SINGAPORE INTERNATIONAL MEDIATION CENTRE

SIAC-SIMC Japan Webinar

International Arbitration and Mediation: Complementary Systems to Preserve Business Relationships and Effectively Resolve Disputes

SIMC had the privilege of co-hosting the SIAC-SIMC Japan Webinar, titled "International Arbitration and Mediation: Complementary Systems to Preserve Business Relationships and Effectively Resolve Disputes". Moderators Ms Michelle Park Sonen (Head of Northeast Asia, SIAC) and Mr Teh Joo Lin (Deputy CEO, SIMC) were joined by a distinguished group of panellists who offered valuable insights from their diverse professional backgrounds and experience.

The panel featured:

- Mr Lok Vi Ming (Vice Chairman, SIMC; Managing Director, LVM Law Chambers LLC)
- Mr Branden Billiet, Managing Director, FTI Consulting)
- Mr Yoshimasa Furuta (FCIArb; Partner, Ander Mori & Tomotsune)
- Mr Gai Matsushita (Partner, Atsumi and Sakai)
- Ms Samantha Tan (Senior Associate, Freshfields Bruckhaus Deringer, Singapore).

It was a highly insightful and interactive webinar, diving deep into changing landscape of international dispute resolution through panellists' reflections, audience polls, and dynamic Q&A engagement. See some of the key highlights below!

Part 1: 'The Growing Use of Mixed Modes and Dispute Resolution'

In the opening discussion, panellists make observations and share their experiences of mixed modes proceedings.

Mixed modes dispute resolution is on the rise, and here to stay.

Reflecting on the increase in preference for 'international arbitration and ADR (alternative dispute resolution)' in the latest Queen Mary International Arbitration Survey (2021), panellists affirmed this trend in their own experience and practice.

Mr Yoshimasa Furuta shared: "This survey matches my experience…I have been practising as a dispute lawyer for more than 30 years, and everybody knows that litigation is lengthy and costly. Arbitration used to be the alternative to litigation, but these days, arbitration tends to be lengthy and costly like litigation. So business people are trying to find a more feasible dispute resolution mechanism, like mediation. But mediation by its nature is a voluntary process."

Continuing, Furuta explained: "…if you combine arbitration, which is a mandatory process, with mediation, you have a good pressure to participate in mediation at a good phase, in a sincere way , so that you can have a more successful settlement at the end of the mediation. These days **I usually recommend my client to mediate the dispute once or twice in the course of any litigation or arbitration [proceedings]".**

Ms Samantha Tan offered her views from a Singapore perspective: "It is indeed consistent with our practice in that we invariably consider one or more forms of ADR in every dispute". However, "it is a minority of our cases that actually undergo mediation, and it's potentially because of the significant investor state arbitration caseload that we have." Nonetheless, Samantha emphasised "that there is almost always some form of negotiation in our cases, and it doesn't matter what kind of arbitration it is. I think that really explains the overwhelming preference for the use of the combination of the two." Explaining further, Samantha recognised that **the use of arbitration together with an ADR method enables parties to "maximise control"** over the result, cost and speed of the process, as well as the relationship between companies and the enforceability of the outcomes.

Mr Lok Vi Ming offered three potential factors that have contributed to the rise of mixed modes. Firstly, the growing sophistication amongst parties with regards to ADR: "I think parties nowadays are a lot more sophisticated…they're familiar with the options available for dispute resolutions, so it's no longer a one size fits all. Parties do know what is available [too]."

Second, the customisable feature of mixed modes allows parties to exercise autonomy over the process: "Parties and party autonomy nowadays is quite important and in house counsels and practitioners from different jurisdictions, whether it's civil law or common law, are all familiar with the various ADR modes, together with arbitration. **With the growing sophistication and the availability of different modes, customisation is quite the name of the game."**

Finally, the desire to attain good outcomes, in a different way: "Businesses, especially in this Covid-driven world, are all results oriented. We want to have good outcomes, but **good outcomes doesn't necessarily mean you've got to win everything…it's really a question of hedging bets."**

Furuta shared about a recent case involving a dispute between a Japanese entity and an Indian entity over a joint venture agreement. The case was filed under the SIAC-SIMC Arb-Med-Arb (AMA) Protocol, and before proceeding with mediation under the JIMC-SIMC Joint Covid-19 Protocol. JIMC and SIMC each appointed a co-mediator familiar with Japanese and Indian jurisdictions respectively. The co-mediators collaborated with the institutions to manage the cross-border dispute, which was mediated fully online in late April 2021. By the end of the second day of the mediation, parties came to an in-principle agreement. The case was settled within 6-7 weeks. Furuta reflected: "this [was] a very successful experience for me, and I would recommend my other clients to mediate going forward, every time."

