

Japan amends its Commercial Arbitration Rules

Japan is known, at least in academic circles, as a country of low "litigiousness". Japanese people and parties doing business in Japan tend to prefer to resolve their disputes by less confrontational methods, such as mediation and arbitration, rather than going to court. Moreover, although Japan was one of the first signatories to the New York Convention,¹ the primary mechanism for the enforcement of international arbitration awards, it has been suggested by some commentators that even without the obstacles prevalent in court-related litigation, rates of arbitration in Japan have nonetheless remained low.² This may now change with the Japan Commercial Arbitration Association ("JCAA")'s implementation of a new set of Commercial Arbitration Rules ("the new JCA Rules")³ which came into effect on 1 February 2014 and apply to all arbitrations initiated on or after that date.

Although minor amendments had been made in 2006 and 2008, the new JCA Rules mark the first major overhaul since 2004 when the Japanese Arbitration Law (which is based upon the UNCITRAL Model Law) was first enacted. The amendments introduced by the new JCA Rules aim not only to make arbitrations administered by the JCAA more efficient and user-friendly, but also to bring the JCAA more in line with recent arbitration trends and the amendments made to internationally recognised institutional arbitration rules commonly used in Asia Pacific, such as the Hong Kong International Arbitration Centre Administered Arbitration Rules 2013 ("HKIAC Rules"),⁴ the Singapore International Arbitration Centre Rules 2013 ("SIAC Rules")⁵ and the International Chamber of Commerce Rules 2012 ("ICC Rules").⁶

Broadly speaking, the key amendments to the new JCA Rules are:

- the introduction of emergency arbitrator procedures;
- clarification of the specific types of interim measures of protection which the tribunal can grant, and the requirements to be satisfied by the party seeking such interim relief;
- in respect of multi-party arbitrations:
 - the introduction of joinder provisions;

¹ The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

² <http://nyujilp.org/wp-content/uploads/2013/02/40.1-Cole.pdf>

³ http://www.jcaa.or.jp/e/arbitration/docs/Arbitration_Rules_2014e.pdf

⁴ <http://hkiac.org/en/arbitration/arbitration-rules-guidelines/hkiac-administered-arbitration-rules-2013>

⁵ <http://www.siac.org.sg/our-rules/rules/siac-rules-2013>

⁶ <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Rules-of-arbitration/Download-ICC-Rules-of-Arbitration/ICC-Rules-of-Arbitration-in-several-languages/>

- a greater ability to consolidate arbitrations, by the relaxation of the requirements for the consolidation of arbitrations;
 - the ability to bring multiple claims within a single arbitration;
 - the removal of the respondent's right, in a multi-party situation, to submit a written request to separate proceedings;
 - the introduction of JCAA's power to appoint all three arbitrators in the event that the claimant(s) or respondent(s) fail(s) to notify the tribunal of their appointment of an arbitrator within the required time limit; and
- the expansion of the expedited procedures with the ability of the parties to agree to the application of the expedited procedures irrespective of the value of the claim in dispute.

In this briefing we have highlighted these key amendments to the new JCA Rules in **the table** below and compared them with similar provisions in the HKIAC Rules, the SIAC Rules and the ICC Rules.

	JCA Rules 2014	HKIAC Rules 2013	SIAC Rules 2013	ICC Rules 2012
Emergency Arbitrator procedures	<p>A party may apply for "emergency measures" via the appointment of an emergency arbitrator ("EA") before the tribunal is constituted or when any arbitrator has ceased to perform his duties (Rule 70.1). The application may be made before the Request for Arbitration is submitted, provided that the Request for Arbitration is submitted within 10 days thereafter (Rule 70.7).</p> <p>If the JCAA determines that it should accept the application (which includes payment of the relevant administrative fee and deposit), the JCAA shall use reasonable efforts to appoint an EA within 2 business days following receipt of the application (Rule 71.4). The EA shall make a decision within 2 weeks of being appointed</p>	<p>A party may apply for urgent or conservatory relief ("emergency relief") via the appointment of an EA prior to the constitution of the tribunal, but concurrent with, or following, the filing of the Notice of Arbitration (Article 23.1 and Schedule 4, para. 1). If HKIAC determines that it should accept the application, an EA shall be appointed within 2 days following receipt of the application and the relevant 'application deposit' (Schedule 4, para. 5). The EA shall make a decision, order or award ('emergency decision') within 15 days from transmission of the file by HKIAC to the EA (unless this time period is extended under Schedule 4, para. 12). An emergency decision has the same effect as an interim measure granted under Article 23 and is binding on the parties (Schedule 4, para. 16).</p>	<p>A party may apply for emergency relief via the appointment of an EA prior to the constitution of the tribunal, but concurrent with, or following, the filing of the Notice of Arbitration (Schedule 1, para. 1). If the President of SIAC determines that SIAC should accept the application, he shall seek to appoint an EA within 1 business day following receipt of the application and the relevant fee (Schedule 1, para. 2). The EA shall have the power to order or award any interim relief he or she deems necessary (Schedule 1, para. 6).</p> <p>Any order or award rendered by the EA shall be binding on the parties (Schedule 1, para. 9).</p> <p>The EA and the tribunal have the power to (reconsider), modify or</p>	<p>A party may apply for urgent or conservatory measures ("emergency measures") via the appointment of an EA prior to the constitution of the tribunal and transmission of the file to the tribunal, and irrespective of whether the applicant has already submitted its Request for Arbitration (Article 29.1). Nonetheless, the President of the ICC Court shall terminate the EA proceedings if the Request for Arbitration is not made within ten days (Appendix V, Article 1.6). If the President determines that the ICC should accept the application (including payment of the relevant administrative and EA fees and expenses), the President shall appoint an EA within as short a time as possible and normally within 2 days</p>

