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Merits of International Commercial Mediation

For both companies and lawyers involved in cross-border transactions, the option of using an alternative dispute resolution mechanism known as international commercial mediation has attracted increasing attention in recent years.

International commercial mediation can be a very reliable method in resolving a dispute without damaging business relationships if it is used properly. Further, by settling the dispute through mediation, parties can avoid more extended arbitration or litigation.

While international commercial mediation has this advantage, it also has many unique features which are different from arbitration or litigation, and it is important to understand these differences.

In this client alert, we provide a brief summary of the features and procedures of international commercial mediation, and introduce major international commercial mediation institutions in Asia.

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1. What is International Commercial Mediation?

Mediation is a dispute resolution mechanism with the aim of settling a dispute by a negotiation between parties with the assistance of a mediator who is an impartial and independent third party. International commercial mediation is a type of mediation used in the context of resolving international commercial disputes between companies.

International commercial mediation may be conducted either by designating a mediation institution (institutional mediation) or an ad hoc basis without any institutional framework (ad hoc mediation). The features common to the both types of mediation are as follows.

First, international commercial mediation cannot be used unless companies consent to mediate their dispute. Such consent can be set out in the dispute resolution clause of the parties' contract, or, absent any language on mediation in this provision, companies may agree to use mediation later if a dispute emerges. This is a common feature with arbitration and litigation, where parties' consent is necessary to use arbitration or in designating the litigation venue.

On the other hand, a major difference between international commercial mediation and arbitration and litigation is the role of a mediator. The mediator may facilitate discussion between the parties to accelerate their negotiation, but has no power to make decisions about the dispute. As such, even if the mediator takes a view in favor of one party's case, that party cannot achieve its settlement goal unless it convinces the other party. Thus, each party's main objective should be to persuade the other side to settle rather than trying to persuade the mediator of the merits of its case.

Communications during the international commercial mediation process are both confidential and "without prejudice" (that is, they cannot be used as evidence in the event that the dispute proceeds to arbitration or litigation).

Accordingly, parties in mediation typically can and will communicate to each other and to the mediator with greater candor than in arbitration or litigation.

Further, and importantly, in international commercial mediation a party may terminate the procedure unilaterally, which is another important difference from arbitration or litigation. This highlights the fact that achieving a settlement in international commercial mediation depends principally on the extent to which the parties may be willing to compromise rather than risk losing in arbitration or litigation.

The settlement agreement concluded during the international commercial mediation normally only has a binding effect of a contract. Some institutional arbitration rules provide for the possibility that, if the parties succeed in settling the disputes they can request an arbitral tribunal to record their agreement as an arbitral "consent" award, which makes it enforceable under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). Rules of arbitral institutions such as the Japan Commercial Arbitration Association (JCAA) and the International Chamber of Commerce (ICC) contain provisions regarding the procedure and conditions for such an award.

2. Procedure of International Commercial Mediation

The international commercial mediation procedure is typically conducted in the following steps and timeline. It generally takes at least several months (and maybe longer) from the submission of a request for mediation (as provided in the step (2) below) until the day of the mediation itself. As indicated below, the mediation process is much simpler than procedures in arbitration.

(1) Agreement to Mediate

First, parties need to agree to mediate to use international commercial mediation. As noted, such agreement may be stipulated in the contract's dispute resolution clause or the parties may agree to mediate later after a dispute has arisen.

(2) Submission of Request for Mediation

Next, a party needs to submit a request for mediation to the designated institution (if the parties have agreed to use an institution). The request is usually a simple form document that contains information such as the identities and contact details of the parties and their representatives, a brief description of the dispute, and basic details of the mediation.

(3) Designation of Mediator

Before or after the submission of a request for mediation, in accordance with the agreed terms (e.g., rules of the designated mediation institution), the parties need jointly to choose the mediator (typically a single individual). Failing such joint designation, the institution will appoint the mediator.

(4) Agreement on Procedure

The parties will then agree on the features and procedures of the mediation and prepare a document reflecting such agreement, which is typically five to six pages. This document will be signed by the parties and the mediator. The

document will address various aspects of the mediation procedure, including the schedule for party submissions and the date on which the mediation will be held, conditions for termination and costs of the mediation, etc.

