Changing the (JCAA) Rules: Improving International Commercial Arbitration in Japan

Gerald McAlinn & Luke Nottage[*]

INTRODUCTION

On 19 November 2004, the upper House of Councillors joined the lower House of Representatives in approving the Law to Promote the Use of Out-of-Court Dispute Resolution Procedures ("*A*lternative *D*ispute *R*esolution Law").[1] This legislation is designed to encourage alternative dispute resolution by *private* service providers, which has lagged behind ADR by or in the shadow of *public* actors.[2] The new ADR Law provides that the Minister of Justice should establish a system for accrediting ADR institutions, which would then have to report on their activities, in exchange for suspension of limitation periods while conducting their ADR procedures. However, a wide range of commercial organizations should be accredited to provide ADR services in Japan, including

---

* McAlinn thanks the staff of the Japan Commercial Arbitration Association ("JCAA") for their assistance in the preparation of a portion of the analysis for this article, published in his name (G. MCALINN, New Rules for International Commercial Arbitration in Effect from March 1, 2004, in: JCAA Newsletter 17 (2004), also available at <*http://www.jcaa.or.jp/e/arbitration-e/syuppan-e/newslet/news17.pdf*>). Nottage thanks fellow members of the Committee charged with revising Arbitration Rules for the Australian Centre for International Commercial Arbitration, for insights into the process and substance of revising rules for arbitration institutions. Both authors welcome comments; but questions regarding the official interpretation and application of the new JCAA Rules should be addressed to the JCAA Secretariat (<*www.jcaa.or.jp*>).

1 *Saibangai funsô kaiketsu tetsuzuki no riyô no sokushin ni kansuru hôritsu*, Law No. 151/2004 (available at <*http://www.ron.gr.jp/law/law/adr.htm*>).

2 For an example of Japan's tradition in the latter respect, see *e.g.* D. VANOVERBEKE, Community and State in the Japanese Farm Village: Farm Tenancy Conciliation (1924-1938) (Leuven 2004) (reviewed in this issue).

venerable institutions like the Japan Commercial Arbitration Association ("JCAA"), which recently began offering mediation services for domestic disputes, as well as its staple services for international commercial arbitration proceedings in Japan. This would be in keeping with the thrust of the recommendations for civil and criminal justice reform published by the Judicial Reform Council in 2001, which advocated strengthening of the ADR system in conjunction with improvements in court procedures and legal education.

One aspect of civil justice reform that had been more quickly instituted by the Office for the Promotion of Judicial Reform (*Shihôkaikaku Sokushin Honbu*), set up within the revamped Cabinet Office from 2001, was enactment of a new Arbitration Law in 2003 ("the Law").[3] It is based on the 1985 UNCITRAL Model Law for International Commercial Arbitration, but with a few noteworthy differences. The Law aimed partly to placate domestic and foreign concerns about Japan's outmoded legislative regime applicable to international arbitrations with their seat in Japan, but also to promote more use of arbitration to resolve domestic disputes.[4]

The Law came into effect from 1 March 2004, as did new amended Commercial Arbitration Rules (the "New Rules")[5] implemented by the JCAA.[6] The New Rules govern requests for arbitration filed after that date. Also, although requests for arbitration filed prior to 1 March 2004 and all arbitrations underway before that date will continue to be governed by the Commercial Arbitration Rules (the "Old Rules") in effect at the time the request was filed, the parties may agree to have their proceedings governed by the New Rules as provided in the Supplementary Provisions. The JCAA had formed an *ad hoc* committee in 2003 to examine the Old Rules in light of the new Arbitration Law. The committee was composed of practitioners, academics and a senior representative from the JCAA, and was chaired by Tokyo University Emeritus Professor Yoshimitsu Aoyama (who also chaired the deliberations on the ADR Law within the

3 *Chûsai-hô*, Law No. 138/2003; semi-official English translation: <*http://www.kantei.go.jp/foreign/policy/sihou/arbitrationlaw.pdf*>.

4 See *e.g.* H. ODA, Arbitration Law Reform in Japan, (*supra* p. 5 in this issue), T. NAKAMURA, Salient Features of the New Japanese Arbitration Law Based Upon the UNCITRAL Model Law on International Commercial Arbitration, in: JCAA Newsletter 17 (2004), available at <*in: http://www.jcaa.or.jp/e/ arbitration-e/syuppan-e/newslet/news17.pdf*> (and his more detailed analysis forthcoming in the Journal of International Arbitration), L. NOTTAGE, Japan's New Arbitration Law: Domestication Reinforcing Internationalisation?, in: International Arbitration Law Review 7(2) (2004).

