

The ADR Basic Law

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1. Review of the Details of the ADR Basic Law

(1) The Judicial System Reform Commission

In Japan, up to now legislation regarding alternative dispute resolution (“ADR”) has been sporadic. For example, with respect to judicial-type ADR there are laws such as the Civil Conciliation Act (for civil mediation) and the Domestic Causes Inquiries Act (for domestic relations mediation), and there also are several laws that establish the basis for administrative-type ADR. There have been no laws, however, that comprehensively provide for a coherent format for ADR. There have been calls for the enactment of such a law from academic circles and others (see Ishikawa et al., mentioned below) but this has not been realized. Now, for the first time the Report of the Judicial System Reform Commission has set forth the aim of actually enacting such legislation.

From its very establishment in July of 1999 the Judicial System Reform Commission took up as one of its points at issue the practical use of ADR, and its Report (see below) promulgated in June of 2001 set out in concrete form a clear course for the fulfillment and activation of such use. Namely, the Report first of all established the basic recognition that, “In addition to exerting special efforts to fulfill the functions of justice that are the core of the judicial system, plans should be devised to expand and activate ADR so that it may become an attractive choice for the citizens in addition to judicial proceedings.” And as a concrete plan therefor, on the one hand the Report provided that, “In order to facilitate the cooperation of the courts and related organs and governmental entities, a system of liaison councils with such related institutions and liaison meetings with related ministries and governmental entities should be established” and, at the same time, it proposed that arrangements for a common system for ADR be made. As one link in such construction of an ADR system, the Report recommended that, “There should be a study of necessary policies for bringing into the field of vision laws (such as the so-called “ADR Basic Law”) that provide for a basic framework for the promotion of the utilization of ADR and the strengthening of its collaborative use with judicial proceedings.” This was the first appearance in Japan of a schedule for the setting up of a concrete system for an ADR basic law.

(2) The ADR Study Group

Based on the Report of the Judicial System Reform Commission, the Government established a

structure for promoting the reform of the judicial system. In the plan for the promotion of reform of the judicial system that resulted from a Cabinet decision in March of 2002, it was provided with respect to ADR that, "Necessary policies to promote the use of ADR should be examined, including the drafting of legislation that would provide the basic framework for an association to work in collaboration with judicial procedures, and the necessary measures therefor should be devised by March of 2004 at the latest." For the purpose of such inquiry, the ADR Study Group (Chair: Professor Yoshimitsu Aoyama) was formed under the Judicial System Reform Promotion Office set up by the Cabinet in December 2001, and it commenced study in earnest in connection with the preparation for the basis for such a system.

The ADR Study Group consists of eleven members; in addition to experienced academics, judges and lawyers, there are persons experienced in the practical workings of ADR. Since February 2002, study has been advancing at the pace of about one meeting a month, and up to the present time, the end of September 2002, seven meetings have been held. As mentioned above, up to now the legislative issues concerning ADR have not necessarily been examined sufficiently; since there are no easily adaptable models in other countries, the study is proceeding with caution. In the Study Group, first of all there was discussion of the basic, general thinking of the members about setting up ADR. This was followed by the work of searching for a common basic understanding, through hearings with ADR organizations and users (consumer groups, industrial organizations and labor groups), a judge, a prosecutor, a lawyer and other professionals concerning the justice, and so on, as well as by conducting a questionnaire survey of ADR organizations. After that, discussions were held on the detailed points. At present almost all the general issues have been examined but from here on additional intense study is planned so as to meet the 2004 deadline for preparing the law.

2. Contents of the ADR Basic Law

(1) Basic Thoughts on Preparation of the Law

As mentioned above, this is the absolute first attempt in Japan at the preparation of a comprehensive, universal law for ADR, and even abroad there are not many examples of such a legal system. Even though most countries have some provision or other regarding ADR, they take the form of being drafted either from the viewpoint of ADR's relationship with civil litigation, with a portion of ADR being a preface to a lawsuit (as in Germany), or of a court referring the case to ADR and then adjudicating the effect of the result of the ADR (as in France). Further, the United States has enacted a federal ADR law but there, too, the contents of the provisions center upon the relationship between judicial procedures and ADR, such as with respect to the obligation of the courts to utilize and promote ADR and to the conditions for referring a case to ADR. In that respect, in my view there is no country that has devised an arrangement for a comprehensive ADR law. (There is a report that in Italy a bill for such a law has been presented to the parliament but this cannot be confirmed.) Consequently, the test that is being carried out in Japan is the first in the world. The contents of the issues now being discussed shall be introduced below (it being understood that these are wholly my personal opinions and reflect nothing more than a preliminary

