



## *The Key Points of the 2014 Amendment to the Commercial Arbitration Rules*

### *1. Introduction*

The Japan Commercial Arbitration Association (JCAA) has thoroughly amended the Commercial Arbitration Rules (Rules), and the amended Rules came into effect on February 1, 2014. The last amendment was in 2004, when the Japanese Arbitration Law based on the UNCITRAL Model Law was enacted, although some minor amendments were made in 2006 and 2008. Ten years have elapsed, and since then, procedural issues to be improved for further expeditious and proper proceedings have arisen out of the arbitration cases that the JCAA has administered.

Under such circumstances, in light of recent trends in the amendment of arbitration rules, such as the UNCITRAL Arbitration Rules 2010 and institutional rules such as ICC Rules 2012, Swiss Rules of International Arbitration 2012, SIAC 2010 and 2013 and HKIAC 2013, the JCAA determined to overhaul the Rules year before last, and established the Rules Amendment Committee in July 2012.

The Committee consists of the following prominent experts, who are to prepare the amendment draft to be submitted to the JCAA Board of Directors for review and approval.

Chairperson:

Prof. Masato Dogauchi (Waseda University)

Member (Alphabetical):

Prof. Yoshihisa Hayakawa (Rikkyo University)

Kazuyuki Ichiba, Esq. (Nishimura & Asahi)

Naoki Idei, Esq. (Kojima Law Offices)

Prof. Shusuke Kakiuchi (Tokyo University)

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Prof. Gerald Paul McAlinn (Keio University)

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The Committee has reviewed each provision of the Rules, article by article, and has also considered necessary improvements and new provisions; in particular on multiple claims in a single arbitration, interim measures by emergency arbitrator, and mediation combined with arbitration.

The Committee made the interim draft of amendment Rules. In August 2013, the JCAA solicited comments on proposed amendments to the Rules and received valuable and insightful comments from corporations, practicing lawyers, international law firms, and professors of law. Those comments were referred to the Committee for its final consideration of the draft of the amendment Rules. The Committee finally made the draft last November, and the Board of Directors of the JCAA reviewed and approved its final draft last December. As a result, the amendment Rules came into effect on February 1, 2014.

This note briefly describes the key points of the JCAA amended Rules.

### *2. Improvements on Multiple Claims in a Single Arbitration*

Arbitration is a consensual process, and so the jurisdiction of an arbitral tribunal is based on the agreement of the parties. Multiple claims can be heard in a single arbitration if all the respective claims arise under the arbitration agreement or if all the parties have so agreed.

With regard to multiple claims in a single arbitration, the JCAA had provisions on multi-party arbitration in the previous Rules. Under Rule 43, any person who is not a party to the pending arbitration, with the consent of the parties, may join the pending arbitration as a claimant or is compelled to be joined as a respondent if all the parties and that person have so

agreed. In addition, under Rule 44, if all the parties have so agreed or if the respective claims are made under the same arbitration agreement, the arbitral tribunal may consolidate another pending arbitration with the pending arbitration, if the respective claims are mutually related and the arbitral tribunal considers it necessary.

### *Requirements for Consolidation*

#### **Rule 15. Single Arbitration for Multiple Claims**

1 The claimant may submit a single Request for Arbitration containing multiple claims (the “**Single Arbitration for Multiple Claims**”), if:

- (1) all Parties have agreed in writing that all such claims shall be resolved together in a single arbitral proceeding;
- (2) all claims arise under the same Arbitration Agreement; or
- (3) all claims arise between the same Parties, and
  - (a) the same or a similar question of fact or law arises from the claims;
  - (b) the dispute is referred by the Arbitration Agreement to arbitration under the Rules or at the JCAA; and
  - (c) the arbitral proceedings are capable of being conducted in a single proceeding with regard to the place of arbitration, the number of arbitrators, language(s), and other issues governed by the Arbitration Agreement under which the claims arise.

Rule 15.1 of the Rules stipulates the three requirements for multiple claims in a single arbitration. This means that multiple claims may be heard together in a single arbitration; that is, (1) the parties have agreed that their respective claims shall be resolved together in a single arbitration, (2) the respective claims arise under the same arbitration agreement, or (3) the respective claims arise between the same parties, and the same or a similar question of fact or law arises from the claims; as well as the parties have agreed to refer their respective claims to arbitration under the Rules or to the JCAA arbitration, and the arbitral proceedings are capable of being conducted in a single arbitration in light of the place of arbitration, the number of arbitrator, language, and so forth, contained in their respective arbitration agreements. Therefore, as to the third requirement, it requires a certain close relationship between the claims and compatibility between the arbitration agreements.

### *A Single Request for Arbitration of Multiple Claims*

#### **Rule 15.**

2 An objection to the Single Arbitration for Multiple Claims shall be made in writing within four weeks from the respondent’s receipt of the notice of the Request for Arbitration. The arbitral tribunal shall make a determination on such objection under Rule 42.

If the claimant considers that either of the above requirements are fulfilled, they may submit a single request for arbitration for multiple claims. In such case, if the respondent disputes the existence of the requirements for the request for arbitration made for multiple claims, pursuant to Rule 15.2, the respondent must submit an objection in writing within four weeks from the respondent’s receipt of the notice of the request for arbitration. If the respondent raises such an objection, the JCAA will proceed to constitute the arbitral tribunal, as long as the possibility cannot be reasonably denied that the arbitral tribunal will affirm the existence of the requirements based on the arguments and evidence presented by the parties. In such case, the arbitral tribunal, after being duly constituted, pursuant to Rule 42.1, will make a determination on any such objection.

#### **Rule 42. Decision on Separate Proceedings**

1 The arbitral tribunal may make a determination on any objection as to a Single Arbitration for Multiple Claims.

2 If the arbitral tribunal finds that the requirements under Rule 15.1 are not satisfied, the arbitral tribunal shall make a decision to separate the arbitral proceedings (the “**Decision on Separate Proceedings**”) and notify the Parties thereof. The arbitral tribunal shall not make a Decision on Separate Proceedings if the respondent has not raised an objection within the time limit under Rule 15.2.