	JCA Rules 2014	HKIAC Rules 2013	SIAC Rules 2013	ICC Rules 2012
	<p>(unless this time period is extended under Rule 72.4).</p> <p>Any emergency measures granted are binding on the parties (Rule 72.5).</p> <p>The tribunal may approve, modify, suspend or terminate any Emergency Measures granted by the EA under Rule 73.2.</p> <p>Unless otherwise agreed by the parties in writing, the EA shall not be appointed as an arbitrator for the same dispute (Rule 72.8).</p>	<p>A party can apply to the EA or the arbitral tribunal (once constituted) for modification, suspension or termination of an emergency decision (Schedule 4, para. 18). In addition, pursuant to Schedule 4, para. 19, any emergency decision will also cease to be binding: (i) if the EA or the tribunal so decides; (ii) upon the tribunal rendering a final award unless the tribunal expressly decides otherwise; (iii) upon the withdrawal of the claims or termination of the arbitration; or (iv) if the tribunal is not constituted within 90 days from the date of the emergency decision, unless this 90-day period is extended under Schedule 4, para. 19 (d).</p> <p>Unless otherwise agreed by the parties, the EA may not act as arbitrator in any arbitration relating to the same dispute (Schedule 4, para. 21).</p> <p>The EA procedures do not apply where the relevant arbitration agreement was signed before 1 November 2013, the date the HKIAC Rules came into effect, unless the parties have agreed otherwise (Article 1.4).</p>	<p>vacate the interim order or award (Schedule 1, paras. 6 and 7). In addition and in any event, any EA interim order or award shall cease to be binding: (i) if the tribunal is not constituted within 90 days of such interim order or award; (ii) when the tribunal makes a final award; or (iii) if the claim is withdrawn (Schedule 1, para. 7).</p> <p>Unless otherwise agreed by the parties, the EA may not act as arbitrator in any arbitration relating to the same dispute (Schedule 1, para. 4).</p>	<p>from receipt of the application (Appendix V, Articles 1.5, 2.1 and 7).</p> <p>The EA's decision shall take the form of an order (Appendix V, Article 6.1) and shall be made no later than 15 days from when the file was transmitted to the EA, unless this time period is extended under Appendix V, Article 6.4.</p> <p>The parties undertake to comply with an EA order (Article 29.2).</p> <p>The tribunal may modify, terminate or annul the EA order, or any modification made thereto by the EA (Article 29.3).</p> <p>In addition, pursuant to Appendix V, Article 6.6 any emergency order will also cease to be binding upon: (i) the President terminating the EA proceedings; (ii) the ICC court's acceptance of a challenge against the EA; (iii) the tribunal rendering a final award unless the tribunal expressly decides otherwise; or (iv) the withdrawal of the claims or termination of the arbitration.</p> <p>The EA may not act as arbitrator in any arbitration relating to the same dispute (Appendix V, Article 2.6).</p>