sketch of the current stage of the undertaking). Further, as is commonly known, in June of this year the UNCITRAL General Meeting adopted the UNCITRAL Model Law on International Commercial Conciliation. The application of this model law is to be limited to mediation in international commercial matters only, but it will be necessary to pay sufficient attention to this law when considering legislation for Japan.

To generalize how the rules for ADR procedures should be, it is desirable that as much as possible the self-governance and autonomy of the ADR organization should be respected. This point is related to the question of why ADR should be promoted and enhanced. If ADR is to be an attractive alternative to a judicial proceeding, as indicated in the Report of the Judicial System Reform Commission, with the objective being to perfect ADR so that it can serve to assist disputing parties as a means to settle various types of disputes, the idea is not to put ADR in one uniform frame so as to provide a uniform service. Rather, it should be understood that the proper role of ADR is to offer a variety of ways in accordance with each particular ADR procedure and organization, letting the users of the ADR service make the selection on their own responsibility, and as a result allow the users to choose the most suitable method to meet the needs of those users for dispute resolution. Furthermore, it may be difficult to conceive that a particular ADR can provide services that will be better than a judicial proceeding on all points; rather, in order for ADR to be a true alternative to a judicial proceeding it will be indispensable for each ADR organization to exert efforts in “selling” ADR by ensuring that in comparison to a court proceeding or other forms of ADR it will not be inferior with respect to speed, specialty, cost and so on. At such a time, if there is any portion of the ADR that is inferior to a judicial proceeding or other ADR, naturally it will be necessary to resolve that point. That is to say, the minimum rule for an ADR organization is that it is always necessary to pay attention so that in strengthening weak points its strong points are not weakened. Therefore, the establishment of good structures and procedures for ADR should be largely premised on enactment of a law that allows each ADR organization to have its own original character. Thus it is indispensable that the system of laws and rules respect the self-governance and autonomy of the ADR organizations as much as possible.

(2) Image of the Entire Legislation

As previously mentioned, the basic proper way to set up a system for ADR is to primarily give precedence to each ADR organization’s self-reliant efforts and to cooperation among the organizations. The enactment of a national law should be carried out in a manner so as to supplement the parts of such efforts that have limitations. From that viewpoint, the items comprising the draft of the law should include the following: (a) matters that cannot be given the desired legal efficacy by means of the rules of the organization and the agreement of the parties; (b) cases in which it is especially desirable to have fixed laws and regulations to encourage ADR, as default rules, although it is possible for the parties to reach an agreement; (c) cases in which it is necessary to have an irreducible minimum of regulations to maintain trust in ADR; (d) matters for which it is desirable for the nation to indicate the abstract course that should be taken when considering the best form of ADR in the future.

Drawing from such premises as mentioned above, the manifestation of the stance to be taken by the Government in dealing with ADR must first be confirmed. The nation has enunciated that it will be responsible for setting up ADR, and by making clear the duties of the persons who are in charge with respect to ADR the base can be built for initially instilling a feeling of trust in users with respect to ADR in general. This will be a matter of dealing with the so-called basic law portion of the system of laws.

Next, in order to compete with judicial proceedings and provide an alternative service to users, it will be important to establish a definite, systematized base. This is a matter of regularizing a form for providing uniform efficacy with respect to ADR organizations that fulfill several requirements, so it is an issue of dealing with the so-called facilitating laws portion.

The basics of the ADR system of laws was treated above, but in order to eliminate defective ADR there should be a requisite place for a minimum of regulation. However, even in such cases, to the extent possible direct regulation should be avoided, as can be seen from the tenor of the explanation set out above. The ADR organization should have a duty to disclose certain designated information and the final selection should be left to the judgment of the users based on that information; to wit, selection of the ADR organization should be left to market forces. Accordingly, the best way to set up so-called general principles laws (regulatory laws) is to first of all codify fulfillment of the disclosure of information and, only in cases where that is thought to be insufficient to establish direct regulatory rules .

