

JCAA's New Commercial Mediation Rules

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I. Introduction

The Japan Commercial Arbitration Association (JCAA) fully amended its Commercial Mediation Rules, which was put into effect on February 1, 2020. The objective of this reform is to make JCAA mediation services more attractive for foreign and domestic business users in the international arena where there has been intensifying competition among institutions providing mediation services. Recognizing that mediation is receiving increasing attention worldwide, JCAA is going to promote the merits of mediation itself and those of combination of mediation and arbitration on the basis of its three sets of new arbitration rules.¹

II. Outline of the Reform

This new Commercial Mediation Rules reform has several characteristics. Among others, more sophisticated and transparent rules are incorporated so as not to delay procedures due to disagreements among the parties. By adopting these distinctive rules, the JCAA would like to promote its mediation in Japan and worldwide.

The new Commercial Mediation Rules have the following features:

- (1) Party autonomy is perfectly respected. In order to facilitate the agreement among the parties on the key issues in mediation proceedings, the new Rules indicate to the parties a number of options to ensure that various measures can be taken to achieve prompt and reasonable settlement of their disputes. Thus, several options are shown on number of mediators (Article 17.1-3), ways of mediation proceedings, such as whether the mediator shall suggest to all the Parties its proposals for settlement and, if so, the timing thereof (Article 21.2(4)), setting a time limit for concluding mediation (Article 25.1), options of remuneration of mediators, including fixed-fee and incentive fee if a settlement is reached (Article 30.2(1) and (2)). Without any choice made by the parties, of course, applicable default rules are explicitly provided for on these issues.

¹ See, <http://www.jcaa.or.jp/e/arbitration/rules.html>.

- (2) In order for the parties to present the case, to give testimony or to introduce evidence during the mediation proceedings without harboring fear that such conducts would be used to the other party's advantage in a subsequent judicial, arbitral or other proceedings, the detailed rules are explicitly made clear (Article 24). These rules would promote the understanding of the mediator on the background story between the parties and the core issues of the dispute.
- (3) In order to ensure that the mediation proceedings would not get stuck due to disagreement or misunderstanding, the JCAA's new rules have more elaborate provisions than those of other institution's rules on various issues (Articles 15, 17, 19, 20, 22, 24, 25.2, 28 and 29).
- (4) Although the United Nations Convention on International Settlement Agreements Resulting from Mediation ("Singapore Convention"²) has not yet been entered into force, the new Rules have a provision which will function under the Singapore Convention. In accordance with the Singapore Convention, settlement agreement resulting from mediation will be enforceable in contracting states regardless of the place of mediation and the residence of or the law applicable to the parties of the settlement agreement. Accordingly, even if Japan will not ratify the Singapore Conventions, the JCAA considers that the new Commercial Mediation Rules should be in conformity with the rules of the Singapore Convention. Thus, under Article 26, where a settlement is reached between the parties in the course of the mediation, the mediator shall sign the settlement agreement as a witness upon the request of all parties and either party may request the JCAA to attest that the mediation agreement has resulted from the mediation administered by the JCAA (Articles 26.2 and 26.3).

III. Remarkable Provisions

1. General Provisions (Articles 1 to 11)

Given the crafted drafting of the three sets of JCAA arbitration rules (2019), those provisions are adopted in the new Commercial Mediation Rules in principle, though some provisions are modified in consideration of the nature of mediation.

² It was adopted on December 20, 2018 by the General Assembly of the United States and open for signature on August 7, 2019 in Singapore. The signatory countries are 51 as of February 8, 2020.

2. Two Distinctive Rules Where There is a Prior Mediation Agreement or Not (Articles 2.7, 12.5 and 13.5)

Mediation agreements are divided into cases: one is an mediation agreement exists before request for mediation and the other is that mediation agreement is made after request for mediation. The mediation commencement date is different in respective cases.

3. Optional Descriptions that the Applicant may Include in the Request for Mediation (Article 12.2 and Article 13.1)

In order to facilitate an agreement between the parties on the mediation procedures, the JCAA new Mediation Rules provide, as guidance, optional descriptions on the procedure to be taken. Thus, the applicant can state in the request for mediation the applicant's proposal to the respondent as to procedural matters, such as a procedure of appointing mediator(s) and whether the mediator should suggest to all the parties its proposals for settlement.

4. Mediator (Articles 15 to 20)

The impartiality and independence of mediators are as detailed as those of arbitrators under the Commercial Arbitration Rules and the Interactive Arbitration Rules (Article 15).

It is noted that the new Mediation Rules suggest that two mediators may be appointed: one is appointed by an applicant and the other is appointed by a respondent (Article 17, Paragraph 2). This is because, unlike arbitrators, mediators cannot make binding decisions, and therefore it is not necessary to make the number of mediators an odd number. The facilitation and, in some cases, settlement proposals by such two mediators may be comparatively easily accepted by the parties and, if so, it is highly likely that they will lead to a settlement agreement.

