Introduction

Historically, efficiency and cost savings were considered to be the cornerstones of arbitral proceedings. Against a background in which national courts were often plagued by delay and the possibility of repeated appeal, international arbitration developed into a logical and reasonable means of resolving transnational commercial disputes due to its reputation for being “quicker” and “cheaper” than court litigation. However, concerns are undoubtedly mounting from end-users of arbitration regarding its tendency to result in soaring costs and protracted delays, especially in international arbitration proceedings, and practitioners must now acknowledge that the game has changed. The reality is, most arbitration cases continue for years, and costs incurred are much higher than those incurred in domestic litigation. In view of this trend, small arbitration cases have become almost unaffordable, international arbitration has come to be regarded as lengthy and expensive, and how to overcome these problems has become the subject of protracted and vigorous debate.

To answer this challenge and to accommodate the needs of clients for speedier and less costly arbitration, some arbitral institutions have introduced new frameworks of accelerated procedures, however, generally, those frameworks are best suited to smaller arbitration cases, and for cases that do not follow an expedited track, the norm is still: i) two full rounds of submissions, ii) a document production phase and witness statements, followed by iii) a multi-day hearing, and iv) post-hearing briefs. Some of these “fully-fledged arbitration cases” are necessitated by the fact that the amounts in dispute are significant, and the awards are final and binding, circumstances which make practitioners and their clients reluctant to dispense with procedure that may enable them to more fully state their cases. As a result, the inexorable march towards higher costs and lengthier arbitral proceedings carries on unhindered.

Another much-touted advantage of international arbitration is that it is said to avoid nationalistic tendencies that may arise from conducting litigation in national courts, thus creating a neutral forum. However, this does not account for the reality that no arbitral proceedings can be immune to all local practice, and further, nor does it mean that all influence of national practice should be excluded from being incorporated in international arbitral proceedings. The ability to embrace the strengths of different national practices must be one, if not the most advantageous feature of arbitration - and a keystone of “party autonomy” - the ability of parties to tailor arbitration proceedings to fit the particular needs of a specific case. International arbitration as an industry has developed through a range of practical innovations introduced by a diverse group of legal professionals across the world: Continental European avocats, English QCs, Chinese lüshi, American lawyers, and others; each of us has been inspired by and brought along our own traditions and national practices to create a more informed vision of international arbitration best practice.

This article summarizes some of the features that Japanese litigation practices can offer to promote efficiency in international arbitral proceedings, that can be proactively adopted in and tailored to arbitral proceedings.

* Partner at Nishimura & Asahi.
1 Such as Expedited Procedures set forth in JCAA Rules 75-81
II Japanese legal developments towards the modernization of Arbitration rules/laws, and efficient dispute resolution mechanisms

Back in the 1980s and early 1990s, Japanese arbitration practices were criticized as being somewhat inefficient with protracted multiple hearing sessions of over a lengthy period, and also numerous exchanges of position papers. Such inefficient practices, though they may not have been envisaged as the norm, could have resulted from inexperienced players who were influenced by practices in Japanese national court litigation that was conducted decades ago.

More than a quarter of a century has passed since such criticisms were leveled, and our domestic court practices, which had been accused of being the major source of such inefficient and frustrating arbitral practices, have drastically changed and developed over decades, as the Japanese Code of Civil Procedure (the “CCP”) has been fundamentally reformed, along with the reform of other major arbitration laws and rules.

Reform of the CCP intended to increase efficiency in dispute resolution mechanism

(a) Introduction of preparatory proceedings (Art. 168 CCP)

This is a partially open type of proceeding which allows documents filed within proceedings to be examined, which expedites the identification of issues in dispute. Since this type of proceeding is not held in an open court, it allows for more frank and wide-ranging discussions. The court may authorize a single judge to conduct preparatory proceedings, thus enabling just one of the panel to preside over the case without requiring the entire panel of judges assigned to the case to be present.

(b) Introduction of preliminary oral hearings (Art. 164 CCP)

Preparatory oral hearings are intended to sort out, and identify the factual and legal issues for determination and the witnesses to be produced. They are held in an open court, which can take place informally in round-table courtrooms, where the parties can discuss matters to sort out the issues, and since it is an oral hearing, witness examination can be conducted.

