



Recent Trends and Outlook of International Commercial Mediation in the world

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A. International Commercial Mediation is Attracting Worldwide Attention

Litigation and ADR (Alternative Dispute Resolution)

- Litigation = resolution procedure by a state organ (national sovereignty can be an obstacle in international disputes)
 - Judgment is based on the exercise of national sovereignty so obstacles may arise when executing abroad
 - Judgment can be biased to protect fellow citizens
- ADR = alternative resolution procedure based on party autonomy (especially suitable for international disputes)
- Main types of ADR
 - ① Arbitration
Mandatory dispute resolution procedure conducted by an independent and impartial third-person (arbitrator) appointed by party agreement
 - ② Mediation
Non-mandatory, harmonious dispute resolution procedure with autonomous dispute resolution by the parties through the medium of an independent and impartial third-person (mediator) appointed by party agreement
 - ③ Hybrid Dispute Resolution (Med-Arb)
Integrated dispute resolution procedure combining mediation and arbitration, enabling the parties to benefit from the comparative advantages of both

Litigation and Arbitration

Similarity

Mandatory dispute resolution procedure resulting in a binding judgment by a third party

Differences

Litigation	Arbitration
Final decision by a judge (state power) (the parties cannot choose the judge)	Final decision by an arbitrator (private person) (the parties can choose the arbitrator)
Susceptible to bias	Not susceptible to bias
Many countries with high risk of injustice	Low risk of injustice
The procedures are provided by law	The parties can decide the procedures based on their agreement
In principle, public	In principle, private
Judgments are difficult to enforce abroad	Awards are easy to enforce abroad (can execute in 160 contracting states based on the New York Convention)

Advantages of Arbitration in Comparison with Litigation as a Means of International Dispute Resolution

- Fairness
- Neutrality
- Expertise
- Flexibility of Procedure
- Privacy
- Global Enforceability of Awards

Arbitration and Mediation

- They do not contradict each other but work together like the two wheels on a car
- Recently, hybrid med-arb procedures are attracting more and more attention

Arbitration	Mediation
A third-person (arbitrator) resolves the dispute by rendering an arbitral award based on the parties' claims and evidence	A third-person (mediator) assists resolution of the dispute by listening to the parties and helping them to reach a settlement through mutual concessions, in some cases on the basis of mediator proposals
The arbitrator renders a legally-binding final decision	The mediator does not render a legally-binding decision
Resolution by an arbitral award based on the claims and evidence (only zero-sum solution may be possible)	The parties' mutual concessions promote dispute resolution (add-sum solution may be possible)
Takes a considerable amount of time especially in complex cases	Tends to be efficient (Hearings usually last 1 to 2 days) (If an agreement cannot be reached, the proceeding ends)
Costs a considerable amount	Much less expensive than arbitration
Awards enforceable under the New York Convention	Settlement agreements not enforceable as a matter of course (contractual effect only) (However, possible to give enforceability under the New York Convention by utilizing a consent award in med-arb proceedings) * There is little need for enforceability to begin with because settlement agreements are based on the parties' agreement, and the percentage of voluntary performance is extremely high (about 90%) * In order to grant international enforceability, the Singapore International Commercial Mediation Convention was signed in August 2019 and will enter into force in September 2020.

Mediation is Attracting Worldwide Attention

1. LOW COST

Recently, the cost of litigation and arbitration tends to be extremely high.
The cost of mediation tends to be much less expensive

2. FAST

- Mediation hearings usually take only 1 day to a few days
- This tends to be faster than litigation or arbitration
- Even complicated and large cases are settled amicably in expeditious mediations
 - (Ex) Settlement of Intel-AMD antitrust disputes in several countries, with the payment of \$1.25 billion and cross-licensing
 - (Ex) The rules of leading international mediation centers provide that cases should be resolved in principle within 3 months of application

3. PARTIES CAN CONTROL THE OUTCOME OF THE RESOLUTION

-Mediator encourages settlement between the parties in dispute. Parties are not forced to accept an unwanted resolution, and where they fail to agree on a solution, the mediation proceeding ends

4. LESS ADVERSARIAL (FEWER CONFLICTS)

- Mediation is a less adversarial (and less conflictual) resolution system as compared to litigation or arbitration
- Mediation can resolve disputes with less psychological burden as compared to litigation or arbitration

5. WIN-WIN SOLUTION

- In mediation, the parties may seek win-win solution/add-sum settlement
- Parties do not prefer zero-sum solution in many cases in which the parties should continue the business relationships
- Looking at the whole business relationship behind the conflict

Cases Suitable for Mediation

- When the parties trust each other
- When their collaboration is expected to continue
- When a win-win solution is possible
- When potential recovery does not justify the cost of litigation or arbitration
- When the dispute is time sensitive, etc.

