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The New Interactive Arbitration Rules of the Japan Commercial Arbitration Association

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The Japan Commercial Arbitration Association ("JCAA") is a major permanent international commercial arbitral institution in Japan. In a bid to attract more arbitration users, the JCAA amended its two existing arbitration rules, the Commercial Arbitration Rules[1] and the Administrative Rules for UNCITRAL Arbitration,[2] and launched a new third option called the Interactive Arbitration Rules (the "IA Rules"). This article focuses on the new IA Rules, which provide an intriguing alternative option for arbitration users who want faster and more cost-efficient arbitration proceedings.

I. Two Key Features of the IA Rules

The IA Rules have two key features, namely, (i) the mandatory communications between the arbitral tribunal and the parties, and (ii) the lower fixed remuneration of the arbitrators. The new IA Rules are unique and aim to address the negative aspects of arbitration proceedings.

A. Mandatory Disclosure of Preliminary Views

With respect to the first key feature, at two stages during the course of the arbitral proceedings, the arbitral tribunal is required to take on a more active role. The IA Rules first require that, at an early stage of the proceedings, the arbitral tribunal present to the parties a summary of their respective positions on the factual and legal grounds of the claims and defenses, as well as the issues tentatively identified by the arbitral tribunal. The parties will be given an opportunity to comment on the summary. Later on, before the arbitral tribunal decides whether or not to hold a hearing for the examination of witnesses, it must send a written summary to the parties on the factual and legal issues that the arbitral tribunal considers important, together with its preliminary views thereon. The parties will also be given an opportunity to comment thereon. Taking into account the comments of the parties, the arbitral tribunal shall then decide whether to hold a hearing for witness examination.[3]

1. Key amendments to the Commercial Arbitration Rules include: (a) the ongoing duty of an arbitrator to conduct a reasonable investigation into any circumstance that may give rise to justifiable doubts as to his or her impartiality or independence, *e.g.*, potential conflicts of interest as laid down in the Japanese Supreme Court Decision dated December 12, 2017 (art. 24); (b) rules concerning the appointment of a third-party Tribunal Secretary (art. 33); (c) prohibition of the disclosure by a co-arbitrator of a dissenting opinion (art. 63), (d) expanding the application of expedited procedures to disputes up to JPY 50 million (previously, JPY 20 million) unless otherwise agreed by the parties (art. 84), (e) amendment of the remuneration of arbitrators based on an hourly rate of JPY 50,000 with certain upper limits, provided that when the arbitration hours exceed 150 hours, the hourly rate shall be reduced by 10% for every 50 hours in excess of the initial 150 hours (but only up to 50% of the original hourly rate) (arts. 93-95), and (f) amendment of the administrative fees (Part IV).
2. The main amendment to these rules concerns the new remuneration system for top arbitrators (*i.e.*, an hourly rate from USD 500 to USD 1,500 based on the experience of the arbitrator, complexity of the case and related matters) (Rule 20.2).
3. IA Rules, arts. 48 and 56.

The JCAA considers the above interactive way of conducting the proceedings as a way to enhance predictability by the parties, and facilitate the drafting of the final award by the arbitral tribunal.[4]

Such disclosure by the arbitral tribunal of its preliminary views may not be common in court or arbitral proceedings in common law jurisdictions, however, it is a common practice in court proceedings in Japan as well as some civil law jurisdictions where judges typically disclose their preliminary views to encourage settlement of disputes. This practice has also been adopted in arbitration in some civil law countries such as Germany,[5] Switzerland, Austria and China.

The JCAA is of the view that the common law adversarial type of arbitration practice has caused costly and lengthy arbitral proceedings where parties may end up submitting evidence and arguments on matters that are not considered necessary or relevant by the arbitral tribunal.[6] The JCAA hopes that the new mechanism of informing the parties of the preliminary views of the arbitral tribunal will encourage them to focus on the issues and evidence that the arbitral tribunal considers relevant, thereby reducing the cost and length of arbitral proceedings. Thus, these new rules may be attractive not only to Japanese companies but also to parties in other civil law jurisdictions.

