The IBA Rules of Evidence Five Years Later

- Japan: Retrospective and Prospective -

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I. EXECUTIVE SUMMARY

During the past five years, the IBA Rules on the Taking of Evidence in International Commercial Arbitration ("IBA Rules of Evidence")[1] have not been widely utilized in Japan. In the coming years, however, the situation will change.

In the recent years, the Japanese government modernized the Arbitration Law in line with the UNCTIRAL Model Law and has gradually allowed non-Japanese lawyers to join the Japanese arbitration community. The IBA Rules of Evidence are now ready to play a substantial role in international arbitration in Japan. In fact, current Japanese litigation practices are already quite similar to those articulated in the IBA Rules of Evidence.

In the next five years, the IBA Rules of Evidence shall be used more than ever in Japan.

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[1] Available on-line from the IBA's website at http://www.ibanet.org/images/downloads/IBA_RULES.pdf.

II. INTRODUCTION

The IBA Rules of Evidence were adopted on June 1, 1999, by the resolution of the IBA Council. Five years later, it appears that the IBA Rules of Evidence are not widely used within the Japanese arbitration community. Why is this? Are there any signs of change?

During these five years, epoch-making legislation was passed in Japan. The Japanese government enacted the new Arbitration Law (Law No. 138 of 2003),[2] which was implemented on March 1, 2004. Before the new Arbitration Law was implemented, Japanese arbitration procedures were governed by the Law Concerning Public Notice and Arbitration Procedures (Law No. 29 of 1890, as amended) ("Old Law"). For more than 110 years, the Old Law had not been substantially amended. As a result, the Old Law was said to be awfully outdated and out of sync with the global standard. The new Arbitration Law has been modeled on the UNCITRAL Model Law on International Commercial Arbitration. Finally, after being updated, Japan's arbitration law conforms to the global standard.[3]

This paper will discuss the evidence rules which have been applied in the Japanese arbitration community, and the future prospects for the IBA Rules of Evidence within the Japanese arbitration community.

III. EVIDENCE RULES UNDER THE OLD LAW

The Old Law had few provisions concerning evidence rules. While no explicit provision existed in the Old Law on the subject, it was understood that, save for some fundamental procedural standards, the parties were free to agree upon the procedural rules

[2] An English translation of the new Arbitration Law is available on-line from the Japanese government's website at http://www.kantei.go.jp/foreign/policy/sihou/arbitrationlaw.pdf. For an overview of the new Arbitration Law, see, e.g., Tatsuya Nakamura, *Salient Features of the New Japanese Arbitration Law based Upon the UNCITRAL Model Law on International Commercial Arbitration*, 17 JCAA Newsletter 1 (2004), available on-line from JCAA's website at http://www.jcaa.or.jp/e/arbitration-e/syuppan-e/newslet/news17.pdf.

[3] Hiroyuki Tezuka, *The New Arbitration Law of Japan: Notable Variations from the UNCITRAL Model Law on International Commercial Arbitration*, 1 (2004), available on-line from the IBA's website at http://archive.ibanet.org/Docs/3564_AU12.pdf.

for the arbitration.[4] Nevertheless, so far as the evidence rules were concerned, the Japanese arbitration procedures tended to be managed much in the same manner as the Japanese national court procedures.[5] I can think of several reasons for this phenomenon.

Firstly, before the new Code of Civil Procedure (Law No. 109 of 1996) was implemented on January 1, 1998, the Old Law was not an independent statute, but rather a part of the old Code of Civil Procedure (Law No. 29 of 1890, as amended). As such, it could be conceived that, in the absence of the parties' agreement to the contrary, the evidence rules for the national court procedures, as provided for in the old Code of Civil Procedure, should also apply to arbitration procedures.[6]

Secondly, until recently, non-Japanese lawyers were statutorily prohibited from representing their clients in Japanese arbitration procedures.[7] Before September 1, 1996, only those lawyers licensed to general practice in Japan ("*Bengoshi*") were authorized to represent their clients in Japanese arbitration procedures. As such, the parties (or more specifically, Japanese lawyers representing them) had little reason to deviate from the evidence rules applied in the Japanese court procedures.

