

# OH-EBASHI LPC & PARTNERS

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### Articles

#### 1 JCAA's Amended Expedited Arbitration Procedures, Reduced Administrative Fees and New Appointing Authority Rules

Miriam Rose Ivan L. Pereira

Aiko Hosokawa



#### 2 Japan's Revised Corporate Governance Code

Yuzo Ogata



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# JCAA's Amended Expedited Arbitration Procedures, Reduced Administrative Fees and New Appointing Authority Rules



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## A. Introduction

The Japan Commercial Arbitration Association (“JCAA”) recently amended the expedited arbitration procedures in its Commercial Arbitration Rules and Interactive Arbitration Rules<sup>1</sup> to expand the scope of their application.<sup>2</sup> The new rules apply to cases filed on or after July 1, 2021. For cases commenced before such date, parties may agree to apply the new rules to their subsequent proceedings.<sup>3</sup> The JCAA also reduced the minimum amount of its administrative fees for the benefit of parties who wish to resolve small value claims using its services. Moreover, the JCAA launched a new set of Appointing Authority Rules effective from July 1, 2021 to fill a vacuum concerning ad hoc arbitration cases.<sup>4</sup>

This article will first describe the key changes to the expedited procedures of the Commercial Arbitration Rules (which changes were similarly reflected in the corresponding provisions of the Interactive Arbitration Rules). Thereafter, the amendments to the administrative fees of the JCAA and the new Appointing Authority Rules will be discussed.

## B. Broader and More Flexible Application of the Expedited Arbitration Procedures<sup>5</sup>

Below are the key changes to the Commercial Arbitration Rules.

### 1. Higher threshold amount

The amount in dispute for the new expedited procedures to automatically apply has been increased from JPY 50

1. For an overview of the former Interactive Arbitration Rules (2019), see generally Aiko Hosokawa and Miriam Rose Ivan L. Pereira, *The New Interactive Arbitration Rules of the Japan Commercial Arbitration Association*, Oh-Ebashi LPC & Partners Newsletter, Summer Issue (2019), 2-4, available at [https://www.ohebashi.com/jp/newsletter/20190624\\_NL\\_en\\_2019summer.pdf](https://www.ohebashi.com/jp/newsletter/20190624_NL_en_2019summer.pdf).

2. JCAA, *Amendment to Arbitration Rules and Enactment of Appointing Authority Rules*, June 10, 2021 (“JCAA Summary of New Rules”), p. 1, available at [https://www.jcaa.or.jp/files/news\\_attach/detail\\_attach00000202-31.pdf](https://www.jcaa.or.jp/files/news_attach/detail_attach00000202-31.pdf).

3. Supplementary provisions of the Commercial Arbitration Rules and Interactive Arbitration Rules.

4. JCAA Summary of New Rules, p. 1.

5. Unless otherwise stated, article references in this part pertain to the Commercial Arbitration Rules (2021).



million to JPY 300 million (approximately, USD 2.73 million) thereby expanding the application of such procedures (art. 84.1(a)). Notably, almost half of the cases administered by the JCAA from 2011 to 2020 (i.e., 47.4%) fell within this higher threshold amount.<sup>6</sup> This amendment is in line with the recent trend of amendments being made to the arbitration rules of other arbitral institutions.<sup>7</sup>

The threshold amount is based on the total sum of the claim, counterclaim and set-off defense (excluding claims for interest and costs) (art. 84.1(a)). The said amount shall be deemed exceeded if the JCAA finds that the economic value of the claim(s) cannot be calculated or it is extremely difficult to do so (art. 84.2). Also, even if the threshold amount is later exceeded due to an amended claim, the case will still be subject to the expedited procedures (art. 84.5).

