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Outline of the Handling of Mediation Procedures in IT-Related Cases in the Tokyo District Court

Nobuy0shi Tanaka
Tokyo District Court
Civil Cases Part 22

No. 1 Introduction

After first providing a review of the process of managing mediation cases by Civil Cases Part 22 of the Tokyo District Court, which specializes in handling such cases, the actual circumstances in managing mediation proceedings for cases concerning IT that are handled by Part 22 will be introduced. (Recently disputes involving the development of software make up over 80% of such "IT-related cases".)

No. 2 Summary of Specialized Mediation in Part 22

1. As a rule, Civil Cases Part 22, as a Part specializing in mediation cases, is in charge of all mediation cases in the Tokyo District Court. By the way, as for the mediation cases taken charge of by Civil Cases Part 22, after they are accepted as lawsuit cases by the Tokyo District Court, in the event that it is decided that they will be referred to mediation proceedings by the judgment of the court responsible for the relevant case (if an IT-related case does not involve a patent or the like it is not handled by the intellectual property rights Part but is allotted to an ordinary Part), almost always it is sent to this Part. (These kinds of cases are called "referred mediation cases".) In addition to these, there are cases that are accepted by reason of a petition for mediation based on the agreement of the parties to the effect that the Tokyo District Court has jurisdiction as the court for mediation (these are called "petition cases"). (In principle, the magistrate's court is the court with jurisdiction over mediation cases, so without an agreement as to jurisdiction a petition for mediation cannot be filed in a district court.) Recently the petition cases have made up an extremely large amount of the mediation cases and a great number of the cases are large-scale, involving an extremely high degree of disputes with details requiring expertise. In forecasting the citizen's awareness of the mediation system (is this a hope for specialized mediation?) and in planning for the best way of utilization of mediation in the future, these trends should be noted.

2. The General Method of Handling Mediation Cases in Civil Cases Part 22

(1) The Situation of the Mediation Commissioners

In Civil Cases Part 22, at present 357 mediation commissioners are registered, and out of these the breakdown of the different fields of the specialist commissioners is as shown in Appendix 1 hereto. At one time the commissioners who specialized in mediation itself held a comparatively important percentage of the total, but recently in the midst of the phenomenon of the contents of lawsuits coming to have a high degree of technical expertise and complexity, and trials tending to be longer, the number of mediation commissioners who specialize in the

various fields has been expanded and strengthened, so as to deal in an appropriate and speedy manner with such complex and problematical cases.

(2) Assurance of Impartiality and Fairness of the Mediation Commissioners

In mediation proceedings, in which the aim is obtain the final resolution of a dispute by the agreement of the parties, the assurance of the impartiality and fairness of the mediation is a decisively important element. Accordingly, from the viewpoint of the assurance of the capability of the mediators and the transparency of the method of their selection, in addition to adopting a policy of depending on professional organizations with a high level of trustworthiness for the recommendation of candidates for positions as mediators, understanding of the importance of such matters on the part of the mediators should be increased through various opportunities for study and training and the like. Fortunately, in the disposition of cases up to the present no misgivings as to these points have been manifested.

(3) Status, Remuneration, etc. of the Mediation Commissioners

The status of the mediation commissioners is that of part-time national government employees. The conditions of fulfillment of their duties are that in addition to their being paid an allowance as compensation, they are reimbursed for necessary actual expenses incurred in the performance of their duties, such as travel expenses, a per diem payment and travel costs, corresponding to the rate for a full-time national government employee. The amount of the daily allowance is 8,650 Yen per mediation times the number of mediations that day, up to a maximum limit of 17, 250 Yen per day. It seems reasonable to heed the voices calling for an improvement in the present allowance system, for cases such as those related to IT, where the majority of the cases are complicated and difficult, there being a high degree of expertise needed for the details, and the factual relationships and records of the case being complex.

