application to set aside. This was allowed in practice under the previous law and it is understood that the same will be the case under the new law.⁴⁰

If application to set aside or suspend an award has been made to a court in the country of the place of the arbitration, the Japanese court may suspend the enforcement proceedings if it considers this necessary (Art. 46, para. 3). In such cases, if requested by the party applying for the enforcement decision, the court may order the other party to provide security. A court may dismiss an application for enforcement if any of the grounds for refusing recognition exists.

39 M. KONDO (*supra* note 227) 249.

40 *Ibid.*, 271.

There have been some cases where the enforcement of foreign arbitral awards was contested in court and the courts have found those awards to be enforceable on the basis of the New York Convention, the Geneva Convention and various bilateral treaties. The enforcement of CIETAC award has been contested in court on several occasions. In one case, the Japanese party argued, *inter alia*, that CIETAC was part of the Economic and Trade Department of China and a fair outcome of the process could not be expected. The court found that the arguments put forward by the Japanese party did not fall within the grounds for refusal of enforcement as listed in the New York Convention, and that no unfairness could be inferred from the mere fact that CIETAC was a state-administered organization. The court therefore allowed the enforcement of the award.⁴¹

CONCLUDING REMARKS

UNCITRAL has formally acknowledged Japan's adoption of the Model Law in its new arbitration law. Unlike countries such as England or Sweden, with a long tradition of arbitration, which did not confine themselves to the UNCITRAL Model Law when enacting new arbitration statutes, it was a natural choice for Japan, where arbitration has had a more marginal role, to base its reform on the Model Law. After all, the Model Law represents a widely accepted norm in international commercial arbitration. It may safely be concluded that the previous antiquated arbitration law in Japan has been successfully replaced by a new law that meets international standards.

However, since the adoption of the UNCITRAL Model Law in 1985, there have been various discussions concerning such matters as multi-party arbitration, the enforcement of interim measures and the taking of evidence. The Model Law is itself currently being reviewed with a view to possible changes. The speed with which the new Japanese law was prepared made it difficult to address certain contemporary issues and include innovations in advance of possible changes in the Model Law. Indeed, the fact that matters were still being discussed at UNCITRAL or elsewhere deterred the drafters of the new legislation from taking a stance on certain points. There are also some gaps, which are expected to be filled by case law.

Nevertheless, there is no doubt that the new law will help to galvanize international commercial arbitration – a goal that Japan has been pursuing for some years.

41 Tokyo District Court, 27 January 1994, in: Hanrei Taimuzu, 853-266.

ZUSAMMENFASSUNG

Im Jahr 2003 hat Japan sein Schiedsrecht umfassend auf sondergesetzlicher Grundlage novelliert. Bis dahin hatten im wesentlichen die Regelungen gegolten, die Japan gegen Ende des 19. Jahrhunderts mit der Modifizierung des Schiedswesens als Teil des Zivilgesetzes nach deutschem Vorbild beschlossen hatte. Das neue Gesetz ist am 1. April 2004 in Kraft getreten.

Die Novellierung des Schiedsverfahrensrechts ist ein Teil der grundlegenden Reform des Justizwesens in Japan, die im Jahre 2001 begann. In diesem Zusammenhang wurde auch kurz nach dem Schiedsverfahrensgesetz ein neues Gesetz zur außergerichtlichen Streitbeilegung verkündet.

Das neue Schiedsverfahrensgesetz basiert auf dem UNCITRAL-Modellgesetz über internationale Handelsschiedsgerichtsbarkeit. Anders als beispielsweise Großbritannien oder Schweden, die eine eigene lange Tradition des Schiedswesens haben und sich aus diesem Grunde nicht an dem Modellgesetz orientiert haben, verfügt Japan nicht über eine solche Tradition. Es hat deshalb als Referenzgesetze die Gesetzestexte von Ländern herangezogen, deren Reformen auf dem UNCITRAL-Modellgesetz basieren, namentlich die deutsche Novelle von 1997 und das neue koreanische Schiedsverfahrensrecht. Wie bereits das alte Schiedsrecht, so ist auch das neue Schiedsverfahrensgesetz allerdings nicht auf die internationale Handelsschiedsgerichtsbarkeit beschränkt, sondern regelt sowohl internationale wie nationale Schiedsverfahren.

Nach der Neuregelung ist eine Schiedsvereinbarung im Regelfall nur dann zulässig, wenn es sich bei dem Gegenstand des Schiedsverfahrens um eine zivilrechtliche Angelegenheit handelt. Etwas anderes gilt nur, wenn ausnahmsweise in einem Gesetz ein Schiedsverfahren für andere Bereiche ausdrücklich vorgesehen ist. Für die Frage der Schiedsfähigkeit ist im Einzelfall mithin entscheidend, ob die Parteien befugt sind, über den Streitgegenstand Vereinbarungen zu treffen.

Im Gesetzgebungsverfahren gingen die Meinungen über die Bestimmung der Schiedsfähigkeit weit auseinander. Während einige sich für eine Verbreitung des Anwendungsbereiches aussprachen, plädierten andere für ein engeres, schärfer gefaßtes Kriterium, nämlich für die Verfügungsbefugnis der Parteien, über den Gegenstand einen Vergleich abschließen zu können. Im Ergebnis setzte sich die zweite Position durch.

Die staatlichen Gerichte dürfen im Rahmen eines schiedsrichterlichen Verfahrens nur insoweit tätig werden, wie dies nach den Bestimmungen des Schiedsverfahrensgesetzes ausdrücklich zugelassen ist. Diese Begrenzung reflektiert eine entsprechende Bestimmung im UNCITRAL-Modellgesetz über den Umfang einer gerichtlichen Tätigkeit.

Soweit sich in der Schiedsvereinbarung keine abweichenden Regelungen finden, ist das Schiedsgericht berechtigt, auf Antrag einer der Parteien vorläufige oder sichernde Maßnahmen anzuordnen, wenn es solche für erforderlich hält. In diesen Fällen kann das Schiedsgericht eine angemessene Sicherheit verlangen.

Die Eile, mit der das neue japanische Gesetz vorbereitet wurde, hat eine Auseinandersetzung mit bestimmten aktuellen Problemen der Praxis erheblich erschwert. Gleiches gilt für eine Berücksichtigung zu erwartender Reformen des Modellgesetzes. Die Tatsache, daß bestimmte Fragen wie etwa einstweilige Anordnungen auf Antrag einer Partei nach wie vor bei der UNCITRAL und anderswo diskutiert werden, hat dazu geführt, daß der japanische Gesetzgeber von der Regelung dieser Fragen zunächst einmal Abstand genommen hat.

Ferner gibt es auch Lücken im Gesetz. Es wird erwartet, daß die Rechtsprechung diese füllt. Gleichwohl kann kein Zweifel daran bestehen, daß das neue Schiedsrecht dazu beitragen wird, die internationale Handelsschiedsgerichtsbarkeit vor Ort zu stärken – ein Ziel, das Japan seit etlichen Jahren verfolgt.

(deutsche Übersetzung durch die Redaktion)