

New 2019 JCAA Rules: Is Three a Crowd?

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Overview^[fn]The views expressed herein are those of the authors and should not be construed as necessarily reflecting those of their firm or of any of its clients.^[/fn]

On 1 January 2019 the Japan Commercial Arbitration Association (the “**JCAA**”) amended its two current sets of arbitration rules. At the same time, it introduced an additional set of new rules with the aim of providing a more efficient and cheaper arbitration procedure that draws on some civil law-type approaches.

The JCAA’s motivation for these changes, and the introduction of the new Interactive Rules, is to provide a range of arbitration rules to support the potential needs of different businesses.^[fn]JCAA background document: “Reform of the JCAA Arbitrations Rules: Three Sets of Rules in Response to All Business Needs” at page 2.^[/fn] These changes also come at an important time, where Japan is embarking into new territory in its approach to and support of international arbitration.

In this post we summarise and analyse the key changes to the JCAA’s two sets of existing rules (the Administrative Rules and the Commercial Rules) and consider the different approach enshrined in the new Interactive Rules.

1) Administrative Rules

The JCAA administers arbitrations under the UNCITRAL Arbitration Rules pursuant to the Administrative Rules. Accordingly, these Rules are designed to provide “the minimum essentials” to allow the UNCITRAL Rules to be overseen by an institution.

The only significant updates focus on arbitrator remuneration. These changes put the JCAA at a similar level – at least under the Administrative Rules – to other international institutions in the region (e.g., SIAC and HKIAC) for arbitrator remuneration; previously the JCAA had a reputation for keeping such fees lower.

The JCAA’s logic behind these revisions is to make it easier to appoint “prominent international experts to serve as arbitrators”.^[fn]Ibid, page 4.^[/fn]

2) Commercial Rules

The Commercial Rules is the JCAA’s main set of institutional rules. Here the JCAA’s approach is

markedly different from that taken vis-a-vis the Administrative Rules. The changes are more significant and include some inventive amendments designed to encourage efficiencies and protect against challenge. They also place heavier restrictions on arbitrators' fees than before.

The most important revisions are as follows:

a) **Explicit ongoing duties for arbitrators to conduct a “reasonable investigation” into potential conflicts of interest (Article 24)** – these active duties after appointment go further than what is stated explicitly in many other sets institutional rules and appears to codify the position for Japan-seated arbitrations as set out by the [Japanese Supreme Court in December 2017](#). Arbitrators should be aware that they may not be able to discharge this requirement by simply disclosing conflicts of which they become aware, and active steps may be required. In the rules, no detail is given as to what such an investigation should involve.

b) **Detailed rules regarding the role of the Tribunal Secretary (Article 33).**

c) **Explicit right for the Tribunal to reject evidence submitted in an untimely manner (Article 41).**

d) **No dissenting opinion may be disclosed “in any manner” (Article 63)** – going beyond most other institutional rules, this change is designed to avoid (i) potential challenges, which are often based on dissenting opinions, and (ii) the additional cost associated with preparation of such opinions.

e) **Increase in scope of automatic expedited procedures to cover disputes up to JPY 50 million (around USD 400,000) (Article 84)** – this represents a welcome increase from the previous figure, but is still far below institutions like the ICC, HKIAC and SIAC. Many smaller disputes, otherwise well-suited to the expedited process, may therefore still end up being resolved in a more time-consuming manner.

f) **Arbitrators' Remuneration (Article 93.2)** – the most fundamental of the changes to arbitrators' remuneration requires all arbitrators to be paid a fixed hourly rate of JPY 50,000 regardless of experience or the complexity of the case. The JCAA has also maintained existing provisions that reduce arbitrators' hourly rates after a period of time worked on the case, but increased the threshold for reduction to 150 hours.

