

## NOTES

### Key Features of New Japanese Arbitration Law

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#### A. INTRODUCTION

The new Japanese Arbitration Law<sup>1</sup> was enacted on 25 July 2003 and came into force on 1 March 2004. The official English version is not available, but an unofficial and highly reliable English translation<sup>2</sup> is available online at the Japanese governmental website.<sup>3</sup>

The salient features of the New Arbitration Law are as follows;

- (1) Almost all parts of the UNCITRAL Model Law on International Commercial Arbitration of 1985<sup>4</sup> ('UNCITRAL Model Law') are incorporated into the New Arbitration Law. The New Arbitration Law, however, applies not only to international commercial arbitration covered by the UNCITRAL Model Law but also to domestic arbitration.
- (2) The main parts of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>5</sup> ('New York Convention') are also

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1 Law No 138 of 2003 ('New Arbitration Law').

2 By the Arbitration Law Follow-up Reseach Group.

3 At <<http://www.kantei.go.jp/jp/singi/sihou/hourei/tyusaieiyaku.html>> (accessed 24 February 2006).

4 Adopted by the United Nations Commission on International Trade Law ('UNCITRAL') on 21 June 1985.

5 New York, 10 June 1958.

incorporated into the New Arbitration Law. However, the validity of the New York Convention and other international conventions is not affected by the New Arbitration Law.

- (3) The New Arbitration Law clarifies many vague issues under the Old Arbitration Law.<sup>6</sup>
- (4) The New Arbitration Law revises some parts of the Old Arbitration Law.
- (5) The New Arbitration Law takes into consideration the needs of the information technology age.

This article outlines these features from the viewpoint of international commercial arbitration.

#### B. NEW ARBITRATION LAW AND UNCITRAL MODEL LAW

The first feature of the New Arbitration Law is the incorporation of almost all parts of the UNCITRAL Model Law, with the exception of Art 2(c) to (f). These definition provisions were excluded because they were accepted under the Japanese legal system and need not be defined in the New Arbitration Law.

The New Arbitration Law, however, applies not only to international commercial arbitration covered by the UNCITRAL Model Law but also to domestic arbitration.<sup>7</sup>

The table below shows the correlation, article by article, between the UNCITRAL Model Law and the New Arbitration Law:

<i>UNCITRAL Model Law</i>	<i>New Arbitration Law</i>
Article 1 (Scope of Application)	Article 3
Article 2 (Definitions and Rules of Interpretation)	Article 2
Article 3 (Receipt of Written Communications)	Article 12
Article 4 (Waiver of Right to Object)	Article 27
Article 5 (Extent of Court Intervention)	Article 4
Article 6 (Court or Other Authority for Certain Functions of Arbitration Assistance and Supervision)	Article 5
Article 7 (Definition and Form of Arbitration Agreement)	Article 13
Article 8 (Arbitration Agreement and Substantive Claim before Court)	Article 14

<sup>6</sup> Law No 29 of 1890.

<sup>7</sup> See the New Arbitration Law, art 1.

<i>UNCITRAL Model Law</i>	<i>New Arbitration Law</i>
Article 9 (Arbitration Agreement and Interim Measures by Court)	Article 15
Article 10 (Number of Arbitrators)	Article 16
Article 11 (Appointment of Arbitrators)	Article 17
Article 12 (Grounds for Challenge)	Article 18
Article 13 (Challenge Procedure)	Article 19
Article 14 (Failure or Impossibility to Act)	Article 20
Article 14(1)	Article 21(1)
Article 15 (Appointment of Substitute Arbitrator)	Article 22
Article 16 (Competence of Arbitral Tribunal to Rule on Its Jurisdiction)	Article 23
Article 17 (Power of Arbitral Tribunal to Order Interim Measures)	Article 24
Article 18 (Equal Treatment of Parties)	Article 25
Article 19 (Determination of Rules of Procedure)	Article 26
Article 20 (Place of Arbitration)	Article 28
Article 21 (Commencement of Arbitral Proceedings)	Article 29
Article 22 (Language)	Article 30
Article 23 (Statements of Claim and Defence)	Article 31
Article 24 (Hearings and Written Proceedings)	Article 32
Article 25 (Default of a Party)	Article 33
Article 26 (Expert Appointed by Arbitral Tribunal)	Article 34
Article 27 (Court Assistance in Taking Evidence)	Article 35
Article 28 (Rules Applicable to Substance of Dispute)	Article 36
Article 29 (Decision-making by Panel of Arbitrators)	Article 37
Article 30 (Settlement)	Article 38
Article 31 (Form and Contents of Award)	Article 39
Article 32 (Termination of Proceedings)	Article 40
Article 33 (Correction and Interpretation of Award; Additional Award)	Articles 41, 42, 43
Article 34 (Application for Setting Aside as Exclusive Recourse Against Arbitral Award)	Article 44
Article 35 (Recognition and Enforcement)	Articles 45(1),(2), 46(1),(2), (7)
Article 36 (Grounds for Refusing Recognition or Enforcement)	Articles 45(3), 46(3), (8), (9)