The key difference between the procedures referred to in (a) and (b) above is whether or not such hearings are held in an open court. When setting down such fixtures, judges consider the nature of the case and decides which form the hearing shall take.

Key strengths of these proceedings to arrange issues and evidence include that the court can sort out the issues of a case early on, and the court and the parties confirm the issues which are to be determined later, so that if a party presents facts relevant to the issues after such proceedings are complete, they must explain the delay in presenting such facts (Art. 93 CCP). The court must set down the first oral hearing to follow preparatory proceedings to examine evidence. Witnesses and parties are questioned as promptly as possible after delineating the issues and

3 Reform of Arbitration Law of Japan: the long awaited reform of Japan's Arbitration Law (Law No138 of 2003, “Arbitration Law”) was completed in 2003, and that was a once-in-a-hundred-year major reform, since the old law was enacted in 1890. Arbitration Law basically follows the UNCITRAL Model Law, with some amendments to ensure consistency with other Japanese regulations or to address social changes over the intervening years, such as technological advancements.
4 Reform of JCAA Rules: the rules of Japan Commercial Arbitration Association (JCAA), the prominent institution for international commercial arbitration, has been amended since then, and especially, the latest amendment in 2014 was intended to take into account trends evolving from the modernization of arbitration rules of other arbitral institutions, and from the UNCITRAL Arbitration Rules.
6 "Partially open" means that the court may permit observation by a person whom it considers to be appropriate; however the court shall permit observation by any person requested by a party, except where his/her observation would be detrimental to the conduct of the proceedings (Art 168(2) CCP).
7 Art 171(1) CCP
8 Since preparatory proceedings are not formal oral hearings that are open to public, the court must hear the opinions of the parties in deciding holding such hearings (Art 168 CCP).
evidence.

At either type of preparatory procedures, the court may have each party submit a brief (Art 170(1) CCP), and, the court may make a decision on an offer of evidence or any other decision that may be made on a date other than the date for oral argument, and examine evidence with regard to documents.\(^9\)

At the end of these preparatory procedures, the court shall confirm, with the parties, the facts to be proven through the subsequent examination of evidence.\(^10\) Further, the judge may require the parties to submit a document summarizing the issues and evidence as identified at such preparatory procedure, and in order to advance any new allegation not included in such statement, a party must explain why the particular allegation could not be advanced in the either type of preparatory procedures if demanded by the other party.\(^11\)

(2) Introduction of “Plan for Trial”: 2003 Japanese Civil Procedure Reform

A further reform in 2003 required all courts and parties to try to establish a schedule to follow for proceedings.\(^12\) If the court deems it necessary due to the complexity or other circumstances regarding a dispute, for example because the dispute involves a number of complicated matters to be examined, a schedule must be established after conferring with the parties.\(^13\)

The schedule should set deadlines for completion of: i) arranging issues and evidence, ii) witness examination, iii) concluding oral argument and rendering judgment.

(3) The influence of the reform of the CCP on Japanese court practice

With those two key features implemented into our new CCP, case management and efficiency of Japanese litigation has drastically improved. The results speak for themselves. The average time required for a decision by the court of first instance has significantly reduced, from 12.9 months in 1990 to 8.5 months in 2014.\(^{14}\) Also, the average number of sessions within proceedings has also reduced to 4.7 sessions (an average of 2.5 preparatory hearings and 2.2 sessions for formal hearings), with an average interval of 1.8 months between hearings.

This development of modern court practice, proactively led by judges and utilized by practitioners, has advanced Japanese national litigation practice to the stage where practitioners can i) have the preparation phase before the formal oral hearing to sort out the issues, carving out undisputed and trivial issues, and singularly focusing on the critical ones by utilizing the different forms of preparatory fixtures depending on the features of the case, ii) isolate the issues and facts in an organized manner, and then iii) proceed promptly to an oral hearing or hearings. The entire schedule of (i) through (iii) can be planned in advance which gives greater predictability and ultimately satisfaction to clients, the end-users of the Japanese court system.

III Influence of modern Japanese litigation practice on efficiency in International Arbitration in Japan –can we utilize what we have?

