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## Now and Future of ADR System in Asian and Pacific Countries

*Tatsuo IKEDA\**

### **1. Preface — Purpose of Studying ADR and Judicial Systems in Asian and Pacific Countries**

The Asian scheme concerning judicial reform and ADR is diversified and profound. As far as ADR is concerned, not only in seemingly mature Australia but also in Singapore, where various choices including litigation are likely to be guaranteed, it is still in the cradle. Modern ADR is considered to have just begun as an experiment on a trial and error basis.

First, before discussing ADR in detail, we should refer to the purpose of studying judicial systems in Asian and Pacific countries<sup>1)</sup> from the point of view of Japan. It has long been a tradition since the Meiji era for Japanese to study Western jurisprudence in main. Regarding the purpose of an Asian Study these days, we could indicate the following three points: Firstly, by clarifying consciousness that Japan is an Asian country in the field of jurisprudence, Japan will be able to establish its own jurisprudence, which is possibly different from Western law. Secondly, economic development in Asian region will inevitably result in increased requirements for a mutually understandable judicial infrastructure. This movement will be accelerated to keep pace with the development of FTA in the Asia region. Thirdly, with regard to Asian countries that are aiming at economic growth through the market economy system, it will help them achieve growth to assist them in the judicial field by providing them with model laws available in Asian region. This means that they can get rid of poverty by improving their judicial systems.

Under these circumstances, on July 1, 1997, which was a memorable day symbolizing the arrival of the Asian Age, namely the historical day when Hong Kong was returned to China, we started the project to study judicial systems and their operation in Asian and Pacific countries, sponsored by the International Cooperation Department, Research and Training Institute of the Ministry of Justice in Japan and the International Civil and Commercial Law Centre Foundation of

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1) Hereinafter abbreviated to Asian Study.

Japan. First, a study on bankruptcy or insolvency law was begun followed by a study in connection with security law.

Then, it was decided to take up Alternative Dispute Resolution (ADR) as a new subject, because it could not be treated lightly in view of the civil judicial system, and the Taskforce for researching ADR in Asian and Pacific Countries started to work in November 1999<sup>2)</sup>. The research target of the Taskforce was ADR in general, excluding mediations in domestic and maritime affairs<sup>3)</sup>. While, taking the meaning of the Asian Study into account, Australia, China, Indonesia, Korea, Singapore, and Thailand (in alphabetical order) were selected as target countries, as they have fairly advanced judicial infrastructures, to say nothing of their utmost importance to Japan from the viewpoint of foreign investment.

Prior to preparing a questionnaire on basic common information of the countries and their tasks concerning ADR in the future, we conducted hearings with domestic experts to obtain professional opinions. We put weight on each country's actual circumstances<sup>4)</sup> as ADR had not been sufficiently discussed previously. The questionnaire was prepared taking the opinions into account and was sent out to

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- 2) The Taskforce consists of six members including (in alphabetical order) myself (in charge of China) as the chairperson; Judge UEDA, Takuya of Tokyo High Court (in charge of Australia), Lawyer OHARA, Masatoshi of Kikkawa Law Office (in charge of Indonesia), Prof. KANEKO, Yuka of Kobe University's Graduate School for International Cooperation (in charge of Thailand), Prof. TANABE, Makoto of Hiroshima University's Faculty of Law (in charge of Singapore), and NAKANO Shun'ichiro of Kobe University's Graduate School of Law (in charge of Korea). There were participants from Supreme Court's Civil Affairs Bureau and Ministry of Justice's Civil Affairs Bureau. In addition, Mr. OHE, Tsuyoshi at the doctor course of Osaka University's Graduate School of Law participated as a recording secretary. Further, in conducting the on-the-spot survey, the society obtained not only all-out assistance by Japan External Trade Organization but also cooperation from many Japan-base companies, local enterprises including law firms, each country's courts, and local ADR institutes. We greatly appreciate kind cooperation.
  - 3) The exclusion of ADR for domestic affairs and maritime affairs was simply due to a technical reason that number of the group researchers was limited, although we had fully realized the importance of ADR in these fields. Frankly speaking, we thought it better for us not to conduct the survey lightly, as excellent studies on ADR in the fields had already been existed. The above two fields are important to ADR study, and we should make goods use of the existing studies on them. Therefore, in collecting data for this report, we have obtained considerable cooperation from Supreme Court, Ministry of Justice, and the Japan Shipping Exchange, Inc. I would like to express my hearty thanks to all people concerned at these organizations and other ADR institutes.
  - 4) We did not take up the points at issue on mediation and arbitration for which plenty of studies was already available. We tried to clarify the position of ADR in basic judicial policy of each country, as we had much concern over movements towards the future in this region. As a result, active reactions were obtained from each country in this regard.

each country's specialists for their reply. At the same time, to avoid heavy reliance on data, we undertook on-the-spot surveys in an effort to know the actual situation of ADR. In conducting the on-the-spot surveys, we tried to hold as many hearings as possible within the limits of our schedule, and met each country's ADR specialists, legal staff of enterprises, the staff of permanent ADR institutions, and the staff of court of first instance. During the survey abroad, in this country the Judicial Reform Council set aside one chapter for ADR in its report, in June 2001, putting great importance on it as a part of judicial reform<sup>5)</sup>.

As the final compilation of these efforts each country's ADR specialists were invited to Japan, and the Research and Training Institute of the Ministry of Justice on Friday, February 15, 2002 jointly held "The 3rd International Business Law Symposium: Present Situation and Tasks for ADR in Asian and Pacific Countries" in a brand-new international conference room of the Nakanoshima joint government office in Osaka. The following six panelists, all famous ADR specialists, were invited from abroad: Mr. Gerald Raftesath (LEADR chairman and lawyer from Australia), Professor Dr. Shen Sibao, (President of Law School of University of International Business and Economics and CIETAC deputy chairman from China), Mr. M. Husseyn Umar (BANI deputy chairman and lawyer from Indonesia), Professor Dr. Byung-Hui Yang (Korea Arbitration Society's deputy chairman and professor of Law School of Kun-Kuk University from Korea), Mr. Lawrence Boo (SMC consultative commission member and lawyer from Singapore), and Mr. Vichai Ariyanuntaka (Judge of Thai Central Intellectual Property/Foreign Trade Court from Thailand). In addition, Sydney University's Mr. Luke Richard NOTTAGE, an authority on ADR worldwide including Japan,

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- 5) "Study Meeting concerning Position of ADR in Judicial System" (dated March 19, 2001) written by Prof. TAKESHITA, Morio as a summary report to Judicial System Reform Council includes all points at issue of this country's judicial policy and is very useful to us. During the period from December 6, 2000 to March 7, 2001, for the purpose of discussing such subjects as preparation of common infrastructures to expand/vitalize ADR as one of judicial facilities, cooperation between courts and ADR institutes as well as horizontal cooperation among ADR institutes, and measures to strengthen cooperation among Ministries and agencies related to ADR, the study meeting was held four times in total to investigate present situation and exchange views about these subjects. From the viewpoint of encouraging use of ADR, such subjects as one-stop supply of information, efficient use of information technology (IT), revision of section 72 of Lawyers Law in connection with securing ADR staffs, expansion of training system for ADR staffs, effectiveness of ADR rulings (stoppage of statute of limitation, grant of execution title, etc.), and strengthening of cooperation in judicial procedures between ADR institutes and courts were pointed out for our further study, and enactment of "Fundamental ADR Law" was proposed to expand/vitalize ADR.

participated.

This summary report covers the ADR Taskforce's activities. Based on data collected for the symposiums, panelists' speech/proposals, and findings from the on-the-spot-surveys, present situation of ADR in each country surveyed is summarized here. I hope this report helps you to understand ADR in the future<sup>6)</sup>. Opinions expressed in this report are not those of the ADR Taskforce, but are entirely mine, although they are based on the Society's findings. Therefore, I am responsible for the entire contents of this report including its summarization and arrangements.

## **2. Present Situation of ADR in Each Country**

Let us start with an overview of ADR in each country.<sup>7)</sup>

### **(1) Australia**

#### **A. Present Situation in Australia**

In Australia today, ADR is widely recognized and is very popular especially in the civil mediation field. An explosion of user dissatisfaction with prolonged proceedings of civil actions (in a narrow sense) has formed the ADR market, in which it is not necessary to contact a judicial authority. Federal International Arbitration Law, Victoria State Commercial Arbitration Act (CAA), and New South Wales State Commercial Arbitration Act were enacted in 1974, 1984, and 1986, respectively. Therefore, ADR began to gain popularity since the 1980s.

As mentioned above, however, ADR mainly means a mediation in Australia. Recognition that arbitration is not included in ADR is rather widespread. There is no fundamental law for mediation. Despite an arbitral system being completely prepared under national laws, private mediations based not on national laws but purely on agreements between individuals are more common than arbitration. This

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6) Mr. KUROKAWA, Hiromasa, lecturer of International Cooperation Department of Research and Training Institute of the Ministry of Justice was very helpful to me in preparing this report, and I hereby express my thanks to him. I am also thankful to Judge UEDA, Takuya, as his adequate arrangement of points at issue was a good guidance for me.

