

ClientAlert

International Arbitration

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JCAA Rules Revisited

New JCAA Rules of Commercial Arbitration recently have been released after a review and amendment process that began in July 2012. The JCAA Rules last were amended in 2008, and the new rules took effect on February 1, 2014. They introduce multiple changes in line with recent international developments.

Improving efficiency

Various revisions to the JCAA Rules aim to make arbitration faster and more efficient. The old provision regarding "Basic Date" (defined as three weeks from the date when the JCAA sends a notice of a request for arbitration), which was used to trigger the four-week deadline for the respondent's answer and any counterclaim, has been removed. Under the new Rules, the respondent is to submit its answer and any counterclaim four weeks after receiving notice of the request for arbitration (Rules 18.1 and 19.1). In addition, the Rules require that any set-off defense be raised by the respondent within the same four-week period (Rule 20).

Other changes encourage arbitrators and parties to develop faster and more cost-efficient procedures, with the presiding arbitrator able to decide procedural matters if the other arbitrators or all parties agree (Rule 7.3). As early as practicable, the tribunal now is required to consult with the parties to prepare a written schedule for the proceedings and to identify the issues to be decided in the arbitration (Rule 40.1). In addition, after giving the parties an opportunity to comment, the tribunal may prepare terms of reference setting forth the major issues in dispute (Rule 40.2). These new provisions are consistent with findings in a survey sponsored by White & Case and conducted by Queen Mary, University of London, that early identification by a tribunal of the issues to be decided is considered to be the most effective method of expediting arbitral proceedings.¹

Arbitrator appointment

The JCAA now is to confirm the appointment of arbitrators (Rule 25.3). Where a party requests that the sole arbitrator or third arbitrator be of a different nationality than the parties, the JCAA must comply (Rule 27.4). While the previous rules afforded the JCAA discretion in this regard, the JCAA respected every such request by appointing a third-country national, and thus the amended provision makes the Rules consistent with this practice.



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¹ 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process. The results of this empirical survey are based on input from over 700 respondents (private practitioners, arbitrators, in-house counsel, and others) across the world.

Multiple parties, joinder and consolidation

The new Rules clarify that, where there are more than two parties and the number of arbitrators is three, the claimant (or claimants' side) and respondent (or respondents' side) each are to appoint one arbitrator, and the two party-appointed arbitrators are to appoint the third arbitrator (Rule 29). A third party may join an arbitration as a claimant, or a party may request joinder of a third party as a respondent, if all parties and the third party have agreed in writing, or the claims are made under the same arbitration agreement, provided that the third party's written consent is required when such request is made after constitution of the tribunal (Rule 52). If the third party joins before the tribunal is constituted, the tribunal shall be appointed pursuant to the Rules, including Rule 29.

A tribunal now may consolidate pending claims with other claims as to which no tribunal has been constituted if all the parties have agreed in writing, all of the claims arise under the same arbitration agreement (provided that written consent by the party to the other claims is required if that party has not been party to the pending claims), or if all of the pending and other claims are between the same parties, such claims have the same or similar questions of fact or law, and the arbitration agreements are compatible (e.g., they all designate the JCAA as the arbitral institution) (Rule 53).

Mediation

The old Rules allowed an arbitrator to attempt to settle an arbitration if all parties consented, with the arbitrator thereby effectively assuming the role of mediator. This approach was unusual from a common law perspective, where there is a conscious effort to maintain mediation proceedings on a "without prejudice" basis so that the arbitrator would not be influenced in reaching any decision in the arbitration. Recognizing these concerns, the Rules now state that, in principle, no arbitrator is to serve as mediator in the same dispute (Rule 54.1). Nonetheless, as before, an arbitrator may do so if the parties agree (Rule 55.1). Such an arbitrator/mediator, however, may not consult separately with any of the parties without the parties' written agreement (Rule 55.2). This greater clarity is welcome and should allow the option of "arb-med" where there is informed consent by the parties.

Interim measures and emergency arbitrator

A tribunal now may order specified types of interim measures, including preservation of assets out of which an arbitral award may be satisfied, preservation of relevant evidence, and provision of appropriate security (Rules 66 and 67).

The tribunal is to decide on these measures using standards such as whether the party requesting the measures would suffer harm not reparable by a damages award and has a reasonable possibility of success on the merits. Where a tribunal has not yet been constituted (or has ceased to perform its duties) and a party so requests, the JCAA now may appoint a sole emergency arbitrator to make emergency interim measures (Rules 70, 71, and 72). The JCAA is to endeavor to appoint the emergency arbitrator within two days of a request, while the emergency arbitrator must decide on the requested measures within two weeks of such appointment (Rules 71.4 and 72.4). These provisions are similar to those introduced by other leading arbitral institutions.

Allocation of costs

The old Rules provided that parties were to bear equally the costs of arbitration (e.g., administrative expenses, arbitrator fees, and legal costs), unless the tribunal determined otherwise. The tribunal now may apportion such costs specifically taking into account the parties' conduct during the proceedings, the determination on the merits, and other relevant circumstances (Rule 83.2). This change is in line with the aforementioned White & Case/Queen Mary survey, which found a strong preference for tribunals to allocate costs taking into account any improper conduct by a party and the arbitration's outcome.

Conclusion

The new Rules take serious steps to improve the efficiency and effectiveness of JCAA arbitration, with several of the changes reflecting current and preferred practices in the arbitral process based both on empirical research and other leading institutions. These Rules bring the JCAA into line with the international arbitration mainstream while maintaining certain unique characteristics for arbitrating in Japan.

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