3 Upon the Decision on Separate Proceedings, the mandate of the arbitral tribunal shall be terminated, and the arbitral proceedings shall be conducted separately as to each separated claim(s). The mandate of the arbitral tribunal, however, shall not be terminated as to:

- (a) any claim(s) against the respondent that has raised no objection within the time limit under Rule 15.2; or
- (b) any claim(s) to which the respondent has requested continuation of the mandate of the arbitral tribunal within one week from the respondent’s receipt of the notice of the Decision on Separate Proceedings.

If the arbitral tribunal finds that the requirements set forth in Rule 15.1 are not satisfied, pursuant to Rule 42.2, the arbitral tribunal will make a decision to separate the arbitral proceedings. By this decision, under Rule 42.3, the mandate of the arbitral tribunal will be terminated and then each separate arbitral proceeding will be conducted separately; nevertheless, as to any claim to which the respondent has not objected within the time limit set forth by Rule 15.2, the mandate of the arbitral tribunal will not be terminated and the arbitral tribunal will continue to proceed with the arbitration. In addition, for any claim to which the respondent has requested continuation of the mandate of the arbitral tribunal within one week from the respondent's receipt of the notice of the decision on separate proceedings, the arbitral tribunal will also continue to proceed with the arbitration.

### **Third Party Joinder**

#### **Rule 52. Third Party Joinder**

- 1 A third party may join in the arbitral proceedings as a claimant or a Party may request a third party to join in the arbitral proceedings as a respondent, if:
  - (1) all Parties and the third party have agreed in writing about the joinder; or
  - (2) all claims are made under the same Arbitration Agreement; provided, however, the third party's consent in writing to such joinder is necessary when the third party is requested to join as respondent after the constitution of the arbitral tribunal.
- 2 If the third party joins in the arbitral proceedings before the arbitral tribunal is constituted, the arbitrators shall be appointed under Rules 25 through 27, 29 and 30. Calculation of periods of time under Rules 26, 27.1 and 29.2 shall be determined based on the date that the respondent against whom the claim is made in the application for joinder receives the notice of the application for joinder.
- 3 If the third party joins in the arbitral proceedings after the arbitral tribunal is constituted, the arbitral tribunal shall remain the same.
- 4 Even when the requirement under Rule 52.1 is satisfied, the arbitral tribunal may deny joinder if it finds that such joinder will delay the arbitral proceedings or it finds any other reasonable grounds.

On the other hand, in the course of arbitral proceedings, based on the three requirements for multiple claims in a single arbitration set forth in Rule 15.1,

Rule 52.1 allows a third party to join as a claimant or be joined as a respondent to the arbitral proceedings if all the parties and the third party have so agreed, or if all the claims are made under the same arbitration agreement. In the latter case, the third party has the right to refuse the joinder if it is joined as a respondent after the constitution of the arbitral tribunal, because it has not been given any opportunity to appoint an arbitrator.

For example, in the arbitration between the employer and the contractor of a construction contract in which the employer claims damages against the contractor, the subcontractor is joined as a respondent when the contractor, claiming damages against the subcontractor, requests such a joinder. There is also the case where, in the arbitration between a franchisee, the claimant, and a franchiser, the respondent, another franchisee, joins the arbitration as a claimant against the franchiser.

The arbitral tribunal may deny the joinder if it finds that such a joinder will delay the arbitral proceedings or if it finds any other reasonable grounds, even when the requirement under Rule 52.1 is satisfied.

Under Rule 52.2, if the joinder takes place before the arbitral tribunal is constituted, Rule 29, the special provisions in case of three arbitrators in multi-party arbitration will apply.

### **Consolidation during the Arbitral Proceedings**

#### **Rule 53. Consolidation**

The arbitral tribunal may, at the written request of a Party and when it finds it necessary, consolidate and hear the pending claim(s) with the other claim(s) (as to which no arbitral tribunal has been constituted), if:

- (1) all Parties (including the parties to the other claim(s)) have agreed in writing;
- (2) the pending claim(s) and the claim(s) to be consolidated arise under the same Arbitration Agreement; provided, however, the written consent to such consolidation by the party to the other claim(s) is necessary when the party has not been a Party to the pending claim(s); or
- (3) both the pending claim(s) and the other claim(s) to be consolidated arise between the same Parties, and
  - (a) the same or a similar question of fact or law arises from the claims;
  - (b) the dispute is referred by the Arbitra-

- tion Agreement to arbitration under the Rules or at the JCAA; and
- (c) the arbitral proceedings are capable of being conducted in a single proceeding with regard to the place of arbitration, the number of arbitrators, language(s), and other issues governed by the Arbitration Agreements under which the claims arise.

In addition, like the third party joinder, under Rule 53.1, based on the three requirements for consolidation set forth in Rule 15.1, the party may request the arbitral tribunal to consolidate another pending arbitration with the pending arbitration, if the arbitral tribunal in the former arbitration has not been constituted. In such case, if the arbitral tribunal finds that either of the requirements set forth in Rule 15.1 are satisfied and considers it necessary, it will decide that another pending arbitration will be consolidated with the pending arbitration. However, the party in the arbitration to be consolidated to the other under the same arbitration agreement has the right to refuse the consolidation if it is not a party in the consolidating arbitration, because it has not been given any opportunity to appoint an arbitrator.

### ***Counterclaim and Amendment to Claim***

#### ***Rule 19. Counterclaim***

1 The respondent, within four weeks from its receipt of the notice of the Request for Arbitration (or within two weeks if Rule 77 applies), may submit a counterclaim, if:

- (1) all Parties have agreed in writing that the counterclaim shall be resolved together with all claims in a single arbitral proceeding;
- (2) the claim and the counterclaim arise under the same Arbitration Agreement; or
- (3)
  - (a) the same or a similar question of fact or law arises from the claim and the counterclaim;
  - (b) the dispute is referred by the Arbitration Agreement to arbitration under the Rules or at the JCAA; and
  - (c) the arbitral proceedings are capable of being conducted in a single proceeding with regard to the place of arbitration, the number of arbitrators, language(s), and other issues governed by the Arbitration Agreement under which the claims arise.

