



New Arbitration Law Enacted in Japan

Effective on March 1, 2004, Japan has amended its century-old arbitration law, becoming the 45th country to adopt the UNCITRAL Model Law on international commercial arbitration.

The new law, promulgated as Law No. 138 of 2003, is applicable to both national and international arbitrations and was drafted to incorporate as many provisions of the 1985 UNCITRAL Model Law as possible.

This long-awaited amendment is the culmination of the efforts of the Office for Promotion of Justice System Reform, which was established in the Cabinet in December 2001. In this issue, Mr. Tatsuya Nakamura, General Manager, International Arbitration Department, JCAA, and a member of the Office's Consultation Group on Arbitration, explains the background and major features of the new law. Also included is a paper by Professor Gerald McAlinn, who was involved in the process of amending the JCAA Commercial Arbitration Rules, the new version of which also went into effect on March 1, 2004.

The English translation of the new law is available at the website of the Office for Promotion of Justice System Reform at <http://www.kantei.go.jp/foreign/policy/sihou/arbitrationlaw.pdf>. The Office is now studying the potential for legislation (such as an "ADR Basic Law") that prescribes the basic framework for promoting the use of ADR and strengthening coordination with trial procedures.

Making the most of these encouraging developments, JCAA plans to conduct various promotional initiatives both in Japan and abroad, including offering a free seminar on the new arbitration law in New York this autumn. More details on the seminar will be posted soon on JCAA's website at <http://www.jcaa.or.jp>, where the full text of the new JCAA Commercial Arbitration Rules as well as information on JCAA's latest activities are also available. 

Salient Features of the New Japanese Arbitration Law Based Upon the UNCITRAL Model Law on International Commercial Arbitration

Tatsuya Nakamura*

Introduction

Japan has recently replaced its present arbitration law ("Old Law")¹ with a new arbitration law ("New Law").² Upon passage by the Diet, the New Law was promulgated on August 1, 2003. Reform of the arbitration law was initiated in late December 2001 by the Japanese government's

*Tatsuya Nakamura is currently a general manager of JCAA and an associate professor of law at Kokushikan University.

¹ Law concerning Procedure for General Pressing Notice and Arbitration Procedure, Law No. 29 of 1890.

² Arbitration Law, Law No. 138 of 2003.

Office for Promotion of Justice System Reform, headed by Prime Minister Junichiro Koizumi (“Reform Office”).³ The Reform Office set up a Study Group of Experts on Arbitration (the “Expert Group”) for consideration of the new law and the experts studied the law reform based upon the UNCITRAL Model Law on International Commercial Arbitration (“UNCITRAL Model Law”). Consideration by the Expert Group ended in March of this year and the Reform Office submitted a bill for the New Law to the Diet on March 14, 2003.

The New Law is modeled substantially and formally on the UNCITRAL Model Law, whereas the Old Law was modeled on old German arbitration law as contained in the Code of Civil Procedure, which came into force in 1897. The outdated Japanese arbitration law had not been amended for more than one century and there were many calls for its reform, especially to promote Japan as an attractive place for international arbitration. With the adoption of the New Law, based on the UNCITRAL Model Law, Japan has now joined the international arbitration community.

This short essay aims to introduce and digest the salient features of the New Law for the readers concerned with international arbitration.

The Adoption and the Slight Modification of the UNCITRAL Model Law

The New Law adopts the majority of the UNCITRAL Model Law, almost verbatim apart from some slight modifications. It consists of 55 articles not including those in the Supplementary Provisions. Like the German Arbitration Act, the New Law applies to both domestic and international arbitration and makes no distinction between commercial and non-commercial arbitration.

The Scope of Application of the Arbitration Law

The New Law, having adopted the principle of territoriality of arbitration, applies to arbitration taking place in Japan. In contrast to the provisions of the UNCITRAL Model Law, however, Article 8 of the New Law stipulates that as long as the place of arbitration has not been determined, the court will assist the parties in the appointment of arbitrators if there is a possibility that the place of arbitration will be in Japan and either the claimant or the respondent has, for instance, a principal place of business in Japan. It is submitted that this modification is to avoid cases where the parties have not designated a place of arbitration and the arbitration in the absence of a designated place cannot be connected to any arbitration law. In such cases, the arbitral tribunal may determine the place of arbitration since it is considered by the parties to be conferred with inherent power to determine the place of arbitration and the ensuing arbitration will be connected to the arbitration law of the determined place of arbitration.

