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The Silver Lining in International Dispute Resolutions Part I: Mediation in Japan

Despite it being a very unusual and challenging year on many aspects, we have seen several positive developments in international dispute resolution in year 2020.

One of the silver linings is the increased popularity in the use of mediation in dispute resolution. Part I of this article discusses the types of mediation in Japan and highlight the differences between Japanese domestic mediation versus international mediation for commercial disputes. Part II of this article will then discuss the development of mediation practice in Japan and its potential as the foremost mechanism to resolve cross border commercial disputes in the near future.

1. Understanding “mediation” in Japan

The most common form of mediation in Japan is the court-annexed mediation administered by courts known as “調停” (pronounced “chōtei”), which is officially translated as “conciliation” in Japan. Based on available statistics, court-annexed mediation has around 33,000 new filings for in civil mediation and 140,000 new filings in family mediation in year 2020.

The other types of non-judicial mediation in Japan are (i) private mediation administered by private institutions such as the Japan Commercial Arbitration Association (“JCAA”), the Japan International Mediation Centre in Kyoto (“JIMC”), ADR Centres in Bar Associations and specialized ADR institutions run by industrial associations and (ii) administrative mediation run by administrative bodies such as the National Consumer Information Centre. Compared to court annexed mediation, non-judicial mediation for general commercial disputes in Japan has much smaller number of filings.

2. Differences between mediation in Japan vs international mediation for commercial disputes

In Japan, commercial mediation administered by mediation institutions such as JCCA and JIMC bears close resemblance to international mediation for resolving

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international commercial disputes. However, court-annexed mediation in Japan has several unique characteristics as compared to international mediation:

	Court annexed mediation in Japan	International mediation
Consent to mediate	A party can file a mediation case without the other party's consent. In certain categories of cases such as rent disputes, mediation is compulsory before litigation can commence.	Most mediation institutions will require an agreement to mediate to be executed between the parties.
Documents submissions	Submissions of petition and documents similar to litigation are required.	Summary of facts, issues, position and a small bundle of supporting documents.
Selection of mediator	Parties cannot appoint the mediators. The court will appoint a committee with one judge and 2 or more members from the local community. In some cases, lawyers and experts such as accountants are chosen as members of the committee.	Parties can jointly appoint the mediator(s) or nominate the mediation institution to appoint the mediator(s). Usually one or 2 mediators.
Conduct of mediation	Procedures are led and directed by the mediation committee.	The parties mutually design and agree on the procedure, often guided by the mediation rules of a particular mediation institution.
Role of mediator	Evaluate the allegations, give opinions and persuade parties to settle the disputes.	Facilitates the parts' communication, assist parties to explore position settlements.
Mediation conference	Conferences dates (court dates) vary from case to case, but generally, a case has several conferences over the span of few months. It tends to be	After documents are filed, mediation conference is usually completed within one or two days.

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	shorter than litigation but usually longer than international mediation.	
Language	Japanese only	Parties will agree on the language of mediation.
Confidentiality	No rule to prevent disclosure in the subsequent litigation proceedings.	Usually strictly confidential and without prejudice.
Enforcement	Settlement agreements are recorded as court documents and enforceable in courts.	Depend on the applicability of the Singapore Convention

3. Conclusion

As shown above, the concept of “mediation” which is familiar to Japanese litigants is vastly different from mediation practice outside of Japan. The main difference being that in international mediation, parties are in full control of the process and are able to select the appropriate mediator of their choice to facilitate their negotiation process. Understanding the differences between the manner in which mediation is carried out domestically and in the international arena is crucial. It enables the parties to prepare its case for mediation more effectively, and to have the right mindset and expectation in relation to the purpose, proceeding and outcome of mediation.

In Part II of this article, we will discuss the development of international mediation in Japan in recent years, how companies can adopt such dispute resolution mechanism into their dispute resolution model, and why mediation should be considered as the foremost dispute resolution mechanism in the foreseeable future.

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