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Japan

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Introduction

Japan is a member state of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “NY Convention”), with a declaration to apply the NY Convention to the recognition and enforcement of awards made only in the territory of another contracting state (in accordance with Article I.3 of the NY Convention). While Japan is not a party to any other convention on the recognition and enforcement of arbitration awards, its signature to the NY Convention soon after it came into force (on 20 June 1961) shows Japan’s arbitration-friendly attitude. Moreover, from a practical point of view, Japanese courts generally take a pro-arbitration stance (see the Enforcement of the Arbitration Award section below).

In Japan, the rules on arbitration are provided by the Arbitration Act (Act No. 138 of 2003, the “JAA”), which applies to “[a]rbitral proceedings where the place of arbitration is in the territory of Japan” (Article 1), regardless of whether the proceedings are domestic or international. The JAA is based on the United Nations Commission on International Trade Law (“UNCITRAL”) Model Law, and almost all the articles of the UNCITRAL Model Law are reflected in the JAA, except for the amendments to the Model Law adopted in 2006. In order to reflect the amendments to the Model Law adopted in 2006, and also deal with the recent developments in the international dispute resolution fields (including the United Nations Convention on International Settlement Agreements Resulting from Mediation (“Singapore Convention”), which came into force in September 2019), the Japanese Government is now engaged in a discussion with regard to the amendments to the JAA.

It is worth noting that, under the JAA, an arbitral tribunal may try to settle civil disputes subject to the arbitral proceedings “if consented to by the parties” (Article 38.4) in writing (Article 38.5). This reflects Japanese court procedures, which allow a judge to attempt to settle a dispute even without the initiative of any party (Japanese Code of Civil Procedures, Article 89). We understand that this is quite unique to Japan and may not be familiar to common law countries. The JAA makes it clear that any attempt at settlement by arbitrators is different from attempts in court proceedings, and requires initiation by the parties themselves.

Japan has no special court for international arbitration, and jurisdiction is decided in accordance with Article 5 of the JAA, which stipulates that the jurisdiction of cases related to arbitration is with: (a) the district court designated by agreement of the parties; (b) the district court with jurisdiction over the place of arbitration (only when the designated place of arbitration falls within the jurisdiction of a single district court); or (c) the district court with personal jurisdiction over the counterparty in the case (Article 5.1).

Japan has an arbitration institution, the Japan Commercial Arbitration Association (the “JCAA”). The JCAA was established in 1950 as part of the Japan Chamber of Commerce and

Industry with the support of six other business organisations, including the Japan Federation of Economic Organisations, the Japan Foreign Trade Council and the Federation of Banking Associations of Japan, to settle commercial disputes and promote international trade.

There are three sets of arbitration rules (which came into force on 1 January 2019), namely the: (a) Commercial Arbitration Rules (the “JCAA Commercial Arbitration Rules”); (b) Interactive Arbitration Rules (the “JCAA Interactive Rules”); and (c) the Administrative Rules for UNCITRAL Arbitration (together with the UNCITRAL Arbitration Rules 2010, the “JCAA UNCITRAL Arbitration Rules”; and together with the JCAA Commercial Arbitration Rules and the JCAA Interactive Rules, the “JCAA Rules”). The JCAA Commercial Arbitration Rules will apply if the arbitration agreement provides for JCAA arbitration without specifying the applicable arbitration rules (Article 3.2 of the JCAA Commercial Arbitration Rules).

The following are brief summaries of the rules:

(a) JCAA Commercial Arbitration Rules

These rules were originally drafted based on the UNCITRAL Model Rules. The current version, however, clearly defines the role of the presiding arbitrator, provides explicit rules on the tribunal secretary to be appointed by the sole or presiding arbitrator, and prohibits an arbitrator from disclosing his/her dissenting opinion in any manner.

