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The JCAA Interactive Arbitration Rules: A Settlement-Centered Approach to Arbitration

Lexi Takamatsu (Mori Hamada & Matsumoto) · Sunday, May 21st, 2023

In recent years, criticism that international arbitration rules lean too heavily on common law traditions—with similar legal costs as a result—has culminated in the creation of multiple new sets of arbitration rules, each claiming to facilitate more efficient arbitration proceedings through civil law-based case management strategies. Whether those rules actually result in more proactive management of proceedings remains uncertain.

The JCAA's Interactive Arbitration Rules, issued in July 2021 ("Interactive Rules"), follow this wave of new "civil law" arbitration rules but also contain unique provisions that may be particularly effective in helping parties resolve disputes in an efficient and cost-effective manner. Specifically, Articles 48 and 56 of the Interactive Rules potentially improve not only the efficiency of the arbitration proceedings themselves but also promote settlement by incorporating strategies successfully employed in Japanese civil litigation proceedings.

Key Promoters of Efficient Settlement: Articles 48 and 56

Articles 48 and 56 help the parties understand their likelihood of success, and therefore an efficient settlement value, by requiring the tribunal to provide its tentative views of the case at two points in time. First, under Article 48, "[a]t a stage as early as possible," the tribunal must summarize in writing "the factual and legal issues that the arbitral tribunal tentatively ascertains arising from" the parties' positions. The parties comment on the summary, and the tribunal may issue a revised summary based on those comments. The parties may also request that the summary be revised later in the proceedings.

Second, under Article 56, before deciding whether witness examination is necessary, the tribunal must issue its preliminary views on the factual and legal issues it considers important. The parties may again comment in writing, and the tribunal will consider those comments when deciding whether to conduct witness examinations. Importantly, pursuant to Articles 56.5 & 56.6, the tribunal's preliminary views are not binding on the tribunal's subsequent decisions and cannot serve as grounds to challenge arbitrators.

While other "civil law-based" rules give the tribunal license to actively manage arbitration proceedings and to initially narrow the factual and legal issues in dispute (see, e.g., Prague Rules

on the Efficient Conduct of Proceedings in International Arbitration (2018) (the "Prague Rules"), Article 2; DIS Arbitration Rules (2018), Annex 3), arbitrators are often reluctant to take that license, at least in part due to "due process paranoia." As the "Note from the Working Group" included in an earlier draft of the Prague Rules (at the time titled the Inquisitorial Rules on the Taking of Evidence in International Arbitration) concedes, "many arbitrators are reluctant to actively manage arbitration proceedings, including earlier determination of issues in dispute and the disposal of such issues, to avoid the risk of a challenge."

Articles 48 and 56 of the JCAA Interactive Rules side-step arbitrators' potential reticence by affirmatively requiring that the tribunal draft summaries of its views at defined points in time. The due process implications of such a mandate are outside the scope of this post, but any discussion of due process should consider the respect to be afforded to the parties' choice, in agreeing to arbitrate according to the Interactive Rules, to prioritize tentatively understanding the strength of its case earlier in the proceedings over whatever due process benefits might result from the tribunal keeping its views a secret.

Record of Success in Japanese Civil Proceedings

The provision of the adjudicators' nonbinding views at various points in the proceedings appears to have been derived from Japanese civil litigation practices.[1)] Although there is variation in individuals' case management styles, many Japanese judges believe that disclosing or hinting at their view of the case throughout the proceedings is important in enabling the parties to reach a well-informed settlement. By disclosing their views, they reason, the judges allow the parties to reasonably anticipate what the result would be in a court decision, thereby informing the settlement amount.[2)]

Indeed, from the perspective of international parties accustomed to common law legal systems, a Japanese judge's tentative views may be the most factually specific data point available regarding the strength of their case in Japanese court. Unlike in many common law jurisdictions, most Japanese judicial decisions are not reported: while final judgments or decisions are available for physical inspection at the courthouse, for civil and administrative cases, only 1.1% of Supreme Court decisions and 1.02% of high court decisions were posted on the court website in 2018. Only 2.79% of decisions were reported on Westlaw Japan.[3)] Thus, international parties accustomed to detailed, fact-specific precedent may find it difficult to arrive at an objective, mutually agreed settlement amount based on the likelihood of success if they cannot gain insight from past factually similar cases.

