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# Sports Arbitration, and the 2020 Tokyo Olympic and Paralympic Games

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Only seven months remain before Tokyo hosts the Olympic and Paralympic Games in the summer of 2020 (the "2020 Tokyo Olympics"). Public attention on the 2020 Tokyo Olympics and on sports, in general, is increasing all over Japan. It might therefore be a good time to review sports-related dispute resolution in Japan with a special focus on sports arbitration.

## Types of Sports Disputes and Choices for Resolution

A variety of disputes can arise in the sporting context, including contractual disputes, funding disputes, selection disputes, anti-doping and other disciplinary disputes, disqualification disputes, and administrative and rules disputes. In Japan, a claimant in any such dispute may use national court proceedings or arbitration/mediation by local and international agency/institutions. For intellectual property disputes, such as a case involving the commercial exploitation of rights to the image of an athlete, WIPO arbitration/mediation is also available.[1]

As long as a claim qualifies as a "legal dispute" for purposes of Article 3 of the Japanese Court Act,[2] filing a lawsuit with the Japanese national courts may be an option. However, considering the unique nature of sports-related disputes, such a claim may be dismissed due to lack of a "legal dispute" status and, even if it is not dismissed, filing a lawsuit in court may be impractical since sports-related disputes generally require a speedy and inexpensive resolution, with preference to confidential proceedings. Thus, alternative dispute resolution, especially sports arbitration, may be a more suitable option.[3]

## The Court of Arbitration for Sport ("CAS")

The CAS is a leading international sports arbitration/mediation institution located in Lausanne, Switzerland (with two decentralized offices in Sydney and New York). Any dispute directly or indirectly linked to sports may be submitted to the CAS by any individual or legal entity with the capacity to act, such as athletes, clubs, sports federations, organisers of sports events, sponsors or television companies. The procedures are expeditious (for the ordinary procedure, between six and 12 months, and for the appeals procedure, within three months after the transfer of the file to the panel). There are approximately 300 CAS arbitrators from 87 countries[4] and 5,057 cases have been submitted to it since its

1. https://www.wipo.int/ip-sport/en/dispute.html.
2. http://www.japaneselawtranslation.go.jp/law/detail/?vm=04&re=01&id=1894.
3. Sports mediation is also useful but unless the parties can voluntarily reach an amicable settlement, no final solution is possible.
4. https://www.tas-cas.org/en/general-information/frequently-asked-questions.html.

creation in 1986 with around 300 cases being registered every year.[5] Until 2016, however, not many cases involving Japanese athletes and entities have been filed with the CAS and, presently, there are only five Japanese CAS arbitrators.[6]

Recently, more cases involving the Japanese have been filed with the CAS, including a case of suspension for an anti-doping rule violation of a Japanese swimmer filed with the CAS in 2018,[7] and a case involving the selection of the Japanese national team for sports climbing for the 2020 Olympic Games over a change in the interpretation of the International Association of Athletics Federation ("IAAF") filed in November 2019.[8]

## The Japan Sports Arbitration Agency ("JSAA")

The JSAA was established in 2003 with a view to offering a fair, just and speedy resolution for sports related disputes through arbitration and mediation. It is now an independent general incorporated foundation and a Minister of Justice accredited dispute resolution provider. It is operated using funds received from the Japanese Olympic Committee ("JOC"), the Japan Sport Association ("JSA"), the Japanese Para-Sports Association ("JPA"), etc. With the enactment of the Japanese Basic Act on Sport in 2011, which, in relation to sports related disputes, aims to support arbitration and mediation, promote the protection of the rights of athletes, and seek cooperation from sports organizations for a fair and speedy resolution, the JSAA is expected to play a pivotal role in the resolution of sports related disputes in Japan.[9]

The JSAA has four sets of arbitration rules, namely, the rules for appeals arbitration, doping arbitration, party-consented arbitration and member organization arbitration.[10] According to the annual report of the JSAA for the fiscal year 2018 (ending on 31 March 2019),[11] 18 claims for appeals arbitration and one claim for doping arbitration were filed that fiscal year, making the total claims filed since its creation 83 for appeals arbitration and seven for doping arbitration.