For parties who wish to avail of the expedited procedures regardless of the amount in dispute, whether before or after a dispute arises, they may opt in by simply notifying the JCAA in writing of their agreement to submit their dispute to the said procedures (art. 84.1 (b)).<sup>8</sup>

## 2. Option to opt out at any time

The parties can opt out of the expedited procedures upon written notice to the JCAA at any time, e.g., even after JCAA's notice of the application of the said procedures (arts. 84.3(a) and 85.1(a)). Before the amendment, the parties had to notify the JCAA of their agreement not to submit the dispute to such procedures within two weeks from the respondent's receipt of the notice of the request

for arbitration.<sup>9</sup> Removing such time limit now offers more flexibility to the parties to explore these procedures.

## 3. Broader JCAA discretion to discontinue expedited procedures

Apart from the above opt-out option, the JCAA now has the discretion (a) to not apply the expedited procedures if, before the constitution of the tribunal, the JCAA finds that the parties' arbitration agreement has provisions that are contrary thereto or other circumstances exist that make such procedures clearly inappropriate (art. 84.3 (b)), or (b) where such procedures are no longer appropriate given the complexity of the case (even after JCAA's notice of the application of such procedures),<sup>10</sup> to terminate the said procedures and move the case to ordinary arbitration procedures after consulting the tribunal and the parties (art. 85.1(b)).

## 4. Certain ordinary arbitration procedures to apply

Due to the higher threshold amount, articles 85 and 86 were removed to make the following ordinary arbitration procedures apply: (a) the period to file counterclaims and/or raise set-off defenses (i.e., four weeks, and not two weeks, from the respondent's receipt of the notice of the request for arbitration) (arts. 19 and 20); and (b) amendments, which may be done with the tribunal's permission (art. 21).

Parties may also now opt for three arbitrators under the expedited procedures though the JCAA may invite them to agree to a sole arbitrator instead based on the dispute amount, complexity of the case and other circumstances (art. 86.2).

6. JCAA Summary of New Rules, p. 3.

7. For example, under the latest amendments to the Rules of Arbitration of the International Chamber of Commerce ("ICC") (2021), for arbitration agreements entered into on or after January 1, 2021, the expedited procedure rules shall apply if the amount in dispute is USD 3 million or less, which is higher than the previous amount of USD 2 million or less (Appendix VI, art. 1.2).

8. At the contractual stage, parties may refer to the JCAA's recommended clause at <https://www.jcaa.or.jp/en/arbitration/clause.html>.

9. The former Commercial Arbitration Rules (2019), art. 84.1(b).

10. JCAA Summary of New Rules, p. 3.



### 5. Period to render an award

This period now depends on the amount of the dispute.<sup>11</sup> It will be six months from the constitution of the tribunal where the amount is more than JPY 50 million, but it will still be three months for smaller disputes worth JPY 50 million or less (arts. 88.1 and 88.2). Only the JCAA, and not the tribunal, can extend the applicable period in exceptional circumstances (art. 89).

To enable the tribunal to render an award within the applicable period,<sup>12</sup> the tribunal must now consult the parties by videoconferencing or other means, and prepare and send a procedural schedule to them and the JCAA within two weeks from the date it is constituted (art. 88.3).

### 6. Documents only and optional hearings

The expedited procedures will still generally be conducted as a documents-only procedure unless the tribunal decides to hold a hearing after consulting and obtaining the parties' agreement (art. 87.1). For hearings, the tribunal must now use videoconferencing or other appropriate means, and keep such hearings as short as possible (art. 87.2). This will prompt tribunals to be more innovative in conducting these procedures.

## C. Changes to the JCAA's Administrative Fees

As to the administrative fees of the JCAA that claimants must pay when requesting for arbitration, the JCAA added a new tier to reduce the minimum fee to just 10% of the amount or value of a claim that is less than JPY 5 million

while limiting the scope of the second tier fee of JPY 500,000 to disputes ranging from JPY 5 million to less than JPY 20 million.<sup>13</sup> Before these amendments, the minimum fee was JPY 500,000 for any claim less than JPY 20 million. These changes were reflected in article 103.1 of the Interactive Arbitration Rules and article 24.1 of the Administrative Rules for UNCITRAL Arbitration as well. With the lower and more reasonable administrative fees, parties can now resolve even small value disputes using the services of the JCAA.