Experts may be drawn upon for independent views, or as a party advisor during the course of arbitration, mediation or hybrid proceedings.

Mr Braden Billiet shared on the roles that experts may play in arbitrations: "The first role we play is that of a party appointed independent expert. In this role, we are coming in to provide an independent view; our duty is to the tribunal. We're there to **provide our opinion on matters within our expertise** and to share our truly held views on those matters."

"The parallel role as we move to mediation is a more formal role as part of the mediation. The party appointed expert will have a visible role. They may present slides and take part in the discussions at mediation."

"The second role we play in arbitrations is that of a party appointed advisor. [We are] behind-the-scenes, not so visible to the tribunal and the other party, but there to assist the client in understanding its case, the strengths and weaknesses of its quantum case, the drivers of loss and damage. The parallel to this role in mediation is a similar one. We won't go to the mediation or present slides, but we'll **provide input into the preparation in advance of the mediation so that the client understands the kind of range within which they might want to negotiate on the day."**

In terms of assisting with hybrid procedures, Braden affirmed: "We're equipped to [transition between mediation and arbitration]. As we have done some preparation work in a mediation, should it transition into an arbitration we can piggyback of that and build upon it with some cost savings and efficiencies for the client".

Part 2: 'Strategies on Using Mixed Modes to Resolve Disputes"

In Part 2, the audience got involved by answering questions via the online poll. The results were revealed, and panellists were asked to comment on the results and share their personal thoughts.

Poll 1: I prepare for success in the same way for both arbitration and mediation.

Audience results: 41% YES; 59% NO

For Vi Ming, the level of preparation for an arbitration or an adversarial hearing in court is a lot higher, especially when acting as counsel. "But as a party and as a counsel preparing for mediation as opposed to an arbitration hearing [or] an adversarial hearing, I will consider a few factors. Firstly, I will try to understand my opponents, [including] counsel for the other side as well as parties on the other side, in a slightly different way. It is no longer adversarial, but **I will try to put on a more empathetic posture**…I will try to understand my opponents better, to try to see things from the other side so this makes me better understand how far we can compromise that position in order to arrive at the place where I want them to be."

"Secondly, **I will try to understand the mediator** […] the mediator isn't the person who is going to decide on the case, so whether he thinks your client is 100% right or 100% wrong really isn't going to make that much of a difference as it would make if that person were the judge. So I will try to focus on the mediator, on what is important for him, and how I'm able to "use" him and his office to try to help me or my client get to the position that I want to be."

Finally, Vi Ming will endeavour to understand his client more: "I need to find out what's important to him or her or to the party so that I can structure that resolution for them. So the preparation is quite different. The focus is quite different as well."

Poll 2: It is preferable for the arbitrator and the mediator to be the same person.

Audience results: YES 18%; NO 82%

Mr Gai Matsushita commented: "The **arbitrator's role is to resolve a dispute**, whilst a **mediator's role is to facilitate settlement**, and so **the roles are different in some sense".** He noted that an obvious pro of having the same person as arbitrator and mediator would be the savings on time and cost. The same individual would also be familiar with the issues and facts of the case.

However, confidentiality becomes a major issue in this arrangement: "If the mediator may later become the arbitrator then **parties may be reluctant to share information with a mediator for fear of showing their weakness**, which may put them in a weaker position in the arbitration procedure [and] undermine the benefit of having mediation."

"Furthermore, the losing party may challenge the the arbitrator award by saying that the arbitrator's decision was based on the information [provided] in mediation and not the information given in the arbitration procedure. So in other words, **having the same person could jeopardise the enforceability of the arbiter award."** Agreeing with the audience poll results, Gai concluded: "That's why I would recommend not to have the same person, serving as a mediator and arbitrator."

Poll 3: Should you be wary of mediation because it is a fishing expedition for the other party during arbitration?