Thirdly, the evidence rules applied in Japanese court procedures have been a mixture of civil law rules and common law rules. The old Code of Civil Procedure was enacted in 1890, originally based upon the German Code of Civil Procedure (or "ZPO") of 1877. After World War II, the 1949 amendments to the old Code were strongly influenced by American law. This amendment made the old Code a mixture of the civil law inquisitorial system and the common law adversarial system.

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[4] Takeshi Kojima, *Arbitration System in Japan*, in Perspective on Civil Justice and ADR: Japan and the U.S.A. 77, 81-82 (Takeshi Kojima ed., 1990).

[5] Toshiro Nishimura & Hiroyuki Tezuka, *Japan*, in Arbitration World 2004 - Jurisdictional Comparison 209, 216 (J William Rowley ed., 2004). *See also*, Tezuka, *supra* note 3, at 3.

[6] Tazuka, *supra* note 3, at 3.

[7] Effective September 1, 1996, the Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers (Law No. 66 of 1986) was amended to allow non-Japanese lawyers to represent their clients in international arbitration in Japan. *See, e.g.*, Nishimura & Tezuka, *supra* note 5, at 215.

IV. EVIDENCE RULES IN THE CODE OF CIVIL PROCEDURE

The evidence rules for any Japanese civil lawsuit are currently governed by the Code of Civil Procedure (Law No. 109 of 1996, as amended) and ancillary Supreme Court Rules of Civil Procedure (Supreme Court Rule No. 5 of 1996). As discussed below,[8] while the current Japanese litigation practices are quite similar to those articulated in the IBA Rules of Evidence, there are several notable differences.

(a) Production of Documents

As in the case of international arbitration,[9] documents are often considered to be a relatively reliable form of evidence in Japanese court procedures. As a general rule, any document is admissible as evidence; hearsay evidence is admissible in civil lawsuits, while it is basically inadmissible in criminal cases.[10] Only in very exceptional cases[11] will the court rule a certain document to be inadmissible as evidence. All documents must be authenticated before being admitted as evidence.[12]

When a certain document is available to that party, in similarity to Article 3.1 of the IBA Rules of Evidence, each party can introduce such document as evidence.[13] Evidence must be submitted on a timely basis;[14] in that respect, the court can set a specific deadline for a submission[15] and can exclude any evidence submitted after any deadline.[16]

When a party wishes to introduce a certain document which is not readily available to said party, akin to Article 3.2 of the IBA Rules of Evidence, such party can request that the court order the document holder to produce such document.[17] The holder of such document

[8] Following explanation owes much to Yasuhei Taniguchi, et al., Civil Procedure in Japan (1999).
[9] IBA Working Party, *Commentary on the New IBA Rules of Evidence in International Commercial Arbitration*, 2 [2000] B.L.I 16, 19.
[10] Article 320 of the Code of Criminal Procedure.
[11] For example, if document was obtained by means of theft or other antisocial means, such document should be inadmissible. *See, e.g.*, Nagoya High Court judgment of February 18, 1981, 1007 Hanji 66, Tokyo District Court judgment of May 29, 1998, 1004 Hanta 260.
[12] Article 228 of the Code of Civil Procedure.
[13] Article 219 of the Code of Civil Procedure.
[14] Article 156 of the Code of Civil Procedure.
[15] Article 147-3 of the Code of Civil Procedure.
[16] Article 157 of the Code of Civil Procedure.
[17] Article 219 of the Code of Civil Procedure.

cannot refuse to produce it if: (1) as a party to the lawsuit, he has cited such document in the lawsuit; (2) the party applying for the order is entitled to obtain or peruse such document; or (3) the document was executed for the benefit of the applicant or with respect to a legal relationship between him and the holder.[18] In contrast, if (1) the document contains any technical or occupational secret, or (2) the document has been prepared solely for the internal use of the holder, the holder of such document may refuse to produce such document.[19] Those exceptions seem to be slightly different from those articulated in Article 9.2 of the IBA Rules of Evidence.