5 See the English translation: <*http://www.jcaa.or.jp/e/arbitration-e/kisoku-e/kaiketsu-e/civil.html*>.

6 The other major institution, the Tokyo Maritime Arbitration Commission of the Japan Shipping Exchange, also amended (on 25 November 2003) its main set of arbitration rules with effect from 1 March (available via <*http://www.jseinc.org/en/tomac/*>).

Office for the Promotion of Judicial Reform).[7] A working group of the committee was charged with drafting the language of the New Rules, chaired by Keio University Law School Professor Koichi Miki (who also chaired the Office's deliberations on the Arbitration Law, and helped generate its semi-official translation). The changes represented by the New Rules are significant, and this article introduces the major ones primarily by contrasting the Old Rules.

The changes should greatly improve the conduct of international arbitration under the auspices of the JCAA, which has long struggled to attract more than a dozen or so new cases each year.[8] Even aside from the substantive improvements achieved by the New Rules, the fact that the JCAA has finally comprehensively updated its rules sends an important message to the worldwide international arbitration community: the Association – and Japan more generally – are trying once more to take arbitration seriously.[9]

Moreover, in light of the background sketched above, the New Rules should promote arbitration also for domestic disputes, and a broader-based ADR culture in Japan. This is because arbitration rules represent a key component of party agreement, which lies at the root of arbitration and other ADR processes, in turn allowing flexibility and innovation to meet evolving commercial expectations and practices.[10] An obvious example of party agreement is selection of a private forum to arbitrate disputes, by means of an arbitration clause incorporated into an underlying commercial contract, or (more rarely) an agreement to arbitrate reached after a dispute arises. But party autonomy also tends to prevail nowadays in selection of the arbitrators, the rules of law applied, and the type of proceedings that are then conducted. The parties also can agree to terminate the proceedings, if they are not happy with the arbitrators, or if they can see a means to reach a negotiated settlement.

---

7 The committee consisted of the following members: Yoshimitsu Aoyama, Tadashi Ishikawa, Naoki Idei, Kazuo Ihara, Toshio Sawada, Yasuhei Taniguchi, Shunichiro Nakano, Yukukazu Hanamizu, Gerald McAlinn, Koichi Miki, Tetsuo Morishita, Aya Yamada, and Kosuke Yamamoto. The working group consisted of Koichi Miki, Naoki Idei, Shunichiro Nakano and Gerald McAlinn.

8 See figures provided by L. NOTTAGE / L. WOLFF, CCH Doing Business in Asia (Singapore 2000-4), Japan ("Dispute Resolution") tab; T. NAKAMURA, Continuing misconceptions of international commercial arbitration in Japan, in: Journal of International Arbitration 18 (2001}. Anecdotal evidence indicates a distinctive rise in caseload over the last year, but from this low base. For caseloads at other international arbitration venues, including the rest of the Asia-Pacific region, see *e.g.* <*http://www.hkiac.org/en_statistics.html*>.

9 The JCAA updated its Rules quite comprehensively in 1992, but made only minimal changes in 1997 (accommodating separate 1995 provisions on arbitrators' remuneration).

10 See L. NOTTAGE, Is (International) Commercial Arbitration ADR?, in: The Arbitrator and Mediator 20 (2002), also available at <*http://www.iama.org.au/docs/jlv21n01.pdf*>, citing Lord MUSTILL, Arbitration, Imagination, and the Culture of Compromise, in: inaugural Clayton Utz International Arbitration Lecture, co-hosted by the University of Sydney, delivered in the Banco Court on 11 June 2002.

Deference to party autonomy has been promoted by widespread adoption of the Model Law regime, which contains minimal mandatory rules, in favour of default rules subject to contrary party agreement. Such agreements can be detailed beforehand or subsequently by the parties, or (more commonly) by incorporating a set of arbitration rules, developed either for *ad hoc* arbitration proceedings (like the 1976 UNCITRAL Arbitration Rules),[11] or rules designed specifically for arbitrations administered by institutions like the JCAA.[12] Many of those are default rules too, allowing parties to agree beforehand (when incorporating the rules) or subsequently (after the proceedings have commenced) to diverge from the standard offered. Thus, a set of arbitration rules allowing for parties to vary any particular rules they find inappropriate for their particular dispute, combined with a liberal arbitration law allowing for arbitration rules and any other party agreement to override the law's default rules, advances the core agenda of arbitration and other ADR processes. It is also consistent with the basic philosophy behind Japan's judicial system reform, designed to encourage self-responsibility and active engagement by the citizenry in the operations of the legal system. In the long-run, more experience with sound arbitration and ADR processes might even change expectations for more formal court processes, still dominated by mandatory rules of procedure and deference to adjudicators.[13]