#### ***Rule 21. Amendment to Claim***

1 The claimant (or the respondent having submitted a counterclaim) may amend its claim by submitting a request for amendment to the JCAA in writing, if:

- (1) all Parties have agreed in writing that the amended claim shall be resolved together with other claims or counterclaims in a single arbitration proceeding;
- (2) the original claim and the amended claim arise under the same Arbitration Agreement; or
- (3)
  - (a) the same or a similar question of fact or law arises from the original claim and the amended claim;
  - (b) the dispute is referred by the Arbitration Agreement to arbitration under the Rules or at the JCAA; and
  - (c) the arbitral proceedings are capable of being conducted under a single proceeding with regard to the place of arbitration, the number of arbitrators, language(s), and other issues governed by the Arbitration Agreement under which the claims arise.

2 After the arbitral tribunal is constituted, the claimant (or the respondent having submitted a counterclaim) shall obtain approval of the arbitral tribunal to amend its claim. The arbitral tribunal shall give the other Party an opportunity to comment before granting approval of an amendment.

3 The arbitral tribunal may deny the amendment under Rule 21.2, if it considers it inappropriate in view of a likely substantial delay in conducting the arbitral proceedings, a prejudicial effect on the other Party, or any other circumstances. The arbitral tribunal shall promptly notify the Parties of its decision on approval or denial.

The counterclaim and amendment to claim can be a mode of consolidation during the course of the arbitral proceedings.

Based on the three requirements for consolidation set forth in Rule 15.1, pursuant to Rule 19.1, the respondent may submit a counterclaim within four weeks from its receipt of the notice of the request for arbitration. If the claimant objects to the jurisdiction on the counterclaim, the arbitral tribunal will make a decision to separate the arbitral proceedings if it finds that the counterclaim does not satisfy the requirements for consolidation. In such case, under Rule 42.3, the

mandate of the arbitral tribunal as to the counterclaim will be terminated, and the arbitral proceedings for the counterclaim will be conducted separately.

In addition, similarly to the counterclaim, based on three requirements for consolidation set forth in Rule 15.1, pursuant to Rule 21.1, the claimant may amend its claim by submitting a statement for amendment to the JCAA. If it is submitted before the arbitral tribunal is constituted, the arbitral tribunal will make a decision to separate the arbitral proceedings if it finds that the amendment of the claim does not satisfy the requirements for consolidation.

On the other hand, after the arbitral tribunal is constituted, under Rule 21.2, the claimant must obtain an approval by the arbitral tribunal for amending its claim. In response, under Rule 21.3, the arbitral tribunal, giving the other party an opportunity to comment, may deny approval if it considers it inappropriate in view of a likely substantial delay in conducting the arbitral proceedings, a prejudicial effect on the other party, or any other circumstances. If the arbitral tribunal denies its approval, the arbitral tribunal will make a decision to separate the arbitral proceedings.

### **3. Improvements on the Appointment of Arbitrators in Multiple Party Arbitration**

#### **Rule 29. Appointment of Arbitrators - Three Arbitrators in Multi-Party Arbitration**

- 1 If there is more than one claimant or respondent and the number of arbitrators shall be three, the arbitrators shall be appointed under this Rule 29.
- 2 If the Parties have agreed that the number of arbitrators shall be three, the claimant(s) and the respondent(s) shall appoint one arbitrator each and notify the JCAA of such appointment under Rule 30 within three weeks from the respondent(s)' receipt of the notice of the Request for Arbitration.
- 3 If the JCAA determines that the number of arbitrators shall be three under Rule 26.2, the claimant(s) and the respondent(s) shall appoint one arbitrator each and notify the JCAA of such appointment under Rule 30 within three weeks from the Parties' receipt of the notice of the determination by the JCAA under Rule 26.2.
- 4 The two arbitrators appointed by the claimant(s) and the respondent(s) shall agree on and appoint the third arbitrator, and notify the JCAA of such appointment under Rule 30 within three weeks from the two arbitrators' receipt of the notice that the JCAA has confirmed the two arbitrators.

5 If the two arbitrators fail to notify the JCAA of such appointment of the third arbitrator under Rule 30 within the time limit under Rule 29.4, the JCAA shall appoint such arbitrator.

6 If the JCAA appoints an arbitrator under Rule 29.5, Rule 27.4 shall apply *mutatis mutandis*.

7 If either the claimant(s) or the respondent(s) fail to notify the JCAA of such appointment under Rule 30 within the time limit under Rule 29.2 or 29.3, the JCAA shall appoint all three arbitrators. In such case, the JCAA may appoint the arbitrator already appointed by the claimant(s) or the respondent(s) as one of the three arbitrators, if no Party raises an objection.

With regard to the appointment of arbitrators in multiple party arbitration, the previous Rules has the provision that multiple claimants and respondents are deemed to be one party for the purpose of the appointment of arbitrators and as a result, the respective parties' rights to appoint the arbitrators are not necessarily guaranteed. To address this issue, the previous Rules provides that if a request for arbitration against multiple respondents is submitted and any respondent submits a written request for the separation of arbitral proceedings, the claimant(s) must submit a new request for arbitration against each respondent. This guarantees each respondent's right to appoint an arbitrator.

On the other hand, the amended Rules have special provisions in case of three arbitrators in multi-party arbitration, repealing the respondent's right to separate the arbitral proceedings under the previous Rules. Under Rule 29, if there are two or more claimants or respondents and the number of arbitrators is one, a sole arbitrator will be appointed pursuant to Rule 27 in the same way as in a case where the parties consist of one claimant and one respondent. In cases where the number of arbitrators is three, the claimant(s) and the respondent(s) will appoint one arbitrator each. The two arbitrators appointed by the claimant(s) and the respondent(s) will appoint the third arbitrator. If the two arbitrators fail to appoint the third arbitrator, the JCAA will appoint such an arbitrator.