If the party so ordered refuses to produce the document, as equivalently stated in Article 9.3 of the IBA Rules of Evidence, the court may deem the allegation of the other party relating to such document true.[20] The same assumption is warranted,[21] if a party, with the intention to prevent the use of the document by the opponent, destroys or defaces a document which that party was bound to produce.[22] Third persons failing to comply with a production order may be subject to monetary sanction.[23]

(b) Witness of Fact

The court can summon any person who is subject to the jurisdiction of the Japanese court, whether Japanese or non-Japanese, as a witness.[24] If a summoned witness fails to appear without good reason, the court may charge him with the cost occasioned by his non-appearance, and detain him and/or impose a monetary sanction upon him.[25] The court can also order a government officer to collect such witness by physical force.[26]

Like Article 4.1 of the IBA Rules of Evidence, any witness must be identified on a timely basis,[27] and the court can set specific deadlines for such submission.[28] The court has

[18] Article 220, Items 1 to 3 of the Code of Civil Procedure.
[19] Article 220, Item 4 of the Code of Civil Procedure.
[20] Article 224, Paragraph 1 of the Code of Civil Procedure.
[21] It appears that this assumption is not warranted under Article 9.2(d) of the IBA Rules of Evidence.
[22] Article 224, Paragraph 2 of the Code of Civil Procedure.
[23] Article 225 of the Code of Civil Procedure.
[24] Article 190 of the Code of Civil Procedure.
[25] Article 193 of the Code of Civil Procedure.
[26] Article 194 of the Code of Civil Procedure.
[27] Article 156 of the Code of Civil Procedure.

the power to exclude those witnesses who are identified in an untimely manner.[29] Officers, employees, directors or other agents of the party can present evidence as witnesses, while a party itself and its legal representative shall present evidence as party-witnesses.[30] As in the case of Article 4.3 of the IBA Rules of Evidence, it is considered permissible to interview a witness or a potential witness in advance.

Although not specifically provided for in the Code or Rules of Civil Procedure, it is a well accepted practice that each party shall submit written statements of a witness or a potential witness in advance. Such witness statement can be made either under oath or not under oath. By reviewing those witness statements, the court can evaluate whether any witness testimonies are really necessary to resolve the dispute. Those witness statements also shorten the length of time needed to conduct direct examinations at evidentiary hearings.[31] Unlike Article 4.8 of the IBA Rules of Evidence, those witness statements shall be admissible as documentary evidence, even where the relevant witness does not appear for testimony at the evidentiary hearing.

As a general rule, a witness must take an oath prior to examination.[32] When a witness refuses to take an oath without statutory reasons, such witness may be subject to the same penalty as in the case of a non-appearance.[33] A witness who gives false testimony under oath may be subject to criminal prosecution for perjury.[34]

A witness may refuse to testify if one of the four following condition exists. First, current and former government officials must refuse to testify as to official secrets unless they have a specific approval from the authorities concerned.[35] Second, professionals, such as doctors, dentists, apothecaries, druggists, mid-wives, lawyers, notaries public, and clergy, may refuse testimony as to knowledge obtained in their professional capacity, unless they have been released from any secrecy obligation.[36] Third, witnesses may also refuse to

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[28] Article 147-3 of the Code of Civil Procedure.
[29] Article 157 of the Code of Civil Procedure.
[30] Articles 207 to 211 of the Code of Civil Procedure.
[31] IBA Working Party, *supra* note 9, at 27.
[32] Article 201 of the Code of Civil Procedure.
[33] Article 201 of the Code of Civil Procedure.
[34] Article 169 of the Penal Code.
[35] Article 197, Paragraph 1, Item 1 of the Code of Civil Procedure.
[36] Article 197, Paragraph 1, Item 2 of the Code of Civil Procedure.

disclose their technical or occupational secrets.[37] Fourth, witnesses may refuse to testify on matters which are likely to incriminate themselves or their relatives, or likely to bring disgrace upon them.[38] If a witness refuses testimony without cause, he is subject to the same sanction as for failure to appear.[39]

While Article 8.2 of the IBA Rules of Evidence provides that the claimant shall ordinarily present the testimony of its witness, neither the Code nor Rules of Civil Procedure provides for the order of call for witnesses. The court has the discretion to determine the order in which witnesses are examined. In practice, the court will consult with the parties and set an order which will maximize the ability of the court to render a just decision.