7) In addition to data collected at the hearings held in each country, the following books are referred to case by case: "Dispute Resolution in Asia" by Michawl Pryles in 1997 (Kluwer Law International), "Australian Courts of Law, 3rd ed." By Lames Crawford in 1993 (Oxford University Press), and "Mediation" Laurence Boulle and Teh Hwee Hwee in 2000 (Butterworths Asia).

is ironic. Anyway, to save time, people are eager to use mediation to settle disputes. They might be even willing to spend a whole day without drinking and eating anything. They put an amazing amount of energy into mediation. Therefore, mediation has established itself as a business, and mediators have high social status and remuneration for their professional expertise. The image of mediation in Australia is entirely different from that of judicial mediation in Japan. Impartiality of mediators and imbalance of power between parties are pointed out as problems involved in mediation<sup>8)</sup>.

There is no definite rule for using the words mediation and conciliation. They are used in various ways in Australia, making it difficult to distinguish them clearly from each other. In general, mediation is understood to be: "a procedure by which, with the help of a mediator, both parties to a dispute clarify the point at issue, widen the latitude of their choices, try to find an alternative solution, and make an effort to reach an agreement. Mediators have no function to give advice and/or decisions as to substantive content and settlement content, but they may give advice and/or decisions for mediation procedures to settle the dispute"<sup>9)</sup>. Mediation is distinguished from conciliation in which an intermediary is more actively involved.

In the case of mediation, the parties to a dispute are not obligated to agree to settle it. If no agreement is reached at mediation, the parties resort to the usual legal proceedings. Even if mediation proceeds, the statute of limitations is not affected by it. To solve this problem, there is a way to proceed with mediation after bringing the dispute to a court. But, in most cases, agreements tend to include a provision to the effect that any dispute shall be settled by mediation (a specific person is designated as a mediator in many agreements). ADR institutes such as LEADR publishes their recommended draft of a provision to settle a dispute through mediation.

## B. Major ADR Institute

### (a) ADR Institute outside Court

#### 1. LEADR (Leading Edge Alternative Dispute Resolvers)

LEADR is a non-profit limited liability corporation founded in January 1989 as a jurists' organization by a lawyers' group; therefore, it is not established under a specific ordinance. It is mainly engaged in commercial disputes, rendering

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8) T. AKABANE, "Outline and Problems of Australian Mediation System", A. Ishikawa and T. Mikami (eds) *Comparative Study of ADR* (Tokyo, 1997) p. 164 et seq.

9) From a report submitted to Attorney General by National ADR Advisory Council (NADRAC) under the title of "Framework of ADR Standards" (in April 2001).

assistance in conducting mediation. Although those who are on its eligible list are mostly lawyers, other specialists such as doctors, architects, and engineers have been increasing recently. Mediation is usually arranged only once for one dispute. Any agreement reached through mediation is put in writing and is given same effectiveness as a commercial contract. The number of cases filed for mediation is about 400 a year. No fee is paid to the LEADR itself. The mediator's remuneration is determined through consultations between the parties and the mediator.

## 2. IAMA (Institute of Arbitrators and Mediators)

IAMA was established in 1975. It used to engage mainly in arbitration, but is now putting its weight on mediation. Most IAMA members are engineers, accountants, lawyers, architectural consultants, architects, and other specialists. Compared to LEADR, whose purpose is to contribute to the general public, IAMA attaches importance to its members' profits. The number of cases accepted is 120 to 150 a year.

## 3. ACDC (Australian Commercial Dispute Center)

ACDC is a non-profit corporation established in 1986 by New South Wales State Government, and it handles a diverse range of disputes including commercial transaction disputes, filings of labor complaints, claims for damages for accidents resulting in personal bodily harm, construction disputes, and other kinds of dispute.

### (b) ADR inside a Court

In 1980s, ADR inside a court was introduced to courts as part of their functions, enabling them to conduct mediations and neutral evaluations. State courts have general jurisdiction over business disputes, while federal courts handle only business disputes that fall under federal jurisdiction. Court (Mediation and Arbitration) Law was enacted as a federal law in 1991. Regulations for ADR differ depending on the State and the court. In most cases, however, senior officers of courts (registrar etc.) are nominated as mediators. This system is based on Courts Legislation (Mediation and Evaluation) Act 1994.

Unlike mediation in Japan, there is no procedure by which a dispute is brought to court for mediation from the beginning. Only litigation can be brought to a court, and some litigation can be submitted for mediation or neutral evaluation. In the case of mediation, mediator's function is limited to encouraging negotiations between the parties to a dispute. To the contrary, a neutral evaluation is distinguished by its evaluator's function to announce its opinion about the expected ruling based on the parties' assertions/attestations, thus making them reach an agreement. Mediation is conducted only once for one dispute. If a private mediator/

evaluator is employed, the parties to a dispute pay the expenses for its services. If a mediator is a registrar of a court, the service is free of charge.

### C. Special Mention – Opinion to Exclude Arbitration from ADR

In Australia, the concept of alternative dispute resolution has been widely recognized since the mid-1980s. As a result, litigation has become an inefficient means to settle disputes for the following reasons: litigation takes a long time, a lawyer's fee is expensive, business relations with the other party are discontinued if litigation is instituted, and a lot of management is taken up with litigation. Meanwhile, arbitration was widely used at that time. However, despite arbitration originating as a means to settle disputes quickly with a specialist's assistance, it gradually came to take longer than litigation, and became a procedure of interrogation that was inferior to litigation. As a result, ADR got broad support because it has no interrogatory factor, unlike litigation and arbitration.

Under the circumstances, the general consensus in Australia about ADR is that it is not a means to confirm the legal rights of parties to a dispute but is a procedure to settle a dispute through an agreement reached between the parties through an adjustment of their interests<sup>10)</sup>. A third party-dominant-type of dispute-settling procedure is not regarded as ADR, whether it is binding on the parties or not. In particular, it is understood that arbitration is not included in ADR. Accordingly, ADR in Australia is mainly used for private mediation<sup>11)</sup>. However, people related to courts understand that, as a means of settling a dispute, all systems other than a trial are a form of ADR. In this sense, arbitration is included in ADR.

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10) Gerald Raftesath, a panelist at the symposium from Australia, had announced his opinion to distinguish ADR from litigation and arbitration. "Alternative Dispute Resolution in Australia" *Liberty and Justice* Vol. 43 No.6 p.139 et seq. (1992).

11) It was properly pointed out that "in contrast to other ADR systems, arbitration is relatively formal and most similar to normal judicial proceedings". Please refer to AKABANE, *supra*, p.141 et seq. There is another opinion that "Under these circumstances, the reason why people seek ADR other than arbitration is that arbitration is not functioning as originally expected to do. However, in the case of ADR other than arbitration (and appraisal with binding force), no dispute can be solved unless parties to a dispute reach conciliation through mutual consultation, thus making the arbitration to be still very important. ("Present Situation of ADR in Australia (1)" written by Nobuyuki Tanaka and Kim Sang-Soo in page 2 and below of "JCA Journal Vol.43 No.6" in June 1996). But, actual situation has been gradually changing.



## (2) People's Republic of China

### A. Recent Situation of ADR

In China, although government agencies take the lead to settle disputes falling under their jurisdiction, the mainstream of modern ADR is arbitration. In particular, as far as business disputes are concerned, arbitration is prevalent with China International Economic and Trade Arbitration Commission (CIETAC) at its core<sup>12)</sup>, although the cost of arbitration is higher than that of litigation<sup>13)</sup>. The popularity of arbitration is evidenced by a secular change in the number of cases accepted. China is a signatory<sup>14)</sup> of the New York Convention on the recognition and enforcement of foreign judgment<sup>15)</sup>. The fundamental law for arbitration is "The Arbitration Law of People's Republic of China" for both domestic and international arbitration, adopted at the 9th standing commission of the 8th national people's congress on August 31, 1994 and promulgated on September 1, 1995. However, even if an arbitration award is obtained, it cannot be executed without an application to the people's court in the final analysis (Section 62 of the Arbitration Law). Therefore, users choosing litigation from the beginning are increasing, as earlier settlement is expected from litigation. Another reason hidden behind this is that "local protectionism"<sup>16)</sup>, which was apt to favor Chinese parties, is now changing for the

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12) <http://www.CIETAC.org.cn>

13) "Chinese ADR in Full Bloom" by Zhu Jianlin in page 201 of "International Commercial Judicial Affair Vol.29" in 2001. In this connection, there is an opinion that we should not be blindly happy about the prosperity of ADR in China, because it has resulted from the fact that the judicial system is not performing its originally expected functions. Therefore, it mistakes the means for the end. In fact, arbitration is nothing to do with local protectionism while keeping fairness and is completed in a short period of time by arbiters, who have comparatively higher knowledge of laws and expertise compared to Judges. In the case of arbitration, language is not confined to Chinese, and parties to a dispute are entitled to appoint foreign lawyers as their representative.

