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# The 11th SOFTIC Symposium Report

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No. 1 Circumstances of Utilization

1. ADR Organizations; Number of Cases Utilizing ADR; Fees

(1) ADR Organizations Other Than Bar Association Arbitration Centers

The below-listed ADR organizations are those that carry out intermediation (mediation) or arbitration, extracted from the list of ADR organizations in the *ADR Utilization Handbook* (Okawa, et al.; Sanseido) (for FY2000).

Where there are blank columns for ADR organizations with respect to the number of cases that utilized ADR (with the number of settled cases shown in parentheses), that means the distinction between discussions/consultations and compromise (mediation) was not clear.

Among the organizations below, those that handled one hundred or more cases of settlement intermediation (mediation) were: The Securities Complaint Consultation Room, The Traffic Accident Dispute Management Center, the Traffic Accident Consultation Center of The Japan Federation of Bar Associations, The Central Architecture and Construction Work Dispute Examination Society (including regional sections), and The Central Labor Committee (including regional sections).

| ADR Organization | No. of Handled Cases (No. of Settled Cases) | Fees |
|---|---|---|
| 1. Securities Complaint Consultation Room | 100 (78) | ¥20,000-50,000 |
| 2. Life Insurance Consultation Center | | No charge |
| 3. Nonlife Insurance Consultation Room | | No charge |
| 4. Tokyo Loan Industry Ass'n. Consumer Consultation Room | | No charge |
| 5. Tokyo Loan Industry Ass'n. Business Section | | No charge |
| 6. Marine Transport Meeting Place | 15 (10) | Based on amt. claimed |
| 7. Int'l. Commercial Arbitration Ass'n. | 9 (12) | Pursuant to its fee provisions |
| 8. Japan Product Futures Transactions Ass'n. Consultation Center | | No charge |
| 9. Japan Intellectual Property Arbitration Center | 5(0) | ¥50,000 at acceptance<br>¥30,000 per term<br>Based on amt. claimed at settlement |
| 10. Copyright Section, Secretariat of the Director of the Agency for Cultural Affairs | 3 (0) | ¥46,000 |
| 11. Construction Dispute Adjustment Rooms<br>- Tokyo Construction Dispute Adjustment Committee | 0 | No charge |
| 12. Central Architecture & Construction Work Dispute Examination Society | 39 (36) | Depends on method of settlement & amt. of claim |
| Regional sections | 167 (218) | |
| 13. Pharmaceuticals PL Center | | ¥5,000 |
| 14. Interior PL Center | 0 | ¥10,000 each party |
| 15. Chemical Products PL Consultation Center | | No charge |
| 16. Gas & Petroleum Equipment PL Center | | No charge |
| 17. Home Electric Products PL Center | | ¥10,000 |
| 18. Automobile Product Liability Consultation Center | | ¥5,000 |

| | | |
|---|---|---|
| 19. Home Parts PL Center | 0 (0) | ¥10,000 |
| 20. Daily Commodities PL Center | | ¥5,000 each party |
| 21. Consumer Products PL Center | | ¥10,000 |
| 22. Paint PL Consultation Room | | No charge |
| 23. Japan Cosmetic Products Industry Ass'n. PL Consultation Room | | Inexpensive fee |
| 24. Pleasure Boat Products Consultation Room | | ¥10,000 |
| 25. Citizens Life Center Consultation Dept. | | No charge |
| 26. Consumer Life Center | | No charge |
| 27. NACS Weekend Telephone | | No charge |
| 28. Central Labor Committee | | No charge |
| (nationwide) | 613 (263) | |
| (central office) | 37 (19) | |
| 29. Seamen's Labor Committee | | No charge |
| 30. Traffic Accident Dispute Management Center | | No charge |
| 31. Japan Federation of Bar Ass'ns. | | |
| Traffic Accident Consultation Center | 983 (747) | No charge |
| 32. Government Procurement Complaint | | |
| Management Organization | 2 | No charge |
| 33. Tokyo Metropolitan Gov't. Pollution Investigation Ass'n. | 4 (1) | Based on the amts. of the items claimed |

(2) Bar Association Arbitration Centers and the Like

The number of cases handled at bar association arbitration centers (which will be the collective term used herein, although various names are used, such as "arbitration center", "intermediation and arbitration center", "settlement intermediation center", " civil disputes management center" and "civil disputes resolution center") in 2001 are as shown below (in the order of the establishment of the centers, with those having no cases being omitted).