(4) Appointment of the Mediation Commissioners

The mediation cases for which this Part is responsible are allotted to it by each judge pursuant to the standards for case allotment. (At present, four judges are in charge of IT-related cases.) A judge who has received an allotted case, acting as the chief mediation judge while consulting with the court clerks and other responsible staff members, takes into consideration such things as the knowledge of the fields of expertise that will be necessary for settlement of the relevant case, and as a rule appoints two mediation commissioners to the case, one being the most suitable expert and the other being a person from the legal profession. (In the event that the scope or field of expertise in the case is very complex or the like, more than one expert mediator may be appointed.) In order for Civil Case Part 22 to accurately get a handle on the expert knowledge possessed by the specialist mediation commissioners, information about the field of expertise of each mediator is put into a computer so that it can be referred to.

(5) Administration of the Mediation Cases

So that the loss that is a consequence of the transfer of cases from the ordinary Parts to Civil Cases Part 22 is diminished to the extent possible and so that it will be possible for the mediation committee to administer mediation that concentrates on the core of the case at an early period, it is requested of the trial Part that has referred the case to mediation that it attach a case record as a referred case liaison memorandum, indicating the point reached in the trial

at the time the case was referred to mediation and referential facts for the administration of the mediation. The Chief Judge for the mediation and the mediators examine the case records beforehand, while consulting the referred case liaison memorandum, and before the first date for mediation carry out consultation among themselves as a mediation committee with respect to matters such as the course to be set for the administration of the mediation, a rough plan of operation, and conditions regarding the production of proof. After that, at each mediation there are further consultations, and through the rigorous cooperation among the mediation committee members they endeavor to suggest a persuasive mediation proposal with respect to the course for resolution of the case, through a combination of carrying out analysis of the nature of the dispute and an examination of the legal aspects.

(6) Conclusion of the Mediation Proceedings

If the mediation is successfully effected and a mediation protocol is prepared, it has the same effect as an in-court settlement, as a final and conclusive judgment. One survey was limited to construction cases, but in that the rate for voluntary performance of the mediation terms and conditions was extremely high, and the efficacy of mediation procedures in dispute resolution can be valued as extremely high.

Furthermore, in cases where the mediation is not effected or completed, the case goes back to the original trial Part that was in charge of it and is tried under litigation procedures, and dealt with by a court decision or the like. In such case, as one method for ensuring that the outcome of the mediation proceedings is not useless, a determination can be carried out based on Article 17 of the Civil Conciliation Act. In an Article 17 determination, the points on which the parties have come to agree on during the mediation process (resolved points in dispute) and the remaining points in dispute are clarified and the views of the mediation committee are indicated, including the opinion of the specialist mediator(s) concerning the points in dispute, with an aim at making all this useful for the forthcoming litigation procedures. So even if the mediation ends without an agreement, the outcome of the mediation process can be used in the later trial.

No. 3 Outline of Mediation of IT-Related Cases

1. Circumstances of Selection of Mediation Commissioners with Expertise in IT The first appointment of a mediation commissioner who specialized in IT was in 1995, and the number of such persons has gradually increased, as shown in Appendix 2; at present there are sixteen of those specialists. They have come from two types of backgrounds: the users side (persons who have for many years done computer-related work from the standpoint of users, such as large-scale enterprises and the like) and the vendors side (persons who have for many years been engaged in the development of software and the like for computer companies).

2. Trends in the Cases

The changes in the number of IT-related cases are as shown in Appendix 2. The cause of the three-fold increase in such cases in 2000 over the figure for a normal year is not clear (perhaps the influence of the recession caused by the collapse of the bubble economy?), but in these past few years it has been a constant that there have been more than twenty cases annually.

And currently, at the end of August 2002, there are thirty-seven unfinished cases outstanding in Civil Cases Part 22, almost all of them being disputes revolving around software development.

3. Circumstances Regarding the Resolution of Cases

The circumstances regarding the resolution of disputes through mediation are as shown in Appendix 2. In the seven year period from 1995, 152 cases have been handled, and out of the 122 cases for which case management was concluded, 81 (66.4%) resulted in a successful conclusion of the mediation, 22 (18%) did not have a successful conclusion to the mediation, 18 (14.8%) were subject to an Article 17 determination and one case (0.8%) was withdrawn. Further, in 2001 38 cases were managed, out of which 33 (86%) were successfully concluded, in four (11%) there was no agreement through mediation and in one case (3%) there was an Article 17 determination, a rapid improvement in the rate of resolving cases.

