New International Commercial Mediation Rules in Japan

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The Japan Commercial Arbitration Association (the "JCAA") introduced their International Commercial Mediation Rules (the "Rules") on 1 January 2009. The JCAA has followed the lead of other international arbitral institutions in devising and promoting a set of mediation rules for international disputes.

Settling disputes by mediation is hardly new to Japan. In a domestic context, judges often act as de facto mediators and work hard to encourage settlement between the parties. The JCAA has also tried to play a role via its own mediation rules for domestic disputes, which have been in place for some time. However, despite these rules and a culture which generally favours settlement where possible, the JCAA felt that there was a general lack of awareness of mediation as an alternative to arbitration, particularly in an international context.

In a mediation under the Rules, the JCAA would play a secretarial role rather than being actively involved in the mediation. The JCAA would prefer the parties to nominate their own mediator. However, if they are unable or unwilling to do so the JCAA can nominate one or more mediators to handle proceedings. The JCAA do not have a 'panel' of mediators in the same way that they have a panel of approved arbitrators but are able to provide a mediator if requested.

As with party-led mediations the parties will have a free hand to decide, along with the mediator, how they wish the proceedings to be managed and in what form.

Depending on the preference of the parties a mediator can, broadly speaking, act either as a facilitator or an evaluator. The former is probably more common in Western jurisdictions. But Japanese companies may prefer the latter approach, with a mediator taking a view on the merits of the case and trying to persuade the parties of what an appropriate settlement might look like – this is similar to the approach used by judges in the Japanese courts. Rule 9(4) expressly provides that a mediator can make a settlement proposal at any time.

The Rules are generally similar to mediation or ADR rules of other leading arbitral institutions although, as would be expected, tending more towards the civil law tradition. There is also a positive approach to 'Arb-Med' reflecting strong advocacy for this by certain members of the Japanese arbitration community. For example, Rule 8 expressly provides that the mediator can be an arbitrator in relation to the same dispute if the parties agree whereas most mediation rules are silent (and the HKIAC rules expressly forbid it). Rule 11 is also interesting in this context – following a settlement, it allows the parties to appoint the mediator as an arbitrator in order to make an arbitral award which incorporates the terms of the settlement. The intention of this provision is, presumably, to aid enforcement of any settlement. This can be particularly useful if the settlement contains ongoing obligations. However, there must be some doubt as to whether an arbitral award made in this way would necessarily benefit from the New York Convention. A party resisting enforcement would be able to point to the artificial nature of the 'arbitration award' given that the New York Convention clearly anticipates that there would be an actual arbitration. That said, consent awards as a means of settling an existing arbitration are a common feature of international arbitration and there does not seem to have been any issue in the enforcement of these. The JCAA may well have taken the view that there is little downside for parties to enshrine the settlement within an arbitration award and it was a useful option to include.

Given that Japan does not have 'without prejudice' privilege in the common law sense, foreign parties may also find that the provisions relating to privacy and confidentiality give them comfort about the procedure. In particular, Rule 12(3) provides that, unless otherwise agreed by the parties, "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" cannot be adduced in any judicial or arbitration proceedings. Although this provision is useful, it is perhaps

regrettable that the wording is not as comprehensive as in many other international rules, leaving an element of doubt as to whether everything produced in the mediation is protected from production in a future court case. Another provision which is frequently included in international mediation rules is an express prohibition on calling the mediator as a witness in subsequent proceedings. This is omitted from the Rules although the mediator and others involved in the mediation do have an express obligation of confidentiality (Rule 12(2)) which may give some comfort on this point.

Many practitioners in mature markets will take the view that separate mediation rules are not required especially since many experienced mediators would rather use their own form of mediation agreement. However, in a relatively immature mediation market, the helping hand provided by the JCAA is likely to be useful. Certainly, the presence of institutional rules helps provide reassurance to parties that there are no particular difficulties in carrying out a mediation in Japan. According to the JCAA, there has already been interest in the Rules and the first (two-day) mediation has taken place.

Hopefully the efforts of the JCAA can promote mediation in Japan and give parties another avenue for the resolution of disputes short of litigation or arbitration. There also is a need to train and develop a pool of mediators (both Japanese and foreign) in order to fully take advantage of the possibilities for mediation in Japan. This is recognised by the JCAA and we anticipate further growth in mediation over the coming years.

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