(b) JCAA Interactive Rules

These rules aim to address the perception that arbitration is too expensive (especially for Japanese companies which are used to the cost-efficient service of the court system and contingent attorneys’ fees), by mandating the “communication” between the parties and the arbitral tribunals and adopting a fixed system for arbitrators’ remuneration.

(c) JCAA UNCITRAL Arbitration Rules

These rules provide for the minimum essentials for the JCAA to administer arbitral proceedings in accordance with the UNCITRAL Arbitration Rules, which were originally drafted as mere *ad hoc* arbitration rules. The JCAA UNCITRAL Arbitration Rules allow the JCAA to maintain its list of arbitrators, including those who are internationally recognised as leading experts, in order to provide the highest-quality dispute resolution services.

In this chapter, we assume that readers are familiar with the JCAA UNCITRAL Arbitration Rules; thus, we will focus on the JCAA Commercial Arbitration Rules and the JCAA Interactive Rules.

We also wish to highlight that, separately from the JCAA, the Japan International Dispute Resolution Centre (the “JIDRC”) was established in February 2018 as a joint undertaking of the public and the private sectors. The JIDRC provides facilities specialised for arbitration and other types of alternative dispute resolution in Japan, just like Maxwell Chambers in Singapore. The JIDRC started its operations in Osaka (JIDRC-Osaka) in May 2018, and also started operations in Tokyo in March 2020.

Arbitration agreement

An arbitrable case under the JAA is a “civil dispute that may be resolved by settlement between the parties (excluding that of divorce or separation)” (Article 13.1). However, two special rules under the JAA must be noted. One, individual labour-related disputes (as described in Article 1 of the Act on Promoting the Resolution of Individual Labour Disputes (Act No. 112 of 2001)) are excluded from the scope of arbitrable cases (Article 4 of the Supplementary Provisions to the JAA). Two, there are special rules regarding the arbitration agreement between a consumer and a business operator which allow the

consumer to cancel the arbitration agreement (Article 3.2 of the Supplementary Provisions to the JAA). These rules stem from the fact that arbitration involving individuals is not common in Japanese culture. On the assumptions that arbitration is much more expensive than going to court, and that an arbitration agreement will deprive an individual of the choice of court actions, these rules seek to protect individuals in dispute resolution.

Under the JAA, an arbitration agreement must be in writing, such as a document signed by all parties or a letter or telegram exchanged between them (including those sent by facsimile or other communication devices which provide the recipient with a written record of the transmitted contents) (Article 13.2). An arbitration agreement may, of course, be included in a contract, and the validity of that arbitration agreement is not necessarily affected even if any or all of the other contractual provisions are found to be void (separability, Article 13.6). The JCAA's website provides for the following standard arbitration clause: "All disputes, controversies or differences arising out of or in connection with this contract shall be finally settled by arbitration in accordance with the Commercial Arbitration Rules of The Japan Commercial Arbitration Association. The place of arbitration shall be [city and country]." (Sample for the JCAA Commercial Arbitration Rules.)

The JCAA Rules, but not the JAA, provide for the joinder or consolidation of third parties to an arbitration case. Article 56 of the JCAA Commercial Arbitration Rules and Article 57 of the JCAA Interactive Rules, respectively, stipulate the rules on joinder, and Article 57 of the JCAA Commercial Arbitration Rules and Article 58 of the JCAA Interactive Rules, respectively, stipulate those on consolidation.

Under these rules, a third party can join (or be involved at the initiative of the parties) if: (a) all the parties and the third party agree in writing to the joinder; or (b) all claims are made under the same arbitration agreement. The third party's written consent to the joinder is necessary if the third party is requested to join as a respondent after the constitution of the arbitral tribunal.

A consolidation is allowed if: (a) all parties have agreed in writing; (b) all claims arise under the same arbitration agreement (see Article 57(2) for the detailed rules); or (c) all claims arise between the same parties and all of the following conditions are satisfied: (i) the same or a similar question of fact or law arises from the claims; (ii) the dispute is referred by the arbitration agreement to arbitration under the JCAA Commercial Arbitration Rules or to the JCAA; and (iii) the arbitral proceedings are capable of being conducted in a single set of proceedings with regard to the place of arbitration, number of arbitrators, language of the arbitral proceedings and other issues governed by the arbitration agreement under which the claims arise.