Form of Arbitration Agreement

With respect to the form of arbitration agreement, Article 13(4) of the New Law states that the arbitration agreement shall be in writing if the agreement is made by way of electromagnetic records such as those produced by electronic or magnetic forms. This provision is not contained in UNCITRAL Model Law Article 7(2) but it meets the recent rapid development of communication and information technology and reflects the present draft of an amendment to the Model Law prepared by the arbitration-working group of UNCITRAL.⁴

³ See <http://www.kantei.go.jp/index.html>.

⁴ See Report of Working Group (II) on Arbitration for the work of its thirty-sixth session (New York, 4-8 March 2002), UN Doc. A/CN.9/508, paras. 25, 26.

Enforcement of Interim Measures Issued by an Arbitral Tribunal

The Expert Group of the Reform Office took into consideration the enforcement of interim measures issued by the arbitral tribunal, but concluded such action was premature at this moment because the UNCITRAL arbitration working group was still discussing the amendment draft of Article 17 for the enforcement of the interim measures issued by the arbitral tribunal and had not yet completed this work.⁵ Thus, the enforcement of the interim measures issued by the arbitral tribunal will be left for future consideration.

Court Assistance in Taking Evidence

With respect to court assistance in taking evidence, the New Law provides for this concretely in Article 35. This provision stipulates that the arbitral tribunal or a party with the consent of the arbitral tribunal may request assistance in taking evidence from the competent court. The court will then carry out the request in accordance with its procedural rules for taking evidence. The arbitrators are entitled to attend the judicial taking of evidence and to ask questions.

Court assistance is limited to cases where the place of arbitration is Japan. However, it is submitted that like the German Arbitration Act,⁶ the Japanese court should also render its assistance for, *inter alia*, the examination of witnesses or request for documents to the holders in Japan. This applies even in cases where the place of arbitration is situated abroad because the arbitral tribunal or a party of a foreign arbitration, faced with the question of how to obtain evidence situated abroad, may need such direct assistance from the court having jurisdiction over such persons.⁷

Law Applicable to the Substance of the Dispute

Article 36 of the New Law slightly modifies the provisions of the UNCITRAL Model Law and provides that unless the parties have agreed on the applicable rules of law, the arbitral tribunal shall apply the law of the State with which the dispute has the closest connection without referring to any conflict in the rules of law. This is the recent trend in many other countries and, for instance, the German Arbitration Act also takes this position.

Enforcement of Arbitral Awards

The New Law, in Article 46, provides for the enforcement of an arbitral award. Following the UNCITRAL Model Law, the New Law states the grounds for refusing the enforcement of an arbitral award are common to both domestic and foreign awards. In addition, such grounds are identical to those under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”). Japan is a Contracting State to the New York Convention and made a reciprocity reservation wherein it recognizes and enforces only foreign awards made in the territory of another Contracting State. Thus, Article 46 will apply to foreign awards made outside other Contracting States. In addition, like the German Arbitration Act⁸, the New Law does not require a copy of the arbitration agreement for the enforcement of an arbitral award. So by virtue of a more favorable right provision than set forth in Article 7 of the New York Convention, Article 46 may be relied upon for the enforcement of a foreign award made in the territory of another Contracting State of the New York Convention.

⁵ See Report of Working Group (II) on Arbitration for the work of its thirty-eighth session (New York, 12-16 May 2003), U.N.Doc.A/CN.9/524.

⁶ Section 1025(2) of the German Code of Civil Procedure.

⁷ Section 1051(2) of the German Code of Civil Procedure.

⁸ Section 1064(1) of the German Code of Civil Procedure.

In addition, the court, upon the request of a declaration of enforceability of an arbitral award, may make a decision without an oral hearing, but with both parties being heard. These simplified court proceedings are a deviation from the current proceedings under the Old Law that always required an oral hearing.

It is also noted that the New Law has repealed the requirement for the deposit of an original arbitral award with the competent court because this deposit is in fact a dead letter and the New Law can avoid any doubts whether an arbitral award will not become effective until deposited.