## D. New Appointing Authority Rules<sup>14</sup>

In ad hoc arbitration, parties can select an arbitral institution to appoint one or more arbitrators for them. For example, under the UNCITRAL Arbitration Rules (2013)<sup>15</sup> commonly used in ad hoc arbitration, parties can agree on an appointing authority and, absent such agreement, any party may request the Secretary-General of the Permanent Court of Arbitration at the Hague to designate such appointing authority.<sup>16</sup> Since some arbitral institutions have specific rules to act as such appointing authority,<sup>17</sup> the JCAA decided to also launch its own Appointing Authority Rules for parties who wish to designate the JCAA to fulfill such role. However, the said rules will not apply to cases conducted under the UNCITRAL Arbitration Rules as supplemented by the JCAA's Administrative Rules for UNCITRAL Arbitration, whereby the parties have agreed to the JCAA providing administrative services, including but not limited to its appointment services (art. 1).

11. *Id.*, p. 5.

12. *Id.*, pp. 5-6.

13. Commercial Arbitration Rules (2021), art. 103.1.

14. Unless otherwise stated, article references in this part pertain to the Appointing Authority Rules (2021).

15. These rules are available at

<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013-e.pdf>.

16. UNCITRAL Arbitration Rules (2013), art. 6.2.

17. For example, the ICC has the Rules of ICC as Appointing Authority in UNCITRAL or Other Arbitration Proceedings (2018) while the Hong Kong International Arbitration Centre has the Rules as Appointing Authority (2019).



Below are some of the highlights of the new Appointing Authority Rules.

### 1. Application requirements

The application for the appointment services of the JCAA must meet the following requirements: (a) the request must be in writing and state the required information, including the appointment request, a reference to and details of the parties' agreement empowering the JCAA to make such appointment or the applicant's opinion on such appointment, the details of the parties and their representatives, the request for arbitration (and the answer, if any), and the estimated amount of the dispute; (b) a copy of the parties' agreement on appointment must be submitted; and (c) payment must be made within the period designated by the JCAA of the application fee of JPY 100,000 plus consumption tax per arbitrator (arts. 6 and 11(a)).

### 2. The JCAA's appointment discretion

In appointing an arbitrator, the JCAA shall consider the arbitrator candidate's background, nationality, residence, language skill, expertise, experience as an arbitrator, availability, and any other relevant factors (art. 9.3). The JCAA shall also consider the opinions of the parties and take into account their order of preference of the arbitrator

candidates provided by the JCAA, if timely submitted, and any other circumstances (art. 9.2). The JCAA shall decline to appoint an arbitrator if it finds that the opinion of the responding party justifies that no arbitrator should be appointed by it (art. 7.3). The JCAA may also decline to make an appointment in the reasonable exercise of its discretion in exceptional circumstances (art. 7.5). If the parties wish to later challenge an appointment made by the JCAA, they must pay another fee of JPY 300,000 plus consumption tax per arbitrator (art. 11(b)).

### E. Conclusion

According to the JCAA, the average duration of JCAA-administered expedited arbitration procedures concluded from 2011 to 2020 was 3.5 months.<sup>18</sup> Unfortunately, only 22 out of the JCAA's 139 cases for the said period were conducted under the said procedures.<sup>19</sup> Hopefully, the new and more flexible expedited arbitration procedural rules, coupled with the reduced administrative fees, will entice more parties to avail of them to save on time and costs.

As to the new Appointing Authority Rules, parties in ad hoc arbitration now have a clearer path if they wish to turn to the JCAA for their arbitrator appointments.

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18. JCAA Summary of New Rules, p. 1.

19. *Id.*

# Japan's Revised Corporate Governance Code



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## A. Introduction

On June 11, 2021, Tokyo Stock Exchange, Inc. (“TSE”) released the latest revision to Japan’s Corporate Governance Code (the “Code”).<sup>1</sup> The Code was put together in 2015 and first revised in 2018. It establishes the fundamental principles for effective corporate governance at listed companies in Japan.