Introduction of Early Preparatory “Procedures to Arrange Issues and Evidence” type of hearing in international arbitration for crystallization of issues

As pointed out earlier, the “fully-fledged," or “standardized” approach typically consists of i) two full rounds of submissions, ii) document production phase and witness statements, followed by iii) a multi-day hearing, and iv) post-hearing briefs. Under the standardized approach, only a single hearing on substantive merits occurs, at a very late stage of the proceedings. Parties are expected to develop their arguments before the hearing through the exchange of documents.

However, whether the mere exchange of multiple documents enables parties to filter out frivolous issues, and clearly focus on the issues that are essential to solve the dispute is somewhat doubtful, since parties strategize about when and which allegations to make and critical items of evidence to submit, rather than presenting their entire cases from the outset. Thus, parties’ positions cannot help but evolve

\(^9\) Art 170(2) CCP.  
\(^{10}\) Art 170(6) CCP; 165(1) CCP.  
\(^{11}\) Art 170(6) CCP; 165(2) CCP.  
\(^{12}\) Art 147(2) CCP.  
\(^{13}\) Art 147(3) CCP.  
\(^{14}\) Supreme Court of Japan, ‘Report No. 6 on the verification outcome on the acceleration of the trial’ (2014).
over the course of proceedings, depending on their opponents’ allegations and evidence submitted. The result of this is that the tribunal does not focus on or review earlier submissions, but lets them develop, causing submissions to become voluminous. Counsel tend to present too much information to the tribunal, due mostly to the fear of leaving something important out, including every authority and argument no matter how insignificant or trivial, and this has the potential to diminish the advantages of arbitration.

Therefore, it is often the case that the issues in dispute crystallize over the course of the hearing, rather than through the exchange of documents, and further, only after actual hearings, after feedback from arbitrators, and once counsel understand the positions of their opponents. This shows that interaction and discussion between the parties, and also the parties and the tribunal, is essential for crystallizing the issues since some matters that may be clear to the parties are not always so to the presiding tribunal. However, such focus on issues is typically not achieved until actual hearings.

Japanese litigation practices were once pointed to as principal culprits in the difficulties facing global players in international arbitration. Multiple arbitral sessions over a lengthy period of time were criticized as a “Japanese approach,” not aligned with global trends. However, our domestic court practices have changed and developed over decades, as the CCP has been fundamentally reformed as stated earlier. Further, provided they are not held over a lengthy period of time, additional early hearings should be encouraged to increase interaction, and provide the opportunity for clarification, thereby contributing to speedier and less costly arbitration. Now, our domestic court practices can work in favor of clients and practitioners in the international arbitration industry, and inspire the creation of more expedited and efficient arbitral proceedings.

Holding an early preparatory hearing before the main hearing can be highly useful for filtering out frivolous issues at an early stage, and to find which issues to focus on. Holding such an early hearing promotes open dialogue between the tribunal and the parties and can enable the parties to set their focus on the important issues, which will eliminate not only the unnecessary submission of allegations, but also the necessity to produce evidence from expert witnesses, unnecessarily broad document production, and further, unnecessary witness examination, thus speeding up the main hearing itself.

To satisfy clients’ needs for speedy and less costly arbitral proceedings by crystallizing the issues, and tailoring proceedings to best suit each case, either type of early hearing can be utilized. That is, one involving the whole tribunal (as per the preliminary oral hearing track), or by only the chairman alone (as per the preparatory proceedings track), with the function of conducting the examination of the witness (as in a preliminary oral hearing), enabling the carving out of the trivial evidence after simple examination, or just pleading of the case and frank discussion (as in preparatory proceedings).

Also, as permitted in accordance with Japanese practice, at the end of such preparatory hearing, the tribunal may require the parties to submit a statement of what has been confirmed. This allows the parties to narrow the scope of an arbitration in such preparatory hearing by carving out preliminary issues that are not essential to resolving the dispute. The parties can agree on certain undisputed facts based on which such issues may be determined, thus eliminating unnecessary cross-examination or submission of exhibits.