Provisions Added to the UNCITRAL Model Law

Arbitrability

With respect to the arbitrability of the subject matter, the New Law maintains the current position of the Old Law and stipulates in Article 13(1) that the arbitration agreement is valid only if the dispute referred to arbitration can be resolved by settlement between the parties, except for that of divorce or separation.

Multiparty Arbitration

With regard to multiparty arbitration, the New Law does not have any provision on the consolidation of the arbitral proceedings but aids the parties in disputes over the appointment of arbitrators. In this respect, the New Law provides in Article 17(4) that if the parties fail to agree on a procedure of appointing arbitrators, a party may request the competent court to appoint arbitrators. The Expert Group of the Reform Office studied the possibilities of the provisions for consolidation, but was faced with the issue of what requirements should be mandatory even without the consent of all the parties. As a result, it determined that a court would assist the parties in the appointment of arbitrators, should the parties fail to reach an agreement, so as to avoid a deadlock in arbitral proceedings.

Court Assistance in Written Communications

Article 12 of the New Law, which corresponds to Article 3 of the UNCITRAL Model Law, adds a provision in Paragraph 2 that the court may assist the parties in written communications. In this respect, a party may request a court to serve written notice in arbitral proceedings if the sender finds it difficult to obtain a record of the delivery of such notice. In practice, the claimant is occasionally faced with the question of how a written notice of request for arbitration should be delivered in the case where the respondent refuses to receive or no one receives such a notice. This court assistance is to help the parties avoid such hardship in arbitral proceedings.

Arb-Med

Under Article 38(4) of the New Law, upon the parties' request, the arbitral tribunal may attempt an amicable settlement. This provision reflects the practice in domestic arbitration as well as international arbitration. In this respect, the arbitrator's involvement in the settlement of the dispute, upon the parties' request, is also in line with the position of UNCITRAL.⁹

Costs of Arbitration

The New Law provides for the costs of arbitration in Articles 47 through 49. First, under Article 47, the arbitral tribunal may determine the arbitrator's reasonable fees unless the parties agree

⁹ See Report of the United Nations Commission on International Trade Law for the work of its thirty-fifth session 17-28 June 2002, UN Doc. A/57/17 (2002), paras 106-110.

otherwise. Second, under Article 48, the arbitral tribunal may order the parties to make advance payment to cover the costs of arbitration, and failure to make such a payment may lead the tribunal to suspend or terminate the arbitral proceedings. Third, under Article 49(1) and (2), the parties may agree to allocate the costs incurred by the parties, and failing such an agreement, the parties bear their own respective costs. The subsequent Paragraph (3) provides that the arbitral tribunal, in accordance with the agreement of the parties, may in an arbitral award determine the allocation of the parties costs incurred in connection with the arbitral proceedings and the amount that one party should repay to the other based on that allocation.

Criminal Penalties for an Arbitrator's Corruption

The New Law specifically provides in Articles 50 through 55 criminal penalties for corruption, *inter alia*, bribery, which will apply to arbitrators irrespective of the country in which such a crime is committed. These provisions are contained in the Old Law but the application was limited to such criminal acts committed in Japan. Hence, the New Law takes a stricter position on an arbitrator's corruption. It seems unusual that the arbitration law expressly provides such criminal penalties for corruption but as long as arbitral proceedings are quasi-judicial proceedings, it is only natural that criminal penalties will also apply to an arbitrator in the same manner as a public official.

Special Provisions for Consumer Arbitration and Individual Employment Arbitration

Consumer protection in arbitration has increasingly and extensively been debated worldwide, especially, in the U.S. and the EU,¹⁰ and the Expert Group of the Reform Office, at the latter stage of its considerations, received a significant number of public opinions that consumers and individual employees should not be deprived of their right to bring a matter before a national court and that both a consumer arbitration agreement and individual employment arbitration agreement should be invalid. This was actually an unexpected event for the Expert Group but in response to those opinions, the Expert Group moved to consider how the special measures should be included in the new arbitration law and as a result, the following unique provisions are provided for in the New Law.