It is worth noting that, under the expedited procedure of the JCAA Commercial Arbitration Rules, joinders and consolidations are not allowed (Article 90 of the JCAA Commercial Arbitration Rules).

The issue of the existence or validity of an arbitration agreement, together with its jurisdiction, is within the competence of an arbitral tribunal (competence-competence principle, Article 23.1 of the JAA).

Arbitration procedure

Under the JAA, arbitral proceedings in respect of a particular civil dispute commence on the date when one party gives the other party notice to refer that dispute to arbitration (Article 29.1). Meanwhile, under the JCAA Commercial Arbitration Rules, the claimant is required to submit to the JCAA a written request for arbitration (the "Request for Arbitration") in order to start arbitral proceedings, and the arbitral proceedings are deemed

to have commenced on the date when the JCAA (not the respondent) receives the Request for Arbitration (Articles 14.1 and 14.6).

The parties can agree on the place of arbitration (Article 28.1 of the JAA). If there is no such agreement, it is the arbitral tribunal that will decide the place of arbitration under the JAA (Article 28.2), while the JCAA Commercial Arbitration Rules stipulate that the place shall be the city of the JCAA office to which the Request for Arbitration was submitted, i.e., Tokyo or Osaka (Article 39.1). Meanwhile, it should be noted that under both the JAA and the JCAA Commercial Arbitration Rules, hearings may be conducted at any place the arbitral tribunal considers appropriate (Article 28.3 of the JAA and Article 39.2 of the JCAA Commercial Arbitration Rules).

The parties can agree on the rules of the arbitral proceedings that the arbitral tribunal must comply with; if there is no agreement between the parties, the arbitral tribunal may conduct the arbitral proceedings in the manner it considers appropriate (Articles 26.1 and 26.2 of the JAA). The JAA further stipulates and makes clear that the power conferred upon the tribunal in case there is no agreement between the parties includes the power to determine the admissibility, relevance, materiality and weight of any evidence (Article 26.3). In this regard, the JCAA Commercial Arbitration Rules do not have specific rules and, in most cases, the rules regarding evidence are decided by the arbitral tribunal based on discussion with the parties; there are many cases where the International Bar Association Rules on the Taking of Evidence in International Arbitration are taken into account.

On a separate note, it is worth noting that it is not only the parties that can retain expert witnesses; arbitral tribunals may appoint experts and ask them to report their findings orally or in writing (Article 34.1 of the JAA and Article 55.1 of the JCAA Commercial Arbitration Rules).

Under the JCAA Commercial Arbitration Rules, arbitral proceedings are held in private; all records are closed to the public; and the parties involved, including the arbitrators and counsel, generally owe confidential obligations (Article 42).

Arbitrators

How many arbitrators and how they will be appointed, in general, depends on the agreement between the parties. Both the JAA and the JCAA Rules have default rules for cases where such an agreement is lacking (Articles 16 and 17 of the JAA; Articles 25 to 30 of the JCAA Commercial Arbitration Rules; Articles 25 to 30 of the JCAA Interactive Rules).

Just as in the UNCITRAL Model Law, the JAA stipulates the grounds for challenging an arbitrator (Article 18), namely: (a) the arbitrator does not possess the qualifications agreed by the parties; or (b) there are circumstances that give rise to justifiable doubts as to the arbitrator's impartiality or independence. In this regard, because of the actual case regarding a conflict of interests of an arbitrator, as explained in "Challenge of the arbitration award" below, the new JCAA Rules highlight and enhance the impartiality and independence of arbitrators (Article 24 of the JCAA Commercial Rules and Article 24 of the JCAA Interactive Rules).