Actually, judicial reform is under way to overcome problem of judicial corruption, i.e. bribery by judges. There was a case, for instance, that a judge was challenged by one of parties to a suit because the judge was revealed to have made a trip on the other party's account. Judges are not treated well with their monthly salary of 3000 yuan on average. Quality of judges is also a problem. It was reported that retired servicemen were still serving as judges in local lower people's courts. The new jurist qualification examination system has just started in March 2002.

14) In particular, it is very expensive to employ foreign arbiters and professional appraisers.

15) January 22, 1987. However, with reciprocal reservation/commercial reservation.

16) It is said that, unless a party to a suite is a local resident where the trial is held, it is rather difficult for the party to be protected its right properly, as local administrative agencies interfere during judicial proceedings in process.

better. In cities such as Beijing and Shanghai, reliance on judicial operations is increasing<sup>17)</sup>. China can be said to have only "agency ADR" being without so-called "ad hoc ADR" available. In addition, China has 160 local arbitration commissions in many provinces, autonomous districts, and large directly controlled cities. Various kinds of arbitral organization have been prepared under the Arbitration Law. Labor arbitration in China is a special ADR beyond the scope of the Arbitration Law (Section 77 of Arbitration Law)<sup>18)</sup>.

ADR provisions are included in about 10% of commercial agreements, especially in joint venture agreements, collaboration agreements, and real estate sales agreements concluded between Chinese companies and foreign companies. ADR provisions are recommended in Law of PRC on Chinese-foreign Equity Joint Ventures and Law of PRC on Chinese-foreign Contractual Joint Ventures, as well as in a model movables sales agreement drafted by Ministry of Foreign Trade and Economic Cooperation.

What is called "court mediation" is not the Japanese style of mediation but is conciliation under litigation in a simple interpretation, although it is worth discussing its procedures. Unlike the foreign law solicitor system in Japan, a lawyer's license (under Ministry of Justice's jurisdiction) is not granted to individual foreign lawyers, but is issued to the law offices to which they belong.

China's multi-leveled judicial structure is as shown by the expression: "there are grassroots measures whereby there is a policy of superiors." A gradual change is now being pressed amid the tendency a way from a "person-controlled country" to a "law-governed country." Indeed, as a result of participation in WTO, China's civil judicial situation (in broad sense) is changing remarkably, although it contains some problems such as local protectionism. Under the reform and liberation policy, the judicial system is rapidly improving towards that of a "law-governed country." Keeping pace with a growth rate of 7% a year under the socialistic market economy, judicial reform is making progress at same speed as economic reform, while coping with the situation after joining the WTO.

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17) China has four kinds of courts; Supreme People's Court, higher people's courts, middle people's courts, and lower people's courts. The first instance trials are held at the middle courts and lower courts, where judicial reform is remarkable under way. China has the second instance system.

18) Pursuant to Chinese Enterprise Labor Dispute Settlement Rule (enacted in 1993). In addition, the followings are also without the scope of the Arbitration Law (section 2, 3 and 77 of the Arbitration Law): 1) disputes concerning marriage, bringing up children, surveillance and protection, family support, and inheritance, 2) administrative disputes to be settled by administrative agencies in accordance with laws, 3) disputes concerning agricultural contact agreements inside agricultural group economic organizations.

## B. Major ADR Institute

### (a) Major ADR Institute outside Court

#### 1. China International Economic and Trade Arbitration Commission (CIETAC)

This arbitral organization was founded in April 1956 as the Foreign Trade Arbitration Commission under the "Decision of Central People's Administration Bureau concerning Establishment of Foreign Trade Arbitration Commission at China Council for the Promotion of International Trade" (in 1954), and changed its name to International Economic and Trade Arbitration Commission in 1980, changing again it to the present name in 1988. This commission is based on the China Arbitration Law and has own arbitration rules. Since the amendment of the law in 2000, CIETAC has had its jurisdiction over disputes between domestic enterprises as well<sup>19)</sup>. As a nationwide organization, CIETAC handles disputes related to Hong Kong Special District, Macao Special District and Taiwan, in addition to international disputes. During its over 40-year history, CIETAC has accepted cases from 45 countries (and regions) around the world, giving arbitral awards to 130 countries (and regions). It is one of the international arbitration centers of the world in name and in fact<sup>20)</sup>. It opened a branch office in Shanghai on

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19) "About Revision in 2002 of International Commercial Arbitration Rule in China" by EGUCHI, Takuya in page 1386 of "International Judicial Affairs Vol.28 No. 11" (in 2000). The CIETAC's revised Arbitration Rule is in force since October 1, 2000. It was enacted and revised by Chinese Commission for Promotion of Trade under the Chinese Arbitration Law. Since the establishment of the commission in 1956, the rule has been revised four times in total in 1988, 1994, 1995, and in September 2000 respectively.

The cases under Jurisdiction of CIETAC pursuant to article 2-2-1~6 of thereof are as follows:

1. International disputes or external disputes.
2. Disputes concerning Hong Kong Special District, Macao Special District, or Taiwan.
3. Disputes between foreign capital enterprises, between foreign capital enterprises and Chinese corporations, and between natural persons and economic bodies.
4. Disputes arising out of project finances, tenders, construction projects, and other activities, which are managed by Chinese corporations, natural persons, and/or other economic bodies, and utilize capitals, technologies, and services introduced from foreign countries, international organizations, Hong Kong Special District, Macao Special District, and/or Taiwan.
5. Disputes, over which the Arbitration Commission has the jurisdiction under PRC's laws or special administrative regulations, or based on a special authorization.
6. Other domestic disputes for which parties to a dispute have agreed to bringing in an arbitration conducted by the Arbitration Commission.

20) Although it is operated on a self-supporting accounting system, its personnel management is under control of the China Council for the Promotion of International Trade. It has about 40 staffs and about 290 registered arbiters, one third of which are foreigners from 26 different countries. (In the register of arbiters, three Japanese arbiters, Mr. TANAKA, Nobuyuki, Mr. HAYASAKI, Takuzou and Prof. TANIGUCHI, Yasuhei, are listed.

March 15, 1990<sup>21)</sup>.

About 800 cases a year are brought to CIETAC<sup>22)</sup>, among which about 80 cases are settled by conciliation at arbitral tribunals<sup>23)</sup>. For your study, about 1,530,000 commercial lawsuits are instituted a year<sup>24)</sup>. An arbitral tribunal is required to give an award within 9 months after the tribunal is formed. Parties to a case are required to voluntarily implement the ruling within the period specified in the award (if it is not specified, instantly). If the ruling is not implemented, the other party has the right to apply for its enforcement to a people's court or a foreign court pursuant to "the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention)."

The application fee system is roughly divided into two depending on the nature of a case. The larger the amount involved in a case the higher the fee is, however, the ratio of the fee to the amount involved in the case decreases<sup>25)</sup>.

## 2. China Council for the Promotion of International Trade (CCPIT)

"Mediation Center" was established in 1987 jointly by CCPIT and China Corporation of International Commerce (CCOIC)<sup>26)</sup>, and is abbreviated to CCPIT

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21) CIETAC has an office also in Shenzhen.

22) The most cases are related to international trade, joint venture, or collaboration agreement.

23) As to grounds for conciliations at arbitral tribunals (settlements made by parties to a dispute themselves) and mediations (intermediated by arbitral tribunals), please refer to article 49 and 51 of the Arbitration Law.

24) They seem to be probably cases under jurisdiction of Beijing City. 97,856 cases in total were accepted for the first instance at lower courts and middle courts.

25) Firstly, with regard to arbitral cases coming under article 2-2-1 and 2-2-2 of CIETAC's Arbitration Rule, if a sum in issue is not exceeding 100,000 yuan (about 1,500,000 yen), for example, the application fee is 3.5% of the sum in issue (with minimum charge of 10,000 yuan (about 150,000 yen)). Upon acceptance of the application, an additional fee of 10,000 yuan is required to pay for examination of the application, commencement of the procedure, computer processing, and preparation of documents. Further, actually required other reasonable expenses may be collected in special occasions.

Secondly, with regard to arbitral cases coming under article 2-2-3 ~ 6 of CIETAC's Arbitration Rule, if a sum in issue is not exceeding 1,000 yuan, for example, the application fee is 100 yuan (about 1,500 yen) at the lowest. If a sum in issue is between 1,000 yuan and 50,000 yuan, the fee is 100 yuan plus 5% of an amount for a portion of the sum in issue exceeding 1,000 yuan. If a sum in issue is not exceeding 50,000 yuan, 1,250 yuan (about 19,000 yen) is collected as examination expenses. In addition, actually required other reasonable expenses may be collected in special occasions.

26) Its head office is located at the same place as CIETAC. While CIETAC serves as its window, CIETAC's arbiters are listed in its register as mediators. It has over 30 offices throughout the country.

Mediation Center. This center handles a wide range of commercial and maritime affair disputes<sup>27)</sup>, but the agreement reached through mediation is unenforceable. Mediators are entitled to persuade the parties to conclude an arbitral agreement and draw up an arbitral award including the contents of agreements reached through mediation.