The introduction of early hearings is aligned with the recent innovations and efforts towards the refinement of issues in international arbitration, such as the “Kaplan Opening,” involving an early hearing after the first round of written submissions and witness statements, but well before the merits hearing, to provide an opportunity for the parties to orally open their case. According to Neil Kaplan, the benefits of the Kaplan Opening are described as i) ensuring the whole tribunal reads the case at a far earlier stage, and enabling the tribunal to understand the case from that point on, ii) enabling the tribunal to have meaningful dialogue with counsel about peripheral points, unnecessary evidence and gaps in the evidence, and to meet and discuss the issues far earlier and thus align with the objectives of the Reed Retreat, iii) allowing the tribunal to put points to the parties which they will then have time to consider and to respond to, and iv) assisting speedier and, I would

---

15 “Reed Retreat”: Proposed by Lucy Reed, a meeting of arbitrators after their submissions but before the commencement of a hearing to discuss the impending hearing, with the goal of arriving together at targeted directions to the parties for the hearing. It encourages arbitrators to digest the pleadings of the parties and provides an opportunity to brainstorm and test arbitrators’ intuition. The potential advantage of implementing the Reed Retreat is speedier proceedings with counsel guided by concise directions by the tribunal.
suggest, better awards.16

A similar proposal is made by our Korean colleague, in adapting a model called the “Gangnam Model” inspired by Korean practices to international arbitration. The features of the Gangnam Model are i) initial submissions to give the tribunal an initial picture of the dispute, ii) an initial hearing that lasts only a day or less, where each side presents an overview of their case, iii) written submissions with no fixed sequence, iv) an intermediate hearing (being a variant of the Kaplan Opening), v) witness statements and further written submissions, vi) evidentiary hearing, and vii) submission after the hearing.17

The advantages described in the Kaplan Opening and the Gangnam Model can be accomplished through the holding of suitable preparatory procedures. Either option, whether preparatory proceedings or preliminary oral proceedings, or some combination thereof, should be considered to suit the needs for the specific case.

Japan is a modern, westernised nation with a rich cultural heritage. Japanese people have a love of the refined aesthetic and naturalness as expressed in the concepts of wabi and sabi or shibui, denoting simple, subtle, unobtrusive beauty. Unlike the western idea of philosophy, these concepts in Japan are regarded as an integral part of life, an expression of underlying values that provide guidance to human conduct and appropriate behaviour.

This ancient wisdom of Japanese people is embedded in many practices and pursuits which have carried over into modern times. Collectively categorised as Do−signifying a way of life (for example chado−the way of tea or Japanese tea ceremony) they can only be understood by western observers with deep involvement. Although all Do practices offer insights into personal experiences of human life, one in particular is of relevance to all dispute resolvers. Budō, loosely translated as “martial arts”, involves experiential practice of both the exercise of, as well as the prevention of conflict.

Surprisingly understanding of the precepts of Japanese Budō can assist the modern day mediator achieve better outcomes in the resolution of commercial disputes.

Mediation

Mediation is slowly coming to be recognised as an important adjunct process to international commercial arbitration, just as it is in the domestic scenario

**IV Conclusion**

As one of the prominent features of arbitration is that the procedures can be tailored to fit each and every case to suit the needs of the parties, and as each case is different, there is no panacea that can be applied to every case. It is not suggested by the author that early preparatory hearings must be utilized as another “default rule.” However, considering that no procedural developments can be immune to, and further, all procedural developments will be guided by local procedures, and although international arbitration has been influenced by certain “negative” practices from domestic legal systems, other “positive” dispute resolution procedures with origins in domestic court practices can be adapted to facilitate better international arbitration processes that will enhance efficiency, being the crown jewel of arbitral proceedings.

Ultimately, creating reasonable and efficient arbitral proceedings lies in the hands of arbitral practitioners, and procedural innovations and developments can be inspired by the best practices across legal systems, and Japanese practices should be included in these.
to court based litigation. There are many reasons for the rise in significance of mediation as a dispute resolution process:

- the changing nature of litigation with a greater emphasis on procedural rules;
- the recognition that ongoing relationship is a commercially better outcome than ongoing disputation;
- the costs of modern litigation make it too expensive for any but the largest or well resourced companies;
- it works. A constant refrain of legal counsel from countries where mediation is an accepted (even court ordered process) is why does it cost so much and take so long to get an international commercial arbitration tribunal to deliver an award, when if the matter was conducted domestically it could go to mediation and 70 percent of the time be resolved.