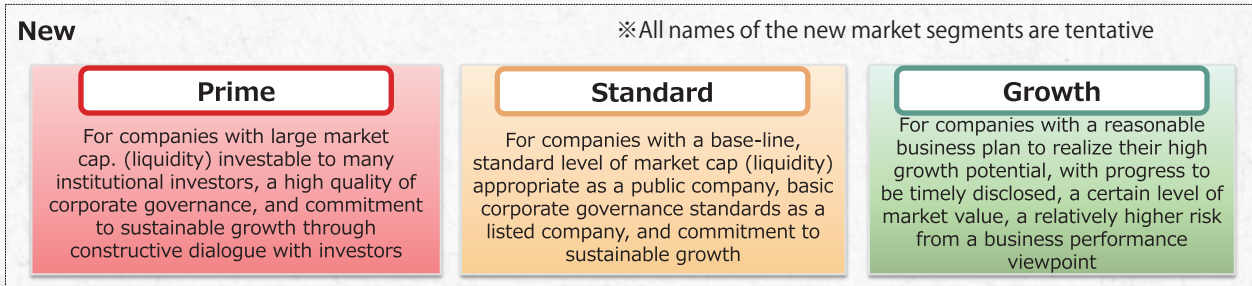
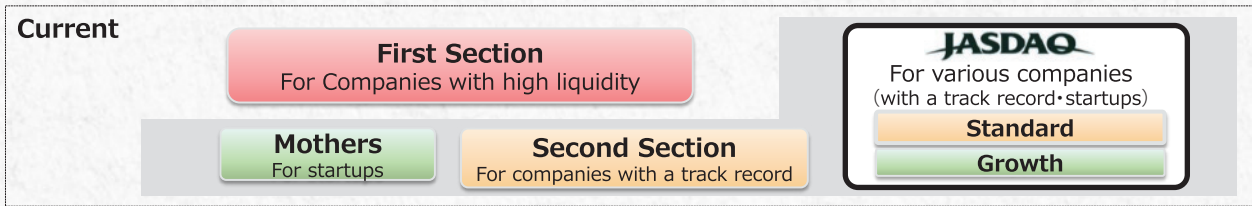
The recent second revision of the Code aims to advance governance reforms to promote the continuous growth of companies and increase their corporate value over the mid- to long-term in light of the changing environment surrounding business firms triggered by the COVID-19 pandemic.

As a prerequisite knowledge to understanding the above revision of the Code, it is necessary to mention the

upcoming restructuring of the cash equity market. TSE is planning to restructure the cash equity market from April 4, 2022 by reorganizing the current five market segments, namely, the First Section, Second Section, Mothers, and JASDAQ (Standard and Growth), into three new market segments, namely, Prime, Standard and Growth.<sup>2</sup> The Code has been revised, in part, to set a higher standard for companies to be listed on the Prime Market. The Prime Market will be a market for companies whose market capitalization (liquidity) is large enough (at least JPY 10 billion) to attract investments from many institutional investors. They must have a high quality of corporate governance as well as a commitment to sustainable growth and mid- to long-term improvement of their corporate value with a focus on constructive dialogues with investors.

1. A provisional translation of the revised Code is available at <https://www.jpx.co.jp/english/news/1020/b5b4pj0000046kxj-att/b5b4pj0000046l0c.pdf>.

2. See <https://www.jpx.co.jp/english/equities/improvements/market-structure/index.html>.



Source: TSE.<sup>3</sup>

## B. Overview of the Revision of the Code

The main points of the revisions to the Code are shown in the table below. The revision addresses issues concerning enhancing board independence, promoting diversity, and attention to sustainability and environmental, social and governance (“ESG”). In addition, it addresses the terms related to (a) group governance, (b) ensuring confidence in audits, internal control and risk management, (c) matters related to general shareholders’ meetings, and (d) business portfolio management. Notably, the use of electronic voting platforms and disclosures in English are being promoted for Prime Market listed companies.