### 3. Beijing Arbitration Commission (BAC)

BAC was established by Beijing People's Government under the Arbitration Law of People's Republic of China on September 28, 1995<sup>28)</sup>. It has hitherto accepted 1421 cases<sup>29)</sup>, up 37% since 1998. The fact that only arbitral awards were cancelled in the past shows the high reliance on BAC<sup>30)</sup>. Use of arbitration by BAC is becoming popular among foreign companies such as OCS, an American oil company. BAC is likely to have been sounded out once by a U.S.A.-based company about a labor dispute with an employee. BAC has no jurisdiction over labor disputes. Labor arbitration is under exclusive jurisdiction of Beijing Labor Dispute Arbitration Commission.

Arbitral cases concerning intellectual property disputes are few, while those

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- 27) The mediations are completed within 30~90 days on average. About 80% of accepted cases reaches agreements through the mediations. Although the mediation expenses proportionate to a sum in issue, ratio of the expenses against a sum in issue decreases gradually as a sum in issue increases. For example, if a sum in issue is not exceeding 100,000 yuan (about 1,500,000 yen), the mediation expenses is 4~6 % of a sum in issue (with minimum charge of 1,500 yuan (about 22,500 yen)).
- 28) The Rule of this Commission is formulated based on related provisions of China Arbitration Law and Civil Procedure Law, and is recently revised on February 25, 1999. This commission used to be subsidized by the government from 1995 to 1998, but is completely under a self-supporting accounting system since 1999. It has 15 official staffs. All of them are employed under only one year contract with possible renewal. This is to prevent unfair practices by them. It was impressive that its young staffs behaved very energetically.
- 29) Number of cases accepted since its establishment in 1995 is 7 in 1995, 140 in 1996, 168 in 1997, 133 in 1998, 326 in 1999 and 446 in 2000. Until March 13, 2001, 1,421 cases were accepted in total, of which 1,231 cases completed their examinations, resulting in the completion rate of 86.6%. 1.5% of the cases were those from foreign countries. The number of cases accepted at this commission is relatively large compared to other institutes. Shenzhen office ranked as No. 1 in terms of number of cases accepted.
- 30) It has 246 registered arbiters, consisting of about 27% of lawyers, about 24% of university professors, about 24% of professionals such as economists, and about 20% of public servants. Register of the arbiters are available in its website on the internet.

related to construction disputes are plentiful<sup>31)</sup>. In the case of construction disputes, the parties first try to settle it themselves before mediation is accepted. If an agreement is not reached between the parties through mediation, it is brought to an arbitral examination. To make appraisals, BAC has tie-up relations (service agreements) with 10 specified professional organizations (appraisal institutions)<sup>32)</sup>. In the case of disputes arising from building construction prices, the necessary reevaluation of the prices is subject to an estimated value appraised by the institutions. If there is an objection to the estimated value, the appraisal institutions give an explanation at the arbitral tribunal. On-line arbitration is not permitted because of ambiguities from the viewpoint of document rules, but consultations are possible via the Internet<sup>33)</sup>.

At present, there is no difference between BAC and CIETAC. In the past, there used to be a difference in the point that domestic cases were not accepted by CIETAC. Arbitration expenses are somewhat lower at BAC than at CIETAC. It is likely to take about 9 months until final award is given at CIETAC, while it is said to be about 8 months at BAC.

#### 4. Beijing Labor dispute Arbitration Commission<sup>34)</sup>

Labor arbitration has 3 characteristics. As to labor disputes, labor arbitration preference policy is adopted. Therefore, no agreement between parties to a dispute is required before bringing the dispute to arbitration. Arbitral award is not binding to the parties as final decision. If one of the parties has an objection to the ruling, it can enter litigation. The commission is under control of Labor Society Security Bureau of Beijing City and has nine offices to conduct arbitrations<sup>35)</sup>. There used to be few cases of labor disputes in the past, as wages were determined by government. However, keeping a pace with development of the market economy, laborers' awareness of rights has risen recently and number of cases accepted is

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31) The accepted cases are mostly related to sales disputes, real estate disputes, or investment disputes, while those related to intellectual property right disputes and international disputes are about 2 % each.

32) This commission is said to be monopolistic and inefficient, while, in case of litigations, it always designates an institution under control of Construction Bank.

33) BAC is making good use of the internet for questions, consultations, and perusals of tribunals' situation.

34) General arbitration tribunals are not open to the public, but labor arbitration tribunals are open to the public. A room for its examinations was exactly same as that of a court in its structure.

35) 98 full-time arbiters and about 400 part-time arbiters are registered.

increasing<sup>36)</sup>.

(b) ADR inside Court

Mediation by People's court is based on the Civil Procedure Law. A mediation agreement is signed by judge and secretary and sent out to the parties. Upon the parties' signing on it, the mediation agreement becomes an obligation title. It is executed by a court of first instance. It is up to the parties whether to use mediation or not. A case concludes when an agreement is reached through mediation. The first instance procedure is required to be complete within 6 month pursuant to the Civil Procedure Law<sup>37)</sup>.

(3) Indonesia

A. Outline and Situation of ADR

"Arbitration and Alternative Dispute Resolution Law (Law No. 30)" was enacted in 1999 introducing a substantial part of UNCITRAL rules, and provides fundamental rules for ADR, especially detailed provisions for arbitration. For example, arbitral procedures are required to be conducted within 180 days. The law also has provisions for international arbitrations including those of definite procedures for execution of arbitral awards and proceedings for approval of execution (exquatur) at Jakarta Central Court.

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36) Number of cases accepted by the commission has been increasing satisfactorily as follows: 72 in 1987, 85 in 1988, 107 in 1989, 150 in 1990, 112 in 1991, 230 in 1992, 401 in 1993, 1,043 in 1994, 1,584 in 1995, 1,185 in 1996, 2,653 in 1997, 3,450 in 1998, 5,234 in 1999, and 7,480 in 2000. The cases accepted in 2000 are broken down to 3,213 wage disputes, 1,811 public welfare disputes, 1,822 disputes related to labor agreement performance, and 35 labor protection (sanitation standard, etc.) disputes.

Among all the cases accepted, 60% are brought to arbitrations and 40% reaches conciliations. To keep pace with the increase in the accepted cases, the commission has expedited to process its procedure so as to complete it within 60 days. If one of parties to a dispute is dissatisfied with a ruling of arbitration, the party is entitled to file a complaint to a people's court in the same way as at other arbitration institutes. Unlike general disputes, labor disputes are required to be brought in arbitration before instituting the suit to a people's court. (Arbitration-before-litigation system) (Article 6 and 30 of Enterprise Labor Dispute Settlement Rule)

Average arbitration expenses of this commission are about 300 yuan (about 4,500 yen), which is lower than those of other institutes

37) Mediation expenses are almost as expensive as litigation expenses. For example, its application fee is 50 yuan (about 750 yen) for a sum in issue not exceeding 1,000 yuan (about 15,000 yen). If a sum in issue is between 1,001 and 50,000 yuan, the fee is 50 yuan plus 4% of an amount for a portion of a sum in issue exceeding 1,000 yuan.

Comparatively often used ADR is arbitration in these days. Nearly all agreements provide that "Parties to a dispute shall first settle it by mutual consultation or mediation, and if no agreement is reached through it, they shall be entitled to settle it by either arbitration or action".

## B. Major Institute of ADR

### (a) ADR Institute outside Court

#### 1. Badan Arbitrase Nasional Indonesia (BANI)

At present, the Indonesia National Board of Arbitration (BANI) is the only ADR institute outside court registered at the Ministry of Justice. BANI is a juridical foundation established under a law by Indonesia Chamber of Commerce, though it is operated independently from it. It handles domestic disputes (including those of Indonesian corporation fully owned by foreign capital) and international commercial disputes<sup>38</sup>. Most of them are related to usual commercial transactions in the field of construction, insurance, transportation, finance, etc. There are 30 cases or so in a year, about a half of which is construction disputes.

There are about 50 registered arbiters and mediators, who are mostly lawyers, economic specialists, engineers, etc. Indonesian language is used, but English can be used subject to permission of arbitral tribunal. The law requires BANI to work through mediation within 30 days and arbitration within 180 days. Its ruling is registered with a local court within 30 days and then executed within 30 days of the registration.

BANI have "binding opinion" system, though it does not correspond to arbitration. Under this system, only a specific point of issue is adjudicated subject to parties' agreement and its ruling becomes binding to the parties.

### (b) Permanent ADR Institute inside Court

Generally speaking, this is not in existence. It is customary for parties to a dispute to make negotiations directly between themselves prior to filing a suit. In addition, it is said that they often reach conciliation during a period between pronouncement of final judgment and its execution.

### (c) Reason to use ADR

Musyawarah, meaning an agreement itself or a process to reach an agreement, is

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38) Mediation expenses are determined through consultation between parties to a dispute. Arbitration expenses are subject to its tariff, in which the expenses vary depending on a sum in issue.



a backbone of people's decision making processes in Indonesian social life. ADR fits such national character. Japan-based companies etc. tend to use ADR owing to distrust of trial, and some of them go to the neighboring Singapore to use ADR there. Arbitrations by International Chamber of Commerce are liked. Approval procedures for foreign judgments are not available at present, which may be one of reasons why ADR is used to settle disputes.