But despite this greater use, for many years there has been an ongoing debate as to what the precise nature of the mediator’s “facilitative” intervention should actually be. For example, should the mediator take a hands-off approach and solely assist each party to reach their own solution, or instead, actively engage with the dispute, proposing solutions for adoption and give expert legal opinion and advice to break down the parties adherence to their positions, in the hope of getting them to settle?

Mediation is fundamentally though, nothing more than assisted negotiation. It is a technique for putting the parties to the dispute in close contact with each, which allows them to explore the range of significant and influential aspects of their relationship. A skilful mediator will be able to let the parties share their different perspectives of the reasons for the breakdown in their relationship and then lead them jointly to explore the bases for the possible resolution of their dispute.

**Competition versus Cooperation**

Integrative solutions to a conflict are possible and preferable to the alternatives of “domination” by third-party decision makers through the making of binding awards or “compromise” (split the difference type settlements) reached by the parties themselves, or their lawyers.

At Harvard University in the early 1980’s, the Harvard programme on negotiation, an interdisciplinary exercise dubbed the “Negotiation Roundtable” was a forum for sharing ideas about negotiation and dispute resolution. One product of this collaborative programme was “Getting to Yes”, a widely published and studied textbook on principled negotiation, which appeared at this time. It provided a prescriptive formulaic approach to negotiation that relied on both parties to a dispute behaving cooperatively and establishing outcomes on the basis of objective criteria.

Despite the book’s success and the continuing popularity of the programme set up to teach it, the ideas have been criticised by many commentators as naïve. In a world where competition is entrenched, ignoring competitive impulses presents an unrealistic basis for managing real conflict. Put another way, the problem facing real world dispute resolution practitioners is; how to persuade an antagonist with whom you are in apparent conflict and who is mistrustful of your own intentions, to act cooperatively?

What is needed is a different basis for developing techniques of negotiation, mediation and dealing with conflict. One that assumes as a starting-point, that parties may be uncooperative as well as cooperative, or even downright aggressive, and may move between these different states at different times. Such techniques will be ones that have been proved to be robust solutions used over many years and maybe even many centuries, for dealing with real conflicts, ones that can result in the ultimate resolution, the death of one, or other of the participants. We are of course talking about warfare.

**Development of BUDO**

Mankind has a continuing history of dealing with disagreement and disputes by taking up arms. This urge to fight (and compete) with others for resources whether territorially based, artificial or even imagined, is just as much a feature of our genetic and psycho-social make-up as the urge to socialise and cooperate, if not more so.

Japan was for hundreds of years, one of the bloodiest theatres of warfare, where the practice of martial arts was raised to a form of art by practitioners (the samurai) who as warriors, were at the very peak of the social and administrative society organisation. During this period they perfected their equipment (the
curved single-edged Japanese sword, the katana, regarded by many as the finest metal weapon ever produced by any country), fighting techniques, attitudes and their philosophy of combat.

As a result of the unification of Japan in 1600, its borders, were closed and an absolute caste system forbidding social mobility and the carrying of arms by any but the samurai class, was introduced. These two actions halted the development of warfare practices for over 265 years, and put them into a suspended animation effectively bringing them into the modern age technically and philosophically, largely unchanged.

It was during this period of intense and enforced peace, that the Japanese martial arts were both favoured (as the retained practice of the samurai ruling class) and emasculated (to prevent uprisings by disaffected groups of warriors) that the practice of Do forms, ways of self cultivation and self development, proliferated. If the highest point in the practice of a martial art was to be able to “forget the technique” then the level of Do required the practitioner to “forget the self” in the practice of the form.

Many extant Japanese martial schools (or Ryū) have histories of continuous practice stretching over 400 to 500 years with twenty or so lineal generations of headmasters. Japan is therefore one of the richest places to study arts which focus on the integration of cooperative attitudes in the practice of conflict.

