



[JCAA News]

The New JCAA International Commercial Mediation Rules Enacted

The JCAA has made New International Commercial Mediation Rules (hereinafter called "New Rules") for the settlement of international commercial disputes and these New Rules came into effect on January 1, 2009. For making these New Rules, last July, the JCAA set up the Mediation Rules Study Group chaired by Dr. Toshio Sawada, Vice-President of the International Court of the ICC. The members of this Study Group consist of the following scholars and practitioners who specialized in this field: Prof. Shozo Ota, Prof. Masato Dogauchi, Mr. Masatoshi Ohara, Ms. Hikaru Oguchi, and Prof. Gerald McAlinn. The Study Group considered the draft of the New Rules prepared by the JCAA Secretariat. The JCAA Secretariat made a comparative study on mediation rules of the other major ADR institutions such as those of AAA, LCIA, Singapore Mediation Centre in common jurisdictions as well as ICC, SCC, DIS, Netherlands Mediation Institute and the Swiss Chambers of Commerce and Industry in civil law jurisdictions. Besides the New Rules, the JCAA has already had Commercial Mediation Rules amended on August 8, 2007 and effective on December 27, 2007. These Mediation Rules are made primarily for the settlement of domestic disputes and mediation under these Rules is accredited by the Ministry of Justice in accordance with the Law on Promotion of Use of Dispute Resolution Process outside Court enacted in 2004 and effective from April 1, 2007. These Rules are designed to be accredited by meeting the strict and onerous requirements imposed by the Law to protect mediation users such as consumers. For instance, prior to the start of the mediation procedure, the ADR institution must make a face-to-face explanation of its mediation to the parties, and if the mediator is not a Japanese lawyer, his or her access to a Japanese lawyer must be ensured. As a result, the Rules cannot be well-served for the mediation to be conducted for international cases involving foreign parties and thus the JCAA separately made these New Rules.

The text of the New Rules is indicated below and it has the following features: Under the New Rules, the party may request mediation or the parties based on the mediation agreement may jointly initiate mediation (Rule 5.1). In the former case, the JCAA will ask the other party as to whether or not it agrees to mediation if there exists no mediation agreement between the parties or, if there is such an agreement, whether or not it intends to proceed with the mediation procedure (Rule 6.2). Mediators may be appointed pursuant to the agreement of the parties (Rule 7.1) and they must be independent in principle and impartial at all times (Rule 7.2). Thus, in light of a more flexible procedure, being different from arbitrators on whom both independence and impartiality are imposed, the persons may serve as mediators even if he or she is not entirely independent as long as he or she remains impartial. If the parties do not agree on the appointment of mediators, the JCAA will then appoint a sole mediator instead (Rule 7.2). The mediator may act as an arbitrator in any arbitral proceedings relating to the dispute referred to mediation if the parties so agree (Rule 8) and thus if either party objects to such a dual position, the mediator may not serve as an arbitrator. The legitimacy of the dual position to serve as both arbitrators and mediators is controversial in terms of impartiality of an arbitrator and in this respect the New Rules require the agreement of the parties.

As regards the mediation procedure, the New Rules provide for the obligation of the parties to ensure the appearance of a person having authority to make a final decision at the important stages on the mediation procedure (Rule 9.2) and it aims to enable the parties to enter into the settlement agreement in the mediation procedure. The mediator may make any proposal for settlement of the dispute (Rule 9.4) and also may consult separately with any of the parties but in such a case, the mediator must disclose to the other party only the fact that such consultation has

taken place (Rule 9.5). Thus even if the mediator meets one of the parties, what was discussed between the party and the mediator will be treated as confidential and will not be disclosed to the other party. The mediation procedure should not be prolonged unless the parties otherwise prefer and the New Rules in principle limit the mediation procedure to 3 months after the appointment of the mediator (Rule 10.1). The mediation procedure is private (Rule 12.1) and the parties, mediator, the JCAA and any other persons involved in the mediation procedure must not disclose any facts related to the mediation case or facts learned through the mediation case where except where disclosure is required by law (Rule 12.2). In addition, to enhance candid discussion between the parties towards amicable settlement of the disputes in the mediation procedure without prejudice even if the mediation fails, no party may introduce as evidence in any judicial or arbitration proceedings any view expressed or statements made by the other party or parties, or any proposal made by the mediator in the course of the mediation procedure (Rule 12.3).

Finally, the cost of mediation is provided by the Mediation Cost Regulations. The mediator's fee is

paid based on the hourly rate within the range of 20,000 yen and 60,000 yen to be determined by the JCAA (Article 4). In addition, the mediator is entitled to reimbursement by the JCAA of her or his actual expenses incurred to the extent required for the mediation procedure (Article 5). On the other hand, as regards the JCAA administrative fee, it is a sum equivalent to 10% of the mediator's fee and the party requesting mediation is also to pay to the JCAA 50,000 yen as a request fee (Article 2).

Under the New Rules, the JCAA has recently received the first request for mediation jointly made by both of the parties in connection with a complex case on construction disputes prior to the initiation of arbitration procedures based on the arbitration agreement; three mediators consisting of a lawyer, a construction engineer and a project manager are mediating the case; the JCAA expects the use of the mediation under the New Rules both prior to arbitration and during the arbitration procedure; and in the latter case, if the arbitrators act as mediators based on the agreement of the parties, the JCAA recommends the parties to the JCAA arbitration proceedings to further agree on the New Rules for their mediation.

The Japan Commercial Arbitration Association International Commercial Mediation Rules

Effective as of January 1, 2009

Chapter I General Provisions

Rule 1. Purpose

The purpose of these Rules is to provide for matters necessary for the resolution of international commercial disputes by mediation under the auspices of the Japan Commercial Arbitration Association (hereinafter the "Association").

Rule 2. Secretariat

1. Secretarial work pertaining to mediation under these Rules shall be conducted by the Secretariat of the Association.
2. The Secretariat of the Association shall, at the request of the mediator or either party, arrange for a meeting room and the services as necessary for conducting mediation proceedings.

Rule 3. Means of Correspondence; Language

1. Correspondence provided for in these Rules may be conducted by postal service, facsimile or e-mail; provided that the mediator may determine otherwise upon consultation with the parties.
2. Correspondence by any party or the mediator with the Association shall be in Japanese or English.