The appeals arbitration procedure, which is for disputes resulting from decisions taken by the internal bodies of sports organisations, is designed to be a simple, speedy, and inexpensive procedure conducted by arbitrators with an expert knowledge in arbitration and sports law, under confidential procedures (the final award will be published on the website of the JSAA without disclosing the names of the parties). The appeals arbitration procedure has been used most frequently.[12]

## The CAS Ad hoc Division for the 2020 Tokyo Olympics

The CAS is expected to, as it did in the past Olympic and Paralympic Games (including the Olympic Games in London in 2012, Rio in 2016 and Pyeongchang in 2018),

5. https://www.tas-cas.org/fileadmin/user_upload/CAS_statistics_2016_.pdf.
6. A list of Japanese CAS arbitrators is available at https://www.tas-cas.org/en/arbitration/liste-des-arbitres-liste-generale.html?GenSlct=2&nmlpt=&LngCkbx%5B%5D=8.
7. https://www.reuters.com/article/us-swimming-doping/japanese-kogas-doping-ban-reduced-to-two-years-cas-idUSKCN1US1OS.
8. https://www.nikkei.com/article/DGXMZO51729670R01C19A1UU1000/ (in Japanese).
9. http://www.jsaa.jp/guide/sports/p07.html (in Japanese), and the White Paper on Sport in Japan by the Sasakawa Sports Foundation, Chapter 1 Sports Policy, http://www.ssf.or.jp/Portals/0/resources/outline/en/pdf/whitePaper2017_01.pdf.
10. http://www.jsaa.jp/guide/sports/p07.html (in Japanese).
11. http://www.jsaa.jp/doc/jigyou/2018report.pdf (in Japanese) and https://www.tas-cas.org/en/arbitration/ad-hoc-division.html.
12. http://www.jsaa.jp/sportsrule/arbitration/index.html#01 (in Japanese).

set up non-permanent tribunals of Ad Hoc Divisions and Anti-Doping Divisions for the 2020 Tokyo Olympics under special procedural rules that it is expected to establish.[13] In this connection, as was the case in previous Olympic Games, local legal pro bono services will be provided. The steering committee in charge has been recruiting around 30 local lawyers to represent athletes who may file claims with the Ad Hoc Divisions, and another 30 to provide athletes, coaches and other team members, sports organisations, etc., with free general legal advice on criminal law, civil law, immigration control law and sports law (including anti-doping), on a pro bono basis. It is hoped that these lawyers, especially those who will represent parties at the CAS, will qualify as future sports arbitration lawyers/arbitrators through their training and actual experience at the 2020 Tokyo Olympics.[14]

13. https://www.tas-cas.org/en/arbitration/ad-hoc-division.html.
14. At the Rio Games, as many as 28 applications were registered (although 16 of those were related to the status/eligibility of the Russian athletes following the IOC EB decision on their eligibility) (*see* https://www.tas-cas.org/fileadmin/user_upload/Media_Release__English__Salimi_final.pdf). *See* also http://www.jsaa.jp/release/2019/0426_2.html (in Japanese); and The Yomiuri, 3 July 2019, https://the-japan-news.com/news/article/0005850321.

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# 2019 Crypto Asset Amendment

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## I. Introduction

After the Payment Services Act ("PSA")[1] was enacted in April 2017, some incidents arose involving the diversion of the virtual currency of users due to unauthorized access and other issues surrounding the virtual currency exchange services. The Financial Services Agency ("FSA") thus established a Study Group on Virtual Currency Exchange Services, and the report of this study group was published in December 2018.

In response to the above report, amendments to the PSA (as revised, the "Revised PSA"), the Financial Instruments and Exchange Act ("FIEA," and as revised, the "Revised FIEA")[2] and other statutes were enacted on May 31, 2019 (collectively, the "Amendment"), to take effect next spring. This article provides a brief introduction of the major points of the Amendment.