If either the claimant(s) or the respondent(s) fail to appoint an arbitrator, considering the principle of equality of the parties in the appointment of arbitrators, pursuant to Rule 29.7, the JCAA will appoint all three arbitrators. However, in such case, considering the interest of the party which already made the appointment of an arbitrator, the JCAA may appoint

the arbitrator already appointed by the claimant(s) or the respondent(s) as one of the three arbitrators if any party does not make an objection.

#### **4. Improvements on the Interim Measures of Protection and New Emergency Arbitrator**

In response to the recent trend to provide an emergency arbitration together with the interim measures ordered by an arbitral tribunal, the JCAA has also introduced an emergency arbitration into the amended Rules.

Chapter V of the amended Rules contains the provisions for interim measures of protection by both an arbitral tribunal and an emergency arbitrator, and the first section from Rules 66 to 69 provides for interim measures of protection by an arbitral tribunal. In line with the UNCITRAL Model Law amended in 2006, it has improved the necessary provisions by stipulating, *inter alia*, the types of measures and the conditions for granting such measures.

##### **Rule 71. Appointment of Emergency Arbitrator**

- 4 The JCAA shall use reasonable efforts to appoint an emergency arbitrator within two business days from its receipt of the application for Emergency Measures, if:
- (a) it confirms that the application for Emergency Measures has been made in conformity with Rules 70.1 through 70.6; and
  - (b) it considers it appropriate to appoint an emergency arbitrator.

##### **Rule 72. Mandate of Emergency Arbitrator**

- 4 The emergency arbitrator shall make a decision on the Emergency Measures within two weeks from his or her appointment. The emergency arbitrator shall not extend this time limit; provided, however, the JCAA may extend such time limit, if all Parties so agree or if the JCAA finds that the case is sufficiently complex or that any other compelling reason exists.

The second section from Rules 70 to 74 provides for interim measures by an emergency arbitrator as necessary before the establishment of the arbitral tribunal. Pursuant to Rule 71.4, the JCAA will use reasonable efforts to appoint an emergency arbitrator within two business days after it confirms the application for emergency measures has been duly made. The section also provides in Rule 72.4 that the emergency arbitrator must make a decision on the interim

measures within two weeks from his or her appointment, but the time limit may be extended if all parties so agree, or if the JCAA finds that the case is sufficiently complex or that any other compelling reason exists. The other necessary provisions are stipulated, including, but not limited to, the effect of the interim measures issued by the emergency arbitrator.

#### **5. Improvements on the Mediation Combined with Arbitration**

##### **Rule 54. Mediation**

- 1 The Parties, at any time during the course of the arbitral proceedings, may agree in writing to refer the dispute to mediation proceedings under the International Commercial Mediation Rules of the JCAA (the “ICMR”). No arbitrator assigned to the dispute shall be appointed as mediator, except if appointed under Rule 55.1.

##### **Rule 55. Special Rules for the ICMR if an Arbitrator serves as Mediator**

- 1 Notwithstanding Rule 54.1, the Parties may agree in writing to appoint an arbitrator assigned to the same dispute as a mediator, and refer the dispute to mediation proceedings under the ICMR. If the Parties do so, the Parties shall not challenge the arbitrator based on the fact that the arbitrator is serving or has served as a mediator.
- 2 Notwithstanding Rule 9.5 of the ICMR, an arbitrator who serves as mediator in regard to the same dispute shall not consult separately with any of the Parties orally or in writing, without the agreement of the Parties in writing. The arbitrator shall disclose to all other Parties, in each instance, the fact that such consultation has taken place, excluding the contents thereof.

In light of the advantages such as saving costs and time, and aiming for a win-win solution for the disputes between the parties, mediation is used not only for domestic, but also international disputes, before arbitration is started or in the course of arbitration. The JCAA has mediation rules for the settlement of international commercial disputes, namely, International Commercial Mediation Rules. Rules 54 and 55 provide for the mediation under these Rules while arbitration is pending.

Under the amended Rules, under Rule 54.1, mediation is conducted by the mediator who is a person different from the arbitrator, and an arbitrator cannot serve as a mediator except only where the parties so

agree. Under Rule 55.1, if the arbitrator serves as a mediator, a party has no right to challenge the arbitrator based on the fact that the arbitrator has served or serves as a mediator. In addition, under Rule 55.2, the arbitrator serving as a mediator cannot consult separately with any of the parties without the written agreement of the parties.

#### ***6. Improvements on Conduct of the Proceedings: Time Limit of Arbitral Award, Making Procedural Schedule, Identifying Issues and Making Terms of Reference***

##### ***Rule 39. Time Limit of Arbitral Award and Procedural Schedule***

- 1 The arbitral tribunal shall use reasonable efforts to render an arbitral award within six months from the date when it is constituted.
- 2 To implement Rule 39.1, the arbitral tribunal shall consult with the Parties, and make a schedule of the arbitral proceedings in writing (the “**Procedural Schedule**”) to the extent necessary and feasible as early as practicable. The consultation shall be conducted through preliminary meetings, telephone conferences, exchanges of documents or any other appropriate methods determined by the arbitral tribunal. The arbitral tribunal shall send the Procedural Schedule to the Parties and the JCAA.
- 3 The arbitral tribunal may amend the Procedural Schedule during the course of the arbitral proceedings after giving the Parties an opportunity to comment.

##### ***Rule 40. Issues and Terms of Reference***

- 1 At a stage as early as practicable, the arbitral tribunal shall use reasonable efforts to identify the issues to be determined upon consultation with the Parties.
- 2 If the arbitral tribunal considers it appropriate for promoting efficient arbitral proceedings, the arbitral tribunal, after giving the Parties an opportunity to comment, may prepare terms of reference setting forth the matters referred to the arbitral tribunal and a list of major issues.