This mandatory system of disclosure of the preliminary views of the arbitral tribunal may also promote the early settlement of disputes. In this regard, as is the case with the Commercial Arbitration Rules of the JCAA, the parties may, at any time during the course of the arbitral proceedings, agree in writing to refer the dispute to mediation under the International Commercial Mediation Rules of the JCAA. Unless the parties agree otherwise, the arbitrator assigned to the dispute shall not be appointed as the mediator.[7]

B. Lower Fixed Remuneration of Arbitrators

This second feature of the IA Rules is meant to tackle the problem of rising costs in international arbitration. Unlike the remuneration scheme for arbitrators under the Commercial Arbitration Rules of the JCAA, which is on a traditional time-charge basis (i.e., JPY50,000 per hour subject to reduction for arbitration hours in excess of 150 hours)[8] with certain upper limits based on the amount of the claim, the remuneration of arbitrators under the IA Rules is lower and fixed based on the amount of the claim. For example, a sole arbitrator will be entitled to a fee of JPY 1 million for a claim of less than JPY 50 million, or JPY 5 million for a claim with a value of JPY 10 billion or more.[9]

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4. Reform of the JCAA Arbitration Rules: Three Sets of Rules in Response to All Business Needs, JCAA, January 1, 2019, at http://www.jcaa.or.jp/e/arbitration/docs/0341aa73476af846bb61177756586608fbebebe3.pdf ("Reform of the JCAA Arbitrations Rules"), p. 10; *see, e.g.*, IA Rules, art. 48(4) and (5).
5. For example, the German Institution of Arbitration ("DIS") has adopted this practice in its arbitration rules. The DIS revised its arbitration rules on March 1, 2018 ("2018 DIS Rules") to require the arbitral tribunal to discuss Annex 3 (measures for increasing procedural efficiency) and Annex 4 (expedited proceedings) of the 2018 DIS Rules with the parties during the case management conference. One of the measures listed in Annex 3 is "[p]roviding the parties with a preliminary non-binding assessment of factual or legal issues in the arbitration, provided all of the parties consent thereto."
6. JCAA no chusai seido no kaikaku ni tsuite bijinesukai no arayuru nizu ni taio suru mittsu no chusai kisoku [Reform of the JCAA Arbitrations Rules: Three Sets of Rules in Response to All Business Needs], JCAA, January 1, 2019, at http://www.jcaa.or.jp/arbitration/docs/a744bd3741b252a5d220a6f24252fdb4b3b44bc5.pdf (in Japanese), p. 7.
7. IA Rules, arts. 59 and 60.1.
8. *See* note 1.
9. IA Rules, art. 94. Some arbitration practitioners have expressed concern that the remuneration rate under the IA Rules is too low to attract or retain renowned or seasoned arbitrators. In response, however, the JCAA has stated that "the task of arbitrators, like judges, should be done with a high level of integrity rather than in pursuit of economic reward." (Reform of the JCAA Arbitration Rules, p. 14.)

II. Opt-In Approach

Parties may opt for the application of the new IA Rules by specifying them in their arbitration agreement,[10] or if not so designated therein, they may still opt for their application later in a separate arbitration agreement notified to the JCAA before the confirmation or appointment thereby of any arbitrator.[11]

III. Conclusion

The issues of "cost" and "lack of speed" have been ranked the first and fourth, respectively, in a recent survey of the worst characteristics of international arbitration.[12] Once users, especially from civil law countries, begin to adopt the new IA Rules for their commercial disputes, it will be interesting to see how the new interactive system addresses such unfavorable aspects of international arbitration.

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10. IA Rules, art. 3.
11. Commercial Arbitration Rules, art. 3.3. Please also note that if the parties have agreed to arbitration by the JCAA without specifying the applicable rules, the Commercial Arbitration Rules will apply by default (*Ibid*., art. 3.2).
12. 2018 International Arbitration Survey: The Evolution of International Arbitration, The School of International Arbitration at Queen Mary University of London, White & Case LLP, at http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF, p. 8.

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Safety Regulations for Consumer Products in Japan

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1. Background

In 1973, the Consumer Product Safety Act[1] (the "CPSA") was established to ensure the safety of consumer products. In 1994, the Product Liability Act[2] (the "PL Act") was established to prevent product defects by holding manufacturers and importers liable for damages.

Despite such regulations, however, accidents have still occurred in Japan, including for example, fatal accidents involving instantaneous water heaters. In response, the CPSA was revised in 2006 and product recall regulations were strengthened. The Recall Handbook for Consumer Products of 2007 was also formulated in 2007, and then revised in 2010 and 2016.

