

Getting Into Gear: The Japan International Mediation Centre - Kyoto

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These are heady days in international mediation circles. A panel discussion earlier this summer at an UNCITRAL conference entitled "Feel the Earth Move - Shifts in the International Dispute Resolution Landscape..." dedicated largely to mediation, captures the sentiment. Reasons for the excitement include the approval of a draft of the UNCITRAL treaty for enforcing mediated settlement agreements (the Singapore Mediation Convention), a reported 20% increase in commercial mediation in the United Kingdom, commercial mediation competitions springing up in Asia (Melbourne in 2017 and Hong Kong in 2018), and a "Belt and Road" initiative that is giving priority to mediation, characterized by some in the Chinese government as one of the "trinity" of international dispute services.

Where these movements fall on the Richter scale, and whether mediation will take an equal place in the dispute resolution pantheon, will only be known with time. But the apparent momentum offers an opportunity to return our attention to the creation of an international mediation center in Kyoto - an initiative first considered in our previous [post](#) on the Center and a related [post](#) concerning the broader reworking of international dispute resolution services in Japan. Those posts identified an initiative by the Japan Association of Arbitrators (JAA) and Doshisha University in Kyoto to create an institution, the Japan International Mediation Center in Kyoto (JIMC-Kyoto), to administer international commercial mediations with operations beginning in late 2018. If the announcement of its creation means that the Centre was put into first gear, the recent developments outlined below mean that the JIMC-Kyoto has moved into second gear. But traffic is usually heavy in Japan and things are still moving slowly.

Developing the JIMC-Kyoto

Since our previous posts, a working group of 10 to 15 academics, lawyers, in-house counsel, and businesses leaders has been meeting about twice a month to iron out the details. While the majority of the participants are Japanese, a few foreigners have been attending the meetings, which have been conducted in both Japanese and English.

The working group is moving towards finalizing the governance structure and operations of the center. Initially, the Secretariat will comprise a small number of lawyers and four assistants employed part time who will coordinate their hours with the case flow. Daily operations will be managed by a Secretary-General assisted by a committee with members subdivided into smaller working groups having responsibility for different of spheres of operations including panel membership, marketing, and education. This committee will include Japanese and non-Japanese nationals whose names and operational responsibilities will be published on the center's website, all of whose contents will be available in both English and Japanese.

The organizers have also prepared procedural rules, not yet public, which were drafted in Japanese, translated into English, and discussed in committee in their English version. The board of directors of the JAA has approved the draft rules, though there may yet be refinements.

In their present form, the rules have familiar modern features. Mediation may be instituted either with or without prior party agreement (as under the ICC Mediation Rules (articles 2 and 3) and SIMC Rules (rule 3)). The center will appoint mediators for parties on request, and the choice will not be limited to the JIMC-Kyoto panel of mediators. The rules will also clarify how mediation will relate to parallel dispute proceedings, though they will stop short of providing for hybrid procedures (as provisioned, for example, in the SIAC-SIMC Arb-Med-Arb Protocol), and they will not take up the possibility of mediators acting as arbitrators. Such "arb-med" remains quite common in Japan and a few other Asian jurisdictions, and it is provided for by the Japan Commercial Arbitration Association (JCAA) rules of arbitration (rule 55) and mediation (rule 8). The current draft "UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation" (A/CN.9/943, discussed by UNCITRAL in July 2018), which will make minor changes to the 2002 Model Law and insert provisions of the 2018 Singapore Mediation Convention, allows the parties to agree to the mediator acting as an arbitrator in the same dispute (Article 13, following the 2002 Model Law).

The JIMC-Kyoto draft rules also do not prescribe any default style of mediation. This is despite evaluative mediation being pervasive in court-annexed and most other mediation in Japan. It further contrasts with draft mediation rules recently proposed by the International Centre for the Settlement of Investment Disputes (ICSID) as a new option under its Additional Facility Rules (draft Annex E). These seem to foreclose mediator recommendations absent party agreement (Rule 14(4)), thus favouring a more facilitative style of mediation even for investor-state disputes.

In addition, the JIMC-Kyoto organizing committee has now compiled a panel of mediators with input from the Singapore International Mediation Centre, regular counsel of the organizing committee, and the Hong Kong Mediation Centre. The list will be further developed and ultimately published on the JIMC-Kyoto website with profiles of the panel members.

The committee is also considering how to make the Center's services distinctive and reflective of its Japanese roots. In time, this might include industry specialization, perhaps taking inspiration in approach - if not substance - from the Silicon Valley Arbitration & Mediation Center, focused on technology. (Already, a new International Arbitration Center Tokyo specialises in disputes over patents.) The JIMC-Kyoto organizers also plan to secure mediation venues outside of the standing facilities at Doshisha University for interested parties, including from among the plentiful temples and shrines in the local area.

Developing International Dispute Resolution in Japan

As discussed in our earlier [post](#), the JIMC-Kyoto is part of a broader plan to breathe life into Japan-related dispute resolution services. Adding its voice to these efforts, a working group comprising 14 academics, lawyers, and in-house counsel recently identified seven proposals to improve international arbitration services in Japan. If realized, these initiatives may present opportunities for symbiosis with the JIMC-Kyoto. They include:

- strengthening the JCAA;
- encouraging increased presence of outside dispute-resolution institutions in Japan;
- holding seminars and trainings for Japanese businesses, perhaps in cooperation with the Japan International Cooperation Agency and the Japan External Trade Organisation;
- emphasizing marketing abroad;
- attracting international arbitration counsel and arbitrators to Japan, perhaps through tax incentives and greater ease obtaining visas; and
- the possible establishment of an umbrella organization to manage international arbitration initiatives.

A final proposal made by the working group is to bring Japanese facilities and laws bearing on international arbitration in line with standards common in arbitration-friendly jurisdictions. Cost-effective venues are now available in Osaka and are apparently on the way in Tokyo. As to the legal framework, although views may differ, it has recently been observed that doubts remain in text if not in practice about the legality of those who are not registered lawyers in Japan acting as arbitrators and counsel in international arbitrations. Since the same concerns about foreigners apply in international mediations, the two issues could usefully be addressed together.

Another suggestion for the Japanese government is to urgently consider ratifying the Singapore Mediation Convention, as Singapore will undoubtedly do, but also probably the other leading regional jurisdictions for international dispute resolution. Even if the new treaty mechanism for enforcing settlement agreements does not have much impact in practice, as parties may still mostly see successful mediations as part of a process of creatively rebuilding their business relationships, prompt ratification would send another message that Japan is keen to promote itself as a serious new international dispute resolution services provider in Asia.