In addition to the provisions in the previous Rules, in order to enhance the expeditious and proper conduct of the arbitral proceedings by the arbitral tribunal, Rules 39 and 40 contain the following provisions.

In the previous Rules, the time limit of rendering an arbitral award is expressly stipulated, and the arbitral

tribunal must render an arbitral award within five weeks or eight weeks at most from the date when the arbitral tribunal declared the proceedings closed, unless the JCAA extends the time limit. Considering the risk that such a relatively strict stipulation of the time limit might encounter refusal of the enforcement of the award, if the arbitral tribunal fails to do so in some foreign countries, repealing this provision, it is provided under Rule 39.1 that the arbitral tribunal must use reasonable efforts to render an award within six months from its establishment.

Pursuant to Rule 39.2, in order to achieve this target the arbitral tribunal, as early as is practical, must consult with the parties through preliminary meetings, telephone conferences, exchanges of documents, or any other appropriate methods, and make a procedural schedule of the arbitral proceedings to the extent necessary and feasible. Under Rule 39.3, the arbitral tribunal may amend the procedural schedule if necessary during the course of the arbitral proceedings. In addition, pursuant to Rule 40.1, at a stage as early as practicable, by consulting with the parties, the arbitral tribunal must make reasonable efforts to identify the issues to be determined. Also pursuant to Rule 40.2, if the arbitral tribunal considers it appropriate for promoting efficient arbitral proceedings, the arbitral tribunal, after giving the parties an opportunity to comment, may prepare terms of reference setting forth the matters referred to in the arbitral tribunal and a list of major issues.

#### ***7. Other Main Improvements Contained in the Amended Rules***

In addition, the improvements and the new provisions include the following points.

##### ***Repealing the Basic Date***

In order to expedite the arbitral proceedings, the concept of a “Basic Date” has been eliminated. Under the previous Rules, a Basic Date is defined as the date after the lapse of three weeks from the date on which the JCAA sends a notice of the request for arbitration and is the basis for the calculation of the period of time under the Rules, because the notice can be delivered to the respondent within three weeks at the longest. However, in fact, at present, almost all the notices are delivered to the respondent much earlier and it is not necessary to set such a long period of time. Therefore, the period of time under the amended Rules is calculated based on the date when the respondent receives the notice of request of arbitration.

## **Arbitration Agreement and Derogation from the Rules**

### **Rule 3. Arbitration Agreement and Derogation from the Rules**

2 The Parties may agree to derogate from or vary any of the Rules, subject to the consent of the arbitral tribunal. If all the arbitrators, upon their appointment, acknowledge such agreement, the arbitral tribunal shall be deemed to have consented.

Under the previous Rules, the parties may agree to derogate from or vary any of the Rules, subject to the consent of the arbitral tribunal. However, considering the respect of party autonomy in deciding the procedural rules, Rule 3.2 provides that if all the arbitrators, upon their appointment, have acknowledged such an agreement, the arbitral tribunal shall be deemed to consent.

## **Definition of Writing Requirements and Deemed Notice Acceptance**

### **Rule 2. Definitions**

2 The term **“in writing”** shall include hard copy and electronic documents. Electronic documents shall include electronic, magnetic and any other recording media used in information processing by a computer or other electronic device.

For procedural convenience and in light of modern trends, under Rule 2.2, the term **“in writing”** under the amended Rules includes hard copy and electronic, magnetic, or any other recording media used in information processing by a computer or other electronic device. For instance, under Rule 15.1, the agreement on the consolidation must be in writing, and thus the parties may make such an agreement even by the exchange of emails.

### **Rule 5. Communication**

1 Any notice, submission or transmission under the Rules (collectively, a **“Communication”**) shall be made by courier, registered mail, e-mail, facsimile, or any other reasonable means, unless otherwise provided.

2 A Communication shall be sent to the street address, habitual residence, or place of business of the recipient (including the street address or habitual residence of the recipient’s representative, if the recipient is a legal entity or other association), the e-mail address usually used by the recipient (if the recipient has designated an e-

mail address, such e-mail address), or any address designated by the recipient (collectively, an **“Address for Communication”**).

4 If the intended recipient refuses to receive a Communication, the Communication shall be deemed to have been received on the fourth day after dispatch or on the day of the refusal where such date is verified.

5 If a Party (other than the intended recipient) uses reasonable efforts to ascertain an Address for Communication but no Address for Communication can be identified, a Communication may be sent to the last-known Address for Communication. In this case, the Communication shall be deemed to have been received on the fourth day after dispatch.

Rule 5 has improved the provisions on notice. Under Rules 5.1 and 5.2, the address to which a notice is to be sent is expressly provided. In addition, the notice can be sent by email or fax, or by any other reasonable means. Under Rule 5.4, in order to cope with the situation in JCAA arbitration practice where the respondent refuses to receive the notice of request for arbitration, a deemed notice acceptance provision is provided. In addition, under Rule 5.5, for cases where the address for giving a notice is unknown, a deemed notice provision is similarly provided.

## **Repealing the Writing Requirements for Arbitration Agreement**

Under the previous Rules, the arbitration agreement must be in writing, and the writing requirements are expressly provided similar to those provided by the Japanese Arbitration Law. However, the form requirements for an arbitration agreement are generally contained as a mandatory provision in arbitration law. Considering the nature of these, the amended Rules has repealed the writing requirements, although there are contrary views in public comments submitted to the JCAA.

## **Period of Time and Change of Time Limit**

### **Rule 12. Period of Time**

1 In calculating a period of time under the Rules, the initial calendar day shall be excluded.

2 Holidays and non-business days occurring during the running of the period of time are included. If the last day of the period falls on a holiday or non-business day at the place of the recipient, the period shall be extended until the next following business day.



3 The Parties, by agreement in writing and in accordance with Rule 3.2, may change any time limit under the Rules, except for the time limits under Rules 15.2, 18.1, 19.1, 20 and 70.7 and any time limits fixed by the arbitral tribunal or by the JCAA. In the event of such a change, the Parties shall promptly notify the JCAA and the arbitral tribunal thereof.