The benefits of this study are the discovery of methods of engagement and control of opponents in situations of armed conflict that do not rely on the use of destructive force but rather enforced collaboration. Some of these methods are described in the following sections. But these bare descriptions offer only the picture of the living and breathing animal, not the reality of its existence.

*Emotions and problems of Rationality*

People are emotional beings. Their emotions can dictate their actions, even when a calm, rational appraisal of a situation would lead to a different course of action being chosen. As William Ury, co-founder with Roger Fisher, of the Harvard University program on negotiation, describes it: “Human beings are reaction machines. The most natural thing to do when confronted with a difficult situation is to react - to act without thinking.”

Human beings are driven by their feelings as much as by their thoughts. Whereas our thoughts contain the reference material and information for our decisions, our feelings and emotions provide the colouration and emphasis about how we personally come to judge the value of one outcome from any other one.

The emotional feelings of the parties involved in the dispute, their emotional hurt and upsets, are not viewed as significant to the ultimate outcome of the legal process in which they are engaged. So when the legal process moves on to mediation for the resolution of their conflict, the tendency can be to continue to ignore the party’s emotional state and their feelings, as being unimportant factors in achieving a settlement.

This is a mistake, as focusing on the emotional dynamics of the parties (including their lawyers) can lead to transformative outcomes that surpass the expectations of even the parties themselves. Recognition (and validation) of another person’s emotional perspective if utilised carefully can positively promote settlement.

Despite an a priori preference for integrated and cooperative solutions, which may even be rationally preferred on the basis that they represent the best possible outcome, people in conflict do not necessarily choose them. People do not come to conflict logically, but emotionally and their reactions may not be rational or even fit within the proto-typically defined rational, economic man (or in law the reasonable man).

Although there may be a rational way to play any game of strategy or conduct any negotiation, people may not choose to play that way. Researchers who have studied people’s game playing experiences (such as the “prisoners dilemma” game) have found that players were often more interested in beating their opponents’ scores than in maximising their own.

That is, they were more interested in winning despite the fact that the strategy they had adopted meant that they were at risk (as in fact often resulted) in both of the parties losing. People apparently gained satisfaction just from competing against the other person and the opportunity to beat them was sufficient for them.
to risk losing overall.

**Mindfulness of the Mediator**

What is the “mind” of the skilful mediator? Is there a particular state of mindfulness that we can associate with mediation because it underlies and underscores the right way of practice? Leonard Riskin, the noted mediator who has done much to advance the debate about mediator qualities, has proposed that mediators need to apply the concepts of mindfulness in order to overcome problems which: “stem in part from certain narrow, adversarial mind-sets that tend to dominate the way most lawyers think and most legal education is structured”.

This “right mind” is associated more with the approach of the transformative mediator who is not seeking any particular outcome, than the mediator who is solely focussed on settlement. A corollary of this is, that the activities of the “right minded” mediator must necessarily require of them less involvement, analysis and expertise then their position and credentials would necessarily justify for them. This is a matter of doing less to achieve more, a concept not readily assimilated by Western experience.

The facilitative mediator, should approach the mediation with a certain mindfulness. The Japanese call it *mushin*, literally it means “no thought” but this does not indicate that the mind is empty of all thoughts, rather that the practitioner is not overwhelmed or diverted by their own desires. These desires are distractions that can take many forms. Hopes for a successful resolution, expectation of results, anticipation of likely circumstances or stages that will occur or especially ego-driven “solutions” which the mediator may try to impose on the parties.

Instead the mediator is concerned with the here and now. Of course the mediator understands that the parties have come to the mediation because they want closure and resolution. As well, there may be significant financial implications, property settlements or expectation of monies owed under contract, the receipt of which may be a driving factor for one or both the parties. There may be other external pressures, the matter may have been filed already in a court for which he first hearing date is drawing close or prepared for arbitration and the mediation may be a mere step along the way.

The idea of emptying the mind of all thought is not only a difficult concept to grasp, but often an insurmountable practice for the Western mind, especially that of the professional technician or arbitrator, who has been trained to make discriminations, employ categorisation and above all, deliver explanations of what is or is not true.