Rule 4. Exclusion of Liability

Neither the mediator, nor the Association, nor the officers and the staff of the Association shall be liable to any person for any act or omission in connection with the mediation proceedings unless such act or omission is intentional or by gross negligence.

Chapter II

Commencement of Mediation

Rule 5. Request for Mediation

1. A request for mediation shall be submitted by postal service, facsimile or e-mail to the Association by either or both of the parties.
2. A request for mediation shall set forth the following:
 - (1) The full personal or corporate names of the parties, and their addresses;
 - (2) The contact details of the party requesting mediation (telephone number, facsimile number and e-mail address) and the other party's contact details if known to the requesting party;
 - (3) If the party is represented by an agent, the name, the address and contact details (telephone number, facsimile number and e-mail address) of such agent;
 - (4) A summary of the dispute and the desired outcome;
 - (5) If the parties have agreed to refer the dispute to mediation under these Rules, such agreement; and
 - (6) If the party has the wishes as to the language to be used in the proceedings, such language.
3. If the party is represented by an agent in the mediation proceedings, such agent shall submit a power of attorney to the Association.
4. At the time when the party submits a request for mediation, it shall pay the request fee provided for in the Mediation Cost Regulations of the Association. If the party fails to pay the request fee, the Association may deem that the request for mediation had not been made and return the request for mediation to the party with notification to such effect.
5. If the party fails to submit a request for mediation and to pay the request fee, the mediation proceedings shall not be initiated.

Rule 6. Notice of Request for Mediation

1. The Association, upon confirmation that the request for mediation has been made in accordance with the provisions of Paragraphs 1 through 4 of the preceding article, shall notify, without delay, all other persons who shall be to be the parties to the mediation that the request for mediation has been made. A copy of the request for mediation shall be attached to such notice.
2. The Association shall request all other persons who shall be to be the parties to the mediation to inform the Association in writing, within twenty-one (21) days of receipt of the notice of the request for mediation, as to whether or not they agree to mediation under these Rules if there is no existing agreement between the parties to refer the dispute to mediation under these Rules or, if there is an agreement, whether or not they intend to proceed with the mediation proceedings.
3. Under the preceding paragraph, any party who agrees to mediation or who is willing to proceed with the mediation proceedings shall submit a written answer setting forth the following:
 - (1) The full personal or corporate names of the parties, and their addresses;
 - (2) The contact details of the party who received the request for mediation (telephone number, facsimile

- number and e-mail address);
 - (3) If the party is represented by an agent, the name, the address and contact details (telephone number, facsimile number and e-mail address) of such agent;
 - (4) A summary of the dispute and the desired outcome; and
 - (5) If the party has the wishes as to the language to be used in the proceedings, such language.
4. If the party is represented by an agent in the mediation proceedings, such agent shall submit a power of attorney to the Association.
 5. In the absence of a written notice to consent to the mediation within the period of the time provided for in Paragraph 2, the Association without delay shall inform the party requesting mediation to that effect.
 6. Even where there is an agreement between the parties to refer the dispute to mediation under these Rules, in the absence of a written notice from the other party indicating intent to proceed with the mediation proceedings within twenty-one (21) days of receipt of the notice of the request for mediation, the Association without delay shall inform the party requesting mediation to that effect.

Rule 7. Appointment of Mediator

1. The mediator(s) shall be appointed pursuant to the agreement of the parties.
2. If there is no agreement referred to in the preceding paragraph, the Association shall designate a candidate as a sole mediator and inform the parties of his or her name, occupation, address and contact details (telephone number, facsimile number and e-mail address); provided that the Association may designate more than one candidate as mediators where the Association considers it appropriate.
3. The mediator shall be independent in principle and shall be, and remain at all times, impartial.
4. The candidate for mediator without delay shall submit to the Association his or her written undertaking to disclose any and all circumstances likely to give rise to justifiable doubts as to his or her independence or impartiality, or to declare that there are no such circumstances. The Association without delay shall send a copy of such undertaking to the parties.
5. If any party has an objection to any candidate for mediator whom the Association has designated, such party shall notify the Association in writing, within fifteen (15) days of receipt of the notice identifying the candidate, of the reason for the objection, and the Association shall, in its sole discretion, either deny the objection or designate a substitute candidate and then appoint the mediator after consulting with the parties.
6. The Association, upon appointment of a mediator, shall notify without delay the parties of such appointment.
7. Where the circumstances regarding independence or impartiality change during the course of the mediation proceedings, the mediator without delay shall disclose

such circumstances, in writing, to the parties and the Association. If either party has an objection, the Association shall, in its sole discretion, deny such objection or appoint a substitute mediator.

Rule 8. Relationship between Mediation and Arbitration

The mediator may act as an arbitrator in any arbitral proceedings relating to the dispute referred to mediation under these Rules if the parties so agree.

Chapter III

Mediation Proceedings

Rule 9. Expedient Management of Mediation Proceedings

1. The mediator shall make efforts towards the amicable resolution of the dispute and conduct the mediation proceedings fairly and expeditiously.
2. The parties shall make efforts to ensure that a person having authority to make a final decision attends at the important stages in the mediation proceedings and shall also make efforts for speedy progress of the proceedings and amicable resolution.
3. Taking the wishes of the parties into consideration, the mediator shall determine the language(s) to be used and manage the mediation in such a manner as he or she considers appropriate. The mediator may decide on involvement of advisers, assistants, translators and note takers.
4. The mediator may, at any time, make any proposal for settlement of the dispute.
5. The mediator may consult separately with any of the parties orally or in writing; provided that the mediator shall disclose to all other parties the fact that such consultation has taken place.
6. The mediator shall determine the place of mediation proceedings upon consultation with the parties.