#### **(4) Korea**

##### **A. Present Situation of Litigation and ADR**

Typical means to settle disputes in Korea is also litigation because of its high reliability. Included in ADR are mediation, arbitration, direct negotiation between parties, and ombudsman program, among which "civil mediation", a inside-court-type mediation, is its main. Fundamental law for civil mediation is "Korea Civil Dispute Judicial Mediation Act (KCMA)" (called in short as "Civil Mediation Act") enacted in 1990.

In general, ADR clause is included in domestic and international agreements. For example, model arbitration clause drafted by Korea Commercial Arbitration Board (KCAB) stipulates as follows: "All disputes, controversies, troubles and/or disagreements between the parties thereto arising out of or in connection with this Agreement or breach thereof shall be finally settled by arbitration in Seoul, Korea under Korean laws in accordance with commercial arbitration rule of Korea Commercial Arbitration Board, and the ruling by the arbiter shall be final and binding to the parties concerned."

Almost all arbitrations are handled by KCAB established under the Arbitration Law. As compared with the former Arbitration Law 1966 modeled after the former Germany Arbitration Law, the new Arbitration Law enacted in 1999 (Law No.6083 in 1999) follows the example of UNCITRAL model arbitration law. Arbitral award is enforceable not only in Korea but also in foreign countries under the New York Pact concluded in 1958.

##### **B. Major ADR Institute**

###### **(a) ADR Institute outside Court**

###### **1. The Korean Commercial Arbitration Board (KCAB)**

This board is established in 1970 under the Arbitration Law of 1966, and handles arbitral cases of various fields including trade, joint venture investment, transportation, real estate lease, technology transfer, construction, and maritime

affairs. There is no specified standard for arbiter's qualification. Korea Arbiters Association was founded in 1998 to provide arbiters with educational programs continuously.

Procedural period is roughly 3 - 6 months. In the past 5 years from 1996 to 2000, about 650 cases per year were accepted on average, including yearly average of 152 arbitral cases (107 domestic and 45 international cases) and 458 mediatory cases (146 domestic and 352 international cases). Although the larger an amount involved in a case is the higher its fee becomes, ratio of an amount of the fee against an amount involved in the case decreases<sup>39)</sup>. Conciliation is seldom made at arbitral tribunal.

## 2. Electronic Commerce Mediation Committee (eCMC)

This was established in April 2000 under article 28 of the Electronic Commerce Fundamental Act, and handles electronic commerce disputes between consumers and electronic commerce enterprises (including their affiliated companies). No mediation fee is charged and procedural period is within a month.

## 3. The Program Deliberation & Mediation Committee (PDMC)

This was established in December 1987 as the Program Deliberation Committee (the name change in 1994) under article 29 of the Computer Program Protection Act, and handles disputes related to copyright of computer programs.

## 4. The Korean Consumer Protection Board (KCPB)

This was established in June 1987 under article 34 of the Revised Consumer Protection Act, and handles consumer disputes.

### (b) Permanent ADR Institute inside Court

The above "civil mediation" is conducted under the Civil Mediation Law at all local courts and high courts (court mediation). Mediators are all appointed by respective head of the local courts and high courts, and include engineers, architects, professors, finance specialists, business persons, certified public accountants, journalists, patent lawyers, lawyers, and doctors.

Procedural period is within a month in more than half of cases and almost all cases conclude within 6 months. In the past 5 years from 1996 to 2000, about

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39) For example, if it is 5,000,000 won (about 500,000 yen), the expenses amount to 920,000 won (about 92,000 yen) in total including fee, cost, consumption tax, and lawyer's remuneration. Mediation is fee of charge since January 1, 2000.

60,000 cases per year were accepted on average, including 46,000 cases in 2000. In 1992, the Civil Mediation Law was amended to enable mediation inside court, and number of the cases has been on uptrend since that time. As decisions substituting for mediation are utilized, ratio of objection against the ruling is low. In the past 5 years from 1996 to 2000, newly accepted civil disputes for first instance were about 740 thousand cases per year on average, including about 730 thousand case in 2000.

When a mediation agreement is described in an official document, it becomes effective and enforceable in same manner as a final judgment. Application fee for mediation is one fifth of that for litigation.

### C. Special Mention

In Korea, several different types of ADR are available including special type. eCMC and KCAB are actively taking various steps to introduce cyber-mediation system. For the purpose of developing arbitration system, KCAB is making efforts in publicity work to publicize ADR through intercollegiate matches of imitational arbitration.

## (5) Singapore

### A. Present Situation of Civil Justice and ADR

Singapore, an advanced country of information technology<sup>40)</sup>, is full of confidence and vigor in every aspect, though its size is nearly same as Awaji Island. As urgent appeal to the Privy Council of U.K. is abolished by the law in 1994, the Court of Appeal in Singapore is the last instance today<sup>41)</sup>. High Court is for the second instance. Various courts such as local courts and summary courts (small claims courts), collectively called as Subordinate Court (lower court), exist for the first instance. Court of Appeal and High Court are collectively called as Supreme Court. During 3 years from 1998 to 2000, number of dispute brought to litigations, ADR inside court of both IAC (Industrial Arbitration Court) and lower courts, and ADR outside court were 47,192 cases, 5,617 cases and 263 cases per year respectively. The number of litigation is outstanding among them. Under the

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40) This is symbolized by the Supreme Court's Technology Court with state-of-the-art equipment and the lower court's e@dr. As to IT projects such as the Technology Court, please refer to "Is the Japanese system of "small claims court" to fail?" by Tatsuo Ikeda in page 24 of "Liberty and Justice Vol.49 No.5" (in 1998).

41) This was occasioned by a case which resulted in a judgment exceedingly unfavorable to Singapore.

overwhelmingly dominant position of judicial authority, number of cases brought to ADR inside court is rapidly increasing<sup>42)</sup>. At the same time, the government-backed ADR mentioned later is expected to grow in terms of number of the case, attracting Japan-based companies etc in the future<sup>43)</sup>. Generally, Singapore is considered that, in spite of strong government power, many challenges are made to realize adventurous idea based on conceptions derived from private sectors. This is symbolized in Subordinate Court's tackling of IT and Singapore Jurisdiction Academy's valuable activities in these days.

On October 5, 2001, a new arbitration law was adopted by Singaporean legislature<sup>44)</sup>, revising chapter 10 of the Arbitration Law covering domestic arbitral procedures. UNCITRAL model law has been already a part of international arbitration law in Singapore since 1995. The new law has many features introduced from the model law.

## B. Major ADR Institute

### (a) Major ADR Institute outside Court

#### 1. Singapore International Arbitration Centre (SIAC)

Established in July 1901, this center is engaged in promotion of international arbitration and is under the wing of Singapore Academy. This academy is chaired by the chief judge of Supreme Court and is operated by board of directors, members of which are mainly judges of Supreme Court. Therefore, SIAC has a governmental background like SMC mentioned later.

This center handles arbitration and conciliation of all commercial disputes. Procedural period varies from less than 6 months to 2-3 years depending on degree of complexity and an amount in issue. During a period from its outset to June 2001, 533 cases were handled. In the recent 2 years, average 86 cases a year were accepted, of which about 70% was international cases.

Singapore is a signatory country of the New York Convention and arbitral

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42) It increased from about 4,000 cases in 1998 to over 8,000 cases in 2000.

43) Japan-based companies in Singapore usually take a safe way by choosing arbitrations at International Chamber of Commerce. This is because they have neither reliable information about SIAC nor enough knowledge about ADR system in Asia. In addition, in usual business practice where ADR clause is included into an agreement at final stage of negotiation, non-Japanese party of the agreement (from foreign country other than Singapore) tends to insist to bring a dispute to an institute in its home country. There was a case that, in spite of higher cost paid to ICC, its arbitration was held in a room of the City Hall Building where SIAC is housed.

44) The full text of the report is available on

<http://www.agc.gov.sg/publications/arbitration/arbitration.pdf>

award is executed in the same way as judgment of court. Procedure at SIAC finishes within 3 months in most cases.

Expenses is said to be lower as compared with those in major international cities<sup>45)</sup>. SIAC requests parties to pay a half of its fee in advance.

## 2. Singapore Mediation Centre (SMC)

Started its activity in 1997, this center is today the leading organization engaged in operation and promotion of mediation and ADR. Like SIAC, this center is also under the wing of Singapore Academy, sharing an office with it. SMC's normal system is joint mediation by two mediators. At the request of parties to a dispute, a mediation agreement is possible to be given enforceability by arbitral award. Mediation concludes usually within a day and seldom takes more than 3 days though 2-3 days are spent in some cases. SMC has ever handled a dispute over a plane's interior design arisen between well-known airlines. Fee is required to pay in full in advance and its amount varies depending on an amount in issue<sup>46)</sup>. SMC handled 585 cases by May 31, 2002 (175 cases a year on average), about 75 % of which reached an agreement through mediation. As SMC is independent of SIAC, it is not provable that ruptured cases at SMC are brought to SIAC.