	JCA Rules 2014	HKIAC Rules 2013	SIAC Rules 2013	ICC Rules 2012
				The EA procedures do not apply where the relevant arbitration agreement was signed before 1 January 2012, the date the ICC Rules came into effect, or where the parties have expressly or impliedly opted out of the EA procedures (Article 29.6)
Interim measures	<p>Pursuant to Rule 66, a party may apply in writing to the tribunal for interim measures against the other party. Rule 66.1 is modelled on Article 23.3 of the 2013 HKIAC Rules, and provides a non-exhaustive list of the examples of interim measures that may be ordered being measures: (i) to maintain or restore the status quo; (ii) to 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; (iii) to preserve assets; and (iv) to preserve evidence.</p> <p>Rule 66.2 sets out the requirements which the applicant must satisfy before interim measures will be granted.</p> <p>The tribunal may require the applicant to provide appropriate security in connection with the interim measures (Rule 67).</p>	<p>At the request of either party, the tribunal may order any interim measures it deems necessary or appropriate (Article 23.2). Article 23.3 provides a non-exhaustive list of the examples of interim measures that may be ordered being measures: (i) to maintain or restore the status quo; (ii) to 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; (iii) to preserve assets; and (iv) to preserve evidence.</p> <p>Any interim measures granted may take the form of an order, award or any other form deemed appropriate by the tribunal (Article 23.3)..</p> <p>Article 23.4 similarly sets out a non-exhaustive list of relevant factors which the tribunal may take into account in determining whether the grant the measures.</p> <p>The tribunal may require the applicant to provide appropriate security in connection with the interim measures (Article 23.6).</p>	<p>At the request of either party, the tribunal may issue an order or award granting an injunction or any other interim relief it deems appropriate.</p> <p>The tribunal may require the applicant to provide appropriate security in connection with the interim relief (Rule 26.1).</p>	<p>At the request of either party, the tribunal may order any interim or conservatory measure it deems appropriate.</p> <p>The tribunal may require the applicant to provide appropriate security in connection with the interim measures.</p> <p>Any such measure shall take the form of an order or an award as the tribunal considers appropriate (Article 28.1).</p>

	JCA Rules 2014	HKIAC Rules 2013	SIAC Rules 2013	ICC Rules 2012
		The tribunal also has an express general power under Article 24 to require a party to provide security for the costs of the arbitration.		
<p>Multi-party arbitrations:-</p> <p>(a) repeal of respondent's right to separate proceedings; and</p> <p>(b) provision for appointment by tribunal of all three arbitrators in certain circumstances</p>	<p>Under the old JCA Rules, a respondent in a multi-party arbitration could submit a written request for the separation of arbitration proceedings. This provision has been repealed under the new JCA Rules.</p> <p>Rule 29.7 gives power to the JCAA to appoint all three arbitrators in a multi-party arbitration if either the claimant(s) or the respondent(s) fail to notify the tribunal of the appointment of their own arbitrator (pursuant to Rule 30) within the time limit prescribed under Rules 29.2 or 29.3. This extends to JCAA re-appointing an arbitrator already appointed by one side, if no objection is raised by the parties.</p>	<p>N/A</p> <p>Article 8.2.c gives HKIAC the power to appoint all three arbitrators in a multi-party arbitration, without regard to any party's designation, if the parties fail to designate arbitrators within the time lines prescribed in accordance with Article 8.1 (and Article 8.2) or if the parties do not agree in writing that they represent two separate sides for the purpose of designating arbitrators.</p>	<p>N/A</p> <p>Rule 9.1 gives the SIAC President the power to appoint all three arbitrators in a multi-party arbitration if either the claimant(s) or the respondent(s) fail to nominate an arbitrator within: (i) 28 days of receipt by the Registrar of the Notice of Arbitration; or (ii) any other period agreed by the parties or set by the Registrar.</p>	<p>N/A</p> <p>Article 12.8 gives the ICC Court the power to appoint all three arbitrators in a multi-party arbitration if either the claimant(s) or the respondent(s) fail to nominate an arbitrator in the Request for Arbitration or the Answer (as appropriate) (see Articles 12.4 and 12.6) and are otherwise unable to agree a method for the constitution of the tribunal.</p>

