Arbitration and Conciliation in Japan: What is Needed in Alternative Dispute Resolution

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I. Introduction

A move towards the reform of Arbitration Law has just started in Japan. In July 1996 the Subcommittee for Civil Procedure in the Legislative Council of the Ministry of Justice decided that revision of Arbitration Law, formerly Part 8 of the Code of Civil Procedure, and now an independent Public Summons and Arbitration Law as a result of recent reform of Code of Civil Procedure, would be one of the new matters for consideration. Accordingly, with the initiative of the Secretariat of Ministry of Justice, the Study Group on Arbitration Law has been organized for a preliminary study. The first meeting of the Study Group was held on 27 January 1997.

Since 1891, when Japan's Arbitration Law was enacted, there have been no major amendments to, or reforms of this almost direct translation of German Law at that time. It is obvious that the Law is completely outdated in the light of globalization of economic activities in this century. Reform of Arbitration Law in Japan is therefore an urgent topic.

The main purpose of reform should obviously be to coordinate with the recent trends of internationalization and adopt international standards of international arbitration rules. Such standards can already be found in UNCITRAL Model Law on International Commercial Arbitration. This kind of effort is also considerably advanced in Japan, and its valuable result is the Draft Text of Law of Arbitration prepared by the Arbitration Law Study Group in 1989.

However, In spite of such great efforts, it seems that an important problem with reform is still remaining: how to consider and regulate

continuity or discontinuity between domestic arbitration and international arbitration. This problem is also closely related to the recent controversies on whether arbitration combined with conciliation is legally acceptable and should be chosen in practice.

This paper intends to seek the answer for the above problem by investigating the nature and operations of two eminent domestic ADRs in Japan: conciliation before the court and arbitration in the Arbitration Center in Daini-Tokyo Bar Association. The study will indicate what is needed in ADR in Japan to be a truly significant alternative to litigation. Next, this study will consider whether these elements necessary to ADR in Japan are common to international commercial arbitration. As a result, a proposal for the coming reform of Japan's Arbitration Law will be attempted.

Ⅱ. Conciliation in Japan

1. Overview

In Japan, there are several institutions, some of them public or half public and some of them private, which provide the service of out-of-court resolution of civil and commercial disputes(1). Amongst them, conciliation before the court is most frequently used. Under the Law for Conciliation of Civil Affairs (Law of CCA; Law No. 222, 1951), a conciliation before the court is conducted by a conciliation committee organized by the court(2).

Conciliation can be attempted both before the commencement of litigation, by application of the parties, and during the litigation process either by application of the parties or by a court order. Its purpose is, as described in Article 1 of Law of CCA, to settle a civil or commercial dispute amicably, not by strictly applying law, but applying the general principles of justice and fairness as benefits the actual circumstances of the dispute. For that purpose, a conciliation committee is usually composed of a judge and two conciliators from outside the court who are either laypersons or certain kinds of related professionals such as legal scholars, architects, accountants, and so on. The committee hears the claims, identify the facts, and attempts to reach an amicable settlement

between the parties.

The total amount of the newly filed conciliation before the court from April 1995 to March 1996 is about 130,000 annually that is almost equivalent to one third of the civil cases newly filed in the courts during the same period. About 50 per cent of the cases of conciliation before the court are settled by compromise between the parties. Conciliation before the court may be viewed as a quite successful example of ADR in Japan.

2. Analysis

Traditionally, conciliation was not so highly valued, or, moderately speaking, not the focus of attention as a method of dispute resolution. The reason is closely related to arguments about Japan's legal culture. Takeyoshi Kawashima, a late famous Professor of University of Tokyo, pointed out that the tendency towards either conciliation or arbitration reflected two opposite poles in attitudes towards the modern consciousness of the Law and litigation(3). Quite often conciliation is deemed as a way to obtain mutual concessions from the parties notwithstanding the expected result according to legal rules.