### C. NEW ARBITRATION LAW AND INTERNATIONAL CONVENTIONS

Japan signed and ratified the New York Convention on 20 June 1961 as Treaty No 10 of 1961.

The Japanese courts have applied the New York Convention without enacting any implementing legislation based on the theory that Art 98(2) of the Constitution of Japan ('the Constitution') provides, *inter alia*, that treaties concluded by Japan shall be faithfully observed. Article 73(3) of the Constitution requires that a treaty shall be ratified by the National Diet before or after being endorsed by the Cabinet. The prevailing opinion therefore interprets these provisions as giving an international self-executing convention such as the New York Convention the validity of a domestic statute without the necessity of enacting any implementing legislation upon its ratification.

Although arts 14, 45(2), 46(1), (2) and (3) of the New Arbitration Law substantially correspond to Arts II, III, IV, V and VI of the New York Convention, it is submitted that the New Arbitration Law does not affect the validity and legal effect of the New York Convention in Japan.

In addition to the New York Convention, Japan has signed and ratified the following international conventions:

- (a) Protocol on Arbitration Clauses drawn up at Geneva on 24 September 1923 and ratified on 4 June 1928 (Treaty No 3 of 1928) ('Geneva Protocol').
- (b) Convention on the Execution of Foreign Arbitral Awards adopted at Geneva on 26 September 1927 and ratified on 11 July 1952 (Treaty No 11 of 1952) ('Geneva Convention').
- (c) Convention on the Settlement of Investment Disputes between States and Nationals of Other States, adopted at Washington on 18 March 1965 and ratified on 17 August 1967 (Treaty No 10 of 1967).

Under Art VII(2) of the New York Convention, the Geneva Protocol and the Geneva Convention ceased to have effect between Japan and other contracting states on becoming bound by the Convention.

Japan has also signed and ratified several bilateral treaties containing provisions on reciprocal recognition and enforcement of arbitral awards.

As explained above, these international conventions and bilateral treaties have been given the validity of a domestic statute in Japan upon their ratification without the need to enact any implementing legislation. Moreover, they prevail over domestic law where any inconsistency arises between the international convention or bilateral treaty and a domestic law.

Accordingly, it is submitted that the abovementioned international conventions and bilateral treaties prevail over the New Arbitration Law if there were any inconsistency between them.

#### D. ISSUES CLARIFIED BY NEW ARBITRATION LAW

The New Arbitration Law clarifies the following issues which were left unsettled under the Old Arbitration Law because there were no statutory provisions covering them.

##### 1. *Governing Law of Arbitral Procedure*

The Old Arbitration Law had no statutory provision on the governing law of the arbitral procedure. However, the New York Convention requires that the composition of the arbitral authority or the arbitral procedure should be in accordance with the agreement of the parties, or failing such agreement, be in accordance with the law of the country where the arbitration takes place.<sup>8</sup>

The New Arbitration Law clarifies this issue by stipulating that the arbitral proceedings must abide by this law where the place of arbitration is in the territory of Japan.<sup>9</sup> Parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the arbitral proceedings, provided that it does not violate the provisions of the New Arbitration Law relating to public policy.<sup>10</sup>

##### 2. *Court Intervention in Arbitral Proceedings*

Since the Old Arbitration Law had no statutory provision on the court's intervention in arbitral proceedings, it was not clear whether the parties to an arbitration agreement could expand or limit this by agreement.

The New Arbitration Law stipulates that no court shall intervene in arbitral proceedings except where so provided.<sup>11</sup> The draftsmen at the Ministry of Justice therefore were of the opinion that parties to an arbitration agreement were not to expand or limit by agreement the court's intervention in arbitral proceedings in violation of the provisions of the New Arbitration Law.

