# New arbitration rules for the JCAA

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**Arbitration analysis: Will significant changes to the Japan Commercial Arbitration Association's (JCAA) rules succeed in attracting more international arbitrations? Phillip Georgiou, partner at Jones Day in Hong Kong, explains the imminent changes which include allowing a party to apply to the JCAA for interim measures to be awarded by an emergency arbitrator.**

## What prompted the JCAA to revise its rules?

The JCAA last made major amendments to its Commercial Arbitration Rules (the Rules) in 2004, followed by minor amendments in 2008. Historically, the JCAA has not been as successful as its counterparts in Hong Kong and Singapore in attracting international arbitration cases, which appears to have prompted it to revise the Rules to ensure that they are consistent with international expectations.

For example, the previous version of the Rules did not contain a provision regarding emergency arbitrators, which has been an issue that both the Hong Kong International Arbitration Centre (HKIAC) and the Singapore International Arbitration Centre (SIAC) have dealt with in the latest amendments to their arbitration rules. Interestingly, the Rules have gone one step further than the HKIAC and SIAC by including a mediation clause stating that parties can agree to refer the dispute to mediation under the JCAA's International Commercial Mediation Rules. A revision like this is likely to be part of the overall drive by the JCAA to holistically promote its alternate dispute resolution capabilities.

## The new JCAA rules represent a significant development from the 2008 version--what are the key changes?

The key changes to the Rules include the addition of procedures dealing with emergency arbitrators, interim measures (in accordance with the UNCITRAL Model Law 2006), joinder of third parties to the arbitration, and the referral to mediation, as well as amendments to the provision regarding expedited procedures.

The Rules now provide for interim measures mirroring those in the UNCITRAL Model Law 2006, including examples of what orders can be made and what the tribunal must be satisfied with before an order will be made. By expressly including an interim measure provision in the Rules that reflects the UNCITRAL Model Law 2006, the JCAA has brought itself into line with the standards expected in international arbitration.

The previous version of the Rules also contained an expedited procedures clause, which was generally limited to claims below ¥20,000,000. The revised Rules now allow for expedited procedures to take place if both parties agree, so long as written notice is given to the JCAA within two weeks of the respondent's receipt of the notice of arbitration.

The previous Rules did not make mention of mediation at all, but the latest version allows for parties to agree to refer the dispute to mediation under the International Commercial Mediation Rules of the JCAA at any time during the arbitration, which will consequently stay the arbitration proceedings. In order to allay parties'

concerns regarding the confidentiality of the mediation proceedings, the Rules expressly state that all offers, admissions and statements made by the parties or recommendations made by the mediator during the mediation shall be inadmissible in the arbitration, unless otherwise agreed to by the parties. If the mediation is terminated, the arbitral proceedings shall resume.

## Are there any new provisions dealing with, for example, emergency arbitration procedures or the consolidation of claims?

Yes, as mentioned above, the previous version of the Rules did not allow for emergency arbitrators to be appointed in arbitrations. Under the revised Rules, before a tribunal is constituted or when an arbitrator has ceased to perform his duties, a party can apply to the JCAA for interim measures to be awarded by an emergency arbitrator.

The application can be made even before a request for arbitration is made, but such a request must be made within ten days of the application. This follows the ICC Rules of Arbitration, as opposed to the HKIAC and SIAC rules, which do not allow an application to be made prior to filing the notice of arbitration. The JCAA will then endeavour to appoint the emergency arbitrator within two days of receiving the application. An emergency arbitrator may order, modify, terminate or suspend the emergency measures (ie those interim measures discussed above), and shall make a decision within two weeks from being appointed. Any emergency measures ordered shall be deemed interim measures granted by the tribunal when it is constituted, until it is modified, suspended or terminated.

In addition, the new Rules allow for the joinder of a third party to the arbitration if the parties and the third party have agreed to such joinder in writing, or all claims are made under the same arbitration agreement (although if the tribunal has already been constituted, the third party's written consent is required). Interestingly, this is more encapsulating than the HKIAC and SIAC rules, which only allow joinder if the third party is bound by the arbitration agreement (and furthermore in the case of the SIAC, the third party must provide written consent).

The new Rules contain a provision that is much more detailed, and with stricter requirements than the older version of the Rules, when it comes to consolidation. Previously, the Rules allowed consolidation simply if the tribunal considered it necessary to consolidate claims that were 'essentially and mutually related' and the parties provided written consent--and in fact, consolidation was allowed where there existed multiple claims arising out of the same arbitration agreement, even without the consent of the parties. The recent amendments to the Rules now state that consolidation can be ordered upon a party's written request if all parties have agreed in writing, the claims arise under the same arbitration agreement (provided that any party to the other claim that is not a party to this claim has provided written consent), or the claims to be consolidated arise between the same parties and the same/similar question of fact or law arises from the claims, the dispute is referred to a JCAA arbitration, and the proceedings are capable of being conducted together based on the arbitration agreements.

## What changes have been made in respect of administrative fees and other arbitration costs?

Previously, the Rules stated that the parties shall bear equally the arbitrators' costs unless determined otherwise by the tribunal. In the revised Rules, it is clearly stated that the tribunal may apportion costs (including arbitrators' fees, reasonable legal expense, administrative fees and so forth), taking into account the parties' conduct, the determination of the merits of the dispute, and any relevant circumstances. The actual costs of the administrative fees have increased slightly (eg the starting fee has increased from ¥210,000 to ¥216,000), although the hourly rate range for arbitrators' fees has stayed the same (namely, between ¥30,000 to ¥80,000 per arbitrator). Of course, the revised Rules also include provisions regarding the payment of both administrative and arbitrator's fees when an emergency arbitrator is required.

## Is there anything in particular that practitioners should be aware of?

Traditionally, arbitration in Japan has been approached cautiously by the international arbitration community, with some overseas parties believing that the system is influenced by a bias towards the interests of

Japanese companies--or at the very least, that the arbitration system has developed much more slowly than other Asian jurisdictions.

Furthermore, domestic parties generally favour the Japanese court system, resulting in lower levels of interest in, and indeed government support for, arbitration as a forum for dispute resolution. Accordingly, the JCAA handles on average around 15-25 new arbitration cases per year, which is significantly less than its counterparts like the HKIAC and SIAC. Having said that, the recent revisions to the Rules bring the JCAA on par with the latest amendments made to the HKIAC and SIAC rules, and it is one important step towards showing that the country is committed to improving its arbitration regime.

## Why do you think parties should choose the JCAA to resolve their disputes?

The most common reason for a non-domestic company to choose the JCAA as an institution, as opposed to other arbitration institutions, for solving disputes usually lies in its comparatively weaker bargaining position with a Japanese counterpart. Having said that, the JCAA handles the most number of international arbitration disputes in Japan, and is likely to be a logical choice over any other arbitration institution in the country, or even over the domestic courts (which are more likely to be advantageous to a domestic company due to familiarity with the local litigation system and civil procedure code).

Apart from the arbitral rules, in order for the JCAA and Japan more generally to be chosen as a venue and place for arbitration it will be necessary for the JCAA to establish a strong list of arbitrators as well as acceptable facilities for the parties to utilise during arbitration hearings. From personal experience, there are some excellent choices for arbitrators in Japan but the assistance of experienced Japanese lawyers (either local counsel or Japanese lawyers in international firms) is required to identify and properly vet nominees for arbitrator. Also, from personal experience, the JCAA's existing facilities must be upgraded and expanded if it is to be seen as a credible alternative to other more established centres in Asia.

*Interviewed by Nicola Laver.*