The New Rules developed by the JCAA also have a more global significance. In the late 1980s and early 1990s, jurisdictions keen to attract international arbitrations to their shores tended not only to enact modern arbitration legislation, usually based on the Model Law (*e.g.* Hong Kong, Australia, Singapore); but also to set up new arbitration centres, with new rules (*e.g.* those jurisdictions), or to update the rules of established centres (*e.g.* the JCAA). In the late 1990s, a second round of amendments to arbitration

---

11 See G. GRIFFITHS / A. MITCHELL, Contractual Dispute Resolution in International Trade: The UNCITRAL Arbitration Rules (1976) and the UNCITRAL Conciliation Rules (1980), in: Melbourne Journal of International Law 3 (2002).

12 Unfortunately, some courts still fail to understand this basic normative structure. See *e.g. Eisenwerk v Australian Granites Ltd* [2001] 1 Qd R 461 (Queensland Court of Appeal). The Singaporean High Court made similar errors, but the Singaporean legislature promptly amended its international arbitration legislation to correct this misunderstanding. See G. SMITH et al, The UNCITRAL Model Law and the Parties' Chosen Arbitration Rules – Complementary or Mutually Exclusive?, in: Vindabona Journal of International Commercial Law and Arbitration 6 (2002).

13 A step already towards changing an unquestioningly deferential attitude towards the judiciary is the inauguration of the lay assessor (*saiban'in*) system, where randomly selected laypersons will sit with judges to try serious criminal cases. See generally K. ANDERSON / M. NOLAN, Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Lay Assessor System from Domestic Historical and International Psychological Perspectives, in: Vanderbilt Journal of Transnational Law 38 (2004).

rules was evident world-wide, especially in "core" venues for international arbitration like the International Chamber of Commerce, the American Arbitration Association ("AAA"), the London Court of International Arbitration, the Stockholm Chamber of Commerce, and the Chinese International Economic and Trade Arbitration Commission.[14] A third round may now be emerging, including further changes for the AAA, in China for the Beijing Arbitration Commission, and new rules planned for the Australian Centre for International Commercial Arbitration ("ACICA").[15] The latter development is particularly interesting, because ACICA's objective is not just to "keep up" with – and hopefully improve on – other arbitration venues, in order to attract and satisfy increasingly demanding users of arbitration services. ACICA also hopes to play its part in a broader effort by a range of arbitration associations, large law firms, other practitioners, and certain universities to push for an update to Australia's Model Law regime, now almost 15 years old.

Likewise, JCAA's New Rules may help maintain momentum and provide pointers for another round of arbitration law reform in Japan in a few years, particularly as UNCITRAL concludes its deliberations since 2000 on possible amendments to the Model Law itself.[16] Specifically, although not spelt out in the New Rules and public commentary on them, the guiding principles behind the amendments appear consistent with two major trends evident in the international commercial arbitration community particularly since the late 1990s: a renewed global perspective (rather than "Americanisation"), and related efforts to promote more informality (and especially efficiency) in arbitration proceedings.[17] Thus, in this longer-term process, hopefully we will witness the rich "cross-fertilisation" at the level of arbitration rule amendments that we have witnessed in UNCITRAL Model Law based legislative reforms, especially in the Asia-Pacific region.[18]

---

14 See *e.g.* M. GOLDSTEIN, International Commercial Arbitration, in: International Lawyer 33 (1999).

15 See, respectively, <*www.adr.org*>; S. LIANBIN, Strides Towards Arbitral Justice: A Comment on the 2004 Arbitration Rules of the Beijing Arbitration Commission, in: Journal of International Arbitration 21 (2004); and <*www.acica.org.au*>.

16 See generally the deliberations of UNCITRAL Working Group II – Arbitration and Conciliation, available via <*www,uncitral.org*>.

17 See L. NOTTAGE, The Procedural Lex Mercatoria: The Past, Present and Future of International Commercial Arbitration, CDAMS Discussion Paper (2003), available at <*http://www.cdams.kobe-u.ac.jp/archive/dp03-1.pdf*> (also forthcoming as a book chapter in Japanese); and also E. HELMER, International Commercial Arbitration: Americanized, "Civilized", or Harmonized?, in: Ohio State Journal on Dispute Resolution (2003).

18 *Cf* L. NOTTAGE, Reviewing the Arbitration Act 1996, in: New Zealand Law Journal 2003.