Under Article 3 in the Supplementary Provisions of the New Law, a consumer may unilaterally cancel an arbitration agreement entered into with a business for the submission of future disputes to arbitration, and if a business initiates arbitration against a consumer, the arbitral tribunal shall send notice of an oral hearing to both parties and hold an oral hearing. The arbitral tribunal, using simple language, shall give a consumer notice of the hearing along with the following information, which shall be orally explained to the consumer at the hearing: (1) an arbitral award has the same legal effect as a final and conclusive judgment, (2) an arbitration agreement deprives consumers of their right to bring the subject matter of an arbitration agreement before a national court and if so, the

¹⁰ See Jeremy Senderowicz, *Consumer Arbitration and Freedom of Contract: A Proposal to Facilitate Consumers' Informed Consent to Arbitration Clauses in Form Contracts*, 32 Colum. J. L. & Soc. Probs. 275 (1999); Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 Hous. L. Rev. 1237 (2001); Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. Disp. Resol. 89 (2001); Julia A. Scarpino, *Mandatory Arbitration of Consumer Disputes: A Proposal to Ease the Financial Burden on Low-Income Consumers*, 10 Am. U.J. Gender Soc. Poly & L. 679 (2002); Russell D. Feingold, *Mandatory Arbitration: What Process is Due?*, 39 Harv. J. on Legis. 281 (2002). See also April 17, 1998, 1998 OJL 115, March 30, 1998, 98/257/EC: Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlements of consumer disputes; April 19, 2001, 2001 OJL 109, April 04, 2001, Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes.

consumer's action shall be dismissed by the court, and (3) a consumer may cancel the arbitration agreement. Failing to attend the oral hearing, a consumer is deemed to have cancelled the arbitration agreement and the arbitral tribunal shall notify the consumer to that effect in the notice of the hearing. In addition, failing the express waiver of the right of termination at the oral hearing, a consumer is also deemed to have cancelled the arbitration agreement.

With respect to individual employment arbitration, Article 4 in the Supplementary Provisions of the New Law stipulates that an arbitration agreement between an individual employee, including a person seeking employment, and a business employer to submit disputes that may arise in the future is invalid. This is provided to secure an individual's fundamental right of access to a national court.

These special measures for consumer arbitration and individual employment arbitration apply to an arbitration agreement entered into after the New Law comes into force. They are interim measures and are expected to be reviewed in the future.

Conclusion

This essay is meant to focus on the salient features of the New Law and a detailed consideration will be presented on a different occasion. The New Law has adopted the majority of the UNCITRAL Model Law, signifying Japan's joining of the international arbitration community. The New Law is also expected to make Japan a more attractive place for international arbitration. It is important to note, however, that the New Law contains no provisions on important issues such as confidentiality in arbitration and the immunity of arbitrators, so these remaining issues should also be considered as future amendments to the New Law. 

New Rules for International Commercial Arbitration in Effect from March 1, 2004

Gerald McAlinn*

Introduction

Effective from March 1, 2004, the Association has implemented amended Commercial Arbitration Rules (the "New Rules") governing requests for arbitration filed after the effective date. Requests for arbitration filed prior to March 1, 2004, and all arbitrations underway before the effective date of the New Rules, will continue to be governed by the Commercial Arbitration Rules (the "Old Rules") in effect at the time the request was filed, although the parties may agree to have their proceedings governed by the New Rules as provided in the Supplementary Provisions. The changes represented by the New Rules are significant and should greatly improve the conduct of arbitration under the auspices of the Association.

The New Rules were adopted in response to a long overdue revision of Japan's Law concerning Procedures for General Pressing of Notice and Arbitration Procedures, Law No. 29 of 1890. The new Arbitration Law, Law No. 138 of 2003, which is modeled on the UNCITRAL Model Law on International Commercial Arbitration, came into effect on March 1, 2004. The accompanying article by Tatsuya Nakamura describes the major features of the new Arbitration Law.

The Association formed an *ad hoc* committee in 2003 to examine the Old Rules in light of the

*Gerald McAlinn, professor of law, Keio University Law School. The author would like to thank the staff of the Association for their assistance in the preparation of this article. The author welcomes comments at mcalinn@yahoo.com, however, questions regarding the official interpretation and application of the New Rules should be addressed to the Secretariat of the Association.

new Arbitration Law. The committee was composed of practitioners, academics and a senior representative from the Association, and was chaired by Yoshimitsu Aoyama¹. A working group of the committee, chaired by Koichi Miki, was charged with drafting the language of the New Rules.