Audience results: YES 43%; NO 57%

Samantha revealed that she was in the minority who voted 'yes': "My perspective is that we should, of course, be wary of the potential use of mediation by some parties as a fishing expedition, but I will say that this factor should not be a deal breaker when you consider using mediation." Sharing from her experience, Samantha recalled: "We were involved in a mediation recently pursuant to a med-arb clause where unfortunately, the other side and their lawyers, at least as it appeared to us, primarily used the mediation as a way to find out our client's position on various issues in our claim."

However, she also recognised the benefits of mediation: **"Mediation is really good because it puts disputing parties face to face with each other** and sometimes that compels people to reach an agreement". Either way, Samantha emphasised a key condition for mediation: **"You do need some kind of buy in, by both your lawyers, as well as the clients, to use mediation in the right way** to avoid a [fishing expedition] situation". She also proposed potential solutions to these risks, for instance, engaging separate settlement counsel, as is sometimes done in US litigation practice.

Poll 4: I will require a quantum expert for mediation.

Audience results: 47% YES; 53% NO

Braden shared that oftentimes, a quantum expert is probably not required. That being said, there are cases where experts can be very helpful: "…**when the stakes are high, when the damages issues are complex**,

then I think it makes a lot of sense to bring an expert on board for the mediation." He continued to identify three key areas where experts can add value in a mediation: "The first is just in **identifying the key issues**…working with counsel [and] working with the client to identify the main things that affect the quantum case and how they relate to each other".

"Second, for **setting up and building a comprehensive damages framework**…generally what we'll do is build a flexible spreadsheet model which has different scenarios. You can attach different probabilities to those scenarios and play with the inputs and assumptions, and tweak them on the fly. On the day of the mediation, you can change the inputs and see how it affects the bottom line."

"Third, and finally, we offer **an independent perspective and a different opinion**, which sometimes is a reality check for the client, as to the strengths and weaknesses of their case."

Poll 5: Suggesting mediation may be perceived as a sign of weakness.

Audience results: 33% YES; 67% NO

Furuta was with the majority in disagreeing: "I would say, no. I usually do commercial dispute resolution…if you litigate or arbitrate, it will be a lengthy and costly procedure, and at the end of the day, you may lose the case, after you invested time, money and legal fees. There's no certainty about the outcome of the litigation or arbitration."

"In mediation, as Samantha said, you have a control over the process and outcome. At the last day of a mediation hearing, whatever mediator says, you can choose to say "no", and get out of the mediation. So, **mediation is more controllable than litigation or arbitration.** So, in business dispute resolution you must always consider mediation."

"As the famous 19th century Prussian Major General, Carl von Clausewitz, once said, 'War is a continuation of political activity by other means'. To me, **dispute resolution is a continuation of business activity by other means.** So whilst we are involved in dispute resolution, you must use all the weapons you have: litigation, arbitration or mediation. So you don't have to care if you say mediation; it should not be perceived as a sign of weakness, from your side."

Vi Ming cautioned against this perception of mediation as a weakness: "I think this is something that we need to be very careful about because there are still many lawyers, and certainly some parties who believe that actually an agreement or a suggestion to mediate might be interpreted as a sign of weakness."

How can this be combatted? "We need to educate and get the message out. Parties are a lot more sophisticated nowadays. It is helpful that **the court is also recommending, at least in Singapore, the thought about whether parties should mediate.** That of course **removes the stigma from having one party suggest the mediation.** But I agree it is still a thought and we need to get the message out there that many of the parties that have been doing mediation for a long time no longer believe that [suggesting mediation is a sign of weakness]".

<u>Part 3: 'The Future of Mixed Modes'</u>

Having reflected on the strategies of using mixed modes, panellists gazed into the crystal ball in their final discussions to consider the future of mixed modes dispute resolution.

Covid-19 has accelerated the technological shift in the world of dispute resolution which, on the whole, has enabled dispute resolution to continue efficiently and effectively, and offered a number of unique advantages.

Vi Ming: "We've seen how Covid has accelerated some of these [technological] changes…we are seeing now court hearings largely now off site by virtual means. Practically all hearings that don't involve cross examination are being conducted off site. And the same goes for international arbitration; we're having hearings all over the world. But it's all made possible by technology."