In cases where JCAA appoints a mediator, it is unlikely that a settlement will be reached through mediation conducted by a mediator unacceptable by either one of the parties, and the mediation would be terminated at the intention of the party. To appoint a mediator who would best suit the parties' needs, JCAA takes the following procedures: first, the JCAA sends a list of some candidates for mediator to the parties; second, the each

party informs the JCAA of the name(s) of the candidates unacceptable to it and the order of preference of the candidates acceptable to it; third, the JCAA appoints a mediator taking into account the order of preference expressed by the Parties and any other relevant circumstances (Article 17.5 and 17.6); fourth, if the appointment of the mediator does not take effect within three months from the date on which JCAA sent the initial list of candidates to the parties, the mediation is to be terminated (Article 28.1(3)).

5. Mediation Procedures (Articles 21 to 29)

If there is an agreement between the parties on matters concerning how to proceed with the mediation, the mediator(s) must comply with the agreement (Article 21, Paragraph 3). For example, if the parties agree that the mediator shall present a final proposal for settlement, the mediator must always do it.

The confidentiality rules are provided in detail in order for the parties to safely make assertions or submit evidences in the mediation, including caucusing, for the purpose of reaching a settlement (Articles 22 to 24).

Time limit for concluding mediation may be freely agreed by the parties, but if such time limit is not specified in the parties' agreement, it shall be three months under the new Mediation Rules (Article 25). The reason for this is that the dispute settlement within a short period of time is one of the significant reasons why mediation is used. The time limit remains the same even if a substitute Mediator is appointed due to challenge, removal, resignation, or death unless the parties agree to extend the time limit. Nevertheless, the JCAA may extend the period in accordance with Article 10.

Article 26.2 stipulates that the mediator(s) must sign a settlement agreement if the settlement agreement has reached between the parties and all the parties request such signature. This is because the Singapore Convention provides that, in order for the settlement agreement to be enforced, the mediator(s)' signature is one of the ways to prove that the agreement is resulted from the mediation (Singapore Convention, Article 4.1(b)(ii)). In response to this convention rule, the settlement agreement resulting from the JCAA Commercial Mediation Rules can be enforced in

the contracting states of the Singapore Convention in the future. On the same reason, Article 26(3) also stipulates that either party may request the JCAA to attest that the mediation agreement has resulted from the mediation administered by the JCAA. This responds to Article 4.1(b)(iii) of the Singaporean Convention.

According to Article 27, when a settlement is reached, the parties may agree in writing to appoint the mediator as arbitrator and request such arbitrator to record the settlement in the form of an arbitral award. While such an arbitral award is generally considered effective, there is also a view that the arbitral award in such cases is problematic because there is no dispute once the settlement agreement has been reached. Therefore, it is a matter of applicable law on this issue.

Article 29 provides that any party may commence or continue judicial, arbitral or similar proceedings in respect of the disputes subject to mediation unless the parties have agreed otherwise or unless prohibited by law. One of the reasons is that it may be necessary to suspend prescription or to have a temporary restraining order. In addition, due to the nature of the mediation, the fact that a party goes to the mediation while resorting to other dispute resolution methods at the same time indicates that they still wish to continue the mediation. If the other party does not accept such an action, it can terminate the mediation at its free will.

6. Remuneration of Mediator (Articles 30 to 32)

The system of remuneration of mediator is, as the default rule, a time-charge of JPY50,000 per hour without any upper limit (Article 30.1). The time-charge system is reasonable in the mediation in general, because the amount of the claim or the economic value of the dispute may not be calculatable or the mediation may be terminated early in the proceedings.

The parties can freely agree to adopt other methods of calculating the mediator's remuneration, such as setting an upper limit in the time-charge system, a fixed-fee system, or a contingent-fee system (Article 30.2). It is the skill and competence of the mediator that divides the success or failure of mediation, and if the settlement agreement is concluded in a short

period of time, the effect of reducing the cost of dispute settlement is extremely great. Accordingly, there are sufficient reasons for adopting a contingent-fee system for mediator's remuneration. Since the mediator has no power to make binding decisions, there seems to be no particular harm in this system.

7. Filing Fee and Administrative Fee (Articles 33 and 34)

The filing fee is JPY50,000 (Article 33.1). It is refundable if the mediation is not commenced, for example, due to the respondent's non-consent to the mediation. In addition, the administrative fee is charged for 10% of the remuneration of the mediator(s).

IV. Concluding Remarks

The merit of dispute resolution through mediation is extremely significant. In drafting a contract, in addition to the arbitration agreement or choice of court agreement, it is worth considering that mediation is conducted for a certain period of time before application for arbitration or litigation (multi-tier dispute resolution clause). Furthermore, even if there is no mediation agreement in the contract, it should be noticed that there is an option not to go immediately to arbitration or litigation, but to consult with the other party on the possibility of using mediation for a certain period of time.

Mediation is an art. Whether a settlement agreement can be resulted from a mediation depends on the skill and competence of the mediator. The JCAA has already established a database of prominent candidates. The JCAA will make public on its website these candidates who have permitted the JCAA to do so. The JCAA's website will be totally renovated in spring 2020.