High Success Rates of Mediation

It is said that at renowned international mediation institutions, in no less than 80% of the cases, settlement can be achieved by just one or two day consecutive session when mediators with professional training who are under strict confidentiality efficiently use the mediation techniques.

Both Culture Has a High Affinity with Mediation

- ▶ Japanese traditional culture is a culture that has a high affinity with mediation.
 - The spirit of mediation is inherent in the Japanese culture where its origins can be traced back to the 17-Article Constitution of A.D. 604 which is said to be the first constitution of Japan. The first article provides, “cherish harmony among the people.” Mediation is said to have been widely used as means of dispute resolution from that period.
 - In fact, modern Japan has a long history of domestic mediation, and domestic mediation is actively utilized today
- ▶ Vietnamese culture also has a high affinity with mediation.

Mediation has a high affinity with both culture, and it is readily acceptable to people and companies in both countries.

Similarity between Japan and Vietnam - Focusing on Mediation -

- ▶ Cultural Similarity - Mediation Culture
- ▶ Achievements of domestic mediation - Has long history and many achievements (mediation has developed from the accumulation of achievements of court-annex mediation)

However, this could be a negative factor for promulgating international mediation for the following reasons.

The Current State of International Mediation - Extremely Low Use

[Reasons]

Need to be appreciated by users around the world

- Divergence from mediation of international standards
 - Confidentiality ... Common law countries attach great importance to this point.
 - Arbitrator (judge) may become a mediator ?
→Big debate on this issue in the world

B. Issues Involving International Commercial Mediation and Efforts to Overcome the Issues

Issues involving international commercial mediation (1)




The usefulness of mediation with respect to international commercial disputes is still not well known in the world.

- The history of mediation as a means of international commercial dispute resolution is rather short.
- Rather few publicized achievements.
- Rather few international commercial mediators who have the skills to handle mediation with parties of different cultures, languages, etc.

International Mediation Centers in Asia

(trend to promote the International mediation)

In Asia, many countries have begun promoting international mediation actively.
Major international mediation centers in Asia have full-fledged hard and soft infrastructure.

Name of Organization	Permanent Facility (not necessarily exclusive to mediation)	Rules for Mediation	Mediator Panel	Notes
Singapore International Mediation Centre (SIMC)	 <small>Photo: Maxwell Chan</small>	○	○	22 new case filings in 2017
Hong Kong International Arbitration Centre (HKIAC)	○	○	○	15 new cases in 2016 15 new cases in 2017
Asian International Arbitration Centre (AIAC) (Malaysia)		○	○	5 domestic cases in 2016 (no international cases)
Vietnam Mediation Centre (VMC)	○	○	○	Established in April, 2018
Japan International Mediation Center in Kyoto (JIMC-Kyoto)		○	○	Established in November, 2018

Issues involving international commercial mediation (2)

No guarantee to attain final resolution of the dispute

- ▶ Mediation is attempted to establish an autonomy settlement.
- ▶ Since no solution is imposed, the parties may easily enter into and walk out from mediation.
- ▶ However, prominent international mediation institutions bring a settlement agreement by only one or two days' intensive session, with over 80 % of the cases. Issue of no guarantee of dispute resolution may not be so critical.

Joint Use with Arbitration

(to attain final resolution of the dispute)

- Mediation and arbitration are not “either-or” but work together

Collaboration comprising a series of prescribed (pre-agreed) dispute resolution procedures

- Mediate first; if not successful, then go to arbitration (“Med-Arb”)
 - Begin arbitration; suspend procedure and go to mediation; if not successful, then go back to arbitration (“Arb-Med(-Arb”))
 - Mediate; if successful, go to arbitration for a consent award (Med-Arb used for consent award)
- Currently, such hybrid procedures are in the spotlight globally

Issues involving international commercial mediation (3)

Just In the process of achieving the framework of international Enforcement

- Has no international enforcement mechanism like arbitration under New York Convention.
- Although the Singapore Mediation Convention (the Signing Ceremony was held in August 2019, and the Convention will enter into force in September 2020) has established a framework for international enforcement, the number of signatories is overwhelmingly small compared to the New York Convention, and the number of ratified countries is very limited (see next slide).
- However high rate of voluntary performance of settlement agreement. Issue may not be so critical.

The Singapore International Commercial Mediation Convention (to grant international enforcement power)

On August 7, 2019, the signing ceremony of the Singapore International Commercial Mediation Convention was held.