Rule 10. Termination of Mediation

1. Unless otherwise agreed by the parties, the mediation proceedings shall be terminated within three (3) months of the date when the mediator was appointed pursuant to Rule 7. At the request of the mediator, the Association may extend this period of time.
2. The mediation proceedings are terminated by any of the following instances:
 - (1) The Association has given a notice as provided for in Rule 6 Paragraph 5;
 - (2) Settlement has been arrived at by the parties;
 - (3) The period of time provided for in the preceding paragraph has expired;
 - (4) The mediator, after consultation with the parties, declared in writing to the parties and the Association that there is no hope of resolving disputes by the mediation proceedings; or
 - (5) Any of the parties requested termination of the mediation proceedings in writing to the mediator (the Association, if the mediator has not been appointed).
3. When the mediation proceedings are to be terminated, the mediator shall notify the Association to that effect in writing.

Rule 11. Arbitral Award based on Amicable Settlement

The parties, upon arriving at a settlement agreement, may agree to appoint the mediator as an arbitrator and request him or her to make an arbitral award which incorporates with the settlement agreement.

Rule 12. Privacy and Confidentiality

1. Mediation proceedings are not open to the public.
2. The mediator, the officers and the staff of the Association, the parties, their agents and any advisers, assistants, translators or any other persons involved in the mediation proceedings shall not disclose facts related to the mediation case or facts learned through the mediation case except where disclosure is required by law.
3. Unless agreed by the parties, no party may introduce as evidence in any judicial or arbitration proceedings any views expressed or statements made by the other party or parties, or any proposal made by the mediator in the course of the mediation proceedings.

Rule 13. Mediation Cost

1. The parties shall pay the administrative fee as provided for in the Mediation Cost Regulations to the Association.
2. The remuneration of the mediator shall be determined by the Association pursuant to the Mediation Cost Regulations.
3. The Association shall pay to the mediator his or her remuneration without delay upon the termination of the mediation proceedings or the termination of the mandate of a mediator due to his or her resignation or for any other reason.
4. The parties are jointly and severally liable for all payments of the administrative fee, remuneration and expenses of the mediator, and other necessary expenses for the mediation proceedings (hereinafter the "Mediation Cost").
5. Unless otherwise agreed by the parties, the parties shall equally bear the Mediation Cost.
6. The parties shall pay to the Association, in the manner and within the period of time determined by the Association, a sum of money fixed by it to cover the Mediation Cost.
7. If the parties fail to make payments as provided for in the preceding paragraph, the Association may request the mediator to suspend the mediation proceedings.
8. Upon the termination of the mediation proceedings, the Association shall settle the total amount of the Mediation Cost and shall reimburse the parties for any excess payment.

Supplementary Provisions

(Effective as of January 1, 2009)

These Rules shall come into effect on January 1, 2009.

The Japan Commercial Arbitration Association Mediation Cost Regulations

Effective as of January 1, 2009

Article 1. Application of these Regulations

These Regulations shall apply to the request fee, the administrative fee, the mediator's remuneration and expenses for mediation under the International Commercial Mediation Rules of the Japan Commercial Arbitration Association (hereinafter the "Association").

Article 2. Request Fee

1. The request fee to be paid by the party requesting mediation shall be ¥52,500.
2. The request fee or any portion thereof is non-refundable once the mediation proceedings have been initiated.

Article 3. Administrative Fee

The administrative fee to be paid by the parties shall be a sum equivalent to ten percent (10%) of the mediator's remuneration to be determined pursuant to the subsequent article.

Article 4. Mediator's Remuneration

1. Taking into consideration the complexity of the case, the speed of mediation proceedings and other circumstances, the Association shall determine the mediator's remuneration based on the amount equal to the Hourly Rate multiplied by the number of Mediation Hours.
2. The Association, upon hearing the parties' and the mediator's opinion and taking into consideration his or her experience as a mediator, the complexity of the case and other circumstances, will determine an Hourly Rate within the range of ¥20,000 to ¥60,000.
3. Notwithstanding the provisions of the preceding paragraph, the Association may adopt a different Hourly Rate if all of the parties agree.
4. Mediation Hours means the time reasonably required

by the mediator for mediation proceedings; provided that, only one-half of the traveling time the mediator spends (other than the time spent for preparation of the mediation proceedings) shall be added to the Mediation Hours, unless the traveling time is spent in preparation in which case it can be counted in full.

5. In case a mediator ceases to be a mediator at any time during the mediation proceedings due to his or her resignation or any other reason, the Association may, considering the actual circumstances, reduce the mediator's remuneration calculated under the provisions of the preceding four paragraphs.
6. The Association shall pay to the mediator his or her remuneration without delay upon the termination of the mediation proceedings, or upon the mediator's ceasing to be a mediator due to his or her resignation or for any other reason.
7. The mediator shall provide the Association with a written monthly report stating the time reasonably spent for mediation proceedings as well as the traveling time pursuant to the proviso of Paragraph 4.

Article 5. Mediator's Expense

1. The mediator shall be entitled to reimbursement by the Association of his or her actual expenses incurred to the extent required for mediation proceedings, including travel expenses, hotel charges and other expenses.
2. The travel expenses shall include air, train and taxi fares.
3. The mediator's expenses set forth in Paragraph 1 shall be paid by the Association when the mediator has provided documentary evidence to the Association except where it is impossible or difficult by a custom to submit such documentary evidence.

Supplementary Provisions

(Effective as of January 1, 2009)

These Regulations shall come into effect on January 1, 2009.

[Articles]

Time to take mediation seriously: International Commercial Mediation Rules introduced in Japan

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1. Introduction

Mediation has been used widely, and for some time, as a useful tool in many jurisdictions. However, despite Japan having a reputation for being fond of consensus and wary of confrontation, formal mediation has struggled over the years to gain a real foothold in the Japanese legal landscape.

The absence of third-party mediation in Japan is perhaps not particularly surprising. Traditionally, domestic Japanese companies in dispute have often been able to resolve difficulties directly and discretely. If matters do proceed to litigation then Japanese judges will frequently encourage settlements rather than allow the matter to go to trial. In this way, the judge is acting as a mediator of sorts. So, the concept is not alien to Japan, but mediation outside of the court system has been rare.

The Japan Commercial Arbitration Association (the "JCAA") sought to remedy the absence of third-party mediation through rules designed to be used by Japanese companies in dispute with each other.¹ The domestic provisions are only part of the JCAA's approach though. After receiving requests from both Japanese and foreign lawyers and companies, the JCAA has sought to further promote the process by introducing new rules to provide for the mediation of international commercial disputes (the "Rules").² The Rules were drafted by a panel of six, made up of five Japanese nationals (a mix of academics and practitioners) and one foreign academic (based in Japan).³ The Rules came into effect on 1 January 2009.