## II. Major Revisions to the PSA

(1) From "Virtual Currency" to "Crypto Asset"
The Amendment renamed the term "virtual currency" (*kaso tsuka*) to "crypto asset" (*ango shisan*) since there has been an increased usage of the latter expression in recent international discussions.[3]

(2) Custody Services for Crypto Assets
Prior to the Amendment, the management of crypto assets of users in connection with the trading or exchange of crypto assets, or an intermediary, brokerage or agency service therefor, fell under the definition of the term, "Crypto Asset Exchange Service." However, the mere act of managing crypto assets of users without performing such trading or exchange, or any intermediary, brokerage or agency service ("Crypto Asset Custody Service"), did not constitute a Crypto Asset Exchange Service under the PSA.

The Amendment now stipulates that such Crypto Asset Custody Service will constitute a Crypto Asset Exchange Service as well.[4]

(3) Tightening of Regulations on Crypto Asset Exchange Services
The Amendment requires providers of Crypto Asset Exchange Services ("CAES Providers") who are not members of the Certified Association for Payment Service Providers to set internal rules equivalent to the

1. Shikin kessai ni kansuru horitsu [Payment Services Act], Act No. 59 of June 24, 2009, as last amended by Act No. 37 of June 14, 2019.
2. Kinyu shohin torihiki ho [Financial Instruments and Exchange Act], Act No. 25 of 1948, as last amended by Act No. 95 of December 14, 2018.
3. Revised PSA, art. 2, para. 5.
4. *Id.*, art. 2, para. 7.

self-regulatory rules of such association, and establish themselves as a corporate structure to comply with such internal rules upon their registration.[5]

As to the separate management of assets of users, the current PSA requires a CAES Provider to manage the money of the users separately from its own money as a deposit or savings at deposit-taking institutions, etc., or as a money trust at financial institutions, etc. The CAES Provider is also required to manage the crypto assets of a user separately from those of other users as a way to clearly distinguish the crypto assets of the users from those held as its own property, and to manage the crypto assets of the users in a manner that allows the crypto assets of each user to be immediately identified.

In contrast, the Amendment now requires a CAES Provider to manage the money of users separately from the CAES Provider's own money in the form of a trust with a trust company, etc., and to manage the crypto assets of a user separately from those of other users in accordance with a certain secure method to be specified by a Cabinet Office Order. A so-called "cold wallet" is expected to be specified as such method according to the FSA.[6]

Furthermore, the Amendment requires a CAES Provider to file prior notification with the FSA of any change in the name of the crypto assets to be handled, or the content and method of providing its Crypto Asset Exchange Services.[7] The Amendment also regulates the disclosure obligations on advertisements, and lists acts prohibited in advertisements and solicitations.[8]

## III. Major Revisions to the FIEA

(1) Electronically Recorded Transferable Right

The Amendment defines the term, "Electronically Recorded Transferable Right" (*denshi kiroku iten kenri*), which is treated as "Paragraph 1 Securities,"[9] to clarify the scope of tokens of initial coin offerings ("ICOs") governed by the FIEA. An Electronically Recorded Transferable Right is the right set forth in article 2, paragraph 2 of the FIEA, which is represented by a proprietary value (limited to the proprietary value recorded in an electronic device or otherwise by electronic means) that is transferable by using an electronic data processing system.[10]

Accordingly, an issuer is basically required to file a securities registration statement upon making a public offering or secondary distribution of Electronically Recorded Transferable Rights.

The Revised FIEA requires registration as a "Type I Financial Instruments Business Operator" to do the business such as trading, intermediary, brokerage or agency services, and dealing in a public offering, secondary distribution, etc., of Electronically Recorded Transferable Rights. On the other hand, self-solicitation by the issuers of Electronically Recorded Transferable Rights are categorized as a "Type II Financial Instruments Business" under the Revised FIEA.