### (b) ADR Institute inside Court

#### 1. Primary Dispute Resolution Centre (PDRC)

This center is founded under article 321 of Subordinate Court Act. Mediation at

45) It differs depending on a sum in issue. There are 8 different grads based on a sum in issue. If a sum in issue is below S\$50,000 (about 3,400,000 yen), its arbitration expense are 3% of the sum in issue (with minimum charge of S\$500 (about 34,000 yen)). It increases, by degrees, in proportion to a sum in issue (though ratio of expenses against the sum in issue decreases). If a sum in issue is over S\$10,000,000, it is S\$750 (about 1,580,000 yen) plus 0.05% of an amount for a portion of the sum in issue exceeding S\$10,000,000.

In addition, arbiter appointing charge of S\$500 (about 34,000 yen), hearing room rent of S\$400 (about 27,000 yen) per day, and tribunal room rent of S\$300 (about 20,000 yen) per day are required.

46) If a sum in issue is below S\$250,000 (about 1,700,000 yen), the fee is S\$750 (about 50,000 yen) per day per head of the parties. If a sum in issue is between S\$250,000 and S\$1,000,000, it is S\$1,500 (about 10,000 yen). If a sum in issue is between S\$1,000,000 and S\$10,000,000, it is S\$2,000 (about 135,000 yen). If a sum in issue is over S\$10,000,000, it is S\$2,500 (about 170,000 yen). However, if many parties are involved in one case, the fee is S\$9,000 (about 600,000 yen) per day in maximum.

In addition, the each party is required to pay S\$125 (about 8,500 yen) for room rent and administrative expenses.

The above amounts are based on the rate revised on February 14, 2001.

subordinate court is introduced in 1994 as Court Dispute Resolution (CDR), and Court Mediation Centre was established in 1995. The center changed its name to PDRC in 1999, and established e@dr to entrust it with cases to be handled via the Internet<sup>47)</sup>.

Number of CDR was 1,113 cases in 1995, 89% of which was mediated. The rate of successful meditation surprising increased in 1999 to 97% out of 4,640 cases in total. After it changed its name to PDRC, 8,160 cases were handled in 2000. Although its mediation is not compulsory, the parties are required to participate, prior to examination, in consultation held by a court as a part of its administrative procedures. Mediation is conducted for one hour in a day in maximum and for 3 days at the longest. When an agreement is reached, it is recorded as consent decision or judgment. The service is free of charge.

## 2. Industrial Arbitration Court (IAC)

This is a labor-management arbitral court established in October 1960 to settle labor-management problems and disputes between managements and labor unions, and retains a same position as High Court though it is not an agency of High Court. Fundamental law for this court is article 136 of the Labor Relation Law.

Strictly speaking, it is not compulsory for parties to entrust IAC with mediation. From the viewpoint of public interest, however, the Minister of Labor or the President is entitled to request parties to entrust IAC with mediation of labor dispute. Frequency and length of negotiation and mediation varies depending on case, but arbitral examination concludes within a day in most case. Examination is usually open to the public. Ruling made by court is regarded as an order or a judgment of High Court. IAC charges fee ranging from 10 Singapore dollars (about 675 yen) applicable to institution of a lawsuit to 50 Singapore dollars (about 3,400 yen) applicable to preparation of mediation by a registrar.

## (6) Thailand

### A. Present Situation of ADR

It is very recent phenomenon that modern ADR has developed in Thailand. For settling disputes in Thai society, personal connections is traditionally playing an important role, and it is also prevalent to rely on influential persons paying money

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47) URL of e@dr is <http://www.e-adr.org.sg/eadr.html>. The world is paying attention to the electronic dispute solution system launched in September 2000. Please refer to "On-line ADR System in Singapore" by Kanji Kawamura in page 2 and below of "JCA Journal Vol.47 No.12" (in 2000).

to them as if it is fee. Under the circumstances, the most popular way to settle disputes is arbitration. ADR clause is usually included in commercial agreements, involving a large amount of money, concluded between domestic companies and foreign companies. In the case of agreements concluded by Government and those related to its agencies, arbitral institute of the Ministry of Justice (under jurisdiction of Judicial Department at present) is selected in the most cases, as the Secretary of Justice is always the legal adviser of the Government side.

The Arbitration Law 1987 is scheduled to be revised by the end of 2002. Draft for the revised law is based on UNCITRAL model law. As Thailand is a signatory of the New York Convention, arbitral awards obtained in its member nations are executable in Thailand and vice versa. In order for the award to be executed in Thailand, the party is required to present the case to a court pursuant to article 34 of the Arbitration Law of 1987.

Usually 3-4 months are required for its procedure.

## B. Major ADR Institute

### (a) ADR Institute outside Court

"Arbitral agency under jurisdiction of judicial department" (formerly under jurisdiction of the Ministry of Justice) handling arbitration and mediation is the arbitral center, and has been functioning successfully for a long time. At its outset in 1990, it handled only one construction dispute. But, about 100 cases were brought to it in 1999. For your study, number of lawsuits accepted for the first trial was about 850 thousand cases in 2000, showing overwhelming dominance of judicial body.

Arbitration in Thailand is fairly expensive as compared with trial. Cost of trial in Thailand is fixed at 2.5% of an amount in issue with upper limit of 200 thousand bahts. To the contrary, arbitration expenses vary depending on an arbitrator's remuneration. It is not a rare case in Thai ADR market that an arbitrator is paid at least a sum amounting to 7 figures in Baht. Cost of mediation and negotiation is lower than that of trial.

### (b) ADR Institute inside Court

Domain of "mediation inside court" under Thai law is similar to that under Japanese law. As a result of recent revision of Section 20 of the Civil Procedure Law, judges are authorized to provide "individual meeting"<sup>48)</sup> in the course of

48) This is a interview held one after the other (caucus). Ratio of successful mediation is said to have increased by this method.

mediation, subject to approval of the parties.

### **3. Summarization of Each Country's ADR**

It entails some difficulty to compare each country's ADR system across the countries. Because of difference in history and culture of each country, same term is often used for different meaning depending on country and person. Definition of Mediation and conciliation is not same. In the first place, what is ADR? Whether or not arbitration (aside from negotiation) is included in ADR is something to do with true nature of ADR.

At any rate, summarizing data collected from the countries, I can point out as follows:

#### **(1) Relation between Litigation System and ADR – System Design from Viewpoint of National Expenditure**

First of all, there is no country where litigation and ADR are systematically and clearly separated so that the former facilities are provided by government agency and the latter by non-governmental body. This is a result that each country has somehow been overcoming only immediate problems with their wisdom case by case. In my opinion, however, the countries are divided into two types, litigation-oriented type and ADR-oriented type. The former is characterized by users' great reliance on litigation system and/or ADR inside court. Korea, Singapore, Thailand and Japan belong to this type. If litigation should be used by everybody as the last resort, the government must be responsible for rendering the service to its people at reasonable charges, to say nothing of their right to be tried. Under the circumstances, litigation will be necessary to be supported by government subsidy. The latter means that ADR is very much preferred to litigation by people. This is reflection of people's dislike and avoidance of litigation owing to their complaints against long duration required for litigation and/or distrust in judicial authority itself. Australia, China and Indonesia are classified in this type. It is difficult to say which type is better, as it is a matter of balance between maintenance of litigation system and promotion of ADR system. In the intraregional countries, litigation system is relatively playing a major role as facilities to settle disputes though it involves many problems unsolved yet. It is a task of these countries to develop well-balanced litigation system incorporating various types of ADR. Each country is today making progress toward such direction.



## (2) Policy to Encourage Use of ADR – System Design from the Viewpoint of Total Cost

As a part of litigation system reform, each country is actively promoting the policy to encourage use of various kinds of ADR. Governments, users and ADR institutions are required to make a system design for ADR from the viewpoint of total cost.

### 1. Compulsory Use of ADR for Dispute in Specified Field

Mediation-before-litigation-system is exemplified in Farmer's Debt Act in Australia and Land/House Lease Law in Japan. China has labor-mediation-before-litigation-system. In Vietnam, commercial disputes are required to make negotiation in advance under Section 239(1) of Commercial Law. It is said that there are some countries where the Governments does not practically approve any joint venture agreement that has no disputes settlement clause specifying use of arbitration at said country's arbitral institute. If it is so, the arbitration is compulsory in the country. Even if taking into account actual situation of said country, such policy is necessary to be reviewed from the standpoint of promoting transactions among the intraregional countries.

### 2. Monetary Incentive to Parties

In Korea, application cost of mediation at court is one fifth of that for litigation. In some countries, an idea is in progress towards realization so that application fee is refunded if a dispute is mediated. In German, as one of policies to encourage use of ADR from lawyers' side, an incentive is introduced to their remuneration under Federal Lawyers Remuneration Law. There may be a country where lawyers are obligated to make an advice to their clients so that they may try another method to settle a dispute before they bring it to a court, thus enabling the clients to reduce expenses.

