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Mediation in Japan

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Abstract: The preference for amicable dispute resolution is deeply rooted in Japanese culture, and there is a long history in Japan of using mediation to manage conflicts. Mediation was used to resolve disputes between merchants and samurai warriors in the 17th century and to resolve claims between private actors and utility companies arising from the Fukushima nuclear disaster in the more recent past. While court mediation is common in contemporary Japan, private mediation is comparatively rare despite legislative changes in 2007 meant to promote growth. Mediation in Japan tends to be evaluative, and private sessions with parties are common. These standards derive, in part, from procedures used in court mediation. However, norms are being revisited in the case of commercial disputes. In 2018, the Japan International Mediation Center opened in Kyoto, prompting greater attention to alternative models of mediation and international commercial mediation standards. Meanwhile, recent international mediation trainings and events have paid more attention to aspects of mediation that are uncommon in court mediation in Japan including joint sessions and non-evaluative facilitation. A recent high-profile international commercial mediation highlighted the potential of co-mediation to manage linguistic and cultural differences. These movements have not resulted in a sea change in mediation culture, but they may in time lead to greater diversification of procedures and perceptions about mediation.

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Historical Background

The preference for resolving disputes amicably has cultural and structural roots in Japan. For example, the first written constitution of Japan of 604 AD, reflecting Confucianist teaching, stresses the importance of social harmony and conflict avoidance. Disputants have historically relied on community leaders and councils to help them resolve disputes amicably. Beginning in the 14th century, for instance, trade guilds mediated disputes among their members and between members and the government.[1] From the 17th to 19th centuries, priests acted as mediators in disputes between merchants and samurai warriors.

Japanese authorities have meanwhile created alternatives to litigation, including a court-annexed conciliation system considered below, and have at times encouraged the public to avoid courts. During the Ashikaga period (1336-1600), for instance, courts stressed that peasants should stay away from their chambers. As a result of these and other factors, Japan has comparatively few court litigations for a country of its size. There were only 518,997 new civil litigations including general and family disputes[2] in 2021, remarkable for the third largest economy on the planet with a population of over 125 million people. Consistent with this emphasis on amicable settlement, the mediation landscape in Japan has developed to include a combination of court mediation and private mediation supported by the judiciary and public bodies.

Contemporary Conceptions of Mediation

When the Japanese public encounters mediation, it is mostly likely to be in the context of court proceedings. Judges routinely press parties before them to amicably settle their disputes. Disputants separately have recourse to court conciliation before and during litigation. Conciliation committees make legal and factual assessments of disputes and advise litigants how they should be resolved. As a result of these processes, mediation may be commonly understood by many as a form of dispute evaluation, that may include legal assessment, aimed at ending or avoiding adversarial proceedings though mutual compromise (*gojo* in Japanese).

Over the past decade, there has been an increase in trainings and conferences on mediation that present different conceptions of mediation. These events have emphasized the mediator's role[3] in helping parties to communicate

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[1] A summary history of mediation in Japan can be found in Ronda Roberts Callister and James A. Wall, Jr. (1997).

[2] On mediation in family Law in Brazil see: BRAGANÇA; NETTO, 2020.

[3] See AWAD, 2020.

more effectively, not simply evaluate claims, and the potential of mediation to create value in negotiations by focusing on the interests of the parties, aiming at possible "win-win" resolutions that, in the commercial context, may include future business between the parties. This trend suggests growing interest of more facilitative aspects of mediation practice among some practitioners.[4]

Court Mediation in Japan

Japan does not have a single mediation act. The Civil Conciliation Act of Japan provides for a procedure of court-annexed conciliation by committees. The Code of Civil Procedure recognizes the right of judges to encourage settlement, propose settlement terms to parties, and enforce settlement agreements that result from court conciliation as court judgements within Japan. These processes are considered further below.

Conciliation Committees *(chotei)*

Court conciliation is commonly used before litigation and may be initiated by disputants without the need to commence adversarial proceedings. Conciliation is not a mandatory pre-condition to litigation except in specific categories of disputes that include landlord-tenant disputes over changes in rent and certain family disputes, but not general commercial disputes. In 2020, there were 161,660 new conciliations of civil and family disputes nationwide. Of these, 43.9% were successfully resolved taking on average 4.2 months each to conclude.

A conciliation committee normally comprises a judge and two, occasionally more, commissioners. Where conciliation takes place during litigation, a different judge from the judge presiding over the case is normally chosen. The co-commissioners come from outside the judiciary and are chosen for their leadership and work experience. There is no formal system of mediation training for the commissioners.