At the same time, it has been said that the merits of conciliation as compared with litigation is that it is simpler and speedier. Another psychological reason which makes it easier for the parties to commence the procedure of conciliation would be the lack of its finality: the parties can deny the settlement as the conclusion.

However, recently, practices of, and critiques by, related persons engaged in conciliations before District Court of Tokyo and Summary Court of Tokyo are reported in one of the most popular legal magazines in Japan(4). According to the report, as to recent conciliations, three points can be listed as its merits. First, conciliation committees can include one or two specialists who have experience and knowledge of the disputed matter, so that, in certain types of cases, more situationally-suited proposals for settlement can be offered(5). Although even in litigation it is possible to hear the opinion of specialists as technical experts, their opinions' effects are indirect and are sometimes the subject of the parties' objections on the grounds of their fairness and correctness. Second, conciliation can be based on extra-legal norms(6). One typical ex-

ample is a plea of no money: a debtor should pay his debt but cannot when he/she does not have enough money to pay at present. The result is that the creditor must agree to payment in the form of installments in the future. Such extra-legal norms can be found in cases where certain future-oriented resolutions are necessary. Third, sufficient efforts to hear and understand the party's claim without hurry[7]. This may show the importance of communication between the parties and conciliators as well as between the two parties.

Ⅲ. Arbitration Centers in Bar Associations

1. Overview

The first Arbitration Center was established in 1990 by the Daini-Tokyo Bar Association within it. Since then, similar Centers have been successively established in other Bar Associations: Osaka in 1992, Niigata in 1993, Yokohama in 1994, Tokyo in 1994, Hiroshima in 1994, The Daiichi-Tokyo in 1995, Saitama in 1995, Okayama in 1997, Nagoya in 1997[8]. The numbers of filed cases are annually about a hundred in the Daini-Tokyo Bar Assosiation Center (the Center), and from thirty to forty in Niigata, Tokyo and Osaka Bar Associations. The proportion of finally concluded resolutions are from more than thirty to more than fifty per cent, most of which are not by arbitral awards but by settlements[9]. Although the scale of service is relatively small, their rapid expansion towards many Bar Associations is surprising. It is also noteworthy that they are spontaneous and non-governmental ADR institutions, which are rather rare in Japan.

The Arbitration Center in Daini-Tokyo Bar Association has at the outset aimed at providing cheap and speedy dispute resolution for small claims by way of arbitration. Famous retired judges, experienced attorneys in private practice and legal scholars have been voluntarily becoming arbitrators with young attorneys' assistance. An applicant can freely choose an arbitrator or arbitrators in line with their reputation or their specialized area.

The Center offers its service of arbitration as a service linked with free consultation to attorneys by the Bar Association, *pro bono publico*.

Their importance exists in that arbitration is linked with consultation for such small claims that are difficult to be treated as formal litigation cases. There are certain cases that are not suitable for litigation because of the monetary sums involved or the maintenance of human relationships or the time factor. In such cases, mere consultation is not enough, but litigation is unrealistic. As a background of this project, there existed the desire to remove the obstacles for the access of ordinary citizens to lawyers and to provide more expanded legal services by attorneys in private practice.

2. Recent Operations

Although the Center is steadily continuing its service, two points occured that had not been precisely expected at the outset. First, in the first several years it became apparent that agreement to arbitrate is hard to get at the beginning of the procedure. The reason is that parties, in some cases claimant and in other cases defendant, are hesitant to take part in a process that may lead to a final and enforceable award irrespective of their willingness[10]. Therefore, it often occurs that an expected arbitrator starts the hearing procedure with the attendance of both parties and an arbitration agreement is attained afterwards. Thus, actual procedures in the Center, in substance, have included not only standard arbitration but also arbitration combined with conciliation[11]. Moreover, in certain cases, at the time of coming to a deadlock, after various proposal of settlement and mediation, the expected arbitrator asks the parties to put the matter into his hands, so that arbitration is agreed between the parties[12]. Second, claims have not always been small ones. This shows that ADR is suitable not only for small claims but also for large ones.