"There are some practitioners in some countries which are more familiar with technology and that gives them a temporary advantage over practitioners that operate out of countries where maybe the technological facilities are not quite as advanced. But I think generally these sorts of advantages or disadvantages iron themselves out. One of the advantages I see, and which offers some degree of comfort to myself as a practitioner, is that when we have a Zoom session or a Zoom hearing or hearing of a virtual means, **the technology is such that only one party speaks at any one time…**and so it's a natural filter. The first one who started speaking gets the floor until the chairman interrupts it, but you don't have a situation where three or four fellas are shouting over each other, which sometimes you get in physical meeting."

"It also emphasises discipline. When I have to speak into a camera…I just feel that I have to address the attention of my audience more effectively. **It encourages us to really fine tune what is it that we want to say and to try to be a bit more concise."**
"I'm not quite sure whether it is entirely a coincidence that **SIMC actually recorded a record number of cases last year, when COVID hit us.** I find also the **success rates via hybrid forms of mediation not being affected.** In fact I myself had two mediation cases last month, and both were was successfully mediated and amicably settled through mediation. One of the cases was with SIMC. Some of these I don't think are coincidences. It's technology, and it's people being forced to question themselves again: 'What is it I want to achieve out of a dispute resolution process? What result do I want to have? Is it a victory at all costs? Is there something that can be done without having to spend all this money on dispute resolution? Is there another better way of doing it?"

The Singapore Convention on Mediation is a great tool to enhance the enforceability of mediated settlements, but will take time to gain traction and have impact around the world. In the meantime, AMA and other such hybrid dispute mechanisms offer user-friendly options for efficient and enforceable dispute resolution.

Vi Ming: 'The Convention is basically a great tool to have, but it's going to take time. It was open for signing on 7th August 2019, almost two years ago. Six countries have ratified and 54 countries have signed it, with Brazil being the latest about four days ago, but we are still a long way from achieving the kind of numbers that can make this really an effective platform through which we can have reciprocal enforcement of mediated awards or mediated settlements. So that's going to take some time."

"The New York Convention for Arbitration today has buy in from over 160 countries, but don't forget that it's been around for 62 years. So it will take some time for the Convention to really be a part of everybody's dispute resolution options. But until then, I think the AMA is really what we've got, where parties agree to piggyback on to the arbitration processes. With the introduction of the AMA every party now that brings a matter before the SIAC actually will be confronted with this option of going for mediation as well. So that that process of presenting the option may become a discipline in time to come, where **every practitioner who actually thinks about arbitration also thinks about mediation as well, and that adds to the armoury and the options that we have as dispute resolution counsel** to see how we can resolve the problems for our respective clients."

Parties from different cultural backgrounds or contexts will likely be familiar with the concept of mixed modes, but may have different mindsets and expectations as to the style and approach of the procedure, particularly for mediation. In this case, the mediator can play an important role to ensure parties are on the same page.

Gai: "**Japanese companies should be familiar with the concept of mixed mode**…so there shouldn't be that much of a [cultural] difference in this sense."

"But one thing I want to point out is that service procedures which Japanese companies may have experienced in Japanese litigations are mostly evaluative. So the court may suggest to the parties that they accept a cost proposal or otherwise they might lose the case. Whereas, the mediation or ADR process which is used in mixed mode [may] be the cooperative style, so this could be a relatively new concept for many Japanese companies."

"For example, if the **European party is attempting to mediate in a cooperative style but the Japanese proceeds with the evaluative style in their mind, then it may be difficult to reach a settlement.** So, in this sense, there could be a cultural difference. Of course this is a matter of training both clients and counsel in Japan, but it may take time for the Japanese companies to adopt a different mindset required for mediation and arbitration. So I believe what we can do is that the mediator may be able to help the parties by **actively facilitating a procedure so that he or she may be able to tell the Japanese companies the difference in mindset required for the mediation.** And as Vi Ming has said, one way is to select an experienced mediator who may be able to do that."

Looking to the future, mixed modes will continue to offer a reasonable and user friendly option for businesses intent on maintaining good business relationships.