(2) Derivatives for Crypto Assets

Since the Amendment added "crypto asset" as a "financial instrument" in article 2, paragraph 24, item 3-2 of the Revised FIEA, derivative transactions with crypto assets as the underlying assets, or with indexes of

5. *Id.*, art. 63-5, para. 1, item 6.
6. *Id.*, art. 63-11, paras. 1 and 2.
7. *Id.*, art. 63-6, para. 1.
8. *Id.*, arts. 63-9-2 and 63-9-3.
9. Paragraph 1 Securities are defined in Article 2, Paragraph 1 of the FIEA.
10. Revised PSA, art. 2, para. 3.

crypto assets as reference indexes, are now regulated by the Revised FIEA.

(3) Unfair Trade Regulations

The Amendment introduced a new series of unfair trade regulations regarding crypto asset transactions and derivative transactions involving crypto assets.[11] Violations of such regulations are subject to criminal punishment, but not administrative monetary penalties.

11. *Id.*, arts. 185-22 to 185-24.

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# The Supreme Court Interprets Public Policy in the Enforcement of Foreign Judgments in Japan

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## Factual Background

In 2013, a Californian company and its shareholders (the "Claimants") brought an action for damages against a Japanese company and its representative (the "Respondents"), as well as other parties in the Superior Court of Orange County, California. The attorney appointed by the Respondents submitted an answer but then resigned in the middle of the lawsuit with the court's permission. After the attorney's resignation, the Respondents failed to attend the court proceedings. The Claimants applied for the entry of a default judgment under the Code of Civil Procedure of California ("California CCP"), and in 2015, a default judgment was rendered against the Respondents.

Unlike the Code of Civil Procedure of Japan ("CCP"),[1] the California CCP does not require judgments to be served by the court. Under the California CCP, except in limited cases, the opposing party should prepare and serve a copy of the notice of entry of judgment on the other party.[2] When a judgment is entered against a party in an action, and even when there is no proof of service of the notice of the judgment, to appeal, in general, such party must file a notice of appeal within 180 days after the entry of such judgment.[3]

In this case, although the Claimants' attorney mailed the notice with a copy of the default judgment to the Respondents, the address used was wrong.[4] Because of this, it is likely that the Respondents did not receive the notice. Nevertheless, the 180-day period after the entry of judgment lapsed, and the judgment became final.

The Claimants brought an action in the Osaka District Court to enforce the judgment. The Respondents argued that the judgment did not meet the requirements for a final judgment rendered by a foreign court to be valid and enforceable under the CCP. Among other requirements,[5] Article 118(iii) of the CCP requires that

1. Minji soshoho [Code of Civil Procedure], Law No. 109 of June 26, 1996. Art. 255 of the CCP stipulates that a judgment should be served on the parties. Section 4 thereof provides the general rules on service. In Japan, service shall be made under the authority of the court, and administered by a court clerk, except as otherwise provided by law (CCP, art. 98).
2. California CCP, art. 664.5.
3. 2019 California Rules of Court, rule 8.104.
4. The Respondents' attorney informed the court of the address of Respondents' head office when he resigned, but the address was an old address. The Claimants' attorney mailed the notice to an address similar to but not exactly the same as the old address.
5. Art. 118 of the CCP stipulates that *"[A] final and binding judgment rendered by a foreign court is valid only if it meets all of the following requirements: (i) the jurisdiction of the foreign court is recognized pursuant to laws and regulations, conventions, or treaties; (ii) the defeated defendant has been served (excluding service by publication or any other service similar thereto) with the requisite summons or order for the commencement of litigation, or has appeared without being so served; (iii) the content of the judgment and the litigation proceedings are not contrary to public policy in Japan; and (iv) a guarantee of reciprocity is in place."*

the content of the foreign judgment and the litigation proceedings should not be contrary to public policy in Japan. The question therefore was: were the litigation proceedings in the US contrary to public policy when the Respondents, the losing parties, did not receive the service of the default judgment?