4 The arbitral tribunal, if it considers it necessary, may change any time limit under the Rules (including a time limit fixed by the arbitral tribunal), except for the time limits under Rules 39.1, 56.4, 72.4 and 81.1 and any time limits fixed by the JCAA. In the event of such a change, the arbitral tribunal shall promptly notify the JCAA and the Parties thereof.

5 The JCAA, if it considers it necessary, may fix or change any time limit concerning the arbitral proceedings under the Rules.

The amended Rules clearly provides for a period of time, where as there is no such provision in the previous Rules. Under Rule 12.1, in calculating a period of time, the initial day shall be excluded. In addition, under Rule 12.2, holidays and non-business days occurring during the period of time are included. If the last day of the period falls on a holiday or non-business day at the place of the recipient, the period is extended until the first subsequent business day.

In the course of the arbitral proceedings, the time limit may need to be changed and accordingly in this respect, the amended Rules specifically provides in Rules 12.3, 4 and 5 the respective powers and its mutual relationship of the parties, the arbitral tribunal, and the JCAA to change the time limits under the Rules.

The parties may change any time limit under the Rules, except for the time limits for the submission of the objection on the consolidation under Rule 15.2, the respondent's answer under Rule 18.1, the respondent's counterclaim under Rule 19.1, and the set-off defense under Rule 20 and the time limits fixed by the arbitral tribunal or by the JCAA.

The arbitral tribunal, if it considers it necessary, may change any time limit under the Rules including a time limit fixed by the arbitral tribunal, except for the time limits for rendering an arbitral award under Rule 39.1, the reopening of the arbitral proceedings under Rule 56.4, and rendering an arbitral award under the Expedited Procedures under Rule 81.1 and the time limits fixed by the JCAA.

The JCAA, if it considers it necessary, may fix or change any time limit concerning the proceedings under the Rules.

### ***Language of the Proceedings***

#### ***Rule 11. Language***

1 Unless Parties have agreed on the language(s) to be used in the arbitral proceedings, the arbitral tribunal shall promptly determine such language(s) to be used in the arbitral proceedings. The arbitral tribunal, in so determining, shall take into account the language of the contract containing the Arbitration Agreement, whether interpreting or translating will be required, and the cost thereof.

Under Rule 11.1 of the amended Rules, if the arbitral tribunal determines the language(s) to be used in the arbitral proceedings, the arbitral tribunal must take into account not only the necessity of interpretation or translation and the cost incurred, but also the language of the contract containing the arbitration agreement.

### ***Request for Arbitration and Answer and Set-off Defense***

#### ***Rule 14. Request for Arbitration***

2 The Request for Arbitration may set forth the following:

- (1) the name, street address and other contact details of an arbitrator appointed by the claimant, if the Parties have agreed that the number of arbitrators is three;
- (2) a statement about the number of arbitrators, the procedure for appointing arbitrators, the place of arbitration, or the language(s) of arbitration; or
- (3) a statement about the governing law applicable to the substance of the dispute.

#### ***Rule 18. Answer***

2 The Answer may set forth the following:

- (1) the name, street address and other contact details of an arbitrator appointed by the respondent, if the Parties have agreed that the number of arbitrators is three;
- (2) a statement about the number of arbitrators, the procedure for appointing arbitrators, the place of arbitration, or the language(s) of arbitration; or
- (3) a statement about the governing law

applicable to the substance of the dispute.

Under Rules 14.2 and 18.2, if the parties agree that the number of arbitrators is three, in order to expedite the appointment procedure the parties may appoint their respective arbitrators when they submit the request for arbitration and the answer, respectively, subject to confirmation by the JCAA. Even if there is no agreement concerning the appointment of arbitrators between the parties, the parties may also state in their request for arbitration or answer their opinions concerning the number of arbitrators, the appointment procedure of arbitrators, and so forth.

**Rule 20. Set-off Defense**

The respondent, within four weeks from its receipt of the notice of the Request for Arbitration (or within two weeks if Rule 77 applies), may submit a set-off defense in writing.

Like other leading arbitral institutions, under Rule 20, in order to expedite the procedure, any set-off defense by the respondent must be submitted within the same period of time as for a counterclaim; that is, four weeks from the respondent's receipt of the notice of request for arbitration.

**Confirmation of Arbitrators by the JCAA and the Nationality of a Sole Arbitrator and a Third Arbitrator Appointed by the JCAA**

**Rule 25. Appointment and Confirmation of Arbitrators**

- 1 Arbitrator(s) shall be appointed pursuant to the agreement of the Parties.
- 2 If the Parties have not agreed on the appointment of arbitrator(s), the arbitrator(s) shall be appointed under Rules 26 through 30.
- 3 The appointment of an arbitrator made by a Party, by Parties, or by arbitrators shall be effective only after confirmation by the JCAA. The JCAA, after giving the Party or the Parties and the arbitrator(s) an opportunity to comment, may refuse to confirm the appointment of an arbitrator if the JCAA finds that the appointment is clearly inappropriate. Upon confirming the appointment of the arbitrator, the JCAA shall promptly notify such confirmation to the Parties and the Arbitrator(s).

Like other leading arbitral institutions, the JCAA has adopted a procedure to confirm the appointment of arbitrators. Under Rule 25.3, the appointment of an arbitrator made by the party or by arbitrators is effective

only after confirmation by the JCAA. The JCAA, after giving the party which appointed an arbitrator and the arbitrator an opportunity to comment, may refuse to confirm the appointment of an arbitrator if the JCAA finds that the appointment is clearly inappropriate.

**Rule 27. Appointment of Arbitrator - Sole Arbitrator**

- 4 In case the JCAA appoints an arbitrator under Rule 27.3 and a Party requests that the arbitrator be a person of a different nationality from that of any of the Parties, the JCAA shall respect such request.

