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New Law, New Changes: An Update On the Japanese Arbitration And ADR Scene

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A lot has happened recently on the Japanese arbitration and ADR scene. There is good news and bad news. Here are highlights:

A new Japanese arbitration law[1] ("New Law") came into effect March 1, 2004. Until this year, the Japanese arbitration law had not been amended in 114 years and was an "almost literal" translation from the 1877 German Code of Civil Procedure. The long-awaited New Law is based on the UNCITRAL Model Law,[2] but contains a number of departures from UNCITRAL in substance, wording and organization.[3] Prominent differences between the New Law and the UNCITRAL Model Law include:

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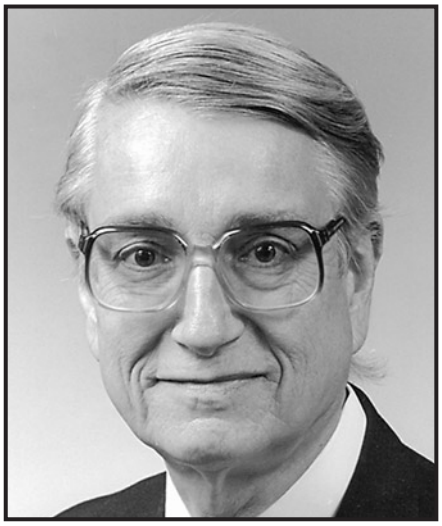

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• The law applies both to domestic and international arbitrations whether involving commercial disputes or otherwise.[4]

• Consumers may elect, at the time a dispute arises, within the scope of an arbitration agreement to resolve civil disputes arising in future, to cancel the arbitration agreement, thereby opting out of the obligation to arbitrate such a dispute.[5]

• Agreements to arbitrate individual labor-related disputes entered after the effective date of the New Law are void.[6]

There are numerous other departures from UNCITRAL. For instance, where the place of arbitration has not been specified in the agreement, Article 8 gives the Japanese courts jurisdiction to appoint arbitrators if there is a possibility that the place of arbitration will be in Japan and one of the parties has its principal place of business in Japan. Chapter IX, containing Articles 47 through 49, deals with arbitrator remuneration, other costs of the arbitration and who bears them, matters not addressed in the UNCITRAL Model Law.[7]

The Japan Commercial Arbitration Association has been changing for the better. The Japan Commercial Arbitration Association ("JCAA") has revamped its arbitrator panel, which now carries numerous names of experienced arbitrators of non-Japanese background, including both arbitrators resident in and outside Japan. Further, the JCAA has amended its Arbitration Rules to come into effect together with the newly enacted Arbitration Law,[8] and has become actively engaged in mediation of domestic disputes. The JCAA's arbitration caseload has also increased, although new filings are still in the low double digits.[9] Lastly, the JCAA, after 50 years of having a different name in Japanese (it was literally "International Arbitration Association" in Japanese) conformed its Japanese name to its English one last year. The JCAA was criticized in the early 1990s[10] for such practices as appointing Japanese nationals as sole or third arbitrator in disputes between Japanese and foreign parties, use of Japanese as the language of hearings and pleadings even though the contract was in another language, protracted proceedings, tendencies to indecision on the part of arbitrators, and a panel limited to residents of Japan and predominantly made up of Japanese lawyers ("bengoshi"). A related problem, not of JCAA's making, was restrictions on representation in arbitration by non-bengoshi. Most of these problems are completely solved, including specifically the problem of represen-

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tation by non-bengoshi.[11] While anecdotal evidence indicates that some problems remain,[12] it is clear that JCAA is intent on further improving its services and image.

New organizations for training neutrals have appeared on the scene. The Japan Federated Bar Association, conscious of the need for more qualified and trained arbitrators and mediators in Japan, took the lead in establishing the "Japan Arbitrators' Association" ("JAA") last October. The JAA's first president is the distinguished arbitration scholar and practitioner Toshio Sawada. JAA's chief purposes are to lift the level of expertise among neutrals, create a forum for communication among professionals engaged in dispute resolution, and most important of all, the training of arbitrators and mediators. Membership is not limited to lawyers. A significant number of the foreign lawyers in Tokyo were founding members of the JAA and several are on its board of governors.[13] At the same time the Chartered Institute of Arbitrators East Asia Branch, based in Hong Kong, has established a Japan subcommittee, which has been conducting arbitrator training in Japan.

The Japanese Government is planning further legislation affecting ADR, probably to be introduced in the Diet before the end of 2004. As part of the Koizumi Cabinet's overall program of reform in the legal and judicial systems of Japan, a special commission has been charged with proposals for further legislation relating to dispute resolution in Japan,[14] envisioned originally as an "ADR Basic Law." The process has, however, been controversial and troubled. Various proposals, including a proposed system of licensing providers of ADR services (including arbitration), were opened for public comment in August 2003, drew extensive criticism from inside and outside Japan, and were completely withdrawn. In renewed deliberations this year it appears that the government is moving in the direction of issuing licenses to providers of non-binding ADR services, and will introduce legislation this autumn including this feature. The chief justification for licensing is that consumers need protection against unqualified and indeed even criminal elements who might provide ADR services.[15] The exact content of the legislation is not yet clear. Apparently it will not cover arbitration. Many of us hope to continue dialogue with the government to deflect or further modify this legislation so that the result is more conducive to development of ADR in Japan.