(5) Submission of Position Papers

Each party will prepare a position paper, often no more than 20-25 pages, which sets out its case in relatively summary fashion. The position papers may be accompanied by a small volume of supporting documentary materials. Position papers usually are submitted several weeks before the day on which the mediation is scheduled to be held. Generally, there is only this one round of submissions in international commercial mediation.

(6) Day of the Mediation

Lastly, the mediation will be held where the mediator meets with all the parties to determine whether a settlement of the dispute is possible. The duration of this meeting is typically one or two days. During this process, after each party makes a brief opening statement, negotiation between the parties commences. Typically the mediator will hold "caucuses," or private meetings, with each party and serve as facilitator or coordinator of the parties' settlement offers and counter-offers. This process will end if the parties reach a settlement or if either the mediator or one of the parties decide to end the process because no settlement appears possible.

3. Major International Commercial Mediation Institutions in Asia

Major institutions in Asia which administer international commercial mediation are as follows.

(1) JCAA

In addition to arbitration, the JCAA administers international commercial mediation. Its latest international commercial mediation rules have been in force since 1 January 2009. The authors understand that the procedure usually ends within three months from the designation of the mediator.

The JCAA rules allow the parties, if they have reached a settlement agreement in mediation, to appoint the mediator as an arbitrator who can then issue an arbitral award incorporating the terms of parties' settlement agreement (i.e., a consent award). In addition, the JCAA's arbitration rules allow parties, after commencing arbitration, to stay the arbitration and refer the dispute to mediation. If the mediation does not lead to a settlement, the arbitration may resume.

(2) ICC

The dispute resolution division of the ICC is headquartered in Paris and ICC also has an office in Hong Kong. Its latest mediation rules have been in force since 1 January 2014. The authors understand that the procedure usually takes four months from the date on which the request for mediation is submitted.

If the parties reach a settlement through mediation proceedings conducted in the course of arbitration proceedings, the ICC's arbitration rules provide that

the parties may request the tribunal to issue a consent award incorporating the terms of such settlement agreement.

(3) Singapore International Mediation Centre (SIMC)

SIMC was established in Singapore in November 2014, and its mediation rules have been in force since that time.

SIMC provides a unique dispute resolution procedure service called Arb-Med-Arb, administered jointly with the Singapore International Arbitration Centre (SIAC). Arb-Med-Arb is a process where a dispute is first referred to arbitration under the SIAC rules but where the parties must then attempt to reach a settlement agreement through mediation. If they succeed, the agreement may be recorded as a consent award; if they fail, the arbitration proceeds.

4. Conclusion

While international commercial mediation is not necessarily an appropriate dispute resolution method for every cross-border commercial dispute between companies, it has the great advantages of relative procedural simplicity and flexibility that companies may wish to consider as an alternative prior to (or even after) commencing arbitration. When making a strategic plan to resolve a dispute, companies may wish to consider using international commercial mediation, in addition to the options of negotiation as well as conclusive dispute resolution procedures such as arbitration and litigation.

For further information please contact


Yoshiaki Muto
Partner
+81 3 6271 9451
yoshiaki.muto@bakermckenzie.com


Joel Greer
Partner
+81 3 6271 9728
joel.greer@bakermckenzie.com


Takeshi Yoshida
Senior Associate
+81 3 6271 9723
takeshi.yoshida@bakermckenzie.com


Yuichiro Omori
Associate
+81 3 6271 9542
yuichiro.omori@bakermckenzie.com


Dominic Sharman
Associate
+81 3 6271 9496
dominic.sharman@bakermckenzie.com

www.bakermckenzie.co.jp/en/

Baker & McKenzie
(Gaikokuho Joint Enterprise)

Ark Hills Sengokuyama Mori Tower 28F
1-9-10, Roppongi, Minato-ku
Tokyo 106-0032, Japan
Tel + 81 3 6271 9900
Fax +81 3 5549 7720