The amended Rules provides in Rule 27.4 and the other relative provisions that if a party requests that the sole arbitrator or the third arbitrator be a person of a different nationality from those of the parties in a case where the JCAA appoints such an arbitrator, the JCAA must respect such a request, while the previous Rules provides only that the JCAA must give consideration to such a request. Under the previous Rules, the JCAA had relatively wide discretion not to appoint a third country national. In the past, the JCAA respected every request received by appointing a third country national. Consistent with its practice, under the amended Rules, upon such a request from a party, the JCAA will appoint the third country national as the sole arbitrator or the third arbitrator unless there exist special circumstances.

**Default of a Party**

**Rule 48. Default of a Party**

- 1 If one Party fails to submit a Written Statement or the Answer within the time limits under the Rules or the time limits fixed by the arbitral tribunal, the arbitral tribunal shall continue the arbitral proceedings without treating such failure in itself as an admission of the other Party's statements.
- 2 If one Party, without sufficient cause, fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the arbitral proceedings and make the arbitral award based on the evidence before it.

The amended Rules expressly provides in Rule 48 that if one Party fails to submit a written statement or the answer within the time limits under the Rules or the time limits fixed by the arbitral tribunal, the arbitral tribunal shall continue the arbitral proceedings without treating such failure in itself as an admission

of the other Party's statements. It also provides that if one party, without sufficient cause, fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the arbitral proceedings and make the arbitral award based on the evidence before it.

#### **Authority of Presiding Arbitrator**

##### **Rule 7. Decision of Arbitral Tribunal**

3 Procedural matters in arbitral proceedings may be decided by the presiding arbitrator alone, if the other members of the arbitral tribunal or all Parties so agree.

In order to expedite arbitral proceedings, under Rule 7.3, procedural matters in arbitral proceedings can be decided by the presiding arbitrator if the other arbitrators or all parties so agree.

#### **Repetition of Proceedings where an Arbitrator is Substituted and Vacancy after Closing of Proceedings**

##### **Rule 35. Repetition of Arbitral Proceedings by Substitute Arbitrator**

If a substitute arbitrator is appointed under Rule 33, the arbitral tribunal, after giving the Parties an opportunity to comment, shall decide whether or to what extent arbitral proceedings already conducted should be repeated.

##### **Rule 34. Vacancy after Closing of Arbitral Proceedings**

Notwithstanding Rule 33, where an arbitrator ceases to perform his or her duties after the closing of the arbitral proceedings but before an arbitral award is rendered, the arbitral tribunal may render an arbitral award without a substitute arbitrator being appointed, if the JCAA, after giving the remaining arbitrators and the Parties an opportunity to comment, considers it appropriate.

Under Rule 35, if a substitute arbitrator is appointed because of reasons such as the resignation or the challenge of the arbitrator, the arbitral tribunal may decide whether or to what extent arbitral proceedings already conducted should be repeated. In addition, under Rule 34, if an arbitrator ceases to perform his or her duty after the closing of the arbitral proceedings, but before an arbitral award is rendered, the arbitral tribunal may continue the proceedings and render an award without appointing a substitute arbitrator if the JCAA considers, after giving the remain-

ing arbitrators and the parties an opportunity to comment, it appropriate.

#### **Application of the Expedited Procedures by the Agreement of the Parties and Time Limit of Arbitral Award**

The JCAA has the Expedited Procedures by which a sole arbitrator must render an arbitral award within three months from his or her confirmation or appointment by the JCAA, if the amount or economic value of the claimant's claim is not more than ¥20,000,000. In this case, the respondent's counterclaim or set-off defense is allowed, if the amount or economic value of such a submission is not more than ¥20,000,000.

##### **Rule 75. Scope**

1 Expedited procedures shall be conducted if a Party notifies the JCAA in writing of the agreement by the Parties to submit the dispute to expedited procedures within two weeks from the respondent's receipt of the notice of the Request for Arbitration.

Unlike the previous Rules, the amended Rules allow the parties to choose the Expedited Procedures by their agreement, and Rule 75.1 provides that the Expedited Procedures will apply if the parties have so agreed.

With regard to the time limit of an arbitral award under the Expedited Procedures, under the previous Rules, the JCAA may extend the time limit of rendering an arbitral award within three months from the establishment of the arbitral tribunal only if the arbitrator and all the parties so agree, or if the JCAA determines that the arbitrator is unable to make an arbitral award within the time limit as a result of his or her mental and/or physical difficulties, or other reason for which the arbitrator is incapable to perform the arbitrator's duties; provided that, in either case, the extension of the time limit by the JCAA shall be limited to a maximum of an additional three months.

##### **Rule 81. Time Limit of Arbitral Award**

2 The arbitrator shall not extend the time limit under Rule 81.1. The JCAA may extend such time limit under Rule 81.1 if the JCAA finds that the case is sufficiently complex or that any other compelling reason exists.

In actuality, even though the amount in dispute may be relatively small and within the scope of applica-

tion of the Expedited Procedures, there may be a case where the complex issues involved may cause it to be practically impossible for the arbitral tribunal to render the arbitral award within three months after his or her appointment. In order to cope with this situation, the amended Rules provides in Rule 81.2 that the JCAA may extend the time limit without the limitation of a maximum of an additional three months if the JCAA finds that the case is sufficiently complex, or if any other compelling reason exists.

### **The Costs of Arbitration**

#### **Rule 83. Allocation of Costs**

- 1 The costs of the arbitration include the administrative fee, the arbitrator(s)' remuneration and expenses, and other reasonable expenses incurred with respect to the arbitral proceedings; and the Parties' legal fees and expenses to the extent the arbitral tribunal determines that they are reasonable.
- 2 The arbitral tribunal may apportion the costs under Rule 83.1 between the Parties, taking into account the Parties' conduct throughout the course of the arbitral proceedings, the determination on the merits of the dispute, and any relevant circumstances.