##### 3. *Separability of Arbitration Agreements*

The Old Arbitration Law had no statutory provision on the separability of arbitration agreements. The Supreme Court has, however, made clear the separability of arbitration agreements in its decision of 15 July 1975.<sup>12</sup> There are

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8 New York Convention, Art V(1)(d).

9 New Arbitration Law, art 1.

10 New Arbitration Law art 26(1).

11 New Arbitration Law, art 4.

12 29 Minshu 1061.

also many lower court decisions to the same effect such as Yokohama District Court's decision of 25 October 1950<sup>13</sup> and Tokyo District Court's decision of 17 October 1973.<sup>14</sup> The New Arbitration Law clarifies the separability of arbitration agreements by stipulating as follows:<sup>15</sup>

Even if in a particular contract containing an arbitration agreement, any or all of the contractual provisions, excluding the arbitration agreement, are found to be null and void, cancelled or for other reasons invalid, the validity of the arbitration agreement shall not necessarily be affected.

#### **4. *Effect of Arbitration Agreement on Substantive Claim before Court***

Although the Old Arbitration Law had no statutory provision on this point, the practice, if the defendant so requests, to dismiss a court action where there is an arbitration agreement has long been accepted by the courts. This practice arose after Japan ratified the New York Convention and other international conventions and treaties which embraced this principle. The New Arbitration Law stipulates that:

[a] court before which an action is brought in respect of a civil dispute which is the subject of an arbitration agreement shall, if the defendant so requests, dismiss the action.<sup>16</sup>

#### **5. *Interim Measures by Court***

Unlike the Old Arbitration Law which had no statutory provision on this point, the New Arbitration Law clarifies this point by stipulating as follows:

[i]t is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure in respect of any civil dispute which is the subject of the arbitration agreement.<sup>17</sup>

It is, therefore, submitted that a party to an arbitration agreement can request a court, which has jurisdiction over the other party or its properties, before or during arbitral proceedings, for an interim measure of protection when the

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13 11 Kaminshu 1913.

14 301 Hanrei Taimuzu 227.

15 New Arbitration Law, art 13(6).

16 New Arbitration Law, art 14(1). This provision applies whether the place of arbitration is in or outside the territory of Japan, or is otherwise not designated: art 3(2).

17 New Arbitration Law, art 15.

place of arbitration is in or outside the territory of Japan, or when the place of arbitration is otherwise not designated.<sup>18</sup>

### **6. *Interim Measures of Protection by Arbitral Tribunal***

The Old Arbitration Law did not specifically provide for interim measures of protection to be issued by the arbitral tribunal. The New Arbitration Law clarifies this point by stipulating that:

[u]nless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute.<sup>19</sup>

The tribunal's order, however, is not enforceable by the court if the party does not voluntarily carry out the order.

### **7. *Waiver of Party's Right to Object***

The Old Arbitration Law had no statutory provision with regard to waiver of a party's right to object to the non-compliance of any provision of the law or any rules of arbitral proceedings by the other party. The New Arbitration Law clarifies this point by stipulating that:

[u]nless otherwise agreed by the parties, as to arbitral proceedings, a party who knows that any provision of this Law or any arbitral proceedings rules agreed upon by the parties (to the extent that none of these relate to public policy) has not been complied with and yet fails to state its objection to such non-compliance without delay (if a time limit by which objections should be made is provided for, within such period of time), shall be deemed to have waived its right to object.<sup>20</sup>

### **8. *Interruption of Limitation***

The Old Arbitration Law did not touch on the issue of interruption of limitation arising from claims in arbitral proceedings. The New Arbitration Law clarifies this point by stipulating that '[a] claim made in arbitral proceedings shall give rise to an interruption of limitation', provided that 'this shall not apply where the arbitral proceedings have been terminated for a reason other than the issuance of an arbitral award'.<sup>21</sup>

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18 New Arbitration Law, art 15 read with art 3(2).

19 New Arbitration Law, art 24(1).

20 New Arbitration Law, art 27.

21 New Arbitration Law, art 29(2).

It is, however, submitted that the New Arbitration Law falls short of making it clear whether the interruption of limitation becomes effective on the commencement date of the arbitral proceedings or on the date when the claim becomes definite in the arbitral proceedings.