2. Obligations of Companies under the CPSA

Under the CPSA, manufacturers and importers of "specified products" or "special specified products" must submit a notice of their business[3] and ensure that their products conform with certain technical requirements or standards.[4] "Specified products" mean consumer products that are deemed highly likely to cause danger (e.g., pressure cookers for home use, defective motorcycle helmets, laser pointers, etc.). "Special specified products" mean specified products for which manufacturers or importers may not have sufficiently secured the quality necessary to prevent the occurrence of danger (e.g., beds for infants, lighters, etc.).[5]

Manufacturers and importers of specified/special specified products must also label their products with the PSC mark (see Figure 1).[6] No person may place the PSC mark or a mark confusingly similar except for those who have submitted the required notice of their business.[7]

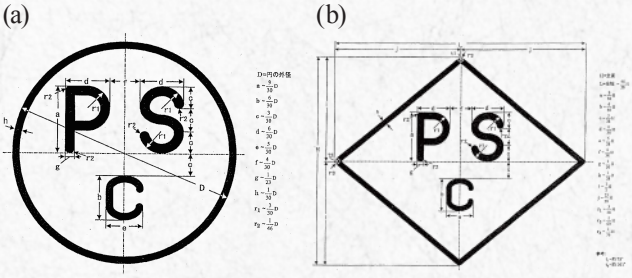

Figure 1. The PSC mark design for (a) specified products, and (b) special specified products.

In addition to manufacturers and importers, retailers of consumer products must collect information on "product accidents," and endeavor to provide such information to consumers.[8] "Product accidents" mean accidents resulting from the use of consumer products where danger to the lives or bodies of consumers has occurred

1. Shohiseikatsuyouseihin anzen hou [Consumer Product Safety Act], Act No. 31 of June 6, 1973, as last amended by Act No. 69 of June 13, 2014.
2. Seizobutsu sekinin hou [Product Liability Act], Act No. 85 of July 1, 1994.
3. CPSA, art. 6.
4. *Ibid.*, art. 11(1).
5. *Ibid.*, art. 2(2) and (3).
6. *Ibid.*, art. 4(1).
7. *Ibid.*, art. 5.
8. *Ibid.*, art. 34(1).

or is deemed likely to occur, other than accidents evidently not caused by defects in such consumer products.[9]

Manufacturers and importers of consumer products must also report the following details about serious product accidents to the competent minister: name and type of consumer product, a detailed account of the accident, quantity of the consumer product manufactured or imported, and quantity of the consumer product sold.[10] "Serious product accidents" mean product accidents that fall within the specific requirements of the Cabinet Order on accidents where the actual or potential danger is serious.[11] This report must be made within 10 days after they become aware of a serious product accident.[12]

Although there is no requirement to report product accidents other than serious product accidents, any person who becomes aware of a product accident must report it to the National Institute of Technology and Evaluation ("NITE").

Please note that unlike the safety regulations in the U.S. and Europe, under the CPSA, manufacturers and importers have no obligation to report any safety concern to the government or recall their consumer products unless they become aware of product accidents. In practice, however, even in such cases, they must endeavor to take the necessary measures to prevent the occurrence of any danger.

In cases where product accidents (even if not serious) are caused by consumer products, manufacturers and importers of such products must endeavor to recall them or take measures to prevent the occurrence and increase of any danger.[13]

In practice, manufacturers and importers refer to the Recall Handbook for Consumer Products of 2016 as guidelines for product recalls. According to the handbook, product recalls include:
(i) stopping the manufacturing, distribution and sales of products, or recalling them from the market;
(ii) informing consumers about the risks relating to the products;
(iii) supplying consumers with or reminding them about information on operating precautions to avoid similar accidents; and
(iv) replacing, repairing or retrieving the products from consumers.

3. Government Orders under the CPSA

Under the CPSA, the competent minister may order manufacturers or importers to take the necessary measures to, among others, improve the methods to manufacture consumer products, or improve measures to prepare for the giving of compensation to victims who have incurred damages due to defects in such products.[14]

In cases where manufacturers or importers of consumer products fail to report serious product accidents, the competent minister may also order them to develop the necessary system for the collection, management and reporting of information on serious product accidents.[15]

In cases where there is a risk of danger to the lives or bodies of consumers due to a failure to conform with the prescribed technical requirements or standards, or place the required PSC mark, the competent minister may order manufacturers, importers or sellers to recall the specified products or take all the necessary measures to prevent the occurrence and increase of any danger.[16]

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9. *Ibid*., art. 2(5).
10. *Ibid*., art. 35(1).
11. *Ibid*., art. 2(6).
12. Shohiseikatsuyouseihin anzen hou ni motoduku judaijikohoukokutou ni kansuru naikakufu rei [Cabinet Office Ordinance for serious product accident reports, etc., under the CPSA], Cabinet Office Ordinance No. 47 of August, 2009, art. 3.
13. CPSA, art. 38(1).
14. *Ibid*., art. 14.
15. *Ibid*., art. 37(1).
16. *Ibid*., art. 32.