The Osaka District Court[6] held that the litigation proceedings were not contrary to public policy under Art. 118(iii) of the CCP just because there was no service of the judgment and other related documents. The court made a reservation, however, for special circumstances where the losing parties were not given sufficient opportunity to defend themselves. It decided that the litigation proceedings in the US court were not contrary to public policy because, judging from the relevant facts, the Respondents knew or could have known the contents of the judgment, and had sufficient opportunity to defend themselves.

On appeal, the Osaka High Court,[7] however, vacated the Osaka District Court's decision and dismissed the case. It held that the service of the judgment on the losing parties was intended to ensure, through the procedure, their right to appeal the court's decision, which constitutes one aspect of public policy that governs the Japanese litigation system. It ruled that the litigation proceedings in the US court were contrary to public policy under Article 118(iii) of the CCP because the default judgment became final without the service thereof on the Respondents and without granting them the opportunity to appeal.

## The Supreme Court's Ruling[8]

On further appeal, the Supreme Court vacated the Osaka High Court's decision and remanded the case. First, the Supreme Court confirmed its earlier decision[9] that the mere fact that a foreign judgment is based on legal rules that are different from the rules of Japan would not make such foreign judgment contrary to the requirements of Art. 118(iii) of the CCP, but that it would only be against public policy if such differing rules were against the fundamental principles of Japanese laws.

The Supreme Court further discussed the following:

(i) The Japanese service rules require judgments to be served on the parties under the authority of the court,[10] and a judgment will not become final until the period to appeal lapses after the service.[11] Service by publication is allowed only in limited circumstances.[12] The CCP ensures the parties' opportunity to appeal by letting them know or by giving them sufficient opportunity to know the contents of the judgment, which is a fundamental procedure in the litigation system of Japan.

(ii) Art. 118 of the CCP does not list the service of the judgment as a requirement, although it lists the service of the summons or court orders on parties for the commencement of the litigation as a requirement.[13]

(iii) It is clear that the procedural rules on the service of judgments differ from country to country, and from jurisdiction to jurisdiction.

In conclusion, the Supreme Court held that the

6. Osaka District Court, November 30, 2016.
7. Osaka High Court, September 1, 2017.
8. Supreme Court (Second Petty Bench), January 18, 2019, *Minshu* 73-1-1 1.
9. Supreme Court (Second Petty Bench), July 11, 1997, *Minshu* 51-6-2573.
10. CCP, art. 255.
11. *Id.*, arts. 116, 285 and 313.
12. *Id.*, arts. 98, 101, 106, 107 and 110.
13. *Id.*, art. 118(ii).

litigation proceedings would be contrary to public policy under Art. 118(iii) of the CCP if a foreign judgment becomes final without the parties being given the opportunity to appeal the same due to the parties either not knowing the contents of the judgment or not being given sufficient opportunity to know the contents of the judgment in the proceedings, even though it was possible to let them know of the same. The Supreme Court remanded the case for the court to further examine whether the Respondents knew or had been given sufficient opportunity to know the contents of the foreign judgment, and had the opportunity to file an appeal.

## Comments

This is the first Supreme Court decision that held that giving the parties the opportunity to appeal by letting them know or by giving them sufficient opportunity to know the contents of a judgment in the course of the litigation proceedings constitutes public policy under Art. 118(iii) of the CCP. What qualifies as sufficient opportunity, however, is not clear and can be different for each case. The upcoming Osaka High Court decision on remand may become a helpful example. The Osaka District Court initially found that the Respondents knew or could have known about the judgment and its contents at least four months before it became final based on the circumstances that took place after the entry of the judgment. However, even if the Osaka High Court arrives at the same factual finding as the Osaka District Court, namely, that the Respondents knew or could have known about the judgment albeit outside the course of the litigation proceedings, the court may still find that such circumstances do not meet the CCP requirements.

From a practical standpoint, to avoid the risk of an unsuccessful enforcement in Japan, it is important for a prevailing party in a foreign court to make sure that the losing party is fully informed of the judgment and its contents in the course of the litigation proceedings, and given sufficient time and the opportunity to submit an appeal.

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