We generally see the rule changes as being positive in terms of encouraging efficiency and protecting against challenges. The attempts to limit fees should also be generally welcomed, although the approach is not without risk. Questions may arise as to whether the lower fixed hourly rates for arbitrators – just one part of the costs of arbitration – could operate as a disincentive to senior international arbitrators, with experience running complex proceedings, taking appointments under JCAA Commercial Rules arbitrations. Alternatively, if such appointments are accepted, there will likely be immediate requests to dis-apply the restrictive provisions (something we have seen happen in JCAA arbitrations regularly in practice).

3) Interactive Rules

The JCAA has also introduced new “Interactive Rules” which is the third and final set of JCAA rules. The Interactive Rules follow the updated Commercial Rules closely, but are meant to also deal with three main issues with arbitration today as identified by JCAA: (i) awards are unnecessarily long; (ii) counsel often do more work than required for the matter resulting in more costs; and (iii) arbitration costs are increasing.

The Interactive Rules propose two main solutions:

a) **Inquisitorial / interventionist approach from the tribunal** – this is enshrined in Articles 48 and 56, which require the tribunal (i) to share a document, as early as possible, summarising the parties' positions and factual and legal issues that arise and (ii) to set out preliminary views on key factual and legal issues before a decision is made as to whether a hearing is necessary. We think the tribunal's more active role could drive greater efficiency and potentially increase the likelihood of early settlement. With the perceived prevalence of common law approaches to arbitration and natural justice concerns, it remains uncertain whether tribunals will adopt this approach on a large scale, but where the Interactive Rules are selected a tribunal is at least empowered explicitly to do so.

b) **Fixed fees** – arbitrators' fees are fixed depending on the value of the claim (up to JPY 5 million for a sole arbitrator working on the highest value claims under Articles 94 and 95).

This should mean that arbitrator remuneration under the Interactive Rules is likely to be lower than in an arbitration under, say, the Commercial Rules. However, it is foreseeable that some arbitrators may be put off from committing to this fixed fee structure – particularly where there is no guarantee that a dispute under the Interactive Rules will necessarily be over quicker or more limited in scope and complexity.

Comment

The JCAA's new rules – coming four years after the last update – demonstrate the JCAA's ambitions to: (i) improve its reputation as a viable institution for international arbitration; and (ii) increase its limited caseload. The focus on efficiency and innovation in the Interactive Rules and the provision of a flexible set of options focused on arbitration users appears to be part of an attempt to overcome the perceptions around "Japan's (In)Capacity in International Commercial Arbitration".

Some of the innovations implemented merit close consideration by the arbitration community at large. For example, while not an endorsement of the "controversial" Prague Rules on the Efficient Conduct of Proceedings in International Arbitration (launched on 14 December 2018), the Interactive Rules are certainly a nod to them and a more inquisitorial and interventionist approach to arbitration. This approach may be an attractive prospect to some parties. While others may be concerned about parties' right to a fair hearing in this inquisitorial approach, both sets of rules present themselves as welcome developments in the international arbitration community and we look forward to seeing how well they are received.

However, rightly or wrongly, it seems that the JCAA has now established a seemingly three-tiered approach via its new Rules. In this regard, the changes to the Commercial Rules – presently understood to be the most widely used set of JCAA Rules for complex international arbitrations – could make it difficult to attract international arbitrators of the highest quality.

Further, although the changes to the Administrative Rules are welcome, our experience is that parties tend to choose institutions for their own bespoke rules or for their track record in administering proceedings. It may be that UNICTRAL cases involving international parties will only come to the JCAA for administration where there is some direct link to Japan (be it seat, party, language or maybe governing law), at least until the JCAA is able to demonstrate sufficient experience to the arbitral community.

Only time will tell how successful these changes are. Alongside the opening of (i) the Japan International Dispute Resolution Center in Osaka in May 2018, with a Tokyo hearing-facility expected

to follow by 2020, and (ii) the IP-focused International Arbitration Center in Tokyo (IACT) in September 2018, many will view the updates to the JCAA Rules as building upon the “[Japan is Back](#)” fever that gripped the arbitral community in Japan last year. The contributors remain optimistic for further developments in the year ahead. Watch this space!

A more detailed summary of the key changes can be found in a [separate post](#) on HSF arbitration notes blog.