JCAA introduces new commercial arbitration rules

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The Japan Commercial Arbitration Association ("JCAA") has introduced an amended version of its Commercial Arbitration Rules (the "New Rules"). The New Rules, which contain comprehensive amendments, came into force on 1 February 2014 and will apply to all arbitrations initiated on or after that date. The changes are intended by the JCAA to update its rules in line with recent trends in the amendment of arbitration rules (such as the 2013 amendments to the Hong Kong International Arbitration Centre ("HKIAC") and Singapore International Arbitration Centre ("SIAC") Rules). Accordingly, the New Rules contain provisions aimed at addressing the most topical issues in international arbitration, including emergency arbitrators, interim relief, expedited proceedings and multi-party arbitration.

Emergency arbitrator

A significant feature of the New Rules is the introduction of provisions for the appointment of emergency arbitrators and the granting of emergency relief. These provisions are in-line with recent amendments made to the HKIAC, SIAC and International Chamber of Commerce ("ICC") Rules, and provide for the appointment of an emergency arbitrator within two business days of receipt of an application [fn]Rule 71.4[/fn] and a decision from the emergency arbitrator within two weeks from his or her appointment [fn] Rule 72.4[/fn]. The New Rules, like the ICC Rules, go further than the HKIAC and SIAC Rules and allow a party to apply for the appointment of an emergency arbitrator prior to the filing of a request for arbitration, provided that a request is filed within 10 days. [fn]Rule 70.7[/fn]

Notably however, whereas the Hong Kong Arbitration Ordinance was amended to clarify that emergency relief ordered by an arbitrator was enforceable prior to the introduction of emergency arbitrator provisions in the HKIAC Rules, no such amendment has been made to the Japanese Arbitration Law 2003. Accordingly, whilst arbitral tribunals are able to order interim measures [fn]Article 24 of the Arbitration Law 2003[/fn], and Japanese courts can order interim measures to support arbitration proceedings [fn]Article 15 of the Arbitration Law 2003[/fn], emergency measures are not currently enforceable in Japan.

Interim measures by the arbitral tribunal

Under the previous version of the rules (the "Old Rules"), a tribunal was able, at the request of a party, to take "such interim measures of protection as [it] may consider necessary"[fn]Old Rule

48[/fn]. Whilst the SIAC Rules contain a similarly broad provision, the New Rules, in accordance with the 2006 amendments to the UNCITRAL Model Law, have adopted the same approach as the HKIAC Rules and set out specific examples of the interim measures which may be ordered by the tribunal, and the requirements for obtaining such interim relief [7.Rule 66].

The example interim measures set out in the New Rules include orders to maintain or restore the status quo, and to preserve assets. In order to obtain such relief, the requesting party must now satisfy the tribunal that (i) the harm caused by the order not being granted "substantially outweighs" the harm caused by its imposition, and (ii) that the party has a "reasonable possibility" of succeeding on the merits of the claim.

Expedited proceedings

An issue with the Old Rules was that expedited procedures were only applicable to cases where the amount and economic value of the arbitration was not more than JPY 20,000,000. Under the New Rules parties to JCAA arbitration may now agree that their dispute will be determined under expedited procedures, regardless of the value of the claim [fn]Rule 75.1[/fn].

Expedited procedures are conducted by a sole arbitrator, who must be agreed upon and appointed by the parties within two weeks of notice by the JCAA that expedited procedures shall be conducted. In addition, the arbitrator is required to make an award within three months of confirmation of his or her appointment – half the time required under the HKIAC and SIAC Rules.

Multi-party arbitration: joinder consolidation and single arbitration under multiple contracts

Under the Old Rules there was no provision for the joinder of third parties. Under the New Rules, a third party may now join proceedings as a claimant, or a party may request the joinder of a third party as a respondent if all parties and the third party agree in writing, or the claims are made under the same arbitration agreement, provided the third party's written consent is obtained when such request is made after the constitution of the tribunal [fn]Rule 52[/fn]. The New Rules on joinder do not go as far as the HKIAC Rules which allows a third party to be joined to the proceedings even after the constitution of the tribunal as long as the third party is bound by an arbitration agreement under the HKIAC Rules giving rise to the arbitration.

