

# New JCAA arbitration rules effective 1 January 2019

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The Japan Commercial Arbitration Association's new rules have some novel features. They include an entirely new set of 'Interactive Arbitration Rules', requiring tribunals to give views on the dispute midway through the arbitration.

## Introduction

The Japan Commercial Arbitration Association (JCAA) has amended its Commercial Arbitration Rules, and its Administrative Rules for UNCITRAL Arbitration. It has also introduced a new, separate set of rules for 'interactive arbitrations'. The new rules take effect from 1 January 2019.

In this alert, we explore some of the rules' key new features.

## Commercial Arbitration Rules

The Commercial Arbitration Rules are the JCAA's main set of rules for commercial arbitrations.

The principal amendments to the Commercial Arbitration Rules relate to:

- i. **Arbitrator impartiality.** Arbitrators must investigate anything that might affect their impartiality and independence. An arbitrator must submit a Declaration of Impartiality and Independence upon appointment, and disclose anything that might give parties 'justifiable doubts' about the arbitrator's independence or impartiality.
- ii. **Tribunal secretaries.** The rules expressly recognise that arbitrators cannot delegate decision-making to third parties, such as tribunal secretaries. Arbitrators can only appoint tribunal secretaries if the parties consent, after being provided with information about the secretary, their scope of work and remuneration.
- iii. **No dissenting opinions.** The rules prohibit the disclosure of a dissenting arbitrator's opinion. The JCAA's rationale is that this will make awards harder to challenge.<sup>1</sup>
- iv. **Amended expedited procedure.** The expedited procedure will now be available in disputes worth up to JPY 50 million (USD 450,000),<sup>2</sup> to be heard by sole arbitrators, and in higher-value disputes if the parties agree to use the expedited procedure early in the arbitration. Expedited arbitrations will, in principle, be conducted on a documents-only basis (ie, without an oral hearing). Arbitrators must aim to issue an award within three months of appointment.
- v. **Arbitrator fees.** Arbitrators will be paid a fixed hourly rate of JPY 50,000 (USD 450). However, this is subject to a cap depending on the value of the dispute. In addition, the hourly rate is subject to a 10%

<sup>1</sup> JCAA, 'Reform of the JCAA Arbitrations Rules: Three Sets of Rules in Response to All Business Needs', p. 7 (available [here](#)).

<sup>2</sup> All USD conversions are approximate, and are based on the prevailing exchange rate at 1 January 2019.

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reduction for each 50 hours spent by the arbitrator above 150 hours, regardless of the amount in dispute, up to a maximum reduction of 50%. The parties can however agree to amend these provisions before the tribunal is constituted (but not afterwards).

- vi. **Administrative fees.** The new rules raise the JCAA's administrative fees (payable by the claimant when submitting a request for arbitration), particularly in lower value cases. The lowest fee is JPY 500,000 (approximately USD 4,500), rising to a maximum of JPY 25 million (USD 225,000) in the highest-value cases.

## Interactive Arbitration Rules

The JCAA's Interactive Arbitration Rules are an entirely new set of rules. They are similar to the Commercial Arbitration Rules, but differ in several important ways:

- i. **Tribunal's active role.** The rules aim to reduce unnecessary work, costs and time by requiring the tribunal to communicate preliminary views about the dispute twice during the proceedings:
- Summary of issues. As early as possible in the arbitration, the tribunal must prepare a summary of each side's position, and the factual and legal issues in the arbitration. The tribunal must consult with the parties on this document.
  - Statement of preliminary views. Before making any decision about whether to hold a hearing for witness evidence, the tribunal must provide the parties with a written summary of factual, legal and other matters that it 'considers important', and its preliminary views on those matters. The parties then have an opportunity to comment, before the tribunal decides whether an oral hearing is necessary. The tribunal's views are non-binding, and the parties agree not to challenge any arbitrator for expressing a preliminary view.
- ii. **Lower, fixed arbitrator fees.** Unlike the Commercial Arbitration Rules, under the Interactive Arbitration Rules arbitrator fees will be fixed according to the value of the dispute. Fees in sole-arbitrator cases range from JPY 1 million (USD 9,000) for disputes worth less than JPY 50 million (USD 450,000), up to JPY 5 million (USD 45,000) for disputes worth at least JPY 10 billion (USD 90 million). These fees are considerably lower than the cap on arbitrator fees applicable under the Commercial Arbitration Rules.

## Administrative Rules for UNCITRAL Arbitration

The Administrative Rules apply to UNCITRAL Rules arbitrations administered by the JCCA.