- ▶ 46 countries including the United States, China, India, Singapore and South Korea have signed the Singapore International Commercial Mediation Convention.
- ▶ The Singapore International Commercial Mediation Convention aims to grant international enforcement power to settlement agreements reached by international commercial mediation similar to that of New York Convention for arbitration.
- ▶ The Singapore International Commercial Mediation Convention will enter into force in September 2020. Neither Japan nor Vietnam have signed the Convention.



C. Establishment and Features of the Japan International Mediation Center in Kyoto

- Establishment of the Japan International Mediation Center in Kyoto (JIMC-Kyoto) –
 - Equipped with global standard hardware and software
 - Practicing global standard mediation

Setting at Kyoto



Why Kyoto ?

- ◆ International mediation is an intensive procedure completed in a short period of time. Because mediation is expedited, it need not be situated in a business center
- ◆ Kyoto is an important city of Japanese culture having a high affinity with mediation
- ◆ The pacific atmosphere of Kyoto – with its gardens, temples, shrines – is favorable to amicable negotiations
 - ◆ ⇒A famous international mediator favors Hawaii as a place of mediation for similar reasons
- ◆ Kyoto is a tourist destination that is appealing to mediators, parties and their counsel
- ◆ JIMC-Kyoto has dedicated facilities on the campus of Doshisha University, which are comparable to the facilities of leading global ADR centers but are less costly

Global Standard Mediation Practice by JIMC-Kyoto

JIMC-Kyoto was established in November 2018 and conducts global standard mediation

Partly due to the high affinity of mediation with Japanese culture, in modern Japan after the Meiji period, domestic mediation significantly spread and developed a distinctive style. There are quite a few differences between Japanese domestic mediation practice and international standard mediation practice

Japanese Domestic Mediation Practice	Global Standard Mediation Practice
Pleadings and information during the mediation process may be disclosed in the succeeding litigation or arbitration procedure	Pleadings and information during the mediation process may not be disclosed in succeeding litigations or arbitrations
Evaluative-type is mainly used	Facilitative-type and evaluative-type coexist (hybrid usage)
Intermittent meetings, loose schedule, and hearings last for relatively long periods of time	Intensive, tight schedule with hearings lasting for short periods (usually 1 day or 2 consecutive days)
Mostly private sessions with parties	Not only private sessions but also joint sessions are used as appropriate

Features of JIMC-Kyoto (Soft and Hard Infrastructure)

Equipped with global standard hardware and software

- ◆ Can utilize full-fledged hard and soft infrastructure in line with global standards

Software infrastructure

- Mediator panel... see slide23
- Mediation rules
- Speedy procedure in line with global standards

Hardware infrastructure

- Facilities...see slide 24

Features of JIMC- Kyoto (Soft Infrastructure)

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Mediator Panel

- 53 non-Japan resident mediators (increasing with recommendations by well-experienced global practitioners)
- Panel prepared with cooperation from international mediation centers such as SIMC, HKMC, etc.

USA	6	New Zealand	1
Australia	4	Korea	1
Canada	1	United Kingdom	6
Singapore	10	Vietnam	2
India	4	Cambodia	1
Hong Kong	14	China	1
EU	4	Total 53 (※ 2 are double-counted)	

- Approx. 70 Japan resident mediators (increasing)
Experts of dispute resolution such as commercial and family affairs, etc.

The mediation panel of JIMC, along with the ICC and SIMC, is recognized overseas as a panel rich in diversity. ("...International organisations such as the Singapore International Mediation Centre (SIMC), the Japan International Mediation Center (JIMC) and the International Chamber of Commerce (ICC) select mediators from diverse countries for their panels, thereby recognising a variety of national and organisational standards for mediator competency, certification and practice" (Nadja Alexander and Shouyu Chong (eds), *The Singapore Convention on Mediation: A Commentary* (Kluwer Law International, 2019)5.53))

Features of JIMC-Kyoto (Hardware Infrastructure)

□ Mediation Facilities

- Use of Facilities of Doshisha University (equipped with simultaneous interpretation booth and dining facilities offering diverse global cuisine)

University and JAA signed a MOU on December 1, 2017

- Option of mediation in temples and shrines in Kyoto such as Kodai-temple

Historically, temples and shrines in Kyoto have been places for resolving disputes. JIMC-Kyoto expects to increase the number of shrines and temples available for mediations