### 3. Publicity Work and Information Provision

Importance of publicity work is referred in the chapter concerning KCAB's activity in Korea. In Japan, an establishment of official organization to provide information of various arbitral institutes and a launching of internet portal site for ADR are becoming the topic of conversation.

Generally speaking, in order to encourage use of ADR as policies as mentioned above, authorities concerned should provide users with various choices, making use of ADR's advantage from standpoint of civil judicial improvement<sup>49)</sup>. In reality,

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49) "Towards Expansion/Activation of ADR" by Kazuhiko Yamamoto in 6 page of "NBL No. 706" (in 2001)

however, it can not be denied that users utilize ADR because of defects in litigation, and judicial agencies use ADR inside court because of its low cost. But, this should not be criticized. There is a merit that it enables trials to concentrate on only proper cases suitable to litigation. In this sense, the policy to request compulsory use of ADR may be reasonable under some circumstances. Therefore, taking both the idealistic discussion and the realistic discussion into account, it becomes necessary to solve a question who should bear expenses.

### (3) Public Sector's Active Role

No matter what the promotional policy is, number of cases brought to ADR is actually far less than that of litigation. Only ADR inside court is increasing in terms of accepted number of cases. ADR inside court is characterized by its advantage of enforceability as compared to Australian civil mediation etc. It may sound paradoxical, but active role by Public entity including courts is also expected in ADR system. On the other hand, in order to create and utilize various private civil mediation facilities, whose mediation procedure does not take long, it is necessary to introduce information technology into ADR system and prepare training system for high quality staffs. An indication is already appearing in Korea and Singapore that IT oriented ADR will become popular in the future<sup>50)</sup>. Government's role as a catalyst may be expected in this regard including staff training system. However, as there is a difference in basic function of judges between civil law line countries and common law line countries<sup>51)</sup>, it may cause some difference in such roles, though

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50) As to the trend in the world, "Internet Society and ADR (the first book)" by Yasutaka Machimura in 6 page of "NBL No.689" (in 2000)

51) Judge Ueda Takuya's opinion is as follows: with regard to conciliation during proceedings, it is reported that judges persuade parties to make them compromise in Thailand. The subject whether conciliation during proceedings is included in ADR or not is worth to be discussed. In Japan, a judge presiding proceedings also plays as an intermediate role for conciliation at a certain stage of the proceedings, and, upon the parties failing to reach conciliation, the same judge adjudicates the case. However, this situation is rarely recognized as a problem in Japan. To the contrary, a judge is an umpire under traditional common law. Therefore, it is inconceivable that a judge persuade parties to make a compromise. In the case of court-annexed mediations in Singapore and Australia, a case is sometimes brought out of the court and mediation is conducted by a mediator who is a third party entirely unrelated to the court. Even if mediation is conducted inside a court, it is a part of pre-trial conference process, and the mediator is not a judge but a registrar. Accordingly, there are large differences among ADR systems in each country depending on judges' role during dispute settling process in judicial system. The report on Thailand referred to the difference in substance of ADR between ADR based on adversary system and ADR on judiciary system.

the difference between the two lines is likely to be rapidly dissolving. Anyway, Government's role is necessary to be reviewed in these countries in the future.

#### (4) Self-help System and ADR Characteristic

An Australian panelist pointed out at a symposium that "the most important thing for ADR is to have parties to a dispute reach an agreement but not to make the agreement enforceable". For the purpose of settling disputes in the region, a preferable structure is that parties to a case voluntarily perform an agreement reached by ADR even if the agreement has no enforceability.

Regarding characteristics of ADR in these countries, a common recognition was obtained as follows: 1. saving of time and money, 2. flexible procedure, 3. flexibility in result of settlement, 4. maintenance of friendly relationship between parties, 5. confidentiality, 6. procedure handled by specialists taking case's nature into account. If arbitration is included in ADR, the above 1 and 4 may be questionable. As it is matter of degree, however, it is rather difficult to say that ADR with arbitration included is different from the other ADR in terms of quality.

#### (5) Improvement of ADR Institutes and Level up of ADR Staff Quality

Even if encouraged to use, unless ADR satisfies its users, it will not supported by general public, and will result in disuse in the final analysis. It is injustice to force people to use ADR of inferior quality. Therefore, while promoting establishment of ADR institutes, it is necessary for both governments and non-governmental bodies to provide a system to maintain quality of mediators and arbiters in charge of ADR. As to the above quality, it is necessary to prepare qualification system and permanent training system for these staffs.

Many countries have arbitral institutes (in broad sense) as government agencies to handle international commercial disputes, namely KCAB in Korea, SIAC in Singapore, CIETAC in China, the arbitral agency of the Ministry of Justice in Thailand, and BANI in Indonesia. Each of them handles fairly large number of international commercial disputes. In Japan, however, in spite of strenuous publicity efforts made by the Japanese Commercial Arbitration Association, the representative arbitral institute in Japan, number of cases handled by it is disappointingly small in comparison with Japan's economic power.

There are also mediatory organizations to handle international commercial disputes. Korea's KCAB provides mediatory service as one of its menus in addition to arbitration. China and Singapore have mediation center established separately. It is a trend that not only arbitration but also meditation is actively encouraged to use.

Further, there is industry-type ADR organization. One of such ADR in Australia is successful mainly handling financial disputes.

There are also general-purpose-type ADR to handle all kinds of commercial disputes and specific-purpose-type ADR to handle only limited types and fields of dispute. In Korea and Singapore, various types of ADR including the two types are available. To cope with new kinds of dispute arising out of electronic transactions and IT related intellectual property rights, ADR facilities capable and suitable to settle such disputes are increasing. Its examples are Korea's Electronic Commerce Mediation Committee (eCMC) and The Program Deliberation & Mediation Committee (PDMC). Special-purpose-type ADR is rapidly increasing also in Japan since the establishment of a liaison committee between Ministries concerned<sup>52)</sup>.

By the way, LEADR in Australia is a NGO/NPO originated from recognition of litigation's defects by general public and some lawyers. This NGO/NPO provides training programs for mediation, granting qualification to mediators. In addition, they are engaged in publicity activity for ADR, which includes introduction of mediation and releasing of model mediation clauses.

While, preparation of ADR facilities under both Government's leadership and NGO/NPO's activities concerning ADR are highly appreciated, it is worthwhile to consider that mediator's qualification is granted to those who completed training programs sponsored by NGO/NPO in compliance with a certain requirements. As to arbiters for international commercial disputes, each country has a list of candidates including domestic and foreign businessmen/scholars with enough knowledge of international transactions. Therefore, training programs for arbiter is not an urgent need. To the contrary, in order to promote mediations for domestic general commercial disputes, it is necessary to control quality of mediators by making it compulsory for mediators to take a training program and acquire the qualification.

#### (6) Reform of ADR Procedure

Common recognition was also obtained that ADR has both advantages and problems in it.

##### 1. Provisional Remedies/Interim Relief by the ADR Institute

Singapore SIAC has a wide range of authorization including injunctive relief and interim injunction to prevent dissipation of assets. There is an opinion that

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52) Development of housing performance warranty system, introduction of arbitration as a result of the revision of Eminent Domain Law and so on have caused "the explosive increase in application for ADR".

preservative measure in ADR should be left to a court. However, if it is handled by a court, more serious consideration is paid at examination before determining a right to be preserved. To the contrary, in such country where reliance on judicial system is not enough, an independently authorized arbitral tribunal may be expected to be established, considering that total dependence on judicial system is very risky.

## 2. Tolling the Period of Statute of Limitation

There is a report from Australia about opinion that, if a period of statute of limitation is threatened to expire during mediation, a lawsuit should be instituted first and then mediation should be referred to during the proceedings. To prevent unnecessary avoidance of litigations, it may be better to design a system taking into account the problem of stoppage of statute of limitation during mediation.

## 3. Enforceability

There are few problems about arbitration. In the every country, which is all member nation of the New York Convention<sup>53)</sup>, arbitral awards are principally enforceable. However, there are difference among the countries in rules and operations of proceedings in which enforceability is given. This is due to a difference in degree of examination conducted during the proceedings.

To the contrary, agreements reached through mediations usually have no enforceability to execute attachments with the exception of mediations or conciliations inside court. In Australia and Singapore, if mediation reaches an agreement successfully, same content as in the agreement is held. Korea has also a system where an official record of conciliation is given same effectiveness as a judgment. This system is understood to be same as judicial mediation system in Japan.

## 4. Serving as Mediator and Arbiter Concurrently

This problem is commonly seen in mediation inside court and conciliation during arbitration. In Thailand, in accordance with conciliation procedure during proceedings, parties to a lawsuit is entitled to evade a judge conducted a conciliation which has ended up with unsuccessful result, preventing presupposition

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53) However, it is said that there is a country where an execution title given by a ruling of an international commercial arbitration was rejected and became unenforceable.