CHAPTER I: GENERAL PROVISIONS

The New Rules apply "when the parties have agreed to submit their dispute to arbitration under the Rules of the Association, or simply to arbitration at the Association (the arbitration agreement)".[19] Rule 3 Paragraph 2 adds: "If the parties have entered into an arbitration agreement, these Rules shall be deemed incorporated into such agreement; provided that the parties may agree differently from the provisions of these Rules subject to the consent of the arbitral tribunal." Presumably, however, if other specific Rules themselves reveal that they are default rules (subject to any contrary agreement of the parties), then there should be no need to obtain the tribunal's consent at least when the tribunal has not yet been constituted. This is obvious for some default rules, like Rule 24 et seq. on appointment of arbitrators, discussed below. But it should also hold for other default rules. Otherwise, parties will lack the incentive to try to build in any desired derogations from the New Rules into their original arbitration agreement, which should always be carefully considered and drafted. A more difficult question is whether the tribunal, even after constituted, should always have to consent when all parties wish to derogate from default rules provided in the New Rules. In any event, capable arbitrators can be expected generally to provide consent when faced with such a situation. Otherwise, they risk provoking the parties into terminating the proceedings.[20]

The Definition section, which was previously located in Old Rule 10, has been brought forward to New Rule 2 and streamlined. For example, the definition of "Agreement in writing" in Old Rule 10, Paragraph 4 has been deleted. The definition of "writing" is now combined in New Rule 5 along with the basic requirement that arbitration agreements be in writing. The old standard of a "meeting of the minds acknowledged in writing" has been abandoned in favor of a broader and more modern definition that allows for the threshold requirement of a written agreement to arbitrate to be satisfied by the exchange of signed letters, telegrams, and facsimiles, as well as by incorporation by reference or virtually any form of electromagnetic records (including emails).[21] The writing requirement can also be satisfied when the claimant submits "a written

19 Rule 3 Paragraph 1. Parties may instead agree for the JCAA to administer an arbitration under the UNCITRAL Rules, for which JCAA has developed "Administrative and Procedural Rules for Arbitration under the UNCITRAL Arbitration Rules" (available at <*http://www.jcaa.or.jp/e/arbitration-e/kisoku-e/uncitral-e.html*>). However, very few parties have availed themselves of this facility.

20 However, under Rule 22, the arbitral tribunal must also first consent even if the claimant requests termination of the proceedings. Under Rule 50 Paragraph 2, it must terminate proceedings "if it considers it has no arbitral jurisdiction". Otherwise, under Rule 50 Paragraph 2, the tribunal can only terminate the proceedings if "tribunal finds that the continuation of the arbitral proceedings has become unnecessary or that continuation of the arbitral proceedings has become impossible". Presumably, Rule 50 Paragraph 2 is sufficient to require the tribunal to terminate proceedings if all parties so agree; but Article 40(2)(ii) of the Arbitration Law more clearly provides for party autonomy in that respect.

21 New Rule 5, Paragraphs 1, 2 and 3.

request for arbitration containing the contents of the arbitration agreement, and a written answer submitted in response by the respondent [that] does not contain anything to dispute it….".[22]

The part of Old Rule 7 that required JCAA to appoint a designated "clerk in charge" has been eliminated. Arbitral proceedings will no longer be assigned an individual clerk in charge. Rather, the Secretariat of JCAA will remain generally responsible for all clerical work under New Rule 8.

Under New Rule 10, parties remain free to choose who will represent or assist them in arbitral proceedings. The language in Old Rule 9 that permitted the arbitral tribunal to reject a party's choice of representative or assistant for good cause has been deleted in its entirety.

New Rule 11 and New Rule 12 have been added to Chapter I to address the language(s) to be used in the arbitral proceedings and the period of time of proceedings, respectively. These matters were formerly addressed in Old Rules 62 and 63 of Chapter VI Supplementary Rules. The substance has not been changed by the New Rules. Arbitral proceedings can still be conducted in Japanese or English or both, as the parties may agree, or as the arbitral tribunal determines absent such agreement.[23] Likewise, the parties by agreement, and the arbitral tribunal if necessary and after giving notice to the parties, may extend any period of time provided for in the New Rules.

Finally, New Rule 13 has been added to provide immunity from liability to arbitrators and JCAA for acts and omissions taken in connection with arbitral proceedings, unless the acts or omissions constitute willful or gross negligence.[24]

CHAPTER II: COMMENCEMENT OF ARBITRATION

The basic procedures regarding the filing of a request for arbitration and the answer thereto remain unchanged. However, New Rule 13 allows JCAA to serve notice of the request for arbitration on the respondent at its last known address if reasonable efforts do not indicate a current location. It should also be noted that the period for filing a counterclaim has been shortened from six (6) weeks to four (4) weeks from the Basic Date by New Rule 19.

More importantly, New Rule 16 expressly authorizes JCAA to proceed to constitute an arbitral tribunal even if the respondent raises objections to the jurisdiction of JCAA.