The rules governing the interrogation of witnesses at an evidentiary hearing were significantly changed by the 1948 amendments.[40] Before that time, it was primarily the judges who questioned the witness. All that the parties could do was request that the judge ask certain questions, or to ask for the judge's permission to pose certain questions themselves.[41] Under the current practice, in contrast, the parties play the primary role in examination. In principle, the party calling the witness conducts the direct examination, and the opposing party cross-examines the witness.[42] This is followed by a re-direct and further examination by the parties, if necessary.[43] The court may ask questions when the parties have finished with their questions, or, when the court deems it necessary. The court has the power to prohibit (among others): (1) irrelevant direct examination; (2) cross-examination on matters not covered in direct examination, except questions challenging credibility; (3) general or abstract questions; (4) leading questions; (5) insulting, embarrassing, or redundant questions; or (6) questions seeking a statement of opinion, not fact.[44]

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[37] Article 197, Paragraph 1, Item 3 of the Code of Civil Procedure.

[38] Article 196 of the Code of Civil Procedure.

[39] Article 200 of the Code of Civil Procedure.

[40] Law No. 149 of 1948.

[41] *See* Articles 298 & 299 of the Code of Civil Procedure prior to the 1948 amendment, which were modeled after Articles 396[3], 397 of ZPO (German).

[42] Article 202 of the Code of Civil Procedure.

[43] Article 114 of the Rules of Civil Procedure.

[44] Article 115 of the Rules of Civil Procedure.

(c) Expert Witness

The Code or Rules of Civil Procedure lack any specific provision on the party-appointed expert. According to the Japanese practice, the court shall select expert witnesses from among appropriate persons of knowledge or experience.[45] As such, expert witnesses are always court-appointed experts. Before rendering an expert opinion, the expert witness must take an oath.[46] The court may require the expert opinion either orally or in writing.[47]

If a party wishes to rely on the opinion of its own expert, that party shall submit such expert opinion as documentary evidence. Unlike Article 5.5 of the IBA Rules of Evidence, such party-appointed expert opinion shall be admissible as documentary evidence, even where said expert does not testify at an evidentiary hearing.

Although not specifically provided for in the Code or Rules of Civil Procedure, it is becoming popular, where more than one expert has been appointed, for those experts to meet and confer in front of the court, so that they can reach agreements on issues about which they may initially have differed. Such practices are becoming especially common in cases like medical malpractice, architect malpractice or patent infringement, where each party appoints its own expert and the court appoints a third expert. Those practices are homogenous to Article 5.3 of the IBA Rules of Evidence.

(d) On-site Inspection

Like Article 7 of the IBA Rules of Evidence, the court can inspect the physical condition or status of movable and immovable property or other objects (including the human body).[48] Depending upon the circumstances, the object may be inspected in the courtroom or at its location. If the object is in the possession of the opposing party or a third person, a party can request the court to order the object holder to produce such object for inspection. The rules governing documentary evidence generally apply to the production or submission of objects to be inspected.

[45] Article 213 of the Code of Civil Procedure.
[46] Article 216 of the Code of Civil Procedure.
[47] Article 215 of the Code of Civil Procedure.
[48] Articles 232 & 233 of the Code of Civil Procedure.

(e) Admissibility and Assessment of the Evidence

Like Article 9.1 of the IBA Rules of Evidence, the court shall determine the admissibility, relevance, materiality and weight of evidence.[49] However, this does not mean that an arbitrary determination is permitted. The court must accord with logical and experiential rules. Accordingly, judgments which deviate from these rules are reversible on appeal.

V. EVIDENCE RULES UNDER THE NEW ARIBTRATION LAW

The new Arbitration Law specifically provides that "the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the arbitral proceedings; provided however it shall not violate the provisions of this Law relating to public policy".[50] Accordingly, the parties are free to adopt the IBA Rules of Evidence to the extent that they do not violate the mandatory provisions in the new Arbitration Law.

As far as the evidence rules are concerned, the mandatory rules require the equal treatment of parties and an opportunity for the parties to make a presentation.[51] As I observe, the IBA Rules of Evidence shall conform well to these requirements.

Although the new Arbitration Law provides that, as a default rule, an arbitral tribunal has the power to determine the admissibility, relevance, materiality and weight of any evidence, this default rules can be overridden by agreement of the parties;[52] parties are free to agree upon the admissibility of evidence.[53] As such, Articles 4.8 and 5.5 of the IBA Rules of Evidence, which mandate an arbitral tribunal to disregard certain evidence, correspond to the new Arbitration Law.