This article will introduce the major and most significant substantive and procedural differences between the Old Rules and the New Rules. There are many additional changes that cannot be highlighted herein due to space limitations. Parties and their counsel who are contemplating making a request for arbitration under the New Rules, or having the New Rules apply to their ongoing proceedings, are advised to obtain a copy of the New Rules directly from the Association, or on-line at www.jcaa.or.jp.

Overview of the New Rules

Chapter I General Provisions

The Definition section, which was previously located in Old Rule 10, has been brought forward to New Rule 2 and streamlined. For example, the definition of “Agreement in writing” in Old Rule 10, Paragraph 4 has been deleted. The definition of “writing” is now combined in New Rule 5 along with the basic requirement that arbitration agreements be in writing. The old standard of a “meeting of the minds acknowledged in writing” has been abandoned in favor of a broader and more modern definition that allows for the threshold requirement of a written agreement to arbitrate to be satisfied by the exchange of signed letters, telegrams, and facsimiles, as well as by incorporation by reference or virtually any form of electromagnetic records (including emails). New Rule 5, Paragraphs 1, 2 and 3. The writing requirement can also be satisfied when the claimant submits “a written request for arbitration containing the contents of the arbitration agreement, and a written answer submitted in response by the respondent [that] does not contain anything to dispute it...” New Rule 5, Paragraph 4.

The part of Old Rule 7 that required the Association to appoint a designated “clerk in charge” has been eliminated. Arbitral proceedings will no longer be assigned an individual clerk in charge. Rather, the Secretariat of the Association will remain generally responsible for all clerical work under New Rule 8.

Under New Rule 10, parties remain free to choose who will represent or assist them in arbitral proceedings. The language in Old Rule 9 that permitted the arbitral tribunal to reject a party’s choice of representative or assistant for good cause has been deleted in its entirety.

New Rule 11 and New Rule 12 have been added to Chapter I to address the language(s) to be used in the arbitral proceedings and the period of time of proceedings, respectively. These matters were formerly addressed in Old Rules 62 and 63 of Chapter VI Supplementary Rules. The substance has not been changed by the New Rules. Arbitral proceedings can still be conducted in Japanese or English or both, as the parties may agree, or as the arbitral tribunal determines absent such agreement. Likewise, the parties by agreement, and the arbitral tribunal if necessary and after giving notice to the parties, may extend any period of time provided for in the New Rules.

Finally, New Rule 13 has been added to provide immunity from liability to arbitrators and the Association for acts and omissions taken in connection with arbitral proceedings unless the acts or omissions constitute willful or gross negligence.

¹ The committee consisted of the following members: Yoshimitsu Aoyama, Tadashi Ishikawa, Naoki Idei, Kazuo Ihara, Toshio Sawada, Yasuhei Taniguchi, Shunichiro Nakano, Yukukazu Hanamizu, Gerald McAlinn, Koichi Miki, Tetsuo Morishita, Aya Yamada, and Kosuke Yamamoto. The working group consisted of Koichi Miki, Naoki Idei, Shunichiro Nakano and Gerald McAlinn.

Chapter II Commencement of Arbitration

The basic procedures regarding the filing of a request for arbitration and the answer thereto remain unchanged. However, New Rule 13 allows the Association to serve notice of the request for arbitration on the respondent at its last known address if reasonable efforts do not indicate a current location. It should also be noted that the period for filing a counterclaim has been shortened from six (6) weeks to four (4) weeks from the Basic Date by New Rule 19.

More importantly, New Rule 16 expressly authorizes the Association to proceed to constitute an arbitral tribunal even if the respondent raises objections to the jurisdiction of the Association. If the Association does, in fact, proceed and an arbitral tribunal is empanelled, the arbitral tribunal is vested with the authority to hear and determine the respondent's challenge to the existence or validity of the agreement to arbitrate. This power is further enunciated in New Rule 33, Paragraph 1, which provides as follows: "The arbitral tribunal may decide challenges made regarding the existence or validity of an arbitration agreement or its own jurisdiction." Naturally, if the arbitral tribunal determines it does not have jurisdiction, it must terminate the arbitral proceedings pursuant to New Rule 33, Paragraph 2.