In cases where serious product accidents have occurred due to defects in consumer products, the competent minister may order the manufacturers or importers to recall such products and take the necessary measures to prevent the occurrence and increase of any serious danger to the lives or bodies of consumers due to said products.[17]

However, there have only been a few cases where the competent minister has ordered the recall of consumer products under the CPSA.

4. Sanctions under the CPSA

Under the CPSA, any person who has sold specified products without the PSC mark, or violated a labeling, suspension, recall, remedial or any other order issued by the competent minister may be punished by imprisonment of up to one year or a fine of up to one million yen, or both.[18] In this regard, please note that although the failure to report a serious product accident is not punishable under the CPSA, if the minister has ordered a manufacturer or importer to develop the necessary system for the collection, management and reporting of information on serious product accidents, then the failure to report serious product accidents becomes punishable by imprisonment of up to one year or a fine of up to one million yen, or both.[19]

If the representatives, agents, employees or other workers of a legal entity commit the above violations, then both the offenders and the legal entity will be held liable. In particular, the legal entity can be punished by a fine of up to one hundred million yen for a violation of a recall order issued by the competent minister.[20]

5. Compensation

Despite the various safety regulations mentioned above, product accidents cannot be completely prevented. Manufacturers and importers of consumer products are liable and must compensate victims of product accidents for damages under the Civil Code[21] and the PL Act. Please note that negligence is required for compensation under the Civil Code but not under the PL Act, which instead requires, proof of the "defect."

Under the PL Act, "defect" means a lack of safety that a product should ordinarily provide, taking into account its nature, the ordinarily foreseeable manner of its use, the time the manufacturer or importer delivered it, and other circumstances concerning such product.[22] Unlike in the U.S., the PL Act in Japan does not officially classify defects into three types, i.e., manufacturing defect, design defect and warning defect; in practice, however, plaintiffs and defendants often use these three types of defective product categories.

As to sellers of consumer products, although they cannot be held liable under the PL Act, they can be held liable under the Civil Code.

Lastly, it may be noted that in Japan, there is no class action system for damages for defects in consumer products. Punitive damages are not available either.

17. *Ibid.*, art. 39(1).
18. *Ibid.*, art. 58.
19. *Ibid.*, art. 58(v).
20. *Ibid.*, art. 60.
21. Minpo [Civil Code], Act No. 89 of April 27, 1896, as last amended by Act No. 72 of July 13, 2018.
22. PL Act, art. 2(2).

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Overview of the Ethics Act and the Ethics Code

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1. Introduction

The promotion of ethical standards of public employees has been high on the agenda in many countries and Japan is no exception. A series of scandals involving high government officials in the 1990s triggered the movement to provide a code of ethics for public officials.

Since April of 2000, national public employees have abided by the rules stipulated in the National Public Service Ethics Act (the "Ethics Act")[1] and the National Public Service Ethics Code (the "Ethics Code")[2] to avoid any suspicion or distrust of the people in the performance of their duties.

Even though these rules apply to "national" public employees, with respect to professors working for national universities and employees of government corporations (e.g., the postal service, national forestry service, printing and mints), who are exempt from some of the provisions of the Ethics Act, as well as local governments, appropriate measures must still be taken to maintain ethics among these public servants based on the measures provided in the Ethics Act. Moreover, even if no penalty is imposed on private citizens, these rules should be taken into consideration in their dealings with public servants.

2. Prohibited Acts with Interested Parties

The Ethics Code is specific and focuses on the issue of ethics management: whether or not a public servant can accept gifts, benefits, etc., from business operators, etc. ("Business Operators"),[3] particularly when the latter are "interested parties,"[4] such as the following:[5]

(1) Business Operators that have obtained permits or subsidies, or are applying for or clearly intend to apply for the same;

(2) Business Operators that are under a contract with the national government, or are applying for or clearly intend to apply for the same;

(3) Business Operators that can be subject to on-site investigations, audits or inspections; or are subject to an adverse disposition;

1. Kokka komuin rinri ho [National Public Service Ethics Act], Law No. 129, 1999, as last amended by Amendment of Act No. 41 of 2018.
2. Kokka komuin rinri kitei [National Public Service Ethics Code], Cabinet Order No. 101, March 28, 2000, as last amended by Cabinet Order No. 427 of 2015.
3. Business Operators refer to juridical persons (including associations or foundations that are not juridical persons, which have rules concerning a representative person or an administrator) and other organizations, and individuals conducting activities to earn profit for their businesses.
4. If an interested party is an enterprise, etc., and its executives, employees, etc., contact a national public employee obviously to seek an advantage for the business of such enterprise, etc., then such executives, employees, etc., are also regarded as interested parties.
5. *See* https://www.jinji.go.jp/rinri/eng/engrule1504.pdf.