---

22 New Rule 5, Paragraph 4. Compare *e.g.* V. VAN HOUTTE, Consent to Arbitration through Agreement to Printed Contracts: The Continental Experience, in: International Arbitration 16 (2000), and the deliberations of the UNCITRAL Working Group (via <*www.uncitral.org*>).

23 A noticeable recent tendency in JCAA arbitrations has been towards more proceedings in English. See NAKAMURA, *supra* note 8.

24 *Cf e.g.* P. LALIVE, Irresponsibility in International Commercial Arbitration, in: Asia-Pacific Law Review 7 (1999).

If JCAA does, in fact, proceed and an arbitral tribunal is empanelled, the arbitral tribunal is vested with the authority to hear and determine the respondent's challenge to the existence or validity of the agreement to arbitrate. This power is further elaborated in New Rule 33, Paragraph 1, which mirrors the basic principle of *Kompetenz-Kompetenz* affirmed by the Model Law, by providing as follows: "The arbitral tribunal may decide challenges made regarding the existence or validity of an arbitration agreement or its own jurisdiction". Naturally, if the arbitral tribunal determines it does not have jurisdiction, it must terminate the arbitral proceedings pursuant to New Rule 33, Paragraph 2.

New Rule 22 provides greater detail than Old Rule 19 regarding the procedures pertaining to the withdrawal of the request for arbitration. The basic principle is that the request can be withdrawn freely at any time prior to the establishment of an arbitral tribunal.[25] After the arbitral tribunal has been appointed, however, consent of the arbitral tribunal is required and the respondent is given the right to object. The arbitral tribunal should not grant permission to withdraw if it determines that there is a "legitimate interest on respondent's part" to continuation of the proceedings.[26]

CHAPTER III: ARBITRAL TRIBUNAL

The New Rules streamline and reorganize this important topic. Many of the provision remain unchanged in substance. For example, the choice of the parties in their agreement regarding the number and manner of appointment of arbitrators is respected under New Rule 23. Absent an agreement between the parties, JCAA will appoint a single arbitrator under New Rule 24, Paragraph 1, or three arbitrators if the parties so request, within three (3) weeks of the Basic Date "taking into consideration the amount in dispute, the complexity of the case and other circumstances" JCAA considers appropriate.[27]

The most significant changes in this Chapter, and perhaps in the entire New Rules, are the new provisions dealing with the impartiality and independence of arbitrators. This has become a very topical issue world-wide.[28] Under Old Rule 20, a person with a "beneficial interest in the case under arbitration" was enjoined from serving as an arbitrator. There were no explicit procedures for challenging or removing an arbitrator on these or any other grounds. New Rules 28 and 29 have been added to remedy this shortcoming in the Old Rules.

---

25 New Rule 22, Paragraph 1.
26 New Rule 22, Paragraph 2 and 3.
27 New Rule 24, Paragraph 2.
28 Parties, advisors and arbitrators themselves should also consult – and, if necessary, expressly adopt – the 2004 IBA Guidelines on Conflicts of Interest in International Commercial Arbitration (<*www.ibanet.org/pdf/InternationalArbitrationGuidelines.pdf*>).

New Rule 28, Paragraph 1 requires that "[a]rbitrators shall be, and remain at all times, impartial and independent." When a person is approached to determine whether he or she is willing and able to serve as an arbitrator, the candidate is under a duty to disclose fully to the approaching party "any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence".[29] Assuming the approaching party is satisfied and the appointment is made, the arbitrator must disclose, without delay, any and all of the same circumstances to JCAA and to the other parties if the arbitrator has not done so already. New Rule 28, Paragraph 3.

The duty to disclose in New Rule 28, without more, would be a vast improvement over the Old Rules. However, New Rule 29 goes further in support of the basic philosophy of impartiality and independence by giving the parties an opportunity to challenge an arbitrator under the "justifiable doubts" standard.[30] A party is allowed to challenge, under Paragraph 2, an arbitrator it appointed only for reasons the party learned after the appointment. Challenges must be filed with JCAA in writing within two weeks of receipt of the notice of appointment of the arbitrator, or the date on which the challenging party became aware of the circumstances giving rise to the challenge.[31] Once a challenge has been made, JCAA will hear the opinions of the parties and the arbitrators, consult with a Committee for the Review of Challenges to Arbitrators, and make a decision on the challenge.[32]