The JCAA is not alone amongst arbitral institutions in producing rules for the mediation of international commercial disputes. For example, the Stockholm Chamber of Commerce⁴ ("SCC"), the Hong Kong International Arbitration Centre⁵ ("HKIAC"), the London Court of International Arbitration⁶ ("LCIA") and the International Chamber of Commerce⁷ ("ICC")

have all had similar systems for some time. The JCAA was influenced by these existing regulations when drafting the Rules.

2. Role of the JCAA

Mediation rules are not strictly necessary because it is open to the parties to arrange mediation themselves if they so wish. Once an agreement has been made to mediate and appoint a mediator there is relatively little further organisation and co-ordination required. So long as the mediator is familiar with his or her role, proceedings can unfold without much (or any) institutional involvement. This is typically what happens in jurisdictions where mediation is common. However, in a legal market where a process has yet to gain traction, it is sensible that an established body such as the JCAA lends parties a 'helping hand' and assists them in participating in mediation. This organisational role is particularly important where the pool of experienced mediators is likely to be small to start with. In a mediation under the Rules, the JCAA would play an organisational and secretarial role.

3. Starting the process

If a party wishes to avail itself of the Rules then the first step is to make a "Request for Mediation", which is similar in many respects to a "Request for Arbitration".⁸ The Request must include, *inter alia*, full contact and representation details, a chosen language and whether the parties have previously agreed to mediate any dispute that arises. The most important aspect though is the "summary of the dispute and desired outcome".⁹ This is an opportunity to frame the dispute for the purposes of proceedings and set the starting point for an eventual settlement.

After a party makes a Request, the JCAA will, after confirming that the provisions of the Rules have been complied with, contact the other party or parties without delay to ask if they would like to participate in mediation proceedings. This notification takes the

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¹ JCAA Commercial Mediation Rules [2007]

² International Commercial Mediation Rules and Mediation Cost Regulations [2009]

³ Professor Toshio Sawada, Professor Shozo Ota, Professor Masato Dogauchi, Masatoshi Ohara, Hikaru Oguchi, and Professor Gerald McAlinn

⁴ These rules were formulated by the Mediation Institute of the SCC - effective as of 1 April 1999

⁵ The Hong Kong Mediation Council is a division of the HKIAC and arranges for the training of mediators and the promotion of mediation. Their rules have been effective from 1 August 1999

⁶ Effective as of 1 October 1999

⁷ ICC ADR Rules - effective as of 1 July 2001

6 ⁸ Rule 5 (Request for Mediation)

⁹ Rule 5.2(4)

form of a “Notice of Request for Mediation”.¹⁰ The receiving party or parties then has 21 days¹¹ to inform the JCAA of whether or not they agree to participate or, if there has been a previous agreement to mediate, whether they intend to honour that previous commitment. If the required response is not received within 21 days of notification of a Request by the JCAA, the other party is deemed to have rejected the offer of mediation. In the case of a multi-party dispute all parties must agree to participate otherwise no mediation will take place. The response from the other party or parties must contain the equivalent details given by the requesting party, including their own summary of the dispute and desired outcome.

4. Appointing the Mediator

Ideally, the mediator should be appointed by agreement of the parties.¹² This is a preferable arrangement. Mediation is a consensual process, therefore it is important that the parties feel comfortable with the mediator. If the parties are unable to come to agreement then it is open to the JCAA to nominate one or more mediators to handle proceedings. The JCAA does not have a ‘panel’ of approved mediators in the same way that a panel for arbitrators exists. However, according to discussions with the JCAA, an internal list of suitable mediators has been created which the JCAA is looking to expand. The Rules also contain provisions concerning mediator impartiality and confidentiality as one might expect, and parties can challenge the JCAA’s choice of mediator too.

The JCAA have also indicated that when choosing a mediator themselves, they will, as a matter of good practice, consult the parties first to see if they have preferences in respect of the mediator’s background, including nationality, and professional experiences. Another important preference to establish (and this is relevant whether it is the parties or the JCAA who chooses the mediator) is what kind of role the mediator is to play. Broadly speaking there are two types of role which a mediator can fulfill: facilitator or evaluator.

The former anticipates the mediator acting as a third-party “go-between” who will listen to both parties’ arguments and then relay them to the other party in a non-confrontational way and without the loaded or emotive language which sometimes creeps in to arbitral or court proceedings. This approach is closer to the meaning of “mediation” understood by common law practitioners. Typically both parties exchange short opening statements before separating and individually discussing the matter with the mediator. He or she will then relay points to the other party, high-

lighting which arguments might be considered to be strong and as such to be considered particularly carefully. The aim for the mediator is to bring the parties towards each other in the expectation that differences can be narrowed and then settled.

An evaluative approach is more akin to a non-binding arbitration or adjudication and although familiar as an ADR technique, is less used in mediations in common law jurisdictions. If the parties decide to take this approach then the format of the mediation will be slightly different. In these kinds of proceedings the parties will typically prepare as if the matter were going to arbitration. Prior to the mediation meeting detailed arguments and supporting documentation will be provided and then on the day of the mediation lengthy oral submissions will be made to the mediator, as if the parties were appearing before an arbitral tribunal. Then, instead of the mediator speaking to both parties and trying to bring them towards a settlement on the day, the mediator will go away to consider what he has heard. Some time later the mediator will inform the parties of his views on the merits of the case and how much, if anything, should be paid to resolve the dispute. The parties then have a benchmark from which to work when discussing settlement henceforth. These can either be direct discussions or the same mediator can then act in a facilitative capacity.

Many believe that Japanese companies are relatively familiar with non-binding arbitrations or adjudications and may therefore prefer an evaluative approach as it allows the initial step to be taken by an independent third party. We understand from discussions with the JCAA that this method was preferred in the very first mediation to be brought under the Rules in mid-March of this year. The two days of the mediation meeting were filled by oral submissions and questions from the panel of three mediators who had been chosen by the parties.