New Rule 22 provides greater detail than Old Rule 19 regarding the procedures pertaining to the withdrawal of the request for arbitration. The basic principle is that the request can be withdrawn freely at any time prior to the establishment of an arbitral tribunal. New Rule 22, Paragraph 1. After the arbitral tribunal has been appointed, however, consent of the arbitral tribunal is required and the respondent is given the right to object. The arbitral tribunal should not grant permission to withdraw if it determines that there is a "legitimate interest on respondent's part" to continuation of the proceedings. New Rule 22, Paragraph 2 and 3.

Chapter III Arbitral Tribunal

The New Rules streamline and reorganize this important topic. Many of the provisions remain unchanged in substance. For example, the choice of the parties in their agreement regarding the number and manner of appointment of arbitrators is respected under New Rule 23. Absent an agreement between the parties, the Association will appoint a single arbitrator under New Rule 24, Paragraph 1, or three arbitrators if the parties so request, within three (3) weeks of the Basic Date "taking into consideration the amount in dispute, the complexity of the case and other circumstances" the Association considers appropriate. New Rule 24, Paragraph 2.

The most significant changes in this Chapter, and perhaps in the entire New Rules, are the new provisions dealing with the impartiality and independence of arbitrators. Under Old Rule 20, a person with a "beneficial interest in the case under arbitration" was enjoined from serving as an arbitrator. There were no explicit procedures for challenging or removing an arbitrator on these or any other grounds. New Rules 28 and 29 have been added to remedy this shortcoming in the Old Rules.

New Rule 28, Paragraph 1 requires that "[a]rbitrators shall be, and remain at all times, impartial and independent." When a person is approached to determine whether he or she is willing and able to serve as an arbitrator, the candidate is under a duty to disclose fully to the approaching party "any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence." New Rule 28, Paragraph 2. Assuming the approaching party is satisfied and the appointment is made, the arbitrator must disclose, without delay, any and all of the same circumstances to the Association and to the other parties if the arbitrator has not done so already. New Rule 28, Paragraph 3.

The duty to disclose in New Rule 28, without more, would be a vast improvement over the Old Rules. However, New Rule 29 goes further in support of the basic philosophy of impartiality and independence by giving the parties an opportunity to challenge an arbitrator under the “justifiable doubts” standard. New Rule 29, Paragraph 1. A party is allowed to challenge, under Paragraph 2, an arbitrator it appointed only for reasons the party learned after the appointment. Challenges must be filed with the Association in writing within two (2) weeks of receipt of the notice of appointment of the arbitrator, or the date on which the challenging party became aware of the circumstances giving rise to the challenge. New Rule 29, Paragraph 3. Once a challenge has been made, the Association will hear the opinions of the parties and the arbitrators, consult with a Committee for the Review of Challenges to Arbitrators, and make a decision on the challenge. New Rule 29, Paragraph 5.

Chapter IV Arbitral Proceedings

A. Section 1 Examination Proceedings

New Rule 32 governs the supervision of the examination proceedings. The arbitral tribunal must, as in the Old Rules, treat the parties equally. However, additional obligations have been added to facilitate the fair and efficient handling of disputes. The arbitral tribunal is empowered to proceed even if one of the parties fails to submit arguments or apply to present evidence. New Rule 32, Paragraph 3. The arbitral tribunal can also conduct hearings if one or both parties fail to appear without good cause. New Rule 35, Paragraph 2. Moreover, the parties will no longer submit documents to the Association for distribution to the arbitral tribunal. Paragraph 6 of New Rule 32 requires the parties to submit documents directly to the arbitral tribunal with a copy to the Association for archival purposes. The submission of documents can be accomplished by electromagnetic record or facsimile if the arbitral tribunal agrees. New Rule 32, Paragraph 7.

As indicated above, New Rule 33 expressly vests the determination of jurisdiction with the arbitral tribunal. Having determined that jurisdiction exists, the New Rules give the arbitral tribunal broad discretion to set a schedule for the proceedings and to conduct them in an appropriate manner. For example, New Rule 37, Paragraphs 4 and 5 allow the arbitral tribunal to order the production of documents in a party’s possession after hearing and ruling on objections. This means that limited discovery is possible under New Rule 37.