(3) Provisions of the Basic Law

In the regulations of the Basic Law there undoubtedly will be provisions on the duties of the relevant organizations and individuals as to ADR. There will be many different subjects under the regulations, but these will certainly include the obligations of the nation, of the regional governmental bodies, of the ADR institutions, of the ADR officials and of the parties. With respect to the nation, the obligation to establish a base for encouraging ADR should be recognized, and also with regard to regional governments and the like it should be confirmed that they will make certain contributions to promoting forms of ADR that will be convenient for their citizens, through extension of their current services offered to citizens, such as offices that offer counseling on legal matters.

Moreover, the ADR organizations should be obligated to abstractly indicate their general policies about the best way to operate ADR institutions in the future; for the healthy development of ADR it will be desirable for this to be made concrete in the rules of each ADR organization. It can be hypothesized that the details of such concrete provisions should include the obligation to expand access to ADR, the obligation to treat the parties impartially, the obligation to develop and train the talents of ADR officials and staff, the obligation to ensure that ADR procedures are transparent, the obligation to ensure the efficacy of the solution that results from the ADR, and the obligation to

publicly announce the results of the resolution. On these points, the nation should not only regulate when necessary from the passive standpoint of protecting users of ADR services, but should also, where it is thought necessary, set up regulations from a positive standpoint so as to make ADR an attractive alternative to a judicial proceeding, and so as to encourage in a loose manner the future development of ADR.

Aside from that, it can be imagined that there will be provisions concerning the obligations of ADR officials, parties and so on. For example, with respect to ADR officials presumably there will be the obligation to operate under impartial and fair procedures, the obligation to maintain and foster professional abilities, and the like. And for the parties, probably there will be obligations such as to first consider to use the ADR procedures and to generally cooperate with respect to the procedures, as well as to preserve confidentiality.

(4) Regulations in the General Principles Laws (Regulatory Laws)

The general principles laws can be presumed to be provisions for general rules concerning the organization and procedures of ADR institutions and so on; for example, provisions related to ADR officials' qualifications and the numbers of such persons, challenges thereto, the duty of confidentiality, the manner of notification, the advancement of ADR procedures, procedural standards for language, and so on. In connection with these points, if it is provisionally assumed that the relevant provisions are not compulsory, any rules of the ADR organization that contradict them will naturally have effect and by the selection of that organization by the parties it will be recognized that they have reached a particular agreement thereto, which will be given effect by law. To be sure, in arbitration law there are many such provisions, but since arbitration has the nature of debarring a legal action by substituting for litigation, it is not permissible to have arbitration become stuck in a deadlock for a procedural reason. However, with coordinated ADR, even in the case where the procedure does not progress because of the lack of a default rule it will be sufficient for the parties to bring a lawsuit. On this point, it will not be necessary in the ADR Basic Law to establish regulatory provisions as not compulsory provisions.

On the other hand, if the provisions are hypothesized as being compulsory, the biggest problem probably will be the requisites for the ADR officers. At present, pursuant to Article 72 of the Lawyers Law it is interpreted that a person other than a lawyer is prohibited from supervising ADR as a profession, but it can be said that a consensus is being formed that such a broad regulation is not generally proper. In particular, if the knowledge and techniques required for coordinated-style ADR are taken into consideration, the portion of mediation in negotiations for which it is important to have the knowledge and expertise typically possessed by the legal profession is not extensive, and it is highly necessary to introduce into dispute resolution professional knowledge outside of the field of law. The problem is, if the requirement that a person be licensed in the legal profession is eliminated, what scope of persons should be recognized as being qualified to be ADR officials. Theoretically, there is the option of establishing no requirements at all, but if we think of the present circumstances in Japan, where it is common for antisocial groups to enter into negotiation

mediation and unsuitable persons are introduced into the dispute resolution process, it cannot be thought proper to immediately adopt such a stance. As an aim the following approaches should be considered with respect to persons qualified to conduct ADR: (1) a quasi-jurist approach, in which the qualifications that should be required for an ADR official should be based on those for already-existing qualified persons in the professional fields of law and the like; (2) the negotiation-specialist approach, in which negotiation specialization is given serious consideration and requisites are established to indicate such specialization, with persons satisfying those requisites being allowed to carry out activities as ADR officers; and (3) the qualified ADR provider approach, in which qualifications for an ADR officer are newly established and such qualified persons' activities are allowed.