	JCA Rules 2014	HKIAC Rules 2013	SIAC Rules 2013	ICC Rules 2012
Multiple claims in a single arbitration	<p>Multiple claims can be heard in a single arbitration if: (i) the parties have agreed; (ii) all claims arise under the same arbitration agreement; or (iii) all claims arise between the same parties <u>and</u>: (a) the same or a similar question of fact or law arises from the claims; (b) all the claims relate to disputes referred to arbitration under the new JCA Rules or at the JCA; and (c) the arbitral proceedings are capable of being conducted in a single proceeding (Rule 15).</p>	<p>Multiple claims can be heard in a single arbitration if: (i) all parties are bound by each relevant arbitration agreement; (ii) a common question of law of fact arises under each arbitration agreement; (iii) the rights to relief claimed arise out, or in respect, of the same transaction or series of transactions; and (iv) the relevant arbitration agreements are compatible (Article 29).</p> <p>The provisions in Article 29 do not apply where the relevant arbitration agreement was signed before 1 November 2013, the date the HKIAC Rules came into effect, unless the parties have agreed otherwise (Article 1.4).</p>	Not specified.	<p>Multiple claims (arising out of or in connection with more than one contract) may be made in a single arbitration - irrespective of whether such claims are made under one or more arbitration agreement (Article 9).</p> <p>If a party objects to the filing of multiple claims under Article 9, the tribunal will decide directly the extent to which the claims can be determined together in accordance with Article 6(3); save that the ICC Secretary-General has the power to refer the issue, on a preliminary basis, to the ICC Court pursuant to Article 6(4). If a reference is made to the ICC Court under Article 6(3), the Court shall decide whether, and the extent to which, the arbitration shall proceed. Where multiple claims have been made under Article 9, the arbitration shall proceed as to those claims where the ICC Court is <i>prima facie</i> satisfied: (i) that the arbitration agreements under which the claims are made may be compatible; and (ii) that all parties may have agreed that those claims can be determined together in a single arbitration (Article 6.4(ii)).</p> <p>If the arbitration is allowed to proceed, any subsequent</p>

	JCA Rules 2014	HKIAC Rules 2013	SIAC Rules 2013	ICC Rules 2012
				decisions on jurisdiction shall be taken by the tribunal itself (Article 6(5)).
Consolidation	<p>Rule 53 gives the tribunal the power to consolidate claims in respect of which a tribunal has not yet been constituted with pending claims already before it, upon the written request of a party (and when the tribunal considers it necessary to do so).</p> <p>The requirements for consolidation are: (i) all parties have agreed in writing; (ii) the pending claims and the claims to be consolidated arise under the same arbitration agreement, provided that parties to the claims to be consolidated which are not party to the pending claims have given their written consent thereto; or (iii) all claims arise between the same parties <u>and</u> (a) the same or a similar question of fact or law arises from the claims; (b) all the claims relate to disputes referred to arbitration under the new JCA Rules or at the JCA; and (c) the arbitral proceedings are capable of being conducted in a single proceeding.</p>	<p>Article 28 gives HKIAC the power to consolidate 2 or more arbitrations pending under the HKIAC Rules at the request of a party, and after consulting with the parties and any confirmed arbitrators.</p> <p>The requirements for consolidation are: (i) all the parties agree; (ii) all claims are made under the same agreement; or (iii) if not arising under the same agreement, where a common question of law or fact arises in both or all of the arbitrations, the rights to relief claimed are in respect of, or arise out of, the same transaction or series of transactions, and HKIAC finds the arbitration agreements to be compatible.</p> <p>Under Article 28.3, in deciding whether to consolidate, HKIAC shall take into account the circumstances of the case. Relevant factors can include whether one or more arbitrators have been designated or confirmed in more than one of the arbitrations and, if so, whether the same or different arbitrators have been confirmed.</p> <p>Where HKIAC decides to consolidate 2 or more arbitrations, all parties to the arbitrations are deemed to have waived their right to designate an arbitrator and HKIAC may revoke the appointment of any arbitrators already</p>	Not specified.	<p>Article 10 gives the ICC Court the power to consolidate 2 or more arbitrations pending under the ICC Rules at the request of a party.</p> <p>The requirements for consolidation are: (i) all the parties agree; (ii) all claims are made under the same agreement; or (iii) if not arising under the same agreement, the arbitrations are between the same parties, the disputes arise in connection with the same legal relationship and the ICC court finds the arbitration agreements to be compatible.</p> <p>In deciding whether to consolidate, the ICC Court may take into account any circumstances considered relevant, including whether one or more arbitrators have been confirmed or appointed in more than one of the arbitrations and, if so, whether the same or different arbitrators have been confirmed or appointed.</p>