5. ‘Arb-Med’ and the subsequent role for the mediator

The previous edition of the JCAA Newsletter¹³ highlighted Article 38(4) of Japan’s Arbitration Law of 2003 which permits an arbitrator to act as a mediator in the same dispute in which he is presiding. This would be somewhat unusual in common law systems, where there is a conscious drive to keep mediation proceedings on a “without prejudice” basis so that the arbitrator will not be influenced in reaching a decision at an arbitral hearing. The Arbitration Law recognises these concerns to some extent by providing that all parties to a dispute must agree before a

¹⁰ Rule 6 (Notice of Request for Mediation)

¹¹ “Days” is not defined in the Rules so it is presumed this means calendar days

¹² Rule 7.1 (Appointment of Mediator)

¹³ Peter Godwin, “Japanese Arbitration in the wake of the 2004 reforms: time to recognise the end of the Ragan Myth” JCAA Newsletter, Number 21 (November 2008)

mediator can also act as an arbitrator. Article 8 of the Rules mirrors this provision by stating that a mediator can also act as an arbitrator in proceedings relating to the dispute referred to mediation under the Rules. As with the Arbitration Law, the consent of both parties is required in order for a mediator to hold this joint role.

This provision is an unusual one in the context of international mediation rules. As noted above, Rule 8 allows a mediator to subsequently sit as an arbitrator. This perhaps reflects the positive attitude towards 'Arb-Med' in the Japanese arbitration community. The ICC and SCC also allow the subsequent appointment of a mediator as an arbitrator, but in both cases the starting assumption is that this should not happen.¹⁴ The HKIAC goes further and does not provide for the parties to derogate even with agreement.¹⁵ This prohibitory position, as opposed to the JCAA's more permissive stance, is indicative of the premium which other international rules place on mediation being a process entirely separate and removed from contentious proceedings.

Similarly, the HKIAC, ICC and SCC rules do not permit a mediator to be a witness in future proceedings, although the SCC and HKIAC rules are stronger in this respect as unlike the ICC¹⁶ they do not allow the parties to derogate from the rule with agreement.¹⁷ By way of contrast there is no such prohibition in the Rules, although the mediator and others involved in the mediation do have an express obligation of confidentiality which may give some comfort on this point.¹⁸

A further interesting provision in this area is Rule 11. This provides that if the parties are able to reach a settlement via a mediation held pursuant to the Rules, then the parties may elect to appoint the mediator as an arbitrator and the mediator/arbitrator can then make an arbitral award which incorporates the settlement agreement. Although this is not a completely novel provision (Article 12 of the SCC mediation rules contains a similar provision), it is certainly an unusual provision which many practitioners will not have seen before. We anticipate the purpose of this rule is to ensure enforceability of the terms agreed by the parties. In theory by 'converting' a settlement into an arbitral award the New York Convention of 1958¹⁹ will apply and allow the terms to be enforced in any signatory state. This can be particularly useful if the settlement contains ongoing obligations.

It remains to be seen whether such a measure will be contested in future. A party resisting enforcement could argue that the New York Convention anticipates an actual arbitration, rather than the granting of a somewhat artificial 'award' as in this case. However, consent awards are already a common means of settling an existing arbitration and there does not appear to have been an issue in their enforcement. The JCAA may well have taken the view that there was little downside for parties to incorporate their settlement within an arbitration award, such that it was a useful provision to include in the Rules.

6. Confidentiality

Unlike common law jurisdictions, Japan does not have "without prejudice" privilege; in theory any document or statement can be presented to court, aside from those between a client and his lawyer. Many foreign parties would feel less comfortable in settlement negotiations if they knew that any statements they made could potentially later be used against them. It is possible therefore that foreign parties may gain some comfort from the provisions relating to privacy and confidentiality in the Rules. In particular, Rule 12(3) provides that, unless otherwise agreed by the parties, "*...no party may introduce as evidence in any judicial or arbitration proceedings any views expressed or statements made by the other party or parties, or any proposal made by the mediator in the course of the mediation proceedings.*"

Although this provision is useful, it is perhaps not as comprehensive as it could be. For instance, documents produced in the course of mediation may be disclosed in later judicial or arbitration proceedings. Even if the parties specifically agreed upon confidentiality in this respect, it is not clear that this limitation would be acceptable in light of the court's ability to order the production of documents.

By way of contrast, a greater emphasis on the privacy of proceedings appears to be present in the other international mediation rules, perhaps best summed up as a spirit of "what happens in the mediation, stays in the mediation". For example, the confidentiality of documents produced during mediation proceedings is robustly protected under the ICC, LCIA and HKIAC rules,²⁰ as well as all views and statements expressed. This confidentiality is subject to any obligations of disclosure which may be binding on the parties in subsequent arbitration or court proceedings, as noted by the LCIA and ICC.²¹

¹⁴ ICC: 7(3) and SCC 1(2)

¹⁵ Article 14

¹⁶ Article 7(3)

¹⁷ SCC: 3(4); and HKIAC: 14

¹⁸ Rule 12.2 (Privacy and Confidentiality)

¹⁹ New York Convention on the Enforcement and Recognition of Foreign Arbitral Awards [1958]

8 ²⁰ ICC: 7(2)(a); LCIA: 10.2; and HKIAC: 12(i) respectively

²¹ LCIA: 10.4; ICC: 7(2)(a)

7. Management of Proceedings

There is an emphasis in the Rules on the expeditious management of proceedings.²² There is an implied assumption that proceedings will be completed within a reasonable time and in any case within three months of the appointment of the mediator, unless the parties have agreed otherwise.²³ If the parties request more time to complete the mediation a further period can be provided by the JCAA.

Proceedings can take any form which the parties choose. The Rules provide for this flexibility by giving the mediator a free rein. For example, a mediator can make a proposal for settlement at any time,²⁴ presumably on his or her own initiative, and he or she can also consult separately with any of the parties orally or in writing at any time, so long as the other party is made aware of this consultation.²⁵ In the context of a mediation meeting (particularly using a facilitative approach) this provision is not unexpected.