The main changes to these rules relate to arbitrator fees:

- i. **Higher arbitrator fees.** Arbitrators in JCCA-administered UNCITRAL arbitrations will be paid USD 500 to USD 1,500 per hour, unless the JCAA determines otherwise with party agreement. Arbitrators will also no longer need to wait until the end of the arbitration to be paid, if all the parties agree.

The new remuneration system is designed to accommodate 'top arbitrators' in long-running UNCITRAL arbitrations.<sup>3</sup> At the higher end, the new JCCA rates are significantly more than some other institutions' standard rates.<sup>4</sup>

- ii. **No other major changes.** Recognising the need for flexibility in UNCITRAL arbitrations, the Administrative Rules aim to provide the 'minimum essentials'.<sup>5</sup> The new rules do not introduce any other major amendments.

## Practical points

The new rules take effect on 1 January 2019. This means that:

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<sup>3</sup> JCCA, 'Reform of the JCAA Arbitrations Rules', p. 3 (see footnote 1 above).

<sup>4</sup> For example, the LCIA's Schedule of Costs (Ad Hoc Arbitration) provides for arbitrators' hourly rates up to £450 (USD 570), although this can be raised with the consent of the parties and LCIA Court.

<sup>5</sup> JCCA, 'Reform of the JCAA Arbitrations Rules', p. 3 (see footnote 1 above).

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- JCAA arbitrations started before 1 January 2019 will continue under the outgoing rules, unless the parties agree otherwise.
  - JCAA arbitrations started on or after 1 January 2019 will follow the new rules, even if the arbitration agreement designates a previous version.<sup>6</sup>

Parties wishing to use JCAA rules should be careful to designate the correct set of rules in their arbitration agreements. The Commercial Arbitration Rules will apply by default if an arbitration agreement refers simply to 'JCAA arbitration'.

## Comment

Historically, the JCAA's caseload has been small – a reflection of the fact that arbitrations in Japan generally have tended to be fairly rare.<sup>7</sup> Now, however, there are signs that arbitration is gaining traction.<sup>8</sup>

The JCAA's latest amendments cover a range of new features. Some of them reflect general trends in international arbitration since the JCAA's last rule update in 2015. Provisions on arbitrator disclosures, tribunal secretaries and greater use of expedition procedures fall into that category.

Other new features are more distinctive. In particular, the Interactive Arbitration Rules encourage tribunals and parties to focus on the key issues in dispute. These provisions bear some similarity to the new Prague Rules on Efficient Conduct of Introduction Arbitration, published in December 2018, which contain similar rules for the 'Proactive Role of the Arbitral Tribunal'. They allow the tribunal to provide preliminary views on issues in the arbitration and relevance of evidence submitted.<sup>9</sup> However, unlike the Interactive Arbitration Rules, under the Prague Rules the tribunal is not obliged to provide preliminary views. The idea is that more interaction between tribunal and parties will avoid spending time and cost on unnecessary points.

In some ways, asking tribunals to give their preliminary views simply codifies the kind of signposting that some tribunals already provide through case management.<sup>10</sup> But imposing a formal requirement on tribunals to state preliminary views is not risk-free. Arbitrators will need to get the balance right. Those that go too far risk appearing biased by expressing views before hearing all of the evidence. Although the rules include a waiver of challenges on that basis, issues may still arise about the effectiveness of such waivers in some situations.

Time will tell how the new rules will fare. At a minimum, they offer some innovative options for users seeking to address oft-cited concerns about the cost, speed and efficiency of the arbitration process.

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<sup>6</sup> This is not clear from the new versions of the rules themselves, but the JCAA has stated that this will be the position: see JCCA, 'Reform of the JCAA Arbitrations Rules', p. 15 (see footnote 1 above).

<sup>7</sup> Around 20 cases per year for the past 10 years: see Ohara, Ohno & Tsunemastu, 'Japan' in *Asia-Pacific Arbitration Review 2019* (GAR, 2018).

<sup>8</sup> For example, the number of Japanese and Japanese-owned parties to SIAC arbitrations more than doubled between 2016 and 2017 (from 13 to 27: see SIAC's 2016 and 2017 Annual Reports, pp. 16 and 15, respectively, available [here](#)). There are other signs of growing interest: earlier this year, the Japan International Dispute Resolution Center opened its doors, offering hearing rooms and other arbitration/mediation facilities.

<sup>9</sup> Article 2.4, Prague Rules, available [here](#).

<sup>10</sup> Tribunals often give interim insights into what they see as key issues in a dispute. For example, at case management hearings, or when deciding document requests or ruling on the scope of expert evidence.