### The Main Points of the Revisions to the Code<sup>4</sup>

#### 1. Enhance Board Independence

- Increased the minimum number of independent directors from two to one-third of the board for Prime Market listed companies (a majority of the board members must be elected as independent directors whenever necessary) (Principle 4.8)
- Create a nomination committee and a remuneration committee (appoint enough independent directors to have them form a majority of the committee members for Prime Market listed companies) (Supplementary Principle 4.10.1)
- Disclose a skill matrix of board members that is consistent with the business strategy of the company (Supplementary Principle 4.11.1)
- Appoint independent directors with managerial experience from other companies (Supplementary Principle 4.11.1)

3. Outline of the New Market Segments dated February 21, 2020, at <https://www.jpx.co.jp/english/equities/improvements/market-structure/b5b4pj000002rxte-att/b5b4pj000003b0f1.pdf>, p. 5.

4. Japan Exchange Group, Publication of Revised Japan’s Corporate Governance Code (June 11, 2021), <https://www.jpx.co.jp/english/news/1020/20210611-01.html> (with some additional points added by the author).



## 2. Promote Diversity

- Disclose policy and voluntary measurable targets that promote diversity in senior management, such as by appointing women, non-Japanese/foreigners and mid-career professionals (Supplementary Principle 2.4.1)
- Disclose human resource development policies that ensure diversity, including the status of their implementation (Supplementary Principle 2.4.1)

## 3. Give Attention to Sustainability and ESG

- Develop a basic policy and disclose the sustainability initiatives of the company (Supplementary Principles 4.2.2 and 3.1.3)
- For Prime Market listed companies, enhance the quality and quantity of climate-related disclosures based on the recommendations of the Task Force on Climate-related Financial Disclosures (TCFD) or equivalent international frameworks (Supplementary Principle 3.1.3)

## 4. Other Notable Major Points

- Appoint enough independent directors to have them form a majority of the board or create an independent special committee at Prime Market listed subsidiaries to address conflicts of interest between their parent company and their own minority shareholders (Supplementary Principle 4.8.3)
- Establish on an enterprise basis effective internal control and proactive enterprise risk management systems and oversee their operational status (Supplementary Principle 4.3.4)
- Establish a system, which enables the internal audit department to appropriately report directly to the board as well as the audit and supervisory board (*kansayaku* board) (Supplementary Principle 4.13.3)
- Promote the use at Prime Market listed companies of electronic voting platforms and disclosures in English (Supplementary Principles 1.2.4 and 3.1.2)
- Present the basic policy decided by the board regarding the business portfolio and the status of the review of such portfolio (Supplementary Principle 5.2.1)

The Code will continue to adopt a “comply or explain” approach in light of the fact that the optimal governance system from the perspective of promoting the continuous growth of companies and increasing their corporate value over the mid- to long-term varies depending on their respective circumstances.

## C. Implementation of the Revised Code

Companies are required to submit their corporate governance reports<sup>5</sup> reflecting the revised Code by December this year. In this regard, TSE will implement its new market segmentation from April 4, 2022. Some of the principles and supplementary principles of the revised Code will apply only to companies listed on the Prime Market, while others will apply to companies listed on other markets, or to all listed companies. The status of implementation of the principles and supplementary principles that are applicable only to Prime Market listed companies must be included in their corporate governance reports, which must be submitted without delay after the holding of their general shareholders’ meetings on or after April 4, 2022.

From the perspective of enhancing constructive dialogues between institutional investors and companies, it would be beneficial for companies to proactively explain their own specific initiatives in conjunction with their implementation of each applicable principle of the Code.

Lastly, depending on their situation, it would also be desirable for companies listed on other markets to take voluntary initiatives to improve their governance by using as a reference the items of the Code that apply to Prime Market listed companies.

5. TSE requires every listed company to prepare this report on corporate governance, which provides investors with information on its corporate governance in a comparable format.





#### D. Conclusion

It is hoped that the investors and directors of listed companies, including the independent directors, will work together to address various social issues while realizing sustainable growth and mid- to long-term improvement of their corporate value.

[Back to List of Articles](#) ➔

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