From the viewpoint of country risk, those who engaged in international businesses have much concern over each country's position as to whether it is a signatory of New York Convention or not. See "International Projects/Business" compiled and written by Yoshio Saito/Yasushi Kinumaki and published by Bunshindo in 2001. This shows popularity of arbitration among parties involved in international disputes.

by the judge. In Australia and Singapore under influence of English law, no judges are involved in mediation at all. There is completely no common jurisdictional culture in the region to make an objection against the serving as mediator and arbiter concurrently.

If a judge or an arbiter is same person as a mediator or a conciliator, parties seeking mediation becomes to be hesitant in exchanging frank opinion during the mediation for fear of possible effect to final judgment or arbitral award. Therefore, it is worth to discuss the subject whether not same person can assume the both positions concurrently, an agreement by both parties to a dispute should be prerequisite for the concurrent serving, and at least one of the parties should be entitled to evade it.

#### **4. Hypothesis**

##### **(1) Hypothesis 1: Arbitration is not Included in ADR**

This is related to essence of “voluntarily” settlement of dispute. Arbitration is to entrust a neutral third party with settlement of a dispute. Therefore, it is not aimed at “voluntarily” agreement reached between parties to a dispute. Arbitration should essentially be a means to quickly settle a dispute by a specialist, as seen in Australia. But, as longer time is required than litigation, arbitration becomes to be considered as an inferior system than litigation. And, ADR that eliminates the trial methods of litigation becomes to be considered as the genuine ADR. In this sense, it is the ADR that encourages settlement of a dispute through an agreement reached by parties to a dispute<sup>54)</sup>. Important thing is not to determine facts and rights in the past, but to establish a relation between parties towards future, in which cost can be concentrated. There is an example of mediation in China that parties to a joint venture dispute reached an agreement to rearrange scheme of the joint venture scheme to overcome the dispute. Neither judgment nor arbitral award can achieve this kind of settlement. As the example shows a characteristic of ADR, it is informative for exploring an type of ADR for the future. It will become necessary to redefine ADR in the future.

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54) The similarity between litigation and arbitration is observed in the fact that an alternative resolution settlement is compulsory to parties to a dispute under the Arbitration Law 1999 in Indonesia, and the both are common in the point that a third party gives a binding ruling to parties to a dispute under laws after the parties have thoroughly argued each other. These indicate that ADR is useful as a consensual process aiming at an agreement to be reached by parties to a dispute, thus offering an alternative method to settle disputes.

## (2) Hypothesis 2: ADR is Expensive

If ADR is discussed from the viewpoint of cost, who should bear the cost to settle dispute and how it should be born are the subject. Cost of litigation is born by nation, while that of arbitration is at user's expenses. ADR of low cost on user's side is available at a sacrifice of neutral parties who voluntarily bear the cost. If cost is born by users, ADR can become a business. ADR to substitute litigation can be said as business-type ADR, while ADR to supplement litigation as social service-type ADR.

Many people are already aware that cost of ADR is not necessarily always low. Especially, the business-type ADR is expensive because remuneration of neutral intermediaries is high and examinations are held in luxurious hotel rooms or skyscraper offices. In this case, it is a merit that users can save time to settle their disputes. Social service-type ADR, exemplified by judicial mediation system in Japan, has established itself as low cost ADR and is now seen here and there in the world. ADR handling environmental disputes in U.S.A is this type. In Germany, ADR often means facilities to handle a case involving relatively small amount of money. From viewpoint of promoting ADR properly towards the future and preparing systematic training system for its operating staffs, it will be necessary to put importance on business-type ADR.

## (3) Hypothesis 3: ADR is "the Second-class Justice"

Although fairness in ADR is stressed<sup>55)</sup>, all the fairness in ADR can not be same as that in litigation and arbitration. ADR can not be called as "the second-class justice" as it is time saving and less expensive thanks to its ingenious flexible procedure. Variety of opinion is generated from differences in understanding of justice. It can be said that ADR does not conflict with the rule of law at all. On the contrary, it supplements quality of the law from another angle, dissolving irritation against rule of law. In order to expand ADR by making good use of its mobility and flexibility, it is worthwhile to dare to place ADR at "the second-class justice" position at its outset, in the sense that ADR is not same as litigation for determining substantive rights. By such positioning, it is expected to find imperfection of ADR arising from the positions that it can be corrected as much as possible. Even if there is a lack in function of ADR, it does not matter. It is not a problem that ADR is unenforceable. In Australia, no agreement reached through mediation is seldom unperformed. No discussion will result in a conclusion that ADR should have

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55) Yoshitaka Hayakawa, "Critical Study on ADR in Japan", Rikkyo Hogaku No.54, p. 174, 2002.

enforceability.

(4) Hypothesis 4: Strengthening of ADR and Weakening of Litigation

If litigation becomes weak as a result that “the second-class justice” plants its roots firmly, litigation would become to be ignored in Australia, where ADR is in full flourish. In reality, however, strengthening of ADR is rather likely to be contributing to make litigation to evolve, as exemplified in its judicial system ingeniously incorporating ADR. This shows a coexistence of ADR and litigation. There is no contradiction between expansion of ADR and improvement of litigation, both of which are promoted in each country. Here is a booklet, “Citizens = Clients, Server = Enterprise Judiciary”, published in 1997 by the Ministry of Justice of the Republic of Austria, which gives us rather quiet impression compared to Germany. This deals with a measure to be taken for strengthening judiciary by introducing IT technology. Meanwhile, the Supreme Court’s technology center with the most advanced equipment in Singapore is very famous. Litigation strengthening policies of these countries must have favorable effects to ADR. Thus, informal system is making progress amid formal system, while formal system is in progress amid informal system. The two systems will not likely to be mixed together, but will likely to show their own usefulness respectively.

(5) Hypothesis 5: Domestication of International Benchmark and Globalization of Domestic Standard

Domestication of international benchmark is seen in two aspects. One is that an international standard is rapidly becoming a backbone of domestic standard as symbolized in the fact that each country is adopting the UNCITRAL arbitration model law in rapid succession. Another is that, under the circumstances as the above, rules of both international (commercial) arbitration and domestic arbitration will be unified into one code with the two rules becoming basically same. New arbitration law in Japan aims at this direction as well. German law and Korean law are already ahead of Japan in this regard. When discussing ADR, the above two movements can not be ignored. Certainly, much more than systems for promissory note and intellectual property right, arbitral system will be inevitably universalize because of the technicality involved in its procedure. However, in order for Asian countries to introduce international standard into their domestic legislation, even the above former point needs to be discussed separately. As judicial system and its operation vary depending on situation of each country, it is necessary to take such actual situation into account in sharing the functions between ADR and judiciary.



As ADR including arbitration has to be positioned in relation to the civil judiciary in a narrow sense<sup>56)</sup>, a more prudent approach is necessary for domestic standards, especially in Asian and Pacific countries. For example, it is quite probable that a system designed to supplement imperfections of the ADR system with judiciary backup is impossible or inefficient depending on the situation in the said country.

Further, it cannot be denied that UNCITRAL, UNIDROIT, or INSOL will lead to universal domestic standards for participating countries, although it is necessary that such a country's standard is highly reasonable for it to be supported on the international stage. However sufficient permanent stages are not available at present, while sporadically held symposiums have their own limitations.

Arbitration is a subject that these countries can discuss on common ground, as arbitration adapts itself to foreign surroundings and causes comparatively little friction within the region. Indonesia, Korea, Singapore, and Thailand have either enacted or are preparing to enact an arbitral law based on the UNCITRAL model law. Arbitration as the mainstream of ADR in China is getting attention around the world. Accordingly, it has become an urgent task in the region to develop an arbitral system for international civil commercial disputes by preparing an arbitral law, and it is increasingly becoming necessary to draw up a regional model law with an Asian flavor that is slightly different from the UNCITRAL model law.

## 5. Conclusion

Increased interest in ADR in the region is derived from various reasons such as a market mechanism rooted in complaints about litigation, strong leadership from governments, and/or overall reform of the judicial system. These combine in a delicate but complicated manner. Who should bear expense to settle a dispute is a subject still to be discussed regarding ADR.

There are two models for solving the problem. One is to focus on an investigation of facts in the past, from which a forecast of consequences is possible. Another is to ask for new ideas to settle the matter in the future, while shelving the facts in the past. Although it is not easy in reality to separate the two models completely, ADR excluding arbitration is undoubtedly classified in the latter. Its demerit that it is unable to forecast a consequence will be sufficiently compensated by its merit that it enables self-selection in the future.

The above is merely a summary of a small part of the fruits obtained by the

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56) In "Judicial System Reform and ADR" by KOJIMA, Takeshi in p.10 of "Jurist No.1207" (in 2001), ADR is included in "judicial system in broad sense", "judicial system in large character", "pan-judicial system".

Taskforce. Each country's efforts to develop ADR will undoubtedly contribute to intraregional transactions in the Asia and Pacific region, making it more active and smoother in the future. I think strongly that the Asian Study is just at its outset and the system design of the Asian model including staff training is still quite open to everybody. We hope that the product of our study will be of some help in developing ADR theory in the future. At the same time, we hope that the Asian Study will make further progress so that it is regarded as an advanced study rather than heterodoxy study, and is properly positioned in the mainstream.