In addition, it is said to be important for arbitrators not to "push" their judgement but to seek for the best resolution together with the parties[13]. It is apparent that preferable attitudes of arbitrators in the Center is common with that of conciliators in conciliation before the court described above.

Ⅳ. What is needed in ADR

Analysis on conciliations before the court and actual operations of arbitration in the Arbitration Center in Daini-Tokyo Bar Association indicate what is needed in ADR by its users. In addition to the traditional merits such as simplicity, speed, low-cost and privacy, several others can be pointed out. The first is the possibility of the choice of the third-party interveners by the parties themselves. Mediations, proposal of settlements, or final awards by specialists on the disputed matters would be of a great help for dispute resolution. Second, reliability[14] on interveners and communication between parties and interveners as well as between the two parties are expected to promote satisfactory dispute resolutions. The third is the combining of arbitration and conciliation. Conciliation procedure combined with arbitration can be a good preparatory step to agreement to arbitrate. The final and probably the most important characteristic of ADR is the possibility of applying extra-legal or non-legalistic norms to the substantial problem. The reason why conciliation is chosen is often said to be the informality and non-adversarial nature of its procedure. However, what can be achieved by them? It is reliance and communications, as pointed out above and, as a result, opportunity to find a more flexible and proper resolution of each dispute.

Ⅴ. Concerns with International Commercial Arbi-tration

The possibility of applying extra-legal norms would become a more controversial issue in the sphere of international commercial arbitration.

Growth of institutional arbitration and international arbitration have been the world-wide trends in the last ten years. This tendency has heavily influenced the nature of norms to be applied[15]. There is a clear co-relationship between emphasis on applying "legal" rules and growth of international arbitration. Previously, *ad hoc* arbitration had been assumed as a principle and the substantial rule applied could be *ex aequo et bono*. However, according to the growing importance of international

commercial arbitration as a dispute resolution system in transnational transanctions, such an understanding that the applied substantive law should be clear and foreseeable for any parties from different countries has been common. Then the vagueness of *ex aequo et bono* has been carefully avoided in the sphere of international arbitration schemes such as UNCITRAL Arbitration Rule and UNCITRAL Model Law. In short, substantive law to be applied has been "legalized" in the last ten years. As a result, the traditional idea that applied norms in arbitration need not necessarily be legal ones has rapidly disappeared in the international sphere.

However, it would also be true even in international commercial arbitrations that in certain cases non-legalistic, future-oriented, problem-solving type resolutions are preferable to legalistic, past-oriented, win-or-lose type ones. Combination of arbitration and conciliation is far more suitable than litigation to get such resolutions. It should also be noted that too much legalization and too much adversarialism in international commercial arbitration is criticized recently even by some famous Western lawyers such as Musttill[16], Mnookin[17] and Oppetit.[18]

VI. Conclusion

Critique from the view point of procedural law is, however, not sufficient to find the correct answer to the problem of possibility and preferability of a mixture of arbitration and conciliation. In the area of Contract Law, limitation and boundary of traditional contract theory which is consisted of discrete rights and duties of each party has begun to be seriously challenged by a so-called Relational Contract theory[19]. In both domestic and international transactions, commercial relationships quite often continue over long time. In such transactions, accumulated relationship in the past and desirable relationship in the future should be focused upon and properly evaluated in the process of dispute resolution. Only through close communication between arbitrators and the parties, such relationships can be fully considered.

Therefore, Japan's new Arbitration Law should admit arbitration combined with conciliation. At the same time, it is essential to make clear the details of existing "extra-legal" norms actually applied in

arbitration and other ADR procedures so that they can be recognized as transnationally applicable "legal" standards.