### **9. *Language of Arbitral Proceedings***

Despite the fact that the Old Arbitration Law had no statutory provision on this point, it is accepted arbitral practice in Japan for parties to be given the freedom to choose the language or languages to be used in the arbitral proceedings.

The New Arbitration Law clarifies this point by stipulating that '[t]he parties are free to agree on the language or languages to be used in the arbitral proceedings and the proceedings to be conducted using that language or those languages'.<sup>22</sup>

### **10. *Time Restrictions on Parties' Statements***

The Old Arbitration Law did not lay down time restrictions for providing parties' statements. The New Arbitration Law clarifies this point by stipulating that it is the claimant's as well as the respondent's obligation to state its claim or defence, as the case may be, within the period of time determined by the arbitral tribunal.<sup>23</sup> The arbitral tribunal has authority to take action in the event of default by either party.<sup>24</sup>

### **11. *Hearing Procedure***

The Old Arbitration Law had no statutory provision on the procedures to be adopted at arbitral hearings. The New Arbitration Law clarifies this point by stipulating in detail the applicable procedures for holding oral hearings.<sup>25</sup>

### **12. *Expert Appointed by Arbitral Tribunal***

Although the Old Arbitration Law had no statutory provision on this point, the New Arbitration Law clarifies the arbitral tribunal's authority to appoint

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22 New Arbitration Law, art 30(1).

23 New Arbitration Law, art 31.

24 See the New Arbitration Law, art 33.

25 New Arbitration Law, art 32.



one or more experts and stipulates the detailed procedures relating to the giving of evidence by such expert.<sup>26</sup>

### **13. *Substantive Law to be Applied in Arbitral Award***

Although the Old Arbitration Law was silent on this point, the New Arbitration Law clarifies the substantive law to be applied by the arbitral tribunal in deciding the dispute.<sup>27</sup> In addition, 'the arbitral tribunal shall decide *ex aequo et bono* only if the parties have expressly authorized it to do so'.<sup>28</sup>

### **14. *Settlement During Arbitral Proceedings***

The Old Arbitration Law had no statutory provision with regard to the settlement of disputes during the course of arbitral proceedings. The New Arbitration Law clarifies this point by stipulating that '[i]f, during arbitral proceedings, the parties settle the civil dispute subject to the arbitral proceedings and the parties so request, the arbitral tribunal may make a ruling on agreed terms';<sup>29</sup> such ruling has the same effect as an arbitral award.<sup>30</sup> The arbitral tribunal or one or more arbitrators designated by it 'may attempt to settle the civil dispute subject to the arbitral proceedings, if consented to by the parties'.<sup>31</sup>

### **15. *Termination of Arbitral Proceedings***

Although the Old Arbitration Law had no statutory provision on the subject of termination of arbitral proceedings, the New Arbitration Law clarifies this point by stipulating two kinds of termination: one by the arbitral tribunal's issuance of its arbitral award and the other by its ruling to terminate the arbitral proceedings.<sup>32</sup>

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26 New Arbitration Law, art 34.

27 New Arbitration Law, art 36.

28 New Arbitration Law, art 36(3).

29 New Arbitration Law, art 38(1).

30 New Arbitration Law, art 38(2).

31 New Arbitration Law, art 38(4).

32 New Arbitration Law, art 40.

### **16. *Correction or Interpretation of Arbitral Award and Additional Arbitral Award by Arbitral Tribunal***

Although the Old Arbitration Law was silent on these points, the New Arbitration Law clarifies them in some detail.<sup>33</sup> It is notable, however, that while the provisions allow for the correction of specified errors in the arbitral award by the arbitral tribunal on its own initiative, the tribunal may only give an interpretation of the arbitral award and issue an additional arbitral award at the request of a party to the arbitration.

### **17. *Remuneration of Arbitrators***

The Old Arbitration Law had no statutory provision dealing with remuneration of arbitrators. The New Arbitration Law clarifies this point by stipulating that '[t]he arbitrators may receive remuneration in accordance with the agreement of the parties.'<sup>34</sup>

### **18. *Deposit for and Apportionment of Costs of the Arbitral Proceedings***

Although the Old Arbitration Law had no statutory provision on these points, the New Arbitration Law clarifies them.<sup>35</sup>

## **E. ISSUES REVISED BY NEW ARBITRATION LAW**

### **1. *Formality of Arbitration Agreement***

An oral arbitration agreement was valid under the Old Arbitration Law. In contrast, the New Arbitration Law provides that the arbitration agreement shall be in writing.<sup>36</sup>

### **2. *Number of Arbitrators***

Under the Old Arbitration Law, the number of arbitrators was stipulated as two if the parties failed to determine it. The New Arbitration Law provides

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33 See the New Arbitration Law, arts 41, 42 and 43.