In addition, the new JCAA Rules stipulate the rules regarding the tribunal secretary (Article 33 of the JCAA Commercial Rules and Article 33 of the JCAA Interactive Rules), which clarify that it is only arbitrators who may perform tasks that substantially influence the arbitral tribunal's decision, including the arbitral award (Article 33.1), and entitle a sole arbitrator and a presiding arbitrator to appoint a third person to assist that arbitrator in his or her mandate (Article 33.2), with the impartiality and independence requirements and obligation of confidentiality (Article 33.3).

The remuneration and expenses of the tribunal secretary are deemed expenses of the sole arbitrator or the presiding arbitrator, and the remuneration of the tribunal secretary is included in the remuneration of that arbitrator for purposes of calculating the upper limit of the remuneration of that arbitrator (Article 33.4).

Apart from the challenge, any party may request a court (under the JAA) or the JCAA (under the JCAA Rules) to remove an arbitrator: (a) if the arbitrator becomes *de jure* or *de facto* unable to perform his/her function; or (b) for reasons other than those in the proceeding item, if the arbitrator acts with undue delay (Article 20 of the JAA; Article 35 of the JCAA Commercial Rules; Article 35 of the JCAA Interactive Rules). In addition, under the JAA, an arbitrator's mandate terminates upon the occurrence of: (a) his/her death; (b) his/her resignation; (c) his/her removal upon the agreement of the parties; (d) his/her issuance of a decision that confirms the existence of grounds to challenge him/her; or (e) the issuance of a decision by the relevant arbitration institution to remove him/her based on the relevant arbitration rules.

The JCAA Commercial Rules (Article 13) and JCAA Interactive Rules (Article 13) each stipulate the immunity of arbitrators, i.e., “(n)either the arbitrators nor the JCAA (including its directors, officers, employees and other staff members) shall be liable for any act or omission in connection with the arbitral proceedings unless such act or omission is shown to constitute wilful misconduct or gross negligence”.

Interim relief

Article 24.1 of the JAA provides that, unless otherwise agreed by the parties, the arbitral tribunal may, upon the request of a party, order any party to take such interim or provisional measures as the arbitral tribunal considers necessary in respect of the subject matter of the dispute. The JCAA Rules further set out examples of interim measures that can be granted by the arbitral tribunal, such as orders to: maintain or restore the *status quo*; take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral proceedings; provide means of preserving assets out of which a subsequent arbitral award may be satisfied; or preserve evidence that may be relevant and material to the resolution of the dispute (Article 71.1 of the JCAA Commercial Arbitration Rules and Article 72.1 of the JCAA Interactive Rules).

The parties, however, are at liberty to apply to either Japanese courts or arbitral tribunals for such interim measures. In contrast to a main action on the merits before a Japanese court, where the Japanese court shall dismiss an action regarding a dispute which is the subject of an arbitration agreement (Article 14.1 of the JAA), Article 15 of the JAA provides that an arbitration agreement does not preclude the parties from filing a petition before a Japanese court, before or during the course of the arbitration, for interim measures in respect of the dispute which is the subject of the arbitration agreement.

It is worth noting that interim orders rendered by arbitral tribunals are not considered enforceable in Japan, at least under the current JAA. Under Article 45.2(vii) of the JAA, the fact that the arbitral award is “not final and binding” is one of the grounds to deny the enforceability of such an award in Japan. Therefore, the parties usually apply for interim measures to arbitral tribunals with the expectation of voluntary performance by the parties. In such cases, however, given that the parties have agreed on the arbitration agreement, and that it will be difficult for them not to follow the order of the arbitral tribunal, the voluntary performance of the parties can be expected to a reasonable degree. It is also said that, in practice, in a majority of cases, the parties voluntarily comply with interim orders of arbitral

tribunals. That being said, as mentioned above, the Japanese Government is now taking steps to amend the JAA, and it is anticipated that in the near future the JAA will be amended so that the interim orders rendered by arbitral tribunals will be enforceable in Japan.