Court conciliation sessions are held about once every three weeks and last around an hour for each session. They normally comprise only private meetings between the committee and each of the parties and their counsel, though joint meetings with both parties may be held depending upon possible progress of discussions. In practice, judges sitting on the committees often do not attend the sessions. Committees may assist the parties to negotiate or assist them to evaluative the claims, particularly when judges participate, by assessing facts and law and proposing settlement options. Attorneys normally speak on behalf of the

[4] On mediation in Brazil see: FERREIRA; SEVERO, 2021. See also: FARIAS, 2020.

parties though parties sometimes supplement the statements of their attorneys or answer direct questions from the committee.

Conciliation sessions are not open to the public, but information exchanged during the process is not treated as confidential or without prejudice by law and may be used in the related litigation. If a settlement is reached under the guidance of the committee, the agreement is treated as a court judgement for the purposes of enforcement. Where parties reach a settlement on terms different than those suggested by the committee, the committee may, in principle, refuse to recognize that the agreement resulted from the conciliation. In practice, however, settlement agreements between parties are given effect unless they violate public policy or order.

Judicial Mediation *(wakai)*

Once adjudicatory proceedings are underway, the judge hearing the dispute may propose a form of judicial mediation or the parties may request it. The parties are legally required to comply, but judges tend not to insist if one or more parties does not wish to participate.

The judicial mediation process is similar to court conciliation in many respects. Sessions last about an hour each, are held about once every three weeks, and normally comprise private meetings with each party and counsel. Attorneys tend to speak on behalf of the parties. Judges commonly adopt an evaluative style, assessing facts and law and helping the parties to evaluate options for settlement. If a settlement agreement cannot be reached on terms set by the parties, the judge will commonly make a settlement proposal. The settlement proposal may address any issue that divides the parties, not just legal claims, and need not be limited by the relief sought by the claimant. If the parties do not accept the proposal, the adjudicatory process resumes. Judges commonly refer ongoing litigations to conciliation, not least because judges in Japan tend to have large caseloads. Parties have the freedom to accept judicial proposals to conciliate though this is not required by law.

Private Mediation in Japan

Despite the traditional importance of mediation globally, private mediation has not historically been used or supported by law in Japan. This changed with the enactment in 2007 of the Act on Promotion of Use of Alternative Dispute Resolution (Act), which addresses the relationship between private dispute resolution services, the courts, and the government. The Act includes a certification system for private mediation centers and reporting obligations. It also empowers

judges to order a stay of lawsuits and the suspension of limitation periods pending the outcome of private mediations. The Act does not address confidentiality, the use of information obtained in mediation in related court proceedings, or the enforcement of mediated settlement agreements. When court enforcement is needed, settlement agreements reached in private mediation must therefore be enforced as contracts in the normal way.

Since the Act became law, private institutional mediation remains uncommon in Japan. There have, however, been important exceptions to the limited uptake of private mediation. After the Fukushima Dai-ichi Nuclear Power Plant meltdown in 2011, for instance, a private dispute resolution center offering mediation services was created to manage claims by people who were affected against the operator of the power plant. By August 2013, the center had received 7,313 applications for mediation and had settled 4,239 disputes.

Because of limited uptake and confidentiality of proceedings, it is difficult to generalize about the nature of private mediation in Japan. There is inherently greater scope for flexibility in the duration, process, and style of mediation than in court conciliation, but in practice the parties and mediators tend to adopt the same evaluative style. The recent growth in interest in international commercial mediation, considered next, has potential to change conceptions of mediation.

International Commercial Mediation

In 2018, the Japan International Mediation Center-Kyoto (JIMC), one of a small number of dedicated mediation institutions worldwide, was created with the purpose of administering international commercial mediations. The JIMC is a grassroots initiative by Japanese attorneys that is affiliated with the Japan Association of Arbitrators, an organization founded in 2008 to encourage the development of private arbitration and mediation. The JIMC offers mediation rules, a list of mediators, and administrative services for mediations including logistical support for hearings and support to parties selecting mediators, as well as providing some training programs, including a mock-mediation discussed below.

The JIMC has been supported since its inception by the Singapore International Mediation Centre (SIMC), which itself began administering international commercial mediations in 2014. The JIMC and SIMC concluded a protocol in 2020 for the joint administration of expedited mediations. The protocol was used for the first time in 2021 to resolve a commercial dispute between Japanese and Indian parties concerning a failed joint-venture agreement.[5] Under the terms of the protocol,

[5] Co-author Yoshihiro Takatori was a mediator of this dispute.

the SIMC assisted the Indian party to select a mediator, the JIMC assisted the Japanese party to select a mediator, and the institutions shared responsibility for case administration.