Unlike the previous Rules, the amended Rules expressly provides in Rule 83.1 that the costs of the arbitration include the parties' legal fees and expenses to the extent the arbitral tribunal determines that they are reasonable. As to the allocation of the costs, under Rule 83.2, the arbitral tribunal may apportion the costs of the arbitration between the parties, taking into account the parties' conduct throughout the course of the arbitral proceedings, the determination on the merits of the dispute, and any relevant circum-

stances.

Under the previous Rules, the claimant must pay the Request Fee of ¥50,000 together with the Administrative Fee when it submits to the JCAA a written request for arbitration. By this amendment, the JCAA has repealed the Request Fee and the claimant pays only the Administrative Fee. As to the emergency arbitration, the administrative fee and the emergency arbitrator's remuneration are ¥200,000 and ¥2,000,000 respectively, excluding consumption tax.

Finally, by this amendment, the JCAA has established the Procedure Consultative Committee, consisting of the following prominent experts.

Member (Alphabetical):

- Prof. Masato Dogauchi (Waseda University)
- Douglas K. Freeman, Esq. (Law Offices of Douglas K. Freeman)
- Prof. Shusuke Kakiuchi (Tokyo University)
- Shinji Kusakabe, Esq. (Anderson, Mori & Tomotsune)
- Prof. Shunichiro Nakano (Kobe University)
- Hiroyuki Tezuka, Esq. (Nishimura & Asahi)

The Committee is to submit views on the procedural issues arising from the JCAA arbitral proceedings that the JCAA considers consultation to the Committee necessary; and as to certain particularly important issues, for example, the decision on the challenge of an arbitrator under Rule 31.5 as provided for in the Regulations of Procedure Consultative Committee, the consultation is compulsory before the JCAA makes a determination under the Rules.

The amended Rules applies to the arbitral proceedings initiated on or after February 1, 2014.

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## **[JCAA Activities]**

### **International Commercial Arbitration Seminar held in Tokyo**

On November 14, 2013 in Tokyo, the JCAA and the Singapore International Arbitration Centre (SIAC) organized an International Commercial Arbitration Seminar entitled "Bridging Cultures in International Arbitration". The seminar started with opening addresses by Ms. Lim Seok Hui, CEO, SIAC, and by Mr. Hiroshi Yokokawa, President, JCAA, respectively. The seminar was composed of three sessions as follows:

Session 1: Managing the Clash of Legal Cultures in International Arbitration

Mr. Kevin (Kap-You) Kim chaired the session and the panelists discussed practical measures to deal with and manage expectations and practices from different legal systems and cultures in international arbitration.

Session 2: Potential Pitfalls in International Arbitration

Mr. Hiroyuki Tezuka chaired the session and the pan-

elists discussed issues such as drafting arbitration agreements, controlling costs and Emergency Arbitrator Provisions and explained recent developments at SIAC and JCAA. Prof. Tatsuya Nakamura, General Manager of the Arbitration Department, JCAA, joined this session as one of the panelists.

Session 3: Enforcement of International Arbitration Awards in Asia

Mr. KC Lye chaired the session and the panelists discussed factors, issues and practical considerations in ensuring enforcement of arbitral awards in some key Asian jurisdictions.

Mr. Hiroyuki Tezuka delivered closing remarks and the seminar was concluded successfully with applause from many participants.

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## ***Arbitration seminars in Osaka and Fukuoka***

Arbitration seminars titled “Practical Introduction to Arbitral Proceedings”, co-organized by the Japan Commercial Arbitration Association Osaka Office, the Osaka Chamber of Commercial and Industry, and the Japan Association of Arbitrators Kansai-Branch, were held on September 12, 2013 in Osaka and on October 15, 2013 in Fukuoka. Mr. Onuki, executive director of the JCAA, participated in both of the seminars as a speaker. These seminars illustrated the over-

all outline of arbitral proceedings from practical viewpoints. The topics ranged from “negotiation before commencement of arbitration”, “practical issues on appointment of arbitrator”, and “how to organize arbitral proceedings” to “settlement during arbitral proceedings”. There were about 110 participants at the seminar in Osaka and about 30 participants at the seminar in Fukuoka.

### **Standard Arbitration Clause**

All disputes, controversies or differences which may arise between the parties hereto, out of or in relation to or in connection with this Agreement shall be finally settled by arbitration in (name of city) in accordance with the Commercial Arbitration Rules of the Japan Commercial Arbitration Association.

### **Notes to Contributors for Article Submissions**

The Editor welcomes submissions of articles and essays on international arbitrations. Articles should not normally exceed 2500 words in length including notes. Manuscripts must be submitted in the format of MS Word together with CV. Material accepted for publication becomes the property of JCAA. However, author may use the article without permission from JCAA. Submission must be sent via E-mail: [arbitration@jcaa.or.jp](mailto:arbitration@jcaa.or.jp)

# The Japan Commercial Arbitration Association

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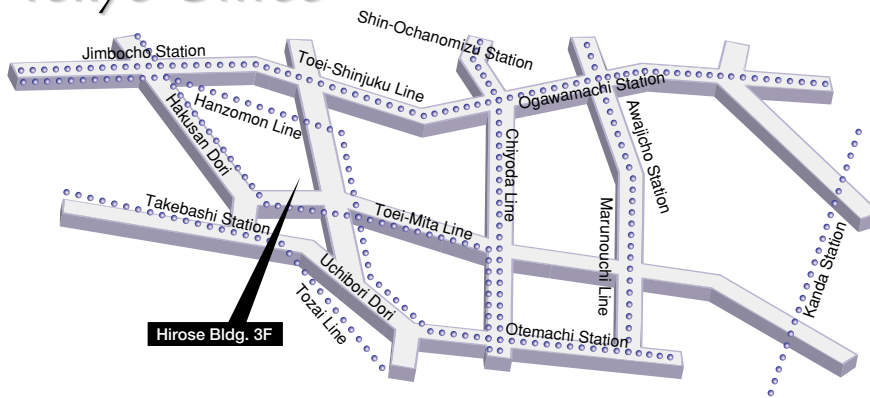
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