D. Effective Use of JIMC-Kyoto

Using Mediation Only

- Using mediation alone without arbitration has its merits
 - In mediation, the mediator promotes settlement between the parties and if an agreement is not reached, the proceeding ends. The parties are not forced into an agreement. Therefore, the hurdle to try mediation is low and this is the merit of Mediation differ from litigation or arbitration. Low hurdles in use can be strongly said in the case of using mediation alone without an arbitration agreement.
 - Consider trying mediation just before going to court or arbitration (use of mediation based on an agreement to mediate after a dispute arises)
- In the case of arbitration, it is very rare to agree to have an arbitration after dispute arises (after a dispute has arisen, it is difficult for the disputing parties to agree on arbitration)

Joint Use of Mediation and Arbitration

- Collaboration comprising a series of prescribed (pre-agreed) dispute resolution procedures
 - Mediate first; if not successful, then go to arbitration ("Med-Arb")
 - Begin arbitration; suspend procedure and go to mediation; if not successful, then go back to arbitration ("Arb-Med(-Arb)")
 - Mediate; if successful, go to arbitration for a consent award (Med-Arb used for consent award)
- In the case of joint use of mediation and arbitration, it is basic principle to put it as a dispute resolution clause in the contract in advance (please refer to the comment at the bottom of the slide on the previous page for the reason)

Strategic use of JIMC-Kyoto

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Using JIMC-Kyoto in Collaboration with Arbitration

- JIMC-Kyoto is a private specialized mediation center. It can collaborate with various arbitration in and out of Japan

Collaboration with Japanese Arbitration

- JCAA arbitration
- ICC arbitration (place: Japan)
- SIAC arbitration (place: Japan)

Collaboration with Foreign Arbitration

- ICC arbitration (place: Paris)
- SIAC arbitration (place: Singapore)
- VIAC arbitration (place: Hanoi)
- Other arbitration centers

※This combination allows you to balance with other countries.

E. Example

~International Construction Disputes and
Mediation~

Characteristics of International Construction Disputes

- There are many voluminous contracts related to a single construction project, and contractual relationships and interests are very complexly intertwined.
- Requires advanced knowledge and expertise in construction-related technologies, industry-specific practices, legal relationships, etc.
- Involves engineers and many experts (construction specialists, claims consultants, process analysis and geology experts, etc.)
- There are many contracting parties and interested parties.
- There are many contracting parties and interested parties of different nationalities, cultures, and business practices.
 - Governments are often parties and interested parties.
- The value in dispute tends to be huge
- International construction projects are carried out on a large scale over a long period of time, during which time differences and risk sharing issues always arise in nature due to the wide variety of risks, such as natural disasters, environmental changes, changes in economic conditions and political situation, changes in laws and permits, and changes in design and construction contents.
- Because of the huge impact when a construction project is canceled, frustrated, or delayed, it is often not possible to stop the construction even if there is some conflict.

It is necessary to resolve the daily differences of opinion and risks quickly by highly specialized experts while the project continues.

Methods of Disputes Resolution in International Construction Disputes

- Dispute Board (DB)
- Arbitration (Litigation)
- Mediation

Benefits of Mediation as International Construction Dispute Resolution Procedures

1. LOW COST

Recently, the cost of litigation and arbitration tends to be extremely high. The cost of mediation tends to be much less expensive

2. FAST

- Mediation hearings usually take only 1 day to a few days
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In the case of international construction disputes, arbitration tends to be time-consuming and costly because there are many complex contracts and many claims, and requires high expertise and huge costs.

In FIDIC contract form, the reasons for suspension or cancellation from the contractor are limited, so a resolution on the premise of continuing the contract is often required.

International construction disputes are appropriate for mediation

Almost all of the following applies to international construction disputes

- Cases where the parties trust each other
- Cases where relationship is expected to continue
- Cases where a win-win solution is possible
- Cases where potential remedy does not justify the cost of litigation or arbitration
- Case where time-constraint is vital

Dispute Board(DB)

- Dispute resolution committee established in individual projects. In construction disputes, a system is often adopted where the parties entrust dispute resolution to the dispute board before referring to arbitration.
- Standing DB...set up from the start of the construction project (at the time of entering the construction contract)
- Ad hoc DB...set up after a dispute occurs
If DB is set up after a dispute occurs, it will be time-consuming and costly like arbitration, so permanent DB is desirable.
- One of the purposes of DB is to make recommendations or decisions to enable on-site resolution at an early stage for disputes that cannot be resolved between the contracting parties. Another purpose of DB is to resolve the differences of opinion and to prevent the occurrence of conflict.
- In principle, DB decisions must be implemented immediately, but appeals are possible.

DB and Mediation

If DB doesn't work



Arbitration (Litigation)

...costly and time-consuming

→worth trying to mediate before or during arbitration

If DB has not yet been set up



Compose DB after conflict occurs?

...Time-consuming and costly like arbitration

→Worth trying to mediate