Gai: "From a Japanese practitioner's point of view, mixed modes is a very **user friendly tool for Japanese companies to resolve international disputes**. One of the difficulties for Japanese companies in using arbitration alone is to persuade the management to start the process. So even when employees on the ground understand that arbitration is inevitable, the management sometimes are reluctant in starting a fight against the other party in **fear of damaging the existing good business relationship**. So unless external factors, for example, a statute of limitation, exists, some Japanese companies have been **very slow in starting action**.**"**

"I think this tendency has been changing as the recent SIAC statistics have shown, but I still observe that some companies are acting that way. On the other hand, mixed modes is more casual way of resolving disputes, so it may be **easier for the employees to persuade the management for the use of international mediation as a starting point**, by saying, 'We will not start a fight; we will just start a discussion', and so I have a feeling that the use of **mixed modes is and will continue to be a reasonable choice for the Japanese companies**, as a means of resolving international disputes."

Original transcript has been edited for clarity. To watch the full webinar recording, click here.

Q+A

With questions pouring in from the audience, panellists spent the remaining time responding to questions posed by webinar attendees.

Q1: We've got a question asking about mediation clauses and basically parties that pre agree to go for mediation in their contract. I think this has happened, and one party is not keen to go for the mediation, how will you answer that and how will you deal with that?

Vi Ming: "Well, strictly speaking, if a party doesn't go for mediation when he has a contractual obligation to, then that in itself is a breach of the contract. Now I think it highly unlikely that you will be able to get an injunction to compel this person to go, but unless the mediation is something that is required as a step to be taken before litigation is commenced, then that's a different story. In which case you just have to make sure that you present to the other side clearly his obligation or her obligation, to go for the mediation. And if he still refused, then that of course would not be considered as a step that's not taken before the formal proceedings are commenced. But that I agree, it's a weakness that you have. Sometimes you have a mediation clause, it still requires parties to really try their best to mediate. You can have parties sometimes who are forced to come to the mediation, but their entire body language is different. But don't ever close it out, because when you have a skilful mediator who is able to draw the best from the other party, especially when you have two counsels who really recognise the power of mediation, you can really make even the least enthusiastic of parties try their best at mediation."

Q2: Question about the development of AI and software: have they come to a stage where they can assist experts in building scenarios and algorithms to assist in the mediation, or even for that matter, arbitration?

Braden: "There are there are some tools. I'm not aware of anyone applying kind of AI yet, in terms of getting valuation outputs but certainly we rely upon technology. There's a software called **Tableau**, which is quite good for handling lots of data, modelling out different scenarios and visualising data. You know a lot of the work that we do is in **Excel**, but we are using statistical packages depending on the kind of data that we're working with. So I think we're some ways away from kind of introducing some of the more cutting edge types of technology into this realm but it's exciting to see what they're coming out with, and technology certainly is having an effect on the way we do our job."

Q3: At which juncture do you think it is ripe to go for mediation?

Sam: "The case I mentioned earlier was a Med-Arb case, so we went to mediation before we were entitled to commence arbitration. I personally think that is a generalisation that **'[mediation before court proceedings is…less effective']**. The **more effective method I think is AMA**, where you start arbitration, both sides have kind of memorialised their positions and evidence to some extent, and **then knowing each other's case more fully, parties then come together to talk.** At that stage I think the mediator will also have more benefit, as to the evidence that's out there and be able to test the cases more effectively. So, at what stage, it's really hard to say, it **depends on the dispute** but probably sometime **after the first round submissions is good place to start thinking about it, but** obviously it depends on the circumstances."

Q3: What strategies do you adopt to avoid the potential perception of weakness from the counterparty, in suggesting mediation?

Yoshimasa: "So if you have a reasonable business entity as a counterparty, you can expect them also to **consider the uncertainty of any litigation or arbitration and the cost to be invested in that project**, and they may lose. If they lose, they may also bear our legal fees. So, if you have a reasonable counterparty, they should also **consider mediation as a plausible option to resolve any dispute**. So, we tried to be very cool and reasonable to propose mediation, and we must let them understand **mediation is one of the very plausible and efficient ways to dissolve any dispute**, compared to arbitration or litigation. That is a way to convince the other party to mediate."

Q4: Is double-hatting (the same individual acting as both arbitrator and mediator) advisable, depending on the context?

Gai: "If the parties can agree on the mediator or arbitrator to serve in dual roles then it is advisable. It really depends on the context and it may be sometimes advisable to have the person to serve as both mediator and arbitrator."

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