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## User Experience of Virtual Mediation under the JIMC-SIMC Joint Covid-19 Protocol

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### I. International Mediation in the age of COVID-19

Mediation provides parties with a flexible dispute resolution process as an alternative to litigation or arbitration. In essence, parties that are otherwise unable to resolve a dispute on their own can engage the services of an independent, third-party mediator who attempts to help them reach mutually agreeable terms for a settlement. Unlike an arbitrator or civil court judge, a mediator is not a binding decision-maker. Ultimately, it is the parties who decide on the outcome of the mediation proceedings.

In a successful mediation, parties are able to resolve their disputes earlier and at a lower cost than in alternative situations whereby they are required to pursue litigation or arbitration proceedings.

Increasingly, parties in international disputes are using mediation either as a stand-alone process or in combination with other dispute resolution mechanisms, such as the SIAC-SIMC's Arb-Med-Arb Protocol. In keeping with and furtherance of this trend, there has been a rise in the development of mediation centers and institutional rules aimed at making the process easier for parties to utilize mediation. For example, Japan has established the Japan International Mediation Center in Kyoto (**JIMC**), which opened in November 2018 to facilitate international mediation. Likewise, Singapore established the Singapore International Mediation Centre (**SIMC**) in 2014.

As the COVID-19 pandemic began to unfold in 2020, officials at the Japan Association of Arbitrators (**JAA**), which operates JIMC, and SIMC came together to develop a protocol to provide “*cross-border businesses, including companies along the Japan-Singapore corridor, with an economical, expedited and effective route for resolving commercial disputes amid the COVID-19 pandemic.*” In September 2020, the “JIMC-SIMC Joint Covid-19 Protocol” (the “**Joint Protocol**”) was promulgated to help achieve that objective.<sup>1</sup> It is considered the first joint online mediation protocol between two international dispute resolution centres committed to providing expedited mediation during the pandemic.

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<sup>1</sup> “*Japan International Mediation Center and Singapore International Mediation Centre Launch Joint Mediation Protocol to Help Cross-Border Businesses Resolve Disputes Swiftly and Inexpensively*” dated 13 September 2020 (<https://www.jimc-kyoto.jp/img/5f5dd469fb377cde0e9f19ba.pdf>).

In this newsletter, we present a brief overview of the Joint Protocol and our experience in the very first case under it.

## **II. JIMC-SIMC Joint Covid-19 Protocol**

### **1. Key Features of the Joint Protocol**

The key objective of the Joint Protocol was to set out a framework for online mediation, backed by reputable mediation centers in Japan and Singapore. As suggested by the name, the idea sprung up in response to the restrictions on international travel and large group gatherings that have been common measures implemented to prevent the spread of COVID-19. Thus, the central feature is that mediations under the Joint Protocol are to be conducted entirely online rather than in person.

Also, the protocol uniquely provides for two co-mediators – one appointed by each of the institutions – to conduct the proceedings. In a typical mediation, the parties may have difficulty in agreeing on a single mediator who is satisfactory to both and, when they do agree, it is typically on a mediator who is neutral vis-à-vis the parties – which generally means of a different nationality and cultural background to either of the parties. The Joint Protocol's co-mediation feature takes a different approach by allowing each party the comfort of having a mediator who shares their legal, linguistic and cultural background, if they choose, without evoking resistance from the other party. Although the Joint Protocol anticipates that the institutions will select the mediators, generally the parties can express their preferred qualities in the mediators (Parties may also choose their own mediators, although the standard fees under the Joint Protocol would not apply in that case) (Paragraph 1.2 of Article 5).

Furthermore, in order to make mediation more attractive and accessible to users under the Joint Protocol, the filing fees, administrative fees and mediators' remuneration are set lower than rates typically applicable to in-person mediations. For instance, applications may be filed at either JIMC or SIMC online by paying a low filing fee of JPY 20,000 or SGD 250 (Paragraph 1 of Article 2). Furthermore, under the general fee schedules set out in Annex 1 to the Joint Protocol, for disputes of less than JPY 100 million, each party pays a flat fee of just JPY 500,000.<sup>2</sup>

Having the proceedings online and conducted jointly by two mediators by default are the most distinct key features of the Joint Protocol. The authors are not aware of any other institutions which provide for the appointment of two mediators.

## **III. Experience under the Joint Protocol**

In mid-2021, Anderson Mori & Tomotune represented a client in the inaugural mediation pursuant to the

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<sup>2</sup> The fee schedule presumes a one-day, two-party mediation conducted online with two mediators selected by the institutions (Paragraph 1.1 of Article 5). Should the parties choose to deviate from those presumptions, the fees will be adjusted.

Joint Protocol. The case arose out of a joint venture dispute between a Japanese company and an Indian company in which the parties had first commenced arbitration proceedings under the SIAC. In the course of the arbitration proceedings, the parties agreed to attempt to resolve the dispute through mediation under the Joint Protocol.

In the initial communications between the institutions and the parties, the parties were asked to submit their preferences as to the qualifications of the mediators. As for selection of the two mediators, the Japanese company requested that one of the mediators should be of Japanese nationality (while also noting that it would not object to the other mediator being of Indian nationality) and that both mediators should be lawyers and proficient in English. In response, the Indian company commented that they prefer at least one of the mediators to be an Indian national.