In addition, it can be envisioned that the minimum rules required of an ADR officer will be stipulated in laws regarding general principles. Typically, these are provisions with regard to the preservation of procedural secrecy and the prohibition of bribery. In connection with arbitration, these points have already been stipulated in provisions, or discussions toward such objective are progressing. Namely, corruption by arbitrators already is subject to punishment (Article 197 et seq. of the Criminal Code), and the following rule is being considered with regard to the preservation of secrets: "Secrets learned in the undertaking of arbitration proceedings shall not be leaked." It would be advisable to stipulate these types of provisions for ADR, including coordinated ADR. Provisions already are in place in connection with the preservation of confidentiality by mediators in judicial law-style ADR; that is, conciliation (Civil Conciliation Law, Article 38; Domestic Causes Inquiries Law, Article 31) and this can be understood to be a basic duty of persons engaged in the resolution of disputes. At the same time, with respect to bribery and corruption, it is necessary to study whether or not penal provisions should be applied to even officers conducting coordinated-style ADR who do not have final adjudicatory authority.

The next thing to be considered is whether or not the duty to disclose information to users should be imposed on all ADR. With this kind of information disclosure meaning the case where, by means of the disclosure of such information, the user of ADR services can understand the details of the particular ADR before it enters into the procedure, even though the basic position of this report is that the user should be presumed to be charged with its own responsibility and while to the extent possible the autonomy of the ADR institution should be respected, and that the discipline of the marketplace will act to eliminate inferior ADR services, this is an important regulation. Generally speaking, by not restricting the contents of the rule itself, this becomes an approach of regulating only the subject matter of the disclosure. Many various things can be imagined to be the subject matter of disclosure but they can be presumed to include such important points as the method of selection of the ADR officers, the "trial" procedures, the time period standards for dealing with matters, and expenses. In any event, information should be stipulated that will be necessary for the user when selecting the relevant ADR in comparison with a court proceeding or other ADRs.

(5) Provisions of Facilitating Laws

Lastly, there are the provisions of facilitating laws. These, by granting a definite positive effect to ADR procedures that satisfy specified requisites, are a set of provisions that have the objective of promoting ADR services that fulfill those requisites. For example, by granting certain ADR procedures that satisfy certain requirements the effect of suspending extinctive prescription (the equivalent of tolling the statute of limitations in common law countries) it can be expected that this will have the effect of promoting dispute settlement by means of that kind of ADR.

Here, the meaning of “promotion” has two facets: (1) by allowing ADR to have equal effect with litigation, it will assure the competitive power of ADR versus litigation and will promote the use of ADR itself and, in addition, (2) by granting such effect only to ADR that satisfies the specified requirements, each type of ADR service will be induced and encouraged to fulfill those requirements. Consequently, when studying the provisions for facilitating laws, both the requisites and the effects will have important significance.

First there are the requisites in the case where legal effect is given to ADR, but this point generally is difficult to discuss, it being necessary to decide on the corresponding relationship of the requisite to the effect that is granted. In that sense, the substance thereof can be subjected to detailed examination but with respect to the methods of checking the requisites the following general classifications are conceivable: (1) the mode of checking in advance; (2) the mode of checking afterward; and (3) the mode of checking both in advance and afterward. Here, checking afterward means the mode in which, generally, the requisites are prescribed in advance and in the event the issue goes to court or the like, the question of whether or not the ADR procedures have satisfied the requisites is individually examined after the fact. And checking in advance is the mode where, with respect to each form of ADR, the facts that will confirm the fulfillment of requisites are examined and certified beforehand, and a certain specified effect is recognized for the proceedings of the ADR organization that has received such certification in advance. Many different combinations can be hypothesized as the concrete methods of checking in advance. First, there can be the following classifications based on the subject matter of certification: certification of the ADR organization itself, or certification of a portion of the procedures of that organization or, then, from the viewpoint of persons, certification of the ADR officials. Second, with respect to the effect of certification, the following hypotheses can be conceived: a specific legal effect is automatically sanctioned, or a legal presumption of legal effect is recognized with regard to the relevant effect or, simply, with only the exclusive name being recognized, a virtual presumptive effect is expected. Third, there can be alternatives with respect to the certifying organization. It is natural to conceive of some national governmental body conducting the certification but perhaps a designated legal person (corporation) or an NPO entity could be used. With the mode of checking in advance, there are the advantages that the possibility for estimating the granting of legal effect is heightened, and along with that being conducive to the convenience of the parties, it lessens the possibility of disputes arising; also, with judgments becoming easier the responsibilities of the courts will be alleviated. But on the other hand there is the fear that the ADR organizations that will be granted legal efficacy will be limited and there will be a distinction between first-class and second-class ADR.