Although the Old Rules did allow for the consolidation of separate proceedings, consolidation was only possible with the written consent of all parties. This has been relaxed under the New Rules and a tribunal may now consolidate the hearing of pending claims with other claims as to which no tribunal has been constituted if (i) all parties agree in writing, (ii) all of the claims arise under the same arbitration agreement (provided that written consent of the party to the other claim is obtained if that party has not been a party to the pending claim), or (iii) all the pending and other claims are between the same parties, concern similar questions of fact or law and the proceedings are capable of being conducted in a single proceeding [fn]Rule 53[/fn]. This is similar to the ICC Rules. The consolidation of separate proceedings is often useful in the context of multi-party or multi-contract transactions, helping to reduce the risk of inconsistent decisions.

A claimant may also submit a single request for arbitration containing multiple claims if all parties have agreed in writing, all claims arise under the same arbitration agreement, or all claims arise between the same parties and (a) concern similar questions of fact or law, (b) the dispute is referred in the arbitration agreement to arbitration under the New Rules or at the JCAA, and (c) the proceedings are capable of being conducted in a single proceeding [fn]Rule 15[/fn]. A respondent to such a claim will have four weeks from its receipt of the notice of the request for arbitration to object

to the single claim in writing. Objections will be considered by the tribunal. However, as a respondent no longer has a right to separate proceedings (see below), the actions will only be separated if the requirements for a multiple claim being brought have not actually been satisfied.

Repeal of a respondent's right to separate proceedings

Under the Old Rules, a respondent in a multi-party arbitration could submit a written request for the separation of arbitration proceedings, thereby requiring the claimant(s) to start separate proceedings against that respondent. Although this provision guaranteed each party's right to appoint its own arbitrator in the event that the respondents were unable to agree on a choice of arbitrator, it has been deleted in the New Rules in an effort to ensure that cases are dealt with more expeditiously and efficiently.

In order to avoid "Dutco" [fn]Dutco v. BKMI[/fn] issues – whereby multiple claimants or respondents are said to have been prejudiced by the inability to appoint the arbitrator of their choice – the New Rules provide that the JCAA shall appoint all three arbitrators if the claimants or respondents fail to notify their appointment [fn]Rule 29[/fn]. This is the same approach as taken in the SIAC and London Court of International Arbitration Rules.

Mediation

The Old Rules did not contain any provisions relating to mediation, but provided that the arbitral tribunal could attempt to settle the dispute with the consent of all the parties. In contrast, the New Rules provide that proceedings may be stayed at any time if the parties agree to refer the dispute to mediation under the International Commercial Mediation Rules of the JCAA [fn]Rule 54[/fn].

In order to try and manage the potential difficulties of an arbitrator also acting as a mediator, the New Rules provide that no arbitrator is permitted to act as mediator unless all of the parties agree. In addition, any arbitrator who also serves as mediator in relation to the same dispute is not permitted to consult separately with any of the parties, without the written consent of all parties.

Other amendments

The New Rules also contain a number of other changes intended to improve the efficiency of JCAA arbitration proceedings, including:
• allowing notice of arbitration to be sent by email, fax or any other reasonable means [fn]Rule 5[/fn];
• removing the concept of a "basic date" and having the deadline for service of the respondent's answer and any counterclaim be triggered on receipt of notice of the request for arbitration [fn]Rules 18 and 19[/fn]; and
• amending the definition of "writing" to include any electromagnetic record [fn]Rule 2[/fn]; and
• enabling the parties to appoint arbitrators at the same time as submitting a request for arbitration (claimants) or submitting an answer (respondents) [fn]Rules 14 and 18[/fn].

Conclusion

The amendments contained in the New Rules are a welcome (and necessary) modernisation. They are in line with recent trends in the amendment of arbitration rules and address the most topical issues in international arbitration. The number of international cases currently heard by the JCAA is relatively low, particularly when compared to the more prominent international arbitration institutions in Asia. It will be interesting to see whether the New Rules serve to make JCAA arbitration more attractive to international parties.