34 New Arbitration Law, art 47(1).

35 See the New Arbitration Law, arts 48 and 49.

36 New Arbitration Law, art 13. This meets the requirements of art 13(2), (3), (4) and (5).

that the number of arbitrators shall be three when there are two parties in an arbitration and they fail to determine the number of arbitrators desired.<sup>37</sup> If there are three or more parties in an arbitration, the court shall determine the number of arbitrators upon the request of a party.<sup>38</sup>

### **3. *Formality and Requirements of Arbitral Award***

The arbitral award shall be made in writing and shall be signed by the majority of all members of the arbitral tribunal.<sup>39</sup> The arbitral award shall also state the reasons upon which it is based unless otherwise agreed by the parties<sup>40</sup> and shall state its date and place of arbitration.<sup>41</sup>

### **4. *Notification of Arbitral Award***

Although the Old Arbitration Law required the service of the authorised copy of the arbitral award on the parties and the deposit of the original copy of the arbitral award with the court, the New Arbitration Law stipulates that the arbitral tribunal shall notify each party of the arbitral award by sending a copy of the arbitral award signed by the arbitrators.<sup>42</sup> The requirement for service of the arbitral award and its deposit with the court were repealed.

### **5. *Simplified Procedures for Court's Intervention***

When a court intervenes in arbitral proceedings, the Old Arbitration Law required the court's judgment, but the New Arbitration Law revised and reduced it to the court's simplified judgment.<sup>43</sup> Under the Code of Civil Procedures,<sup>44</sup> an oral hearing is required for the court's judgment, but the court may make its simplified judgment without oral argument of the parties. This revision is expected to speed up these court processes relating to arbitral proceedings.

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37 New Arbitration Law, art 16(2).

38 New Arbitration Law, art 16(3).

39 New Arbitration Law, art 39(1).

40 New Arbitration Law, art 39(2).

41 New Arbitration Law, art 39(3).

42 New Arbitration Law, art 39(5).

43 New Arbitration Law, arts 12(2), 17(2)(5), 19(4), 20, 23(5), 35(1), 44 and 46.

44 *Ie*, the Code of Civil Procedures, art 87(1).

## 6. *Setting Aside of Arbitral Award*

The New Arbitration Law revises the grounds and the time limit for the party's application to a court to set aside the arbitral award<sup>45</sup> with a view to accelerating the dispute resolution process.

## 7. *Exception Relating to Arbitration Agreements Concluded between Consumers and Businesses or Concerning Individual Labour-related Disputes*

For the time being until otherwise enacted, any consumer arbitration agreement concluded between consumers and businesses subsequent to the enforcement of the New Arbitration Law may be cancelled by the consumer under certain circumstances.<sup>46</sup> Further, any arbitration agreement concerning individual labour-related disputes that may arise in the future shall be null and void.<sup>47</sup> These exceptions were made for the protection of consumers and employees.

### E. CONSIDERATION FOR INFORMATION TECHNOLOGY AGE

It is notable that the New Arbitration Law takes into consideration advancements in information technology and includes the following provisions:

- (1) An arbitration agreement made by way of electromagnetic record (records produced by electronic, magnetic or any other means unrecognisable by natural sensory function and used for data-processing by a computer) recording its content is considered a valid arbitration agreement.<sup>48</sup> Accordingly a valid arbitration agreement can be concluded by an exchange of e-mails.
- (2) The arbitral tribunal may carry out consultation among members of the tribunal, hearing of parties, experts or witnesses, and inspection of goods, other property or documents at any place it considers appropriate, notwithstanding the place of arbitration determined by the parties or the arbitral tribunal.<sup>49</sup>

It is, therefore, submitted that these provisions allow arbitral procedures to be conducted on a computer network such as the Internet and make Online Dispute Resolution ('ODR') legally possible.

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45 New Arbitration Law, art 44.

46 See the New Arbitration Law Supplementary Provisions, art 3.

47 See the New Arbitration Law Supplementary Provisions, art 4.

48 See the New Arbitration Law, art 13(4).

49 See the New Arbitration Law, art 28.