A variety of things can be hypothesized as legal effects that can be granted based on the checking of requisites but the main ones are set forth below. (In addition to those below, it is also possible to conceive of certain ADR as being supported by legal aids) Firstly, there is the effect of suspending extinctive prescription. The recognition of the effect of suspending prescription when an ADR petition is filed can be seen as an indispensable requirement for giving effect to negotiations held in the course of the relevant ADR proceedings. In the case where the parties have entered into negotiations under the control of a third party pursuant to specified requisites, even if such negotiations end in failure, the effect of suspension of extinctive prescription should be recognized if a lawsuit is filed afterwards within a specified time period. Actually, such provisions have been stipulated for civil conciliation and some kinds of administrative-type ADR. However, since the respondent does not have a duty to accede to negotiations, recognition of suspension of prescription should be limited to when the opposing party accedes to the negotiations.

Secondly, there is the granting of executing force . As the result of the agreement of the parties, a result from an ADR has legal effect as a settlement contract, but if a party does not perform the contents of the ADR agreement the other party cannot, based on that ground, immediately carry out a compulsory execution; it is necessary to sue in court. Accordingly, the effect of ADR is minimal and as a result the use of ADR will inevitably be limited. Therefore, it has been suggested that the results of ADR resolutions should be executable. For example, it may be of value to look into means by which executability could be allowed by obtaining an order of execution based on an ex post facto examination by a court with respect to the compliance of an ADR proceeding with the specified requisites. If the party must always go to court it may be thought that ADR proceedings will be less convenient than other currently-existing substitute types of settlement such as summary conciliations and notary certification but under a scheme in which the parties will first go to court after the dispute arises, instead of the current state in which the parties have to go to another institution right after settlement is reached, it will result in only a few cases in which there will actually be a chance of non-performance of the ADR resolution, thereby increasing the aspect of convenience.

Thirdly, there are the various effects stemming from cooperation with judicial proceedings. First of all, the case where the ADR fails and the matter proceeds to a lawsuit must be considered. In such an event, certain information obtained in the course of the ADR can be denied admission in the litigation. Consequently, there is the argument that by thus making it possible to have free negotiations under the ADR procedures and by constructing an environment in which it is easy to reach agreement, the use of ADR will be promoted. (This point is prescribed in the UNCITRAL model law.) Further, in the case where facts are disputed by means of ADR proceedings, the cooperation of the court can be sought for the taking of evidence and the like. In order for the resolution of the ADR to be devised based on the actual facts, it is necessary that those facts be elucidated, so perhaps the compulsory taking of evidence by the court should be relied on. Moreover, in connection with the system under which some cases that once were in the courts are then moved into ADR and in types of cases in which the civil conciliation is compulsory before filing an action , a system can be envisioned in which private-type ADR will be alternative to the

civil conciliation . In Japan, where there is a strong respect for authority, this model, in which cases that go into the courts are then forwarded to ADR, will heighten the people's trust in ADR, and the showing of some successful results in the handling of a certain number of cases will be especially important in bringing about the elevation of ADR.

3. Program for the Future

As related above, it is planned that the preparations for the legal system related to ADR will be done by March of 2004. Until then, the topics that must be examined are numerous, and extremely difficult problems remain about each of the issues under discussion. If Japan is to take up the challenge of being a world pioneer in the matter of setting up a legal system for ADR, it is only natural that these issues thus can be said to be experimental. This international symposium offers an opportunity to receive constructive advice and information from distinguished experts in ADR from various countries, and it will be most fortunate if this will give rise to discussion about the establishment of the ADR legal system in Japan.

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