ENDNOTES

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(1) As to the more detail descriptions of ADR institutions in Japan, *see* Akira Ishikawa, "Alternative Dispute Resolution (ADR) in Japan", in A.J.de Roo & R.W. Jagtenberg (eds.), *Yearbook Law & Legal Practice in East Asia 1995*, p. 121 (Kluwer Law International, 1995).

(2) As to conciliation before the court and conciliation outside the court in Japan, *see* generally, Kazuo Iwasaki, "ADR: Japanese Experience with Conciliation", 10 *Arbitration International*, No. 1, p. 91 (1994).

(3) T. Kawashima, *Nihonjin no Hou Ishiki* (The Legal Consciousness of the Japanese), (Iwanami Shoten, 1967). A part of the book has been translated into English as T. Kawashima, "The Legal Consciousness of Contract in Japan", 7 *Law in Japan*, p. 1 (1974).

(4) *See* generally, Special Editing of *Hanrei Times* No. 932 (April 1997). The following descriptions in the text much owes it.

(5) Opinion by Mr. Sono-o in "Part Ⅱ, Symposium: Problems of Civil Conciliation", *Hanrei Times* No. 932, p. 12, p. 18 (April 1997).

(6) Opinion by Prof. Takahashi, *Id.*, p. 17.

(7) *Ibid.*

(8) The exact names of these Centers are not always the same. Reflecting subtle difference of main purposed activities, either "Arbitration Center", "Mediation and Arbitration Center", or "Out-of-Court Settlement and Mediation Center" is used in each of them. As to the newest data and comprehensive analysis on arbitration in Bar Associations in Japan, *see*, Daini-Tokyo Bar Association ed., *Bengoshikai Chnsai No Genjou To Tenbou* (The Present and Future of Arbitration in Bar Associations), (Hanrei Times Co., 1997).

(9) These data are quoted from Takeshi Kojima, "Saibangai Funsou Shori Kikan ni Tsuite (On Alternative Dispute Resolution Institutions)", *Hanrei Times* No. 932, p. 52, p. 54 (April 1997).

(10) Such unwillingness of the parties seems to derive from the fact that the meaning of the word "arbitration" is traditionally understood as the same with "mediation" and "conciliation" in Japan. *See*, Hiroshi Ohkawa, "Chusai Center To Bengoshi Gyoumu (Arbitration Centers and Attorneys' Tasks)", in Miyakawa, Nasu, Koyama & Kubori (eds.), *Henkaku no Naka no Bengoshi;*

Joukan (Attornys in Changes; The 1st Volume), p. 379, pp. 395–396 (Yuhikaku, 1992).

(11) *Id.*, pp. 393–396.

(12) "Symposium: Bengosi Chusai Center ni Tsuite (On Arbitration Centers in Bar Associations)", *Hou No Shihai* (Rule of Law), No. 104, p. 48, p. 58 (Jan. 1997).

(13) *Ibid.*

(14) "Reliability" should not be confused with "authority" which is often pointed out as an important factor of successful arbitrators and conciliators in Japan.

(15) Akira Mikazuki, "Funso Kaiketsu Kihan no Tajuu Kouzou (Multiple Structure of Dispute Resolution Norms)" in A. Mikazuki, *Minnji Sosho Hou Kenkyuu* (Studies on Code of Civil Procedure) Vol. 9, p. 235, pp. 257–259 (Yuhikaku, 1984).

(16) Michael Mustill, "Comments on Fast-Track Arbitration", 10 *Journal of International Arbitration*, No. 4, p. 121 (1993).

(17) Robert H. Mnookin, "Creating Value through Process Design", 11 *Journal of International Arbitration*, No. 1, p. 125 (1994).

(18) Bruno Oppetit, "Philosophie de l'arbitrage commercial international", *1993 Journal du droit international*, N^0 4, p. 811.

(19) The first and the most famous advocate of relational contract theory is undoubtedly Ian R. Macneil. Amongst his many books and articles, Ian R. Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations* (Yale University Press, 1980) would be the most comprehensive one.