8. Costs of the mediation

The Rules have been supplemented by provisions which regulate the cost of mediation.²⁶ In addition to paying an initial Request fee (¥52,500)²⁷ the parties must pay additional administrative fees to the JCAA equivalent to 10% of the mediator's remuneration.²⁸ The hourly rates payable to mediators range between ¥20,000 and ¥60,000 an hour.²⁹ The exact level will be determined by the JCAA after receiving the opinions of the parties and the mediator and after considering the complexity of the case and the experience of the mediator. The mediator's fees are paid by the JCAA, to be reimbursed on an equal basis (unless agreed otherwise) by the parties.³⁰

The categories of fees and expenses included in the JCAA's Mediation Cost Regulations are fairly standard across the other international arbitral institutions. For example, the ICC and LCIA also have "registration fees"³¹ (both of which are higher than the JCAA's equivalent fee) and they also provide for hourly rates for mediators. All institutions have some kind of administrative fees or costs for their role in conducting a mediation, but the method in which these fees and costs are charged differ somewhat. For example,

the ICC and LCIA charge administrative costs for work actually carried out,³² whereas the JCAA ties its administrative costs and expenses to the fees received by the mediator. No other international arbitral institution shares the same structure, but it is not alone in calculating administrative fees by reference to an indicator; the SCC charges a flat fee plus a percentage (which increases on a sliding scale) of the amount in dispute.³³ Neither the JCAA nor the SCC's administrative fees and costs directly reflect work completed, but of the two, the JCAA's approach is probably easier to justify as it indirectly preserves a link between the complexity of the mediation and time spent working on it. For example, it could be argued that complex proceedings, which may require the mediator to prepare extensively and spend considerable time in a mediation meeting, may well also entail higher costs for the JCAA.

The HKIAC has a different administrative fee structure altogether,³⁴ reflecting their perhaps more limited organisational role. Administrative fees are only charged for the appointment of a mediator (HK\$ 2,000) and holding each party's deposit (HK\$ 1,800 per party). Otherwise, the HKIAC requires only that deposits be paid by each party as security for their share of the mediator's fees and expenses, as negotiated by the mediator and the parties.

In most circumstances the HKIAC is likely to be the cheapest of the arbitral institutions. But it is otherwise difficult to compare the relative expense of the others because of the differing methods of calculation of administrative fees, mediators' fees and the involvement of the mediator. However, the overall cost of JCAA mediation does not obviously appear to be any higher than any other arbitral institution.

9. Conclusion

Mediation is not a panacea. It will not be appropriate in all cases and on occasion it will be misused or demeaned by parties "going through the motions" with no real intention of settling. Every mediation faces that risk and it cannot be ignored. However, in many cases mediation can be a useful means of settling disputes and/or removing or narrowing issues in the context of a wider dispute.

²² Rule 9 (*Expeditious Management of Mediation Proceedings*)

²³ Rule 10.1 (*Termination of Mediation*)

²⁴ Rule 9.4

²⁵ Rule 9.5

²⁶ Mediation Cost Regulations [2009]

²⁷ Article 2 (*Request Fee*)

²⁸ Article 3 (*Administrative Fee*)

²⁹ Article 4.2 (*Mediator's Remuneration*)

³⁰ Rule 13.4-6 (*Mediation Cost*)

³¹ ICC: \$1,500 (*Appendix, Schedule of Costs*); LCIA: £ 500 (*Schedule of Mediation Costs (1(a))*)

³² ICC: *Administrative costs decided at the discretion of the ICC but in no event more than \$10,000*; LCIA: £ 200 or £ 100 per person per hour, depending on the seniority of the LCIA personnel involved

³³ SCC *Regulations for Mediation Costs*

³⁴ HKIAC *Fee Schedule - Mediation*

The Rules are generally similar to mediation or ADR rules of the other leading arbitral institutions. However, as noted above, the emphasis on confidentiality and the inviolability of mediation proceedings which exists in some other international mediation rules is not present to the same degree in the Rules.

This in part reflects Japan's civil law tradition, but may also reflect the composition of the committee who drafted the Rules. It is somewhat regrettable that none of the many active foreign practitioners based in Japan were present on the committee or that the Rules were not sent out in draft form to the wider foreign legal community before being finalised. Such an approach may have yielded additional insights and promoted consensus and support for the Rules within the wider legal community in Japan.

Brief Empirical Study on Arb-Med in the JCAA Arbitration

Tatsuya Nakamura*

1. Introduction

Arbitration is a process by which an arbitrator finally determines on a dispute between the parties involved, although in general approximately 60% of all arbitrations are brought to an end by a settlement between the parties.¹ In such cases, it is conceivable that there are cases in which an arbitrator is involved in the settlement negotiations between the parties, acting as a mediator.

Under Article 38(4) of the Japanese Arbitration Law, an arbitrator is permitted to act as a mediator in the course of arbitral proceedings only with the agreement of the parties, and in the JCAA arbitration, there are many cases where arbitrators attempt to mediate the case between the parties in the course of arbitral proceedings. This brief report, based on the empirical data for the past 10 years (1999-2008), examines how arbitration combined with mediation, in which arbitrators change their roles to mediators, or so-called Arb-Med, has actually been conducted in the JCAA arbitration.

2. Arbitrator's Active Involvement in Settlement Negotiation

Although the number of JCAA arbitration cases is relatively small and the annual number of arbitration cases filed with the JCAA is only a little over a dozen cases, a total of 133 arbitration cases were concluded during the period between 1999 and 2008. Out of these 133 cases, 12 cases were concluded before the arbitral tribunal was established. In 48 cases out of 121 (40%), the arbitral tribunal suggested mediation to the parties or asked the parties whether they need

Hopefully, the efforts of the JCAA can further promote mediation in Japan and give parties another avenue for the resolution of contentious matters. For the Rules to be truly successful though, efforts will be needed to train mediators in Japan. Professor Tatsuya Nakamura of the JCAA believes that lawyers would be ideal candidates to be evaluative mediators but that more focus should be placed on training facilitative mediators, as the skills required for that approach are more subtle. Whilst experienced mediators from elsewhere in the region or from Europe can be appointed, from a practical and cost perspective alone it is preferable for there to be a steady stream of home-grown mediators. For this, training from the JCAA will be useful, as will, ultimately, parties becoming aware of and then using the Rules to settle international commercial disputes in Japan.

the arbitrators' assistance in the settlement of their disputes by mediation, and then based on the agreement of the parties, the arbitral tribunal attempted mediation in the course of arbitral proceedings, except for one case where mediation was attempted by the arbitral tribunal upon the request of the parties. On the other hand, in the remaining 73 cases the arbitral tribunal did not attempt mediation, except for 4 cases where mediation was suggested by the arbitral tribunal but one of the parties declined this suggestion because they preferred to settle their disputes through arbitral awards to be rendered by the arbitral tribunal. In the cases where the arbitral tribunal attempted to mediate the case, the arbitral tribunal mediated by itself and did not entrust specific arbitrators to serve as mediators.