With respect to fees, at the time a petition is filed the petitioner pays ¥10,000; at each arbitration date there is a fee of ¥5,000. Upon settlement there is a fee of eight percent of the value of the dispute as of that date (as the settlement amount increases there is a successive diminution of the fee). Each party is liable for fees at the rate determined by the intermediary or arbitrator, but commonly the fees are equally divided.

| Association Name | No. of Handled Cases(no. of settled cases) | Breakdown of Settled Cases | | |
|---|---|---|---|---|
| | | Compromise | Compromise-style arbitration award | Arbitration award |
| 1. 2nd Tokyo Bar Ass'n. | 177 (61) | 56 | 5 | 0 |
| 2. Osaka Bar Ass'n. | 75 (26) | 25 | 0 | 1 |
| 3. Niigata Pref. Bar Ass'n. | 22 (14) | 14 | 0 | 0 |
| 4. Tokyo Bar Ass'n. | 155 (57) | 54 | 3 | 0 |
| 5. Hiroshima Bar Ass'n. | 7 (4) | 4 | 0 | 0 |
| 6. Yokohama Bar Ass'n. | 15 (5) | 5 | 0 | 0 |
| 7. 1st Tokyo Bar Ass'n. | 54 (31) | 29 | 0 | 2 |
| 8. Okayama Bar Ass'n. | 149 (61) | 60 | 1 | 0 |
| 9. Nagoya Bar Ass'n. | 168 (61) | 60 | 0 | 1 |
| 10. Nishi-mikawa Branch of Nagoya Bar Ass'n. | 55 (27) | 27 | 0 | 0 |
| 11. Kyoto Bar Ass'n. | 11 (2) | 2 | 0 | 0 |
| 12. Hyogo Pref. Bar Ass'n. | 52 (20) | 20 | 0 | 0 |

| | | | | |
|---|---|---|---|---|
| Total | 930 (369) | 356 | 9 | 4 |

(3) Summary

As shown above, In Japan both in the case of administrative-type and private sector-type ADR organizations, only a few handle one hundred or more disputes per year. It can be said that since in Japan a mediation system has been set up in the courts, administrative-type and private sector-type ADR have not developed.

As taken from the *2000 Judicial Statistical Yearbook*, here are the number of mediation cases handled by the summary courts.

| | |
|---|---|
| Total number: | 315,577 |
| Breakdown | |
| 1. Specially-designated mediation | 210,785 |
| 2. Regular cases | 78,900 |
| (a) loan industry-related | 36,447 |
| (b) consumer loan-related | 8,042 |
| (c) other | 34,411 |
| 3. Commercial cases | 12,758 |
| (a) loan industry-related | 5,068 |
| (b) consumer loan-related | 2,495 |
| (c) other | 5,195 |
| 4. Residential land & buildings | 8,060 |
| 5. Traffic accidents | 4,801 |
| 6. Pollution, etc. | 226 |

Among the total number, specially-designated mediation cases make up 66.8% of the cases, about two-third. Specially-designated mediation procedures have the objective of promoting the adjustment of interest relationships with respect to monetary debts borne by debtors, to assist in the economic reorganization of debtors who seem likely to become insolvent. These procedures are established as special provisions (exceptions) under the Civil Conciliation Act. They grant to the mediation commission the authority to prescribe the terms and conditions for mediation proposals and grant to the court the authority to decide to use mediation as an alternative to a trial.

Further, in regular cases as well, with respect to the cases concerning the loan business and consumer loans in the category of commercial cases, the mediation commission works strongly in the role of assisting debtors, and its operation is like that in specially-designated mediation.

Moreover, in connection with a "claim about a variation in the amount of ground rent or other rent" for residential land or buildings, before a lawsuit is filed the case must go through in-court mediation (pre-positioning of mediation).

Accordingly, in-court mediation is in the position of holding a virtual monopoly on the "market" with regard to these types of cases, so there is only slight room for private sector ADR to enter this market.

The number of cases other than specially-designated mediation, loan business-related mediation and consumer loan-related mediation comes to 52,467 cases, no more than 16.6% of the grand total of 315,577 of all mediation cases. So there is a wide difference when private sector ADR is compared with judicial-type ADR.