	JCA Rules 2014	HKIAC Rules 2013	SIAC Rules 2013	ICC Rules 2012
		<p>designated or confirmed, and re-appoint the tribunal in respect of the consolidated proceedings (Article 28.6).</p> <p>The provisions in Article 28 do not apply where the relevant arbitration agreement was signed before 1 November 2013, the date the HKIAC Rules came into effect, unless the parties have agreed otherwise (Article 1.4).</p>		
Joinder	<p>Under Rule 52.1, a third party may join in the arbitral proceedings as a claimant, or a party may request a third party to join in the proceedings as a respondent, if: (i) all parties and the third party have agreed in writing; or (ii) all the claims are made under the same arbitration agreement, provided that the third party's written consent is required when that third party is requested to join as respondent after the constitution of the tribunal.</p> <p>Under Rule 52.4, the tribunal retains a discretion to deny joinder even if the requirements stipulated are otherwise satisfied, if it finds that joinder will delay the proceedings or based on any other reasonable grounds.</p>	<p>Under Article 27.1, the tribunal has the power to allow a third party to be joined to the arbitration provided that, <i>prima facie</i>, the additional party is bound by the agreement giving rise to the arbitration (including any arbitration consolidated under Article 28, or involving multiple claims under Article 29).</p> <p>The application can be made by a party to the arbitration, or by the third party wishing to be joined (Articles 27.3 and 27.6).</p> <p>Where a request for joinder is received by HKIAC before the tribunal is confirmed, HKIAC may decide whether, <i>prima facie</i>, the additional party is bound by the arbitration agreement and, if so, join the additional party to the arbitration.</p> <p>Any question as to the jurisdiction of the tribunal shall still be decided by the tribunal – see Articles 27.8 and 27.2.</p> <p>Where joinder occurs before the tribunal is confirmed, all parties to the arbitration are deemed to</p>	<p>Under Rule 24.1(b), the tribunal has the power, upon the application of a party, to allow one or more third parties to be joined, provided that such person is a party to the arbitration agreement, and with the written consent of such third party.</p>	<p>Under Article 7.1, if a party wishes to join an additional party to the arbitration, it should submit to the Secretariat its request for arbitration against that additional party.</p> <p>No additional party may be joined after the appointment or confirmation of any arbitrator, unless all parties, including the additional party, otherwise agree.</p> <p>If the additional party objects to the filing of the claim against it under Article 7, the tribunal will decide directly the extent to which it has jurisdiction in accordance with Article 6(3); save that the ICC Secretary-General has the power to refer the issue, on a preliminary basis, to the ICC court pursuant to Article 6(4). If a reference is made to the ICC Court under Article 6(3), the Court shall decide whether, and the extent to which, the arbitration shall proceed.</p>

	JCA Rules 2014	HKIAC Rules 2013	SIAC Rules 2013	ICC Rules 2012
		have waived their right to designate an arbitrator and HKIAC may revoke the appointment of any arbitrators already designated or confirmed, and re-appoint the tribunal (Article 27.11).		Where an additional party has been joined pursuant to Article 7, the arbitration shall proceed where the ICC Court is <i>prima facie</i> satisfied that an arbitration agreement under the ICC Rules exists which binds them all.
Expedited Procedures	<p>The parties can agree to apply the expedited procedures irrespective of the value of the claim. Notification must be made to the JCAA of the parties' agreement within 2 weeks from the respondent's receipt of the notice of the Request for Arbitration. (Rule 75.1).</p> <p>The expedited procedures shall also apply where the amount or economic value of the claimant's claim is not more than JPY 20,000,000, unless JCAA is notified in writing within 2 weeks of the respondent's receipt of the notice of the Request for Arbitration of: (i) the parties' agreement not to apply the expedited procedures; (ii) the parties' agreement that there will be more than 1 arbitrator; or (iii) the amount of any counterclaim or set-off defence exceeding JPY 20,000,000 (except where the parties have agreed in writing to submit such counterclaim or set-off defence to the expedited procedures (Rule 75.2)).</p>	Prior to the constitution of the tribunal, a party may apply to HKIAC in writing for the application of the expedited procedures where: (i) the amount in dispute representing the aggregate of any claim, counterclaim and set-off defence does not exceed HKD 25,000,000; (ii) the parties so agree; or (iii) in cases of exceptional urgency (Article 41.1).	Prior to the constitution of the tribunal, a party may apply to the SIAC Registrar in writing for the application of the expedited procedures where: (i) the amount in dispute representing the aggregate of any claim, counterclaim and set-off defence does not exceed S\$5,000,000; (ii) the parties so agree; or (iii) in cases of exceptional urgency (Rule 5).	Not specified. However, the parties may agree to shorten any time limits under the Rules. Any such agreement reached subsequent to the constitution of the tribunal is only effective upon approval by the tribunal (Article 38).

Contacts

Cameron Hassall

Partner

E: cameron.hassall
@cliffordchance.com

Nish Shetty

Partner

E: nish.shetty
@cliffordchance.com

Kathryn Sanger

Consultant

E: kathryn.sanger
@cliffordchance.com

Michelle Mizutani

Counsel

E: michelle.mizutani
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

Clifford Chance, 28th Floor, Jardine House, One Connaught Place, Hong Kong

© Clifford Chance 2014
Clifford Chance

www.cliffordchance.com

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Jakarta* ■ Kyiv ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Riyadh ■ Rome ■ São Paulo ■ Seoul ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

*Linda Widyati & Partners in association with Clifford Chance.