Attempt of Arb-Med by the Arbitral Tribunal	
Yes	48 (40%)
No	73 (60%)

Thus, in a significant part of the JCAA arbitration, based on the agreement of the parties, the arbitrators employ Arb-Med as a means of settlement of the dispute in arbitral proceedings and they are actively involved in the settlement negotiations by serving as mediators.

3. Successful Result by Arb-Med

In 25 cases out of 48, arbitral proceedings were terminated as a result of a settlement agreement being reached by the parties with the assistance of the arbitral tribunal in the Arb-Med proceedings, putting the success rate of Arb-Med at 52%.

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¹ See Klaus Peter Berger, *Integration of Mediation elements into Arbitration 'Hybrid Procedures and 'Intuitive' Mediation by International Arbitrators*, 19(3) *ARBITRATION INTERNATIONAL* (2003) 387, 398.

Success of Arb-Med by the Arbitral Tribunal	
Yes	25 (52%)
No	23 (48%)

In the remaining 48% of the Arb-Med cases, mediation failed and they returned to arbitration. The arbitral tribunal then proceeded with arbitration and made arbitral awards, apart from in one exceptional case where the parties negotiated further and reached the settlement of their disputes without the assistance of the arbitral tribunal. With regard to the possibility of the impartiality of the arbitrators being challenged by the parties after mediation failed, on the grounds that they became partial as a result of their involvement in the settlement negotiations by serving as mediators,² there were no cases where this occurred.

4. Method of Arb-Med

Settlement Proposal by the Arbitral Tribunal

In 28 (58%) of the 48 cases where Arb-Med was employed by the arbitral tribunal, the arbitral tribunal proposed settlement terms to the parties in mediation. In these cases, as shown below, the timing of Arb-Med is usually after the taking of evidence is completed, because the arbitral tribunal must first evaluate the case based on the parties' arguments and evidence so that they will know the likely outcome of the case.

Settlement Proposal by the Arbitral Tribunal	
Yes	28 (58%)
No	20 (42%)

Timing of Arb-Med

In 37 cases out of 48 (77%) the mediation was attempted by the arbitral tribunal in the final stages of the arbitral proceedings before concluding the examination but after all of the taking of evidence including witness examination was completed. In two cases where technical issues were particularly disputed between the parties, the arbitral tribunals appointed a neutral expert and mediated when the expert reports were submitted before them.

In such cases, obviously there is no substantial advantage of Arb-Med in terms of cost and time savings, but it is considered that such advantages may be gained compared to the case where mediation is conducted concurrently with or separately from arbitration. In addition, the parties can expect to achieve a gentler solution as compared to a black-and-white decision, with greater importance being placed upon the continuation of their business relations.³

Facilitative or Evaluative Mediation

In general, mediation is broadly divided into two types. In one type the mediator facilitates the settlement negotiations between the parties so as to lead the parties to reach a settlement agreement. In the other the mediators evaluate the case and then propose settlement terms. While facilitative mediation requires communication and negotiation skills, the function of evaluative mediation is similar to that of arbitration in that both arbitrators and mediators consider the parties' legal arguments on their merits, and thus, as shown below, it seems that arbitrators tend to employ the evaluative method rather than the facilitative.

Period of Arb-Med

The period of time required for mediation by arbitral tribunal ranges from a one day session for mediation to continuous mediation sessions extending over several months. According to the empirical data, 20 cases out of 48 (42%) require less than one month, 20 cases (42%) require between one and two months and 8 cases (16%) require more than 2 months, with the longest, a construction case, requiring 10 months.

Period of Arb-Med	
Less than one month	20 (42%)
More than one month less than two months	20 (42%)
More than two months	8 (16%)

Consent Award

Under Article 38(1) of the Japanese Arbitration Law, upon the request of the parties, the arbitral tribunal may render an award that incorporates the settlement reached by the parties. As mentioned above, 25 cases out of 48 resulted in settlement agreements being reached between the parties, and in 18 of these cases (72%) the parties further requested the tribunal to make an arbitral award based on the settlement terms, and the tribunal made such awards. In the remaining cases, the parties did not request the consent award and instead withdrew their request for arbitration.

Consent Award by the Arbitral Tribunal	
Yes	18 (72%)
No	7 (28%)

5. Difference in Arb-Med between Different Legal Backgrounds of the Arbitrators and the Parties - Civil Law or Common Law

Arbitral Tribunal - A Sole Arbitrator or Three Arbitrators

In respect of the difference between different legal

² See e.g., Jacob Rosoff, *Hybrid Efficiency in Arbitration: Waiving Potential Conflicts for Dual Role Arbitrators in Med-Arb and Arb-Med Proceedings*, 26(1) *JOURNAL OF INTERNATIONAL ARBITRATION* (2009) 89, 94.

³ See Toshio Sawada, *Hybrid Arb-Med: Will West and East Never Meet?*, 14(2) *ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN*(2003) 29, 32-33.

backgrounds of arbitrators acting as mediators in arbitral proceedings, out of 121 cases where the arbitral tribunal was established, in 78 cases (64%) the arbitral tribunal consisted of a single arbitrator and in the remaining 43 cases (36%) the arbitral tribunal consisted of three arbitrators.