The new Arbitration Law provides that the arbitral tribunal or a party may apply to have a court assist in the taking evidence.[54] While this provision is considered primarily to be a mandatory provision,[55] it is covered by "whatever steps legally available to obtain the

[49] Articles 247 of the Code of Civil Procedure.
[50] Article 26, Paragraph 1 of the new Arbitration Law.
[51] Article 24, Paragraphs 1 & 2 of the new Arbitration Law.
[52] Article 26, Paragraph 3 of the new Arbitration Law.
[53] Masaaki Kondo et al., Arbitration Law of Japan 121 (2004).
[54] Article 35 of the new Arbitration Law.
[55] Kondo, *supra* note 53, at 137.

requested document" (as provided for in Article 3.8) and by "whatever steps legally available to obtain the testimony" (as provided for in Article 4.9).

In sum, there is no statutory barrier in Japan to prevent the Japanese arbitration community from adopting the IBA Rules of Evidence. As the new Arbitration Law has few provisions on evidence gathering, the IBA Rules of Evidence can serve very well as an initial framework for evidence rules in any particular international arbitration.[56] The parties may adopt the IBA Rules of Evidence or modify them.[57] For example, the parties may agree that any document submitted during the arbitration shall be kept confidential,[58] and/or that a witness statement shall be admissible even where that witness does not testify at an evidentiary hearing.[59]

VI. CONCLUSION

During the past five years, the IBA Rules of Evidence have not been widely utilized in Japan, for several reasons. First, the number of arbitrations in Japan is still relatively small.[60] Second, due to the statutory restrictions on non-Japanese lawyers existing prior to 1996, the parties are oftentimes represented solely by Japanese lawyers (*"Bengoshi"*), who are most familiar with the Japanese court procedures. Third, insofar as the Japanese evidence rules, which are customarily applied in national court procedures, are a mixture of the civil law tradition and the common law tradition, the parties have relatively less resistance to applying those rules, even when the parties are from different legal cultures.

In the coming years, the situation will change. By implementing the new Arbitration Law, the Japanese government expects Japan to become one of the leading arbitration

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[56] *See* Preamble 1 of the IBA Rules of Evidence.

[57] *See* Preamble 2 of the IBA Rules of Evidence.

[58] Article 3.12 of the IBA Rules of Evidence provides that those documents "produced" shall be confidential, but does not provide whether those documents "submitted" by a party shall be confidential. This distinction is intentional. *See* IBA Working Party, *supra* note 9, at 24.

[59] This treatment is the same as the current court practice in Japan; while the evidence is admissible, a witness statement, which has not been cross-examined, is accorded relatively little weight.

[60] It is reported that the total number of arbitration proceedings in Japan is around 100 cases each year, while the American Arbitration Association alone handles approximately 200,000 cases each year. *See*, Nozomu Ohara, *Dispute Resolution Culture in Japan: Its Impact On Arbitration Procedure*, 4 (2004), available on-line from the IBA's website at http://archive.ibanet.org/Docs/3165_AU75.pdf.

centers. That means more foreign arbitration players will join the Japanese arbitration community.[61] Within such perspective, Japan will need a set of evidence rules friendly to both Japanese and non-Japanese lawyers. Naturally, Japanese lawyers are well versed in the Japanese rules, while non-Japanese lawyers are usually not. At the same time, a majority of Japanese lawyers are not yet familiar with the IBA Rules of Evidence, although those rules are well know in the international arbitration arena. Once Japanese lawyers become familiar with the IBA Rules, however, they shall become more comfortable in working with them. As shown above, the IBA Rules of Evidence are consistent with Japanese evidence rules. Toward this end, there are several organized efforts to promote international commercial arbitration in Japan. For example, the Japan Association of Arbitrators,[62] a non-profit organization comprised of leading scholars and practitioners, provides professional training for arbitrators and mediators.

In the next five years, I expect that the IBA Evidence Rules will be more widely used than ever within the Japanese arbitration community.

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[61] Effective April 1, 2005, the Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers (Law No. 66 of 1986) was further amended to allow non-Japanese lawyers to employ, or form a partnership with, Japanese *Bengoshi*. This amendment will also encourage non-Japanese lawyers to participate in the Japanese arbitration community.

[62] http://arbitrators.jp/