The arbitral tribunal is authorized to appoint experts to advise it on “necessary issues.” New Rule 38, Paragraph 1. While there is no express obligation on the part of the arbitral tribunal to inform the parties that it has engaged an expert, Paragraph 2 of New Rule 38 anticipates that this will be the case by giving “an opportunity to the parties to put questions to the expert in a hearing.” Finally, New Rule 39 empowers the arbitral tribunal, when it deems it necessary and after obtaining the consent of the parties, to “cause one or more of the arbitrators constituting the arbitral tribunal to proceed with a part of the proceedings.”

With respect to the governing law of a dispute, the agreement of the parties is controlling. New Rule 41, Paragraph 1. Absent agreement on this point, the arbitral tribunal must “apply the law of the country or state with which the dispute ... is most closely connected.” New Rule 41, Paragraph 2. *Ex aequo et bono* decisions are only permitted if the parties have expressly requested the arbitral tribunal to do so. New Rule 41, Paragraph 3.

Under Paragraph 1 of New Rule 42, the parties may freely agree on the place of arbitration. In effect, arbitration can be conducted under the auspices of the Association and the New Rules anywhere in the world. It is no longer required that the arbitration be conducted in Japan. Nevertheless, failing agreement by the parties on this point, the place of business of the Association

where the request for arbitration was submitted will be the place of arbitration.

Two additional new rules have been added as well. New Rule 47 allows the arbitral tribunal to attempt to assist the parties in reaching a settlement to the dispute if all of the parties consent. New Rule 48 grants to the arbitral tribunal the power to take “interim measures of protection” and to order the posting of security in connection therewith.

Section 2 Arbitral Award

A number of significant changes have been made in this section of the New Rules. Pursuant to Paragraph 6 of New Rule 54, it is expressly provided that the arbitral award is final and binding on the parties. New Rule 56 allows the arbitral tribunal on its own motion, or at the request of a party, to correct computation, clerical and like errors in the award. New Rule 57 permits a party to request the arbitral tribunal to interpret a specific part of its award. This rule does not, however, affirmatively obligate the arbitral tribunal to provide an interpretation. Finally, a party may ask the arbitral tribunal to make an additional award under New Rule 58 as to “claims presented during the arbitral proceedings but omitted from the arbitral award.”

Chapter V Expedited Procedures

The provisions governing expedited procedures remain substantially unchanged.

Chapter VI Supplementary Rules

As indicated above, the provisions in the Old Rules dealing with Language (Old Rule 62), and Extension of Period of Time (Old Rule 63) have been removed from the Supplementary Rules and taken up in New Rules 11 and 12, respectively. Under New Rule 68, the parties remain jointly and severally liable for the payment of fees, arbitrators’ remuneration and expenses to the Association. The provision of Old Rule 64, Paragraph 2, which required disputes between the parties and the Association to be decided by the arbitral tribunal has been deleted. Similarly, the provision in Old Rule 65, Paragraph 3, making the party requesting an alteration to the hearing schedule responsible for payment of the hearing schedule alteration fee has been eliminated. Lastly, under New Rule 72, the arbitral tribunal is expressly authorized to include in its award the payment of fees and expenses incurred by a party’s representative in connection with representing a party in the proceedings.

Conclusion

As can be seen from the above, the New Rules are the result of an extensive overhaul to the Old Rules. The New Rules will only apply to requests for arbitration filed after March 1, 2004, or by the agreement of the parties to have them apply to ongoing arbitral proceedings. The New Rules will surely result in substantial improvements to the efficient and fair conduct of arbitral proceedings under the purview of the Association. They also bring the practice and rules of the Association into alignment with the new Arbitration Law and the rules in effect at other leading international commercial dispute resolution organizations. 

The Japan Commercial Arbitration Association

Website: <http://www.jcaa.or.jp>

Address: Taishoseimei Hibiya Bldg. 4F 9-1, Yurakucho 1-chome, Chiyoda-ku, Tokyo 1000006 Japan

Tel: +81-3-3287-3061 Fax: +81-3-3287-3064 Email: arbitration@jcaa.or.jp