Number of Arbitrators Constituting the Arbitral Tribunal	
A sole arbitrator	78 (64%)
Three arbitrators	43 (36%)

A Sole Arbitrator - Difference between Civil Law and Common Law Backgrounds

In cases where the arbitral tribunal consisted of a single arbitrator, 73 arbitrators had civil law backgrounds (94%) and 5 arbitrators had common law backgrounds (6%). Of the 73 civil law arbitrators, which included 67 Japanese arbitrators (92%), 27 arbitrators mediated the case (37%), while only one common law arbitrator mediated the case (20%).

Background of Sole Arbitrators	
Civil Law	73 (94%)
Common Law	5 (6%)

Attempt of Arb-Med by Sole Arbitrators	
Civil Law Arbitrators	27 (37%)
Common Law Arbitrators	1 (20%)

Three Arbitrators - Difference between Civil Law and Common Law Backgrounds

On the other hand, in cases where the arbitral tribunal consisted of three arbitrators, in 35 cases (81%) the arbitral tribunal consisted of civil law arbitrators while in 8 cases (19%) the members of the arbitral tribunal included common law arbitrator(s). Out of the above 35 civil law arbitral tribunals, which included 29 (83%) where all three arbitrators were Japanese, in 20 cases (57%) the arbitral tribunal mediated the case. On the other hand, the 8 arbitral tribunals that included common law arbitrators did not mediate the case.

Background of Arbitrators Constituting the Arbitral Tribunal	
Three Arbitrators from Civil Law	35 (81%)
At least One Arbitrator from Common Law	8 (19%)

Attempt of Arb-Med by Arbitral Tribunal	
Three Arbitrators from Civil Law	20 (57%)
At least one Arbitrator from Common Law	0 (0%)

Thus, in the JCAA arbitration, although most of the arbitrators are from civil law jurisdictions, in particular Japan, there is a clear tendency for Arb-Med to be widely employed by the civil law arbitrators as a means of settlement of the dispute. On the other hand, although the number of cases in the sample is small, it seems that common law arbitrators are unlikely to attempt to mediate the case.

The Parties - Difference between Civil Law and Common Law Backgrounds

On the other hand, in respect of the difference between different legal backgrounds of the parties, in only 7 cases out of 48 (15%) at least one of the parties were from common law jurisdictions, and in all the other cases all the parties were from civil law jurisdictions. In the 7 cases involving common law jurisdiction parties, the parties were not opposed to Arb-Med, and they accepted the suggestion of Arb-Med made by the arbitral tribunal and then participated in mediation towards the settlement of the disputes. On the other hand, in 4 cases where the arbitral tribunal consisted of civil law arbitrators, the parties from the civil law jurisdiction declined to Arb-Med suggested by the arbitral tribunal.

Thus, although the number of cases is small, it seems that there is no clear difference between the parties from civil law and common law in respect of their attitudes to Arb-Med.

6. Conclusion

It goes without saying that arbitration and mediation are fundamentally different in nature and function, and as a general rule the role of the arbitral tribunal is to make an arbitral award based on the arguments and evidence of the parties. However, in the JCAA arbitration, based on the agreement of the parties, the arbitral tribunal is actively involved in the settlement negotiation between the parties and Arb-Med is recognized as an option for settlement of the dispute in arbitration. However, Arb-Med is mostly employed by civil law arbitrators, in particular Japanese arbitrators, and there is almost no case in which the arbitrators have common law backgrounds, although such cases are in fact rare. Thus, we need to continue with such empirical studies, while at the same time, in light of best practices of arbitration, we should see how Arb-Med is evaluated by arbitration users not only in Japan but also in the other civil law and common law jurisdictions, and continue to study the effective use of Arb-Med in the future.

[JCAA Activities]

International Commercial Arbitration Seminar on November 10, 2008

“Selecting and Drafting Dispute Resolution Clauses for International Transactions”

On November 10, 2008 in Tokyo, JCAA invited Dr. Loukas Mistelis (Clive M Schmitthoff Professor of Transnational Law and Arbitration; Director, School of International Arbitration, Centre for Commercial Law Studies, Queen Mary, University of London) as a speaker and held the International Commercial Arbitration Seminar. He gave a lecture on negotiation and drafting techniques of dispute resolution clauses in international contracts. He also explained examples of best and worst practices of arbitration clauses. Many business persons, lawyers and scholars attended this seminar.

International Commercial Arbitration Seminar on December 16, 2008

“Current Situation of International Commercial Arbitration in India”

On December 16, 2008 in Tokyo, JCAA co-organised the International Commercial Arbitration Seminar with the Japan Association of Arbitrators. The speaker was Mr. Shishir Dholakia, Senior Advocate, Vice-President of the Asia-Pacific Regional Arbitration Group. He made a presentation on the Indian court system and arbitration system. At the end of his speech, he showed his view that India would come to be one of popular places in international commercial arbitration. In addition, Prof. Yasuhei Taniguchi shared his experience of arbitration in India and Mr. Naoki Iguchi described his impression of Indian courts at his research in India. Finally, Prof. Tatsuya Nakamura, General Manager of the Arbitration Department of the JCAA, explained JCAA arbitration cases involving Indian parties briefly.

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: nishimura@jcaa.or.jp

Moving Announcement of the JCAA' Office

The JCAA is pleased to announce the new location of the Tokyo office for your convenience. Its telephone number and facsimile number have also been changed. The E-mail address of the Tokyo office and the location of Osaka office remain unchanged.

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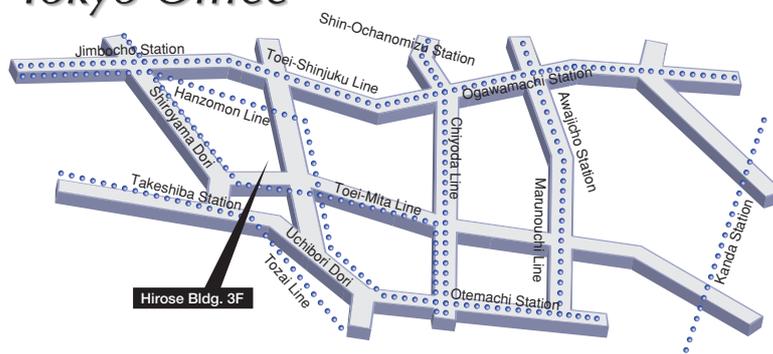
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