(4) Business Operators that are currently required to take a certain action or not take a certain action by an administrative guidance;
(5) Business Operators that conduct business subject to the work of promotion, improvement, and adjustment of business by each ministry or agency; and
(6) A national agency with a budget, fixed number of officials in each grade of the salary schedule, or ceiling on the number of officials that is subject to assessment by the relevant authorities.

The following are examples of prohibited acts with an interested party:
(1) Receiving gifts in the form of money, articles or real properties,[6] except for advertising materials or souvenirs generally distributed, and souvenirs given at large buffet-style stand-up parties;
(2) Receiving money loans, except customer loans obtained from financial institutions;
(3) Using goods or real properties provided by an interested party for free, except if used during an official visit to an interested party;
(4) Receiving services provided by an interested party for free, except for the use of a car (regularly used by the interested party in its business) during an official visit to the interested party as part of the official's duties if appropriate in light of transport circumstances and other reasons;
(5) Receiving unlisted shares;
(6) Receiving entertainment or a treat, except refreshments or simple food and drinks[7] at meetings or gatherings attended by an official as part of his or her duties, and food and drinks at buffet-style parties attended by 20 persons or more;
(7) Playing games (mahjong, etc.) or golf, except when an official who is a member of a golf club happens to have a chance to play golf with an interested party in the same monthly competition of the golf club;
(8) Taking trips (except official business trips), except when an official participates in a tour arranged by a travel agent, and an interested party happens to be on the same tour; and
(9) Causing an interested party to commit any of the above acts in favor of a third party.

Officials may commit the above acts (except item 9) with respect to an interested party with whom they have an existing private relationship, which means a relationship that is not related to their being national public service employees, but only if taking such action will not give rise to public suspicion or distrust concerning the fair performance of their public duties taking into consideration the relationship between their official duties and the interested party, the history and current status of the private relationship, and the nature of the action.

3. Other Prohibited Acts

The following are examples of prohibited acts involving non-interested parties:
(1) Receive entertainment or a treat, or monetary benefits that exceed the limit of socially accepted convention such as receiving entertainment or a treat repeatedly;
(2) Having a non-interested party who is not present pay for food, drinks or other hospitality charges ("tsukemawashi");
(3) Receive remuneration for the compilation or editorial supervision of books, etc., prepared using the subsidies or at the cost of the national government, or the majority of which are to be purchased by the national government; and
(4) Sharing of benefits, knowing that such benefits were obtained by another national public employee in violation of the Ethics Code.

6. When a national public employee purchases goods or real estate from an interested party at a price extremely lower than the market price, or rents goods or real estate, or accepts a service at a price extremely lower than the market price, then the difference between the actual price and the market price is deemed a gift.
7. For example, lunch boxes worth around 2,000 yen to 3,000 yen.

4. Examination of Mandatory Reports on Gifts, etc., Received

The Ethics Act provides for a mandatory reporting system to promote a transparent relationship between national public employees and Business Operators. The National Public Service Ethics Board (the "Ethics Board")[8] examines the reports sent by each ministry to determine the propriety of the gifts, etc., received, and whether the reports were properly submitted.

Officials with the rank of deputy director or higher at the ministry or agency headquarters shall report to the heads of their ministries or agencies when accepting gifts, food, drinks, lecture fees, etc., and any other benefits from Business Operators, in excess of 5,000 yen. Reports on gifts, hospitality or remuneration worth more than 20,000 yen shall be open to the public upon request.

5. Case Studies

Can Business Operators offer food and drinks to a national public employee at a lecture attended by such public employee as part of his or her duties?

(1) The Case of a Business Operator that is an Interested Party

As mentioned above, while a national public employee may not allow an interested party to pay for food and drinks, an official can receive simple food and drinks at a meeting attended by the official as part of his or her duties. The Ethics Board has interpreted this to mean that the employee can also have a small amount of modest food and drinks served before or after a lecture attended by the employee as part of his or her duties.

(2) The Case of a Business Operator that is a Non-Interested Party

This would depend on whether or not the food and drinks exceed the conventionally socially acceptable limit. The Ethics Board has interpreted this to mean that the employee may have simple food and drinks.

8. The Ethics Board is responsible for activities concerning the observance of ethics among employees. This board is part of the National Personnel Authority.

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