With respect to security, Article 24.2 of the JAA provides that the arbitral tribunal may order any party to provide appropriate security in connection with such interim or provisional measures. The JCAA Rules also provide for the same (Article 72 of the JCAA Commercial Arbitration Rules and Article 73 of the JCAA Interactive Rules).

Arbitration award

Article 39 of the JAA provides for the formal requirements of an arbitral award. Among others, an arbitral award must be made in writing and signed by the arbitrators who made it. However, if there is more than one arbitrator, the signatures of a majority of the members of the arbitral tribunal will suffice if the award states the reason for the absence of the signatures of the other members. An arbitral award must also state the reasons upon which it is based, unless otherwise agreed by the parties. If the reasons are omitted, the JCAA Commercial Arbitration Rules and the JCAA Interactive Rules require the arbitral tribunal to state the reason for such omission in the arbitral award (Article 66.3 of the JCAA Commercial Arbitration Rules and Article 67.3 of the JCAA Interactive Rules).

The JAA does not provide for any specific time frame for issuing the arbitration award. For arbitration proceedings under the JCAA Commercial Arbitration Rules and the JCAA Interactive Rules, the arbitral tribunal must make reasonable efforts to render an arbitral award within nine months and seven-and-a-half months, respectively, from the date of constitution of the arbitral tribunal (Article 43.1 of both the JCAA Commercial Arbitration Rules and the JCAA Interactive Rules).

With respect to the allocation of the costs, Articles 49.1 and 49.2 of the JAA provide that the costs for the arbitration proceedings shall be apportioned in accordance with the agreement of the parties, and that if the parties fail to reach an agreement, each party shall bear the costs it has incurred for the arbitration proceedings. However, Article 49.3 of the JAA allows the arbitral tribunal to determine the allocation of the costs in an arbitral award or in an independent ruling, if the parties so agree. Therefore, if the parties agree on the application of any of the JCAA Rules, the provisions of the JCAA Rules regarding the allocation of the costs will apply.

Under the JCAA Commercial Arbitration Rules and the JCAA Interactive Rules, the arbitral tribunal may apportion the costs between the parties, taking into account the parties' conduct throughout the course of the arbitration proceedings, the determination on the merits of the dispute, and any relevant circumstances (Article 80.2 of the JCAA Commercial Arbitration Rules and Article 81.2 of the JCAA Interactive Rules).

Challenge of the arbitration award

The unsuccessful party in an arbitration proceeding may file a petition with a competent Japanese court to set aside the arbitral award within three months from the date of receiving the copy of the award and before any enforcement decision of a Japanese court (detailed below) has become final and binding (Articles 44.1 and 44.2 of the JAA).

The grounds for setting aside an arbitral award are stipulated in Article 44.1 of the JAA, which substantially mirror those set out in the NY Convention and the UNCITRAL Model Law. In other words, most of the grounds are limited to serious procedural defects such as

invalidity of the arbitration agreement, defective composition of the arbitral tribunal, and the failure to give the party the opportunity to appear or present its case in the arbitration proceedings. In addition, if the contents of the arbitral award are in conflict with public policy or good morals in Japan, this would constitute another ground to set aside the award (Article 44.1(viii) of the JAA).

As a judicial precedent, on December 12, 2017, the Supreme Court of Japan rendered a decision regarding the issue of setting aside an arbitral award on the ground of a conflict of interests of an arbitrator (Supreme Court of Japan December 12, 2017, Hei 28 (Kyo) No. 43). In that case, the presiding arbitrator was an attorney at the Singapore office of an international law firm. A new attorney, who joined the San Francisco office of the same law firm after the commencement of the arbitration proceedings, represented a sister company of one of the parties in an unrelated litigation in California, but the presiding arbitrator failed to disclose this fact. Although the presiding arbitrator made an advance declaration and a waiver of potential future conflicts of interests before the commencement of the proceedings, the Supreme Court held that such an abstract declaration did not constitute proper disclosure and remanded the case to the Osaka High Court, holding that further fact-finding was necessary to determine whether the presiding arbitrator was actually aware of the conflict, and whether he would have been aware of it had he exerted reasonable efforts. Given that, the Osaka High Court acknowledged that the presiding arbitrator ran a conflict check within his law firm but could not be aware of the conflict due to the error of the aforesaid colleague, and denied the presiding arbitrator's breach of obligation, as he had properly utilised the conflict-check system of the general level.