CHAPTER IV: ARBITRAL PROCEEDINGS

Section 1: Examination Proceedings

New Rule 32 governs the supervision of the examination proceedings. The arbitral tribunal must, as in the Old Rules, treat the parties equally. This is also one of the rare mandatory provisions under the Model Law regime. However, additional obligations have been added to facilitate the fair and efficient handling of disputes. The arbitral tribunal is empowered to proceed even if one of the parties fails to submit arguments or apply to present evidence.[33] The arbitral tribunal can also conduct hearings if one or both parties fail to appear without good cause.[34] Moreover, the parties will no longer submit documents to JCAA for distribution to the arbitral tribunal. Paragraph 6 of New Rule 32 requires the parties to submit documents directly to the arbitral tribunal with a

29 New Rule 28, Paragraph 2.
30 New Rule 29, Paragraph 1.
31 New Rule 29, Paragraph 3.
32 New Rule 29, Paragraph 5.
33 New Rule 32, Paragraph 3.
34 New Rule 35, Paragraph 2.

copy to JCAA for archival purposes. The submission of documents can be accomplished by electromagnetic record or facsimile if the arbitral tribunal agrees.[35]

As indicated above, New Rule 33 expressly vests the determination of jurisdiction with the arbitral tribunal. Having determined that jurisdiction exists, the New Rules give the arbitral tribunal broad discretion to set a schedule for the proceedings and to conduct them in an appropriate manner. For example, New Rule 37, Paragraphs 4 and 5 allow the arbitral tribunal to order the production of documents in a party's possession after hearing and ruling on objections. This means that limited discovery is possible under New Rule 37.[36]

The arbitral tribunal is authorized to appoint experts to advise it on "necessary issues".[37] While there is no express obligation on the part of the arbitral tribunal to inform the parties that it has engaged an expert, Paragraph 2 of New Rule 38 anticipates that this will be the case by giving "an opportunity to the parties to put questions to the expert in a hearing." Finally, New Rule 39 empowers the arbitral tribunal, when it deems it necessary and after obtaining the consent of the parties, to "cause one or more of the arbitrators constituting the arbitral tribunal to proceed with a part of the proceedings".

With respect to the governing law of a dispute, the agreement of the parties is controlling.[38] Absent agreement on this point, the arbitral tribunal must "apply the law of the country or state with which the dispute … is most closely connected".[39] *Ex aequo et bono* decisions are only permitted if the parties have expressly requested the arbitral tribunal to do so.[40]

Under Paragraph 1 of New Rule 42, the parties may freely agree on the place of arbitration. In effect, arbitration can be conducted under the auspices of JCAA and the New Rules anywhere in the world. It is no longer required that the arbitration be conducted in Japan. Nevertheless, failing agreement by the parties on this point, the place of business of JCAA where the request for arbitration was submitted will be the place of arbitration.

Two additional new rules have been added as well. New Rule 47 allows the arbitral tribunal to attempt to assist the parties in reaching a settlement to the dispute if all of the parties consent, either orally or in writing. This should be read in conjunction with Article 38 of the Arbitration Law. Paragraph 4 thereof allows all parties to consent for the arbitral tribunal (or one or more persons it selects) to attempt settlement, subject to

---

35 New Rule 32, Paragraph 7.

36 To flesh out the procedures in this area, parties may wish to adopt the 1999 IBA Rules on the Taking of Evidence in International Commercial Arbitration (available at <*http://www.ibanet.org/images/downloads/IBA%20rules%20on%20the%20taking%20of%20Evidence.pdf*>).

37 New Rule 38, Paragraph 1.

38 New Rule 41, Paragraph 1.

39 New Rule 41, Paragraph 2.

40 New Rule 41, Paragraph 3.

the safeguard in Paragraph 5 requiring this consent to be in writing *unless the parties agree otherwise*. By agreeing to incorporate JCAA New Rule 47, the parties should be held to have allowed for the possibility of oral consent to mediation attempts by the arbitrator. Even so, it is generally advisable for all parties to record their consent in writing. They should also specify the extent to which they wish to empower the tribunal to assist in reaching settlement. This is because there are significant disparities world-wide as to the acceptable extent and manner of such involvement by arbitrators,[41] reflected for example in the exclusion of detailed provisions on arbitrators acting as mediators from the 2002 UNCITRAL Model Law on International Commercial Conciliation. For example, most parties and arbitrators will probably be happy with minimal involvement, such as the full tribunal suggesting in a formal hearing that it might now be a good time for parties to discuss amongst themselves the possibility of settlement. However, those with advisors especially from the English law tradition are likely to be very cautious about a situation at the other extreme, involving just one of the arbitrators "caucusing" (or meeting separately) with each party and actively proposing terms of settlement.