By the way, with respect to traffic accident cases, in contrast to the 4,801 cases handled in summary courts, 3,644 cases were settled by compromise intermediation and by examinations at the Traffic Accident Dispute Management Center and 983 cases through settlement intermediation at the Japan Federation of Bar Associations

Traffic Accident Consultation Center. (Further, there were 2,587 cases at bar associations throughout the country in 2001.) When these are added up, they just about rival the number of cases at summary courts. I have not found any publications in which there was research as to why judicial-style ADR and private sector ADR are on a par when it comes to traffic accidents, but this is a subject that should not be neglected when the future expansion and development of ADR are considered.

In any event, the use of ADR in Japan is small compared to Europe and the United States. The American Arbitration Association ("AAA") is said to handle about 100,000 cases a year. Looking at these absolute numbers it can be seen that the use of ADR is much more common in the U.S.

It is necessary, however, to heed the following points.

The annual number of lawsuits in the United States is said to come to 18,000,000 to 20,000,000 cases (U.S. ADR information *Mediation Guidebook*, Levine and Hisako Kobayashi, authors, p. 6). When this is compared with the number of cases handled by the AAA, that rate is about 0.4%. So there is no material difference in rates between Japan and the U.S.

Moreover, in the year 2000 the number of civil and administrative cases handled by the district courts of Japan (including regular litigation, bankruptcy, compulsory performance and all other types) came to a total of 1,161,498 cases. This amounts to only about five or six percent of the U.S. number.

In Japan is it not only that ADR is not much utilized but that the present circumstances are such that the judicial system is not much utilized. This is a subject for the judiciary in the 21st century.

2. Types of Disputes and Dispute Management

In Part 1 (1) above there was a listing of the ADR organizations that handle specially-designated disputes in all types of fields. Except for traffic accident disputes, construction disputes, collective labor disputes and securities disputes, the situation is that ADR is not very active.

The bar association arbitration centers handle all types of civil disputes and the types of disputes, as taken from the *2001 Arbitration Statistical Yearbook (national edition)* are as follows.

There were 23 cases concerning disputes related to real estate sales; 105 disputes about real estate leases; 75 regarding contracting agreement disputes; 42 disputes regarding loans; other contractual disputes totaled 111 cases; 309 disputes concerning unlawful acts (torts); 6 disputes about intellectual property; 90 family-related disputes; 70 workplace-related disputes; 13 disputes about social relationships; 39 disputes between neighbors; 9 related to "mansions" (condominiums); and 22 in other categories.

Towering above the other categories are cases concerning claims for damages based on unlawful actions (torts), taking up about one-third of the total. And out of them, the most numerous, 108 cases, about one-third, are traffic accident cases. Next in number are disputes between men and women outside of marriage (illicit affairs), amounting to 53 cases.

There are many cases, 105, of disputes involving real estate leases and one-third of them concern surrender of premises (i.e., issues about compensation for removal).

Most of these cases concern money, such as compensation for damages, consolation money or compensation for removal.

Only a few of the organizations handle arbitration as a procedure for resolving disputes. These are The Marine Transport Meeting Place, The International Commercial Arbitration Association, The Japan Intellectual Property Arbitration Center, The Architecture and Construction Work Dispute Examination Society, The Labor Committee, The Seamen's Labor Committee, The Pollution investigation Society and the bar association arbitration centers (however, the bar association "settlement intermediation centers" do not handle arbitration). Moreover, nationwide the number of cases is few.

If we take the example of the bar association arbitration centers, out of 930 cases that were filed, a mere four were settled by an arbitration award. A compromise settlement-style arbitration award takes the form of an

arbitration award but the text of the arbitration award is the contents of the settlement agreement, so in essence it is a compromise settlement.

In Japanese everyday vernacular, no distinction is made between mediation and arbitration.

As an eminent arbitration scholar has written on the very first page of his book, "If we examine the Kojien dictionary, "arbitration" is defined as "entering into a dispute and causing the two parties to compromise; procuring a reconciliation; mediation", and for "mediation" we find, "causing a dispute to end by means of a third party intermediating between the two parties; arbitration," (Noboru Koyama, *Arbitration Law, New Edition*, page 1).

In addition, as heard in everyday expressions such as "arbitration in a fight", arbitration is an old, familiar word. The word "arbitration" was used in translation as far back as the early Meiji Period, but even in the Edo Period it often appeared in novels.