The Japanese Lawyers' Law threatens to "chill" arbitration and ADR in Japan. A particularly unfortunate result of the activities of the ADR Study Group has been to give new life to an anomaly in the drafting of the Japanese Lawyers' Law,[16] which assertedly limits to bengoshi the roles of arbitrator and mediator for pay. This interpretation has been ignored in practice for a generation, but was espoused anew by the JFBA in its submissions to the Study Group.[17] While the likelihood of anybody proceeding against neutrals in international proceedings in Japan is nil, other concerns remain. The potential "chilling effect" seems not to be understood either by the Japanese Government or the JFBA. Apparently the new legislation will not adequately address it. A related issue is whether non-bengoshi may represent parties in mediation.

Conclusion: The world of dispute resolution in Japan is changing. The new arbitration law is a huge step forward. Many in Japanese government, business and legal circles have a sincere desire to develop and improve arbitration and ADR in Japan even more. However, cultural, bureaucratic and legal baggage threaten to hinder the effort. Hopefully these problems will be solved, and Japan will take its rightful place in the international community of dispute resolution.

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[1] *Law No. 138 of 2003*

[2] *Uncitral Model Law on International Commercial Arbitration, United Nations document A/40/17, Annex I, adopted by the United Nations Commission on 21 June 1985.*

[3] *An English translation of the New Law may be found on line at http://www.kantei.go.jp/foreign / policy/sihou/arbitrationlaw.pdf.*

[4] *New Law, Articles 1 and 3(1). The UNCITRAL Model Law applies only to international commercial arbitrations.*

[5] *Article 4, New Law Supplementary Provisions. The rights given to consumers in this respect are provided for in the Supplementary Provisions, not in the law proper, and the words "for the time being" is used in the relevant provision, suggesting that the provision may be revised in future.*

[6] *Article 5, New Law Supplementary Provisions. This likewise is "for the time being."*

[7] *Other differences include provision for electronic arbitration agreements (Art. 13(4)) and express provision for the arbitrator to act as mediator if both parties agree (Article 38(4)). See Nakamura, "Salient Features of the New Japanese Arbitration Law . . . . ," JCAA Journal, April 2004, available at http://www.jcaa.or.jp/e/arbitration-e/syuppan-e/newslet/news17.pdf.*

[8] *The changes, many without substantive change in meaning, are extensive and difficult to summarize. An obvious improvement is deletion of the provision giving power to the tribunal to reject a party's representative (Old Rule 9). New Rule 13 has been added to provide immunity from liability to arbitrators and the Association for acts and omissions taken in connection with arbitral proceedings unless the acts or omissions constitute willful or gross negligence. New Rule 28 now expressly requires impartiality of arbitrators and disclosure of circumstances which might give rise to doubts as to impartiality while new Rule 29 provides a procedure for challenge of arbitrators.* See generally, op. cit. *McAlinn, "New Rules for International Commercial Arbitration," JCAA Journal, April 2004, footnote 7.*

[9] *The number of new cases filed with the JCAA over the past 5 years: 12 in 1996; 10 in 2000; 18 in 2001; 9 in 2002; 14 in 2003; and 14 in 2004 as of July 7. Personal communication from Mr. Tatsuya Nakamura, July 7, 2004.*

[10] See, e.g., *Charles R. Ragan, "Arbitration in Japan: Caveat Foreign Drafter and other Lessons" 7 Arbitration International 93 (1991).*

[11] *By legislation enacted in 1996, any person admitted as a lawyer anywhere may represent parties in arbitration in Japan. Law No. 65 of 1996, amending the Law Concerning Handling of Legal Business by Foreign Lawyers, Law No. 66 of 1986.*

[12] *All Japanese panels are still sometimes appointed, Japanese is still sometimes chosen as the language of proceedings even though the contract and parties' dealings were in English, and case management still sometimes resembles the drawn-out process of Japanese civil litigation more than arbitration as conducted in, say, typical AAA proceedings. The JCAA responds correctly that these problems are not intrinsic to its system but mainly arise from a strange tendency on the part of many foreign parties to acquiesce in the appointment of-or even appoint themselves-Japanese as sole arbitrators or tribunal chairmen. Personal communication from Mr. Tatsuya Nakamura, July 7, 2004. It is to be hoped that better arbitration advocacy, more trained arbitrators and enhanced case management by JCAA will eliminate these problems, which moreover are not characteristic of all JCAA proceedings.*

[13] *The JAA may be contacted at Japan Federation of Bar Associations, 1-3 Kasumigaseki 1 chome, Chiyoda-ku, Tokyo 100-0013.*

[14] *Called the ADR Study Group (unofficial translation). A very extensive record of the ADR Study Group's work, unfortunately entirely in Japanese, is available on the web at http://www.kantei.go.jp/jp/singi/sihou/kentoukai/03adr.html.*

[15] *These concerns are not without basis in the particular circumstances of Japanese society, although licensing is not in my view the right way to address them.*

[16] *Article 72, which defines the Japanese lawyer's monopoly.*

[17] See, e.g., *document 14-1 presented by the JFBA at the session of the ADR Study Group on April 7, 2003, and available at the website cited in footnote 14 above.*