

## MHM Asian Legal Insights

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### The Silver Lining in International Dispute Resolutions

#### Part II: Development of mediation practice in Japan and internationally

In Part I of this article, we have discussed the types of mediation in Japan and the unique characteristics of Japanese domestic mediation as compared to the practice outside of Japan. This Part II will discuss the development of international mediation in Japan in recent years, how companies can adopt such dispute resolution mechanism into their dispute resolution model, and why mediation should be considered as the foremost dispute resolution mechanism in the foreseeable future.

#### 1. Development of international mediation in Japan

Due to the increased interests in international mediation on a worldwide basis, there have been several initiatives taken by the Japanese government and several private sectors to revitalize international dispute resolution in Japan. Some of these initiatives are as follows:

##### *COVID-19 Protocol by JIMC with SIMC*

JIMC is the first international mediation centre in Japan, which provides hearing facility for international mediation. Since its opening, it has worked closely with the Singapore International Mediation Centre (“**SIMC**”) on various initiatives including the JIMC-SIMC Joint Covid-19 Protocol in September 2020. The Protocol provides an expedited mediation during the pandemic especially for businesses that operate between Japan and Singapore. This is the first joint online mediation protocol for dispute resolution by the cross-border collaboration of two international dispute institutions.

##### *JCCA Mediation Rules 2020*

The amended Commercial Mediation Rules of JCAA came into effect on 1 February 2020. The amendments are intended to modernise its rules in line with international mediation practice to attract larger pool of users from abroad. The 3 most significant amendments are:

- (a) more **party autonomy** to the parties in respect of certain aspects of the mediation proceeding, including whether the mediator shall suggest to all the Parties its proposals for settlement and, if so, the timing thereof (Art. 21.2(4)), the time limit for concluding the mediation proceedings (Art. 25), remuneration of the mediator (Art. 30); and

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- (b) comprehensive rules on **confidentiality** (Art. 23) and **non-disclosure in other dispute resolution proceedings** (Art. 24).
- (c) **elaborated provisions** on several issues including on commencement of mediation (Art. 12 – 13), impartiality and independence of mediator (Art. 15), appointment of mediator (Art. 17) and termination of mediation proceeding (Art. 28).

### *Japan International Dispute Resolution Centre (“**JIDRC**”) opens in Tokyo*

The JIDRC was established with dual purposes – to provide facilities for hearings of institutional and ad hoc arbitrations and mediations, and to promote international arbitration and mediation in Japan. The JIDRC opened its first office in Osaka in May 2018, followed by its second office in Tokyo in October 2020. The facility provides hearing rooms and breakout rooms with state-of-the-art technology and facilitates the use of virtual hearings (online hearings) and hybrid style hearings with the co-existence of participants within and outside the venue. It also offers permanently installed simultaneous interpretation booths and receivers at hearings.

### *Amendment to the Foreign Lawyers Act*

The amendment to the Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers (“**Foreign Lawyers Act**”) came into effect from 29 August 2020, which enables registered foreign lawyers and non-registered foreign lawyers to represent parties in international mediation cases where the dispute concerns a contract or transaction between private businesses (excluding consumer disputes, labour disputes, and family disputes etc).

## 2. Mediation as the preferred ADR

The increase in popularity of mediation is seen not only in Japan, but also globally due to 2 main reasons – (a) the uncertainties in global economic outlook caused by the COVID-19 pandemic which lower the appetite for costly and lengthy litigation or arbitration, and (b) the Singapore Convention which came into effect in the midst of the pandemic on 12 September 2020, which makes it possible to enforce settlement agreements reached via mediation.

It will not be surprising if mediation would become the foremost mechanism to resolve cross border commercial disputes in the foreseeable future, not only for Japanese parties who are already familiar with the concept of mediation, but also for non-Japanese parties who value non-acrimonious approach to resolving dispute. The following the reasons for such prediction:

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**First**, mediation has many advantages over arbitration/litigation which is discussed in our [previous article](#). Most importantly, in mediation, the parties retain control of the negotiation process and the outcome of the dispute, instead of leaving outcome of their dispute in the hands of third party.

**Second**, mediation is akin to negotiations between parties before the dispute is escalated to formal dispute resolution proceeding, except that it is a more structured and guided by experienced third party who is experienced in such negotiation and whose main tasks are to facilitate a more constructive discussions, identify the issues in dispute, search for the common grounds, and explore potential settlements and resolutions. Even if the mediation process does not lead to a settlement, parties may be able to narrow down the issues in dispute before proceeding to litigation.

**Third**, the efforts taken by the government and private sector to revitalize international mediation in Japan (and elsewhere) have made mediation more accessible, affordable and user friendly than ever before. This should provide additional incentive to Japanese parties, who are already familiar with mediation in general, to consider adopting mediation into their dispute resolution model.

**Fourth**, there are various ways to include mediation as part of the dispute resolution process due to its flexibility. In other words, mediation need not be the sole dispute resolution mechanism. One of the ways which was discussed in our [previous article](#) is to include a multi-tiered dispute resolution clause or a hybrid dispute resolution clause, providing for a contractual mandated negotiation and/or mediation period before parties are able to commence a litigation or arbitration proceeding against each other. Mediation is a fluid dispute resolution mechanism that can be incorporated at any stage of the dispute resolution process. Some of the model clauses provided by mediation institutions can be used for reference, including the following:

- [JIMC's Med-Arb clause](#)
- [SIMC/SIAC's Arb-Med Arb clause](#)
- [ICC's mediation clause](#)

**Fifth**, even though the Singapore Convention is only enforceable in 6 countries at the present, experience has shown that parties tend to honor the settlement agreements which they voluntarily negotiated. Similarly, the fact that Japan is yet to ratify the Singapore Convention should not be deterrent factor because as long as the settlement agreement satisfy the requirements of being “international” under the Singapore Convention, it would be enforceable without fresh litigation or arbitration in countries which have ratified the

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Singapore Convention, regardless of where the settlement agreement was made.

### 3. Conclusion

For the reasons set out above, there is no reason why mediation should continue to be considered as a sidekick to arbitration/litigation. Under the current economic uncertainties around the globe, there is no better timing than now for parties to reconsider how to fit mediation into the existing dispute resolution model.

\* *Mori Hamada & Matsumoto (Singapore) LLP is licensed to operate as a foreign law practice in Singapore. Where advice on Singapore law is required, we will refer the matter to and work with licensed Singapore law practices where necessary.*

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