Nonetheless, the majority of court cases in Japan end in settlement: in 2021, only 41.4% of civil cases ended with a court judgment. While this may partially be attributable to cultural norms, the importance that Japanese judges place on the parties' ability to reasonably anticipate the outcome of litigation may play a role as well. In contrast to the constant nudges towards settlement and gradual development and revelation of the judge's view of the case in Japanese litigation, Japanese parties may feel that international arbitration is an expensive black box—once they file a Request for Arbitration, they feel they will progress no closer to settlement until the tribunal issues its final award.

Indeed, from the parties' perspective, international arbitration may involve similar visibility and predictability problems to those that would otherwise create inefficiencies in the Japanese litigation system. Even if the governing law includes considerable published precedent, the parties (or their counsel) may misunderstand their likelihood of success when filtering the governing law through the legal thinking of their home jurisdictions. The tribunal itself may also interpret the governing law in an unpredictable way, as they too must apply the governing law through the filter of their own jurisdictions. Moreover, because arbitration awards are often confidential, parties' predictions on how any given arbitrator will view a particular set of facts and law are often limited to assumptions based on, for example, the arbitrators' place of legal education or counsel's prior experiences with that arbitrator. In this way, the Interactive Rules may be a welcome approach for potential arbitration parties, as they may enable them to arrive at a reasonable settlement amount earlier in the proceedings, based on third-party objective input, however tentative.

Potential Hurdles

Despite their potential benefits and appeal, the Interactive Rules may have drawbacks. First, because the Interactive Rules are largely based on rules of Japanese civil procedure, Japanese and non-Japanese arbitrators may apply the rules differently, as Japanese arbitrators may apply their preexisting understandings of Japanese civil procedure to expand the role of the tribunal. Japanese arbitrators may therefore be more involved in "hinting at" settlement, whereas common law arbitrators may be more conservative, going no further than the plain language of the rules requires.

Second, to the extent the Rules are based on the principle of *Iura Novit Curia*, their success may be limited if the tribunal does not, in fact, "know the law" at the relevant stage of proceedings. It may be difficult for arbitrators who are not licensed in the governing law to provide an initial view pursuant to Article 48, as legal expert opinions likely have not been submitted "[a]t a stage as early as possible" after proceedings begin. Further, even at the time it is expected to provide its views pursuant to Article 56, the tribunal's understanding of the law may be limited to the legal expert opinions submitted by the parties, making it difficult for the tribunal to form views on the law that were not previously raised by the parties. In short, the predictive power of the tribunal's tentative views under Articles 48 and 56—and, accordingly, the Rules' ability to encourage settlement—may depend greatly on the familiarity of the tribunal with the governing law.

Third, effective use of Articles 48 and 56 may be hindered by due process concerns. The parties' agreement to rules that mandate the tribunal's provision of initial views at specified times (and prohibit the parties from challenging arbitrators based on those views), as well as the parties' opportunity to provide feedback, would seem to weigh against any due process concerns. And, in any event, the possibility of set-aside proceedings becomes moot if the parties choose to settle. Nonetheless, it is possible to imagine that arbitrators' willingness to provide parties with more information than is absolutely required by the rules—and the power of Articles 48 and 56 to encourage settlement—may be significantly hindered until the enforceability implications of these provisions become clearer.

Conclusion

The Interactive Rules provide a relatively unique approach to arbitration proceedings, giving the parties several potential settlement “off-ramps” before reaching the destination of the arbitral award. This may make reluctant parties less wary of international arbitration and, through early settlement, may ultimately satisfy the oft-claimed goal of more efficient dispute resolution.

References

?1 *See* Shintaro Kato & Aoi Inoue, *Evaluation of the Interactive Arbitration Rules of the JCAA from the Perspective of Japanese Court Practices*, Japan Commercial Arbitration Journal, Vol 2 [2021].

?2 Nobuaki Iwai, *Alternative Dispute Resolution in Court – The Japanese Experience*, Journal on Dispute Resolution, Vol 6:2 [1991], pp. 209, 222.

?3 Yasutaka Machimura, *Judicial Decisions and Open Data in Japan*, Japan Commercial Arbitration Journal, Vol 2 [2021], p. 98.

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