After hearing the parties' preferences, the institutions appointed a Japanese law-qualified lawyer (by the JIMC) and a Singapore law-qualified lawyer (by the SIMC) as the co-mediators, respectively. Although the Indian party's preference of an Indian national was not reflected in the appointments, neither party raised any objections.

In accordance with the default rules of the Joint Protocol, the parties agreed that the mediation hearing was to be held entirely online. Also, considering the participants' availabilities, the mediation hearing was scheduled for three days on alternating (non-sequential) days to accommodate the parties' respective availabilities. Because the mediation was conducted online, this flexibility in scheduling was more feasible than in a case where parties had flown to a common location away from work and home, reserved a venue and were paying for daily hotel accommodations.

As agreed, the mediation hearing was conducted fully online. At the beginning of the first day, the mediators emphasized that the purpose of the mediation is to seek common, legal and commercial interests between the parties. The parties proceeded with their opening statements, respectively, to present their factual and legal contentions as well as their settlement proposals. Thereafter, the co-mediators jointly conducted several private and joint sessions with the parties, addressing various issues that had been raised by the parties, seeking to identify areas of agreement and resolve areas of disagreement where possible. Although the mediation hearing was originally scheduled for three (non-consecutive) days, as the parties had managed to successfully reach a settlement at the end of the second day, it was concluded earlier.

## **IV. Key Takeaways**

The following were our main takeaways from the experience:

### **1. The use of two mediators**

Overall, having two mediators was helpful to facilitate settlement discussions.

(1) Benefits of having two mediators

First, the parties would have the benefit of having the views of two independent mediators. This would not only make it easier for the mediators to bring across a point to the parties, but was also effective in persuading such parties to recognize the strengths and weaknesses of their legal positions.

Further, where the parties hail from different national, legal, cultural and linguistic backgrounds, a single mediator will rarely have a complete understanding of all the nuances that may be relevant to a full comprehension of both parties' backgrounds and expectations. By allowing two mediators to be part of the process, it is possible to appoint individuals who can, jointly, better understand the various nuances arising from the diversity in language, nationality, and legal background of the parties. The parties are not required to prioritize those qualities in the selection of the mediator, but having two mediators inherently allows for a broader scope of qualifications and background than just one.

(2) Potential downsides of having two mediators

The potential downsides of having two mediators are costs and time.

First, since the parties are to bear the mediators' remuneration, having two mediators would presumably increase the costs of the mediation.

Second, depending on the schedule of the appointed mediators, there may be difficulties in finding an available timeslot for the mediation proceedings as compared to a sole mediator. As a consequence, the parties may not be able to hold the mediation hearing at their preferred date.

That said, the Joint Protocol is specifically designed to reduce costs as mentioned above. Likewise, it is intended to achieve time efficiencies through the use of an online platform, as discussed in section 2(1) below.

**2. Having a fully online mediation**

Overall, having a mediation hearing conducted entirely online allows for greater flexibility and efficiency than an in-person mediation session likely would.

(1) Benefits of an online mediation hearing

It is a common occurrence for the parties and the mediator(s) to face certain challenges in finding an available time slot for a mediation hearing due to the need to coordinate various schedules and the time required for international travel. In certain situations, this could affect the momentum in achieving a settlement, especially if the parties are only able to have a mediation hearing after several months have lapsed following their agreement to take their dispute to mediation. It may also limit the pool of available mediators.

However, an online mediation hearing would dispense with the need for the parties and mediators to travel, thereby allowing for greater flexibility in choosing mediation dates. Further, this would also allow the parties access to a wider pool of mediators given that there is no longer a geographical limitation. In our case, as explained above, the mediation hearing was held on alternate days, which may not have been feasible or could have added to the overall costs had the mediation been conducted in-person, as having vacant days could be disruptive or costly if international travel and hotel accommodations were required.

In addition, the Joint Protocol sets out a fixed fee schedule for online mediation which is designed to be less expensive than the traditional process (Article 1.3 of the Joint Protocol).

## (2) Potential downsides of an online mediation

On the other hand, there may be potential downsides to having a mediation hearing conducted entirely online.

First, if the respective time zones of the participants, including mediators, vary significantly, it may be difficult to find common timeslots that would be suitable for all participants. In that event, for practical reasons, it may be more appropriate for the mediation to be conducted physically or partially online. In an online mediation, one option to address this issue would be to schedule shorter days to ensure the proceedings are held during reasonable hours for all parties.

Second, the parties' attitudes towards the mediation may differ if it is conducted online. The parties may feel more "invested" in the mediation hearing if it is held physically, as they would have had to set aside more time and incur higher costs (e.g. travel, accommodation, costs of the mediation venue). In addition, one is in a different mental state when physically sitting in the same room rather than just seeing faces on a screen.

Third, there may be a risk of technical difficulties. Based on our experience, as the parties were able to ensure a secure and strong internet connection during the mediation hearing, there were no major difficulties in holding the mediation session online. And while the online format has its limitations, it was more than adequate in our case.

On balance, we found online mediation to be very useful and would recommend it.

## **V. Conclusions**

From our experience, the Joint Protocol is a unique approach and an effective mechanism for mediation proceedings during the COVID-19 pandemic, particularly in light of the travel and safe distancing restrictions being imposed. Given the benefits of having the mediation conducted entirely online, and

the appointment of two mediators, we anticipate that the Joint Protocol may be extended even after the effects of COVID-19 have subsided and would welcome such a development.

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