Thus in normal usage in Japan, the term "arbitration" has a positive image.

Nevertheless, arbitration under law is an unfamiliar system, and the practice of entering into an arbitration agreement before a dispute arises is extremely rare. In opposition to the image of "settlement by intermediation related to the arbitration legal system", there are many opinions, such as from consumer organizations and the consumer issues policy committee of the bar association, to the effect that arbitration is an abandonment of the constitutional right to a trial, and that with respect to consumers an agreement to arbitrate entered into before a dispute arises should be invalid ("Summary of Views From Various Spheres of Society", a bulletin). So the biggest restriction on arbitration is a strong feeling of wariness.

The fact that the number of cases settled through arbitration awards at the bar association arbitration centers is very low reflects these circumstances.

No. 2. The Actual Operation - The Process Leading Up To Settlement

Here, since I am not qualified to talk about all ADR organizations in general, I will mention the arbitration center of the Second Tokyo Bar Association, to which I belong.

The Second Tokyo Bar Association Arbitration Center has received 1,669 petitions for arbitration from the time of its establishment in March of 1990 up through the end of March 2002, and out of them 598 cases were resolved. Further, out of those resolved cases, 33 were the result of arbitration awards, and 71 were arbitration decisions in which the main text was the contents of the compromise settlement. Accordingly, it can be concluded that in operation almost all the resolutions were reached through compromise intermediation.

1. Compromise Intermediation and the Arbitration Draft Proposal System

Since cases of arbitration contracts entered into before a dispute arises and cases of agreements on arbitration before a petition are filed are extremely rare, the cases that are filed all go through compromise intermediation procedures.

Generally the procedure is that the steps of confirmation of the facts and arrangement of the factual and legal points in dispute are not done with both parties present, but at the stage where the settlement proposal is prepared the mode of individual interviews is applied with discretion. However, there are some intermediaries who do utilize individual interviews at that stage, taking the view that by listening to separate accounts of the circumstances the parties will speak more frankly. Moreover, at present there are some parties who do not wish to see their opposing parties. The following are cases that I myself handled. (A) One dispute was among a parent and children, involving the allotment of shares of a company's stock. (The background was that there was antagonism between the mother and her daughter-in-law.) The parent and children said they did not want to see each other and attended all proceedings separately from beginning to end. They were present together for the first time only at the signing of the settlement agreement. (B) In a dispute involving an illicit affair one party did not want to see the face of the other, so from beginning to end there was a request for separate attendance. (C) There was a case in which a

woman who was cohabiting with a man sought recovery of medical expenses for injuries from his frequent violent acts and wanted to break off relations with him. (D) And there was a case in which when they attended together one party would talk the other person down, so the less aggressive party wanted to attend the proceedings separately. Often a desire is also expressed for separate hearings at the stage for coordinating the points in dispute.

There is a strong view that even in compromise intermediation proceedings there must be joint attendance for the sake of transparency, impartiality and fairness. As a model, mediation with the attendance of both parties is an ideal form but proceedings should not take place unless the parties are disposed to do so.

Next, a system called the "arbitration draft proposal system" has been set up at the Second Tokyo Bar Association Arbitration Center. The regulations are as set forth below.

QUOTE

Article 25. 1. The intermediary shall have the right to produce an arbitration draft proposal (this includes compromise settlement proposals; hereinafter the collective term "Arbitration Draft Proposal" shall be used) with respect to all or a part of a case. In case both parties so desire, the intermediary shall exert his or her efforts to produce an Arbitration Draft Proposal.

2. The Arbitration Draft Proposal shall in principle be in writing and shall be furnished to both parties. When the intermediary deems it proper, the reasoning behind the Arbitration Draft Proposal shall be explained in writing or orally.

3. The parties shall be free to approve or reject the Arbitration Draft Proposal.

4. In the event that both parties approve the Arbitration Draft Proposal, pursuant to the provisions of Article 23 a compromise settlement agreement that includes the contents of the Arbitration Draft Proposal shall be prepared, and an arbitration award shall be rendered.

5. Even if one or both of the parties rejects the Arbitration Draft Proposal, the intermediary may again continue with the compromise settlement intermediation proceedings.

UNQUOTE

With these provisions, when the parties do not reach an arbitration agreement there can be a kind of non-binding arbitration award, and in the case where the compromise settlement intermediation procedure does not resolve the dispute, if there is a future legal action, it serves the function of forecasting the result, serving as a system of neutral evaluation.

There are many cases where a compromise settlement results from an arbitration draft proposal. But on the other hand, when the cases switches over to a lawsuit because the proposal was not accepted, there is a precedent in which the tenor of the court's decision was about the same as the intermediary's arbitration draft proposal ("A Case Seeking Compensation for Damages", Tokyo District Court, 1998 (Wa) No. 23103; decision of January 28, 2000).

2. Switch from Compromise Settlement Intermediation to Arbitration Proceedings

At the bar association arbitration center an agreement beforehand to arbitrate is rare, but there are cases where such an agreement is reached during the course of compromise settlement intermediation proceedings. The regulations for such cases are as follows.

QUOTE

Article 24. 1. At any stage in the compromise settlement intermediation proceedings the intermediary can confirm with the parties whether or not they have an intention to switch to arbitration proceedings by agreeing to arbitrate.

2. When in the progress of the compromise settlement intermediation proceedings both parties agree to arbitrate and furnish a written arbitration agreement, the case shall be transferred to arbitration proceedings. In such an event, the intermediary who conducted the compromise settlement intermediation proceedings shall become the arbitrator in the arbitration proceedings. However, pursuant to the opinion of that intermediary, the arbitration proceedings may be conducted by a panel of three arbitrators.

3. In the case prescribed in the preceding section, in the event that one or both of the parties desires arbitration by a different arbitrator, another arbitrator shall be appointed pursuant to the provisions of Article 6.

UNQUOTE

There is some debate about a mediator becoming an arbitrator but if the parties so agree, an effective resolution could promptly be devised that would reflect the results of the examination up to that point. This, too, is an issue of how the parties' intentions should be viewed.

No. 3. Relationship with Court Proceedings

1. Pre-positioned Mediation

There are provisions for the pre-positioning of mediation in the Civil Conciliation Act and the Domestic Causes Inquiries Act, but in all cases the subject organizations are the courts (district, summary and family courts), so in actuality there is no system for pre-positioning mediation in private sector ADR organizations.

2. Subordinate Arbitration and Subordinate Mediation

The present situation is that there is no system for referral by a court to a private sector ADR organization of an arbitration or mediation case. Since there exist basic issues such as the intentions of the parties, the bearing of fees and the number of ADR organizations, this is not a matter that can be promptly systematized but, rather, is a topic for long-term study.

3. Handling of Extinctive Prescription

In court precedents, arbitration has been found to validly interrupt the period for extinctive prescription (similar to the tolling of the statute of limitations in common law countries) but there is now a movement to expressly provide this through a revision of the Arbitration Law.

With respect to ADR other than arbitration, except for a certain portion of administrative-type ADR organizations (regarding pollution and individual labor matters), for which the validity of the interruption (suspension) of prescription has been found, the validity of the interruption of the period for extinctive prescription has not been recognized.

4. Endowment of Executability

Since arbitration is given the same validity as a final judgment, as an executable decision it becomes a fixed title of debt.

However, the executability of other compromise settlements conducted in ADR organizations is not

recognized. In order to assure executability, in addition to attested documents and arbitration award documents there is a procedure for a summary compromise settlement protocol, in concert with the summary court.

5. Taking of Evidence

There are provisions in the Arbitration Law related to cooperation with the competent courts, but there is no such system for other kinds of ADR. Furthermore, the taking of evidence goes in the direction from the courts to ADR and vice-versa, but it is necessary to prudently examine whether or not such a system should be established and what kind of content such a system should have.

No. 4. Assurance of the Competence of Arbitrators and Mediators, and Their Training

1. Assurance as to Arbitrators

At the bar association arbitration centers, the head of the association designates certain members to be arbitrators, with a specified lawyers' examination being a requisite. In addition to that, the head of the association names other persons who are nominated based on their academic and career experiences.

2. Arbitration Training

At the Second Tokyo Bar Association Arbitration Center an arbitration work study committee convenes seven times a year. Three times a year a joint study group of the three Tokyo bar associations meets and once every summer a retreat lasting one night and two days is held. The core of the research is settled case precedents, but sometimes related themes are entrusted to a lecturer from outside the group, and lectures and seminars are conducted.

At other bar association arbitration centers as well, similar study groups and the like convene regularly.

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