New Rule 48 grants to the arbitral tribunal the power to take "interim measures of protection" and to order the posting of security in connection therewith. This is another difficult area, where rules vary among arbitral institutions world-wide, and which UNCITRAL is still debating with a view towards amending the Model Law.[42]

Likewise, Rule 40 Paragraph 2 maintains a fairly conventional obligation of confidentiality.[43] To heighten the visibility of the JCAA, and arbitration in Japan more generally, it might have been better to have parties also consent to publication of redacted versions of JCAA awards, as permitted now for example under the AAA Rules.

Section 2: Arbitral Award

A number of significant changes have been made in this section of the New Rules. Pursuant to Paragraph 6 of New Rule 54, it is expressly provided that the arbitral award is final and binding on the parties. New Rule 56 allows the arbitral tribunal on its own motion, or at the request of a party, to correct computation, clerical and like errors in

---

41 See M. SCHNEIDER, Combining Arbitration with Mediation, in: A. van den Berg (ed.), International Dispute Resolution: Towards an International Arbitration Culture (1998).

42 See *e.g.* G. MARCHAC, Interim Measures in International Commercial Arbitration under the ICC, AAA, LCIA and UNCITRAL Rules, in: American Review of International Arbitration 10 (1999) and UNCITRAL Working Group deliberations (via <*www.uncitral.org*>).

43 "The arbitrators, the officers and staff of the Association, the parties and their representatives or assistants shall not disclose facts related to arbitration cases or facts learned through arbitration cases except where disclosure is required by law or required in court proceedings." Compare generally BROWN, Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration, in: American University International Law Review 16 (2001).

the award. New Rule 57 permits a party to request the arbitral tribunal to interpret a specific part of its award. This rule does not, however, affirmatively oblige the arbitral tribunal to provide an interpretation. Finally, a party may ask the arbitral tribunal to make an additional award under New Rule 58 as to "claims presented during the arbitral proceedings but omitted from the arbitral award".

CHAPTER V: EXPEDITED PROCEDURES

The provisions governing expedited procedures remain substantially unchanged. So far, they have been little used. Other aspects of the New Rules, promoting more efficiency even in normal proceedings, may further lessen their attraction. However, as parties become used to prompter proceedings, they may also begin experimenting with expedited proceedings.

CHAPTER VI: SUPPLEMENTARY RULES

As indicated above, the provisions in the Old Rules dealing with Language (Old Rule 62), and Extension of Period of Time (Old Rule 63) have been removed from the Supplementary Rules and taken up in New Rules 11 and 12, respectively. Under New Rule 68, the parties remain jointly and severally liable for the payment of fees, arbitrators' remuneration and expenses to the JCAA. The provision of Old Rule 64, Paragraph 2, which required disputes between the parties and the JCAA to be decided by the arbitral tribunal, has been deleted. Similarly, the provision in Old Rule 65, Paragraph 3, making the party requesting an alteration to the hearing schedule responsible for payment of the hearing schedule alteration fee, has been eliminated. Lastly, under New Rule 72, the arbitral tribunal is expressly authorized to include in its award the payment of fees and expenses incurred by a party's representative in connection with representing a party in the proceedings.

CONCLUSIONS

As can be seen from the above, the New Rules are the result of an extensive overhaul to the Old Rules, and should result in substantial improvements to the efficient and fair conduct of arbitral proceedings under the purview of JCAA. They also bring the practice and rules of the JCAA into alignment with the new Arbitration Law, and the rules in effect at other leading international commercial dispute resolution organizations.

Further, the New Rules hold considerable broader significance. First, they should help promote the growth of arbitration and private ADR services for resolving domestic disputes, as part of a broader transformation well underway in Japan's civil justice system. Related developments include new initiatives to train arbitrators in Japan, and establish more knowledge of arbitration (and ADR) at all levels of the university system.[44] Secondly, such transformations should help correct rather stereo-typical views still presented by some commentators outside Japan, linking limited use of arbitration within Japan to cultural preferences.[45] Finally, the effort behind amendments to the JCAA Rules should contribute to further rounds of arbitration law reform, and improvements in the rules and practices of arbitral institutions, in Japan, the Asia-Pacific region, and world-wide.

---

44 The Chartered Institute of Arbitrators (originally founded in the United Kingdom), and a new Arbitrators Association (*Chûsainin Kyôkai*), have recently begun work on training a new generation of arbitrators in Japan. On 6 November 2004, Kobe University's Centre for Legal Dynamics of Advanced Market Societies held a workshop focusing on teaching arbitration in Japanese universities, which has been surprisingly limited compared to the excellent scholarship produced by Japanese academics in this field. One of the suggestions by Nottage was to incorporate Rule drafting exercises into university courses, along with other skills-based activities like arbitration clause analysis and mooting. (See <*http://www.cdams.kobe-u.ac.jp*> and compare *e.g.* S. WARE, Teaching Arbitration Law, in: American Review of International Arbitration 14 (2003).) Sophia University recently hosted the third annual Intercollegiate Negotiation Competition (<*http://www2.osipp.osaka-u.ac.jp/~nomura/project/inter/*>), with students competing in both Japanese and English. The first day's round actually involved a mock arbitration, although without directly bringing in any issues of arbitration law or procedure. Also in late 2004, a new academic association for ADR (*ADR Chûsai Hôgakkai*) was formed, comprising practitioners and professors.