Another case involving the setting-aside of an arbitral award is a Tokyo High Court decision dated August 1, 2018. In this case, the unsuccessful party in an arbitration argued various grounds to set aside the arbitral award, but the Tokyo High Court denied most of them by simply pointing out that they do not constitute grounds to set aside an arbitral award under the JAA. In addition, the court ruled that, even if the "cause of action" written in the request for arbitration (i.e., damages) was different from that granted in the arbitral award (i.e., unjust enrichment) from the perspective of Japanese civil procedure law, this does not constitute a ground to set aside the award, as long as the legal structure adopted in the arbitral award can be reasonably expected from the economic and social facts provided in the request for arbitration. The decision also clarified that including a minority opinion in the arbitral award is not prohibited under the JAA or the JCAA Rules and, thus, does not constitute a ground to set aside the award.

As for the correction of an arbitral award based on clear clerical errors, Article 41 of the JAA provides that the parties may request the correction within 30 days from the date of receiving the copy of the award. However, under the JCAA Commercial Arbitration Rules and the JCAA Interactive Rules, that request must be filed within four weeks (Article 68.2 and Article 69.2, respectively).

Enforcement of the arbitration award

As mentioned above, Japan is a member state of the NY Convention subject to the reciprocity reservation and, thus, an arbitral award made in a signatory state is enforceable in Japan. Further, the JAA does not actually require reciprocity in enforcing a foreign arbitral award, so a foreign arbitral award is enforceable in Japan as long as it satisfies the requirements of the JAA, even if it was made outside of a signatory state to the NY Convention.

An arbitral award (whether or not the place of arbitration is in Japan) shall have the same effect as a final and binding judgment of a Japanese court if it satisfies the requirements of

Article 45 of the JAA. The requirements for the enforcement of an arbitral award set out in Article 45 of the JAA substantially mirror those of the NY Convention and the UNCITRAL Model Law. In particular, if an arbitral award is set aside or suspended by a court in the place of arbitration, that arbitral award cannot be enforced (Article 45.2(vii) of the JAA). As is the case under the NY Convention and the UNCITRAL Model Law, the grounds for a court to refuse the enforcement of an arbitral award are quite limited. In addition, although we have not found any clear statistics, it is said that Japanese courts generally take a pro-arbitration stance in respect of the recognition and enforcement of arbitral awards.

A party seeking to enforce an arbitral award should first file a petition for an enforcement decision before a competent Japanese court, and submit a copy of the arbitral award together with a document certifying that the content of the copy is identical to the arbitral award, and a Japanese translation of the arbitral award. The obligor (i.e., the opposing party) shall be involved in the proceedings as a respondent. After the court renders an enforcement decision and the decision becomes final and binding, the party can then apply for compulsory execution based on the arbitral award (Article 22(vi-2) of the Civil Execution Act of Japan).

Investment arbitration

Japan is a member of the International Centre for Settlement of Investment Disputes (“ICSID”). It is also a signatory to the Energy Charter Treaty (“ECT”), and the agreement between Japan, the Republic of Korea and the People’s Republic of China for the promotion, facilitation and protection of investment. Further, Japan is a signatory to more than 20 bilateral investment treaties and around 10 economic partnership agreements containing the Investor-State Dispute Settlement (“ISDS”) procedure. We have not found any recent investment arbitration cases against Japan.

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