The mediation, which resulted in settlement, offers an example of how mediation institutions can collaborate effectively as well as how co-mediation can bridge cultural and linguistic gaps between disputants. A co-mediation roleplay based on the protocol, with simultaneous English-Japanese interpretation, was held at an event in Japan in 2022. In the roleplay and panel discussion that followed, emphasis was placed on the benefits of facilitative features of mediation.[6]

International commercial mediations are also administered by the Japan Commercial Arbitration Association (JCAA), the leading Japanese arbitration institution. The JCAA first published commercial mediation rules in 2009 and revised them in 2020. The JCAA offers a list of mediators and administrative services for mediations. The JCAA also offers the possibility of integrating arbitration and mediation in its rules. Notably, the commercial arbitration rules recognize the right of arbitrators to act as mediators where the parties expressly agree, and the mediation rules provide a procedure for converting mediated settlement agreements into arbitral awards for the purposes of cross-border enforcement ("arb-med-arb"). The JCAA has been very active in promoting international mediation practice and its arb-med-arb procedure in recent years.[7] The institution has also administered a co-mediation under its 2020 rules.

The creation of the JIMC and the JCAA rules revision coincide with the creation of new venues for dispute resolution hearings in the two largest cities in Japan. The Japan International Dispute Resolution Center (JIDRC) opened facilities in central Osaka in 2018 and in central Tokyo in 2020. This center, which has funding from the government, comprises hearing rooms, interpretation booths, and technology to support virtual proceedings.

Prospects for Mediation in Japan

The past decade has seen important global developments in international commercial mediation. The United Nations promulgated the first treaty on international commercial mediation and revised its model mediation law and rules of mediation procedure. The developments in Japan, including improved institutional support for private mediation and new hearing facilities, have also been remarkable. They have amplified attention to international commercial mediation in

[6] The authors played roles in the mock-mediation and as speakers in the related panel.

[7] Co-author Takatori presented at an online mediation webinar by JCAA on 15 February 2023 that was well attended.

Japan and spawned trainings and events. But will this result in more Japan-related mediations or change conceptions about mediation among Japanese companies?

While there is interest in mediation among a few Japanese companies that operate internationally, there is no evidence of a significant increase in the use of private mediation yet. The caseloads at the JIMC and JCAA remain modest. The tendency of Japanese businesses to resist formal dispute resolution and to resist using lawyers may even discourage the use of private mediation. Businesses may assume that lawyers are necessary for private mediations. When businesses decide that it is time to bring in lawyers, they may consider the relationship to be broken and litigation to be inevitable. Some practitioners may also consider that complex commercial disputes or especially contentious disputes are not appropriate for mediation. To the authors, this underestimates the potential of mediation and underscores the need for a change in mindset to encourage further development of mediation practice in Japan.

The legacy of recent mediation trends may be, in the short term, more about legal change than more mediation. Japan has not ratified the Singapore Convention on mediation.[8] It is said that the government has had other priorities, notably managing the pandemic, and that a unilateral obligation on the judiciary to give special treatment to international mediated settlement agreements, which are fundamentally private contracts, is objectionable to some. There are also concerns about the relationship between the treaty and domestic legislation. If the convention were ratified, settlement agreements from international mediations would be easier to enforce in Japanese courts than those issued in the course of domestic mediations.

A small but influential group of Japanese attorneys has been encouraging the government to ratify the Singapore Convention. Owing in part to their efforts, the Japanese legislature is now considering both the adoption of the Singapore Convention as well as revisions to the Japanese domestic laws on mediation and enforcement procedure. The changes to the domestic law include provisions for facilitated enforcement of mediated settlements agreements reached in private mediations that aim to bring the domestic regime in line with the regime for facilitated enforcement under the Singapore Convention. In other words, the move to improve legal support for private *international* mediation may result in improved legal support for private *domestic* mediation by encouraging changes in the legal framework to support the mediation process and the enforcement of mediated settlement agreements at the domestic level.

[8] On the Singapore Convention in Brazil see: MASON, 2021. See also: COMETTI; MOSCHEN, 2022.

Another dynamic to follow is institutional cooperation. The JIMC project was inspired by a small number of lawyers who created the center from the ground up without financial support from the government or leverage from an arbitration institution. The JIMC was buoyed from the start by the support of the SIMC, which initially shared resources and know-how and has since worked with the JIMC to jointly administer mediations and to promote international commercial mediation at trainings and events. This kind of cooperation and cross-institutional capacity-building may serve as a model for mediation initiatives beyond Japan.

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