45 Only two years ago, for example, Professor Thomas Carbonneau reasserted the conventional wisdom that "the Japanese endorsement of [international commercial arbitration] is limpid and unenergetic", due in part to "the strong cultural preference in Japan for negotiated dispute settlement"; and that "Japan is not ready to assume a regional leadership" in the field. T. CARBONNEAU, The Ballad of Transborder Arbitration, in: University of Miami Law Review 56 (2003) 786-7. The former assertion was highly debatable even then. Compare *e.g.* L. NOTTAGE, The Vicissitudes of Transnational Commercial Arbitration and the Lex Mercatoria: A View from the Periphery, in: Arbitration International 16 (2000); NAKAMURA, supra note 8; T. HAGIZAWA, Characteristics of International Commercial Arbitration in Japan – With Primary Emphasis on Problems Associated with Revising the Japanese Arbitration Law, in: World Arbitration and Mediation Report 13 (2002). Since 2003, the scene within Japan has become much livelier. Regarding Professor Carbonneau's latter assertion, hopefully the initiatives introduced in this article will eventually bear fruit in advancing Japan's role in the evolving world of arbitration.

ZUSAMMENFASSUNG

Gegen Ende des Jahres 2004 hat Japan gesetzliche Vorschriften erlassen, um die außergerichtliche Streitbeilegung (Alternative Dispute Resolution) *zu fördern. Hiermit ist das umfassende Programm zur Reform des Zivilverfahrensrechts weitgehend abgeschlossen, dem die Empfehlungen der Kommission zur Justizreform aus dem Jahr 2001 zugrunde liegen. Besonderen Bezug zur ADR haben das Schiedsgerichtsgesetz von 2003, das am 1. März 2004 in Kraft trat, und die neuen Regeln für Schiedsverfahren, die unter der Aufsicht der* Japan Commercial Arbitration Association (JCAA) *durchgeführt werden. Die Reformen dürften die Durchführung von Schiedsverfahren in Japan nachhaltig erleichtern und zu einer Zunahme von internationalen Schiedsverfahren unter der Leitung der JCAA führen. Die Reformen fördern die Entwicklung einer Kultur der außergerichtlichen Streitbeilegung in Japan. Bislang dominierten Mediationsverfahren vor den Gerichten oder ADR-Verfahren vor administrativen Einrichtungen des Staates die nichtstreitige Erledigung von Verfahren. Der wichtigste Grund für die Förderung des Schiedswesens in Japan dürfte darin liegen, daß man die Parteiautonomie nachhaltig ausbauen will, welche ein Charakteristikum moderner Schiedsregelungen ist. Gleichzeitig wird das Verfahren den sich ändernden Usancen und Erwartungen des internationalen Handelsverkehrs angepaßt.*

Im übrigen dürfte die Reform der Schiedsregeln in Japan zu einer „Befruchtung" auch von Schiedsverfahrensregeln in anderen Teilen der Welt, insbesondere im asiatisch-pazifischen Raum, führen. In einer Rückkopplung mit diesen Entwicklungen könnten die neuen Regelungen zugleich die Grundlage für künftige Reformen der japanischen Schiedsinstitutionen und möglicherweise sogar des neuen Gesetzes von 2003 sein.

Vor diesem Hintergrund vergleicht der Beitrag Kernpunkte der Neuregelung mit den früheren Verfahrensregeln, die seit 1992 in Kraft waren. Die Reformen stehen im übrigen, auch wenn dies nirgends ausdrücklich erwähnt wurde, in Übereinstimmung mit den gesetzlichen und institutionellen Verbesserungen des Schiedswesens, die weltweit seit den späten neunziger Jahren erreicht worden sind. Zu nennen sind insoweit eine internationale Perspektive und damit zusammenhängende Bemühungen, die Effizienz der jeweiligen nationalen Schiedsverfahren zu verbessern. Abschließend ziehen die Verfasser eine Verbindung von den Neuregelungen zu anderen einschlägigen Initiativen in Japan, die sämtlich dazu beitragen, die Position des Landes im internationalen schiedsverfahrensrechtlichen Kontext zu verbessern.

(deutsche Übersetzung durch die Redaktion)