This practice of “no-mind” was described by the Zen monk, Soho Takuan in a letter written to the sword master Yagyu Matazaemon Munenori as: The mind that thinks about removing what is within it will by the very act be occupied. If one will not think about it, the mind will remove these thoughts by itself and of itself become No-Mind. Therefore the mediator does not hold on to any fixed answer to the conflict that is brought to the mediation. As the introduction of the mediator’s own “solution” can make the process or unified settlement more difficult. This requires the mediator to be able to move in harmony with the parties.

**Concept of Confluence**

Confluence is the powerful, flowing together of two separate and individually distinct streams of thought or action. The Japanese call this “aiki”, harmonising energy (literally *ai* – together and *ki* – universal energy). The word *Aikidō* made up with the addition of the term *Dō*, means the method or the way for *aiki*. *Aikidō* is also the name of a Japanese martial art that was developed around the middle of the last century by Morhei Ueshiba a martial arts practitioner whose life spanned the ancient and modern eras in Japan.

The significance of *Aikidō* for the modern-day mediation practitioner, is that it offers consistent principles for dealing with conflicts involving (either passive or aggressive) non co-operative adversaries. Whilst seeking joint, integrative solutions, following the *Aikidō* principles allows a practitioner to employ a non-violent response to aggression combined with a flexibility of movement to neutralise and harmlessly redirect the aggressive energy of the attacker.

Using the actions of *aiki*, aggressive non-resistance is impossible. The *aiki* practitioner’s strategy in dealing with a resistive and non-co-operative adversary is not to force, pull or push, fight or flee from them but to follow them. And after establishing a mutual cen-
teredness, to let the opponent lead them to where they want to go. This is what Professor Ury calls, “letting the other person have your way”.

The power of confluence, used in this way is overwhelming. The sole or single power of the one person, is overwhelmed by the joint force of both people acting together. The uniqueness is that the initiation comes from us, not giving in or getting out of the way but powerfully going with and totally blending, with the others strength and intention.

This is not just about using a person’s power against them, it is using that power with them. Often in the very practice of this process both parties are changed and their directions are altered from the original courses each individual had intended. When this occurs in a dispute resolution environment, the room takes on an energy that was not there before. Rather then the slow grinding forward of the settlement process with a word or phrase changed here or a difference split there, it is as if people are propelled forward by a seemingly endless flow of energy. The result is a creative solution designed by the combined efforts of all parties not a destructive reduction of a hoped for result.

Summary
Japanese cultural practices, in particular that of Budo provide a unique and alternative pathway for mediators. These practices can assist the resolution of disputes by introducing powerful techniques for understanding and engaging productively with the combative and aggressive intentions of an adversary.

Japanese lawyers, arbitrators and dispute resolvers can look to their own unique cultural inheritance to find powerful solutions to modern commercial dispute resolution practice. Rather than just adopting the practice of Western mediators, they can employ their own wisdom derived from the practice of Budo in the resolution of conflicts and legal disputes.

Standard Arbitration Clause
All disputes, controversies or differences which may arise between the parties hereto, out of or in relation to or in connection with this Agreement shall be finally settled by arbitration in (name of city) in accordance with the Commercial Arbitration Rules of the Japan Commercial Arbitration Association.

Notes to Contributors for Article Submissions
The Editor welcomes submissions of articles and essays on international arbitrations. Articles should not normally exceed 2500 words in length including notes. Manuscripts must be submitted in the format of MS Word together with CV. Material accepted for publication becomes the property of JCAA. However, author may use the article without permission from JCAA. Submission must be sent via E-mail: arbitration@jcaa.or.jp

The Japan Commercial Arbitration Association
URL: http://www.jcaa.or.jp

Tokyo Head Office
3F Hirose Bldg., 3-17, Kanda Nishiki-cho, Chiyoda-ku, Tokyo 101-0054 Japan
Tel: +81-3-5280-5161 Fax: +81-3-5280-5160 Email: arbitration@jcaa.or.jp

Osaka Office
5F The Osaka Chamber of Commerce & Industry Bldg., 2-8, Hommachibashi, Chuo-ku, Osaka 540-0029 Japan
Tel: +81-6-6944-6164 Fax: +81-6-6946-8865 Email: arbitral-osaka@jcaa.or.jp