4. Time Period

The average time for a mediation is shown in Appendix 3. The 12.0 months for the eighty-one settled cases is exceeded by the 13.2 months for the average time until a decision is rendered in trials for ordinary first-instance civil cases in 2001. When taking into consideration the facts of the complexity and difficulty of IT cases and that mediation settlements are final decisions without appeal, it is not in error to evaluate the results for mediation as pretty good.

No. 4. The Difficulties in Managing IT-Related Cases and the Most Recent State of Affairs of Case Management

1. Difficulties in Managing IT-Related Cases

With IT-related cases the difficulties arise not only from the high degree of specialized expertise inherent in the case itself but also from the points at issue of the persons participating in the litigation; namely, the weight of the adverse condition that the parties (mainly the user´s side), the legal counsel (especially legal counsel for the user´s side when assistance cannot be expected from the party itself) and the three persons from the court do not have sufficient expertise in the IT technology or understanding of the actual circumstances of the transaction in question. It is a matter of fact that up to now while encountering this triple handicap, as it were, there are also the problems due to the facts that there are exchanges of documents that do not sufficiently reflect the allegations of both parties, there is a large volume of difficult-to-understand documentary evidence that is only obscurely related to the points at issue, and there is a needlessly great amplification of the litigation records, thus requiring a long time period for the trial.

In these cases that involve a high degree of expertise, the points at issue should be accurately determined and the only documentary evidence that should be requested for production should be that which is truly necessary in light of that determination. And also it is indispensable to secure the participation of specialists who have abundant experience acquired in the course of actual dealings in transactions related to software development, in which of course there is a high degree of specialized knowledge of IT technology.

2. Actual Conditions of Performance of Duties by the IT Mediation Commissioner

After carefully examining the records of the litigation (since quite often if the time for the referred mediation has been delayed the litigation records are fairly voluminous and the detailed examination requires a goodly amount of time), the IT specialist mediator who has been appointed to the case normally attends deliberations after having prepared a detailed memorandum concerning the technical points at issue; this should be one of his activities to be carried out by the date for mediation. This memorandum is always kept in mind in discussing with the other mediation commissioners and the chief judge for the mediation the objective of a legal solution that is based upon the technical arguments. In most of the cases with this kind of preparation before the date of the mediation, the presence of the persons who were involved in the development of the relevant software is required. In addition, other devices for advancing the progress of the trial are to give the parties written interrogatories and, when necessary, to set up a computer in the mediation room, to test the actual state of the software. On the day of mediation, the mediation progresses by means of frank argument on the points in dispute, by means of the presence of both sides at the same time or by hearing alternating statements of the circumstances of the case, with the aim being the production of a mediation proposal with persuasive reasoning.

3. The Role of the IT-Specialist Mediation Commissioner

In the aforementioned process of dispute resolution the specialist mediation commissioner has a role as a trustworthy translator of the specialized terminology, so that it may be understood by the lawyers and others and as a raiser of questions based on the actual circumstances of the transaction. Aiming for the resolution of disputes, the specialist mediators must demonstrate their zeal and effort, including in their meticulous pre-mediation preparations.

No. 5 Legal Issues in Disputes Concerning the Development of IT Software

1. Legal Relationships Involved in the Development of Software

The legal relationships involved in the development of software can be divided into several large categories as follows: (A) the type where there is a contract in which the development of special software is undertaken; (B) the type where, preceding the software development two contracts are entered into separately: an entrustment agreement the contents of which consist of consultation with the objective of improving the contents of the business of the party placing the order, and a contract for the development of the related software; (C) the type where (A) and (B) above are integrated; and (D) the type where, in addition to the above, there is a sales contract for hardware.

2. The Forms of IT Disputes

In the aforementioned types of contracts the following matters become issues in concrete form in disputes: (A) matters concerning the quality of the developed software; (B) matters related to the date for delivery; and (C) there are many cases related to the computers performance. In all the cases, however, one central point of dispute is whether or not performance has been rendered in accordance with the basic tenor of the obligations agreed to in the contract, and in order to adjudicate this point the most common important issue in dispute by far is the confirmation of the contents of the contract, in particular the details of the obligations

undertaken by the software development company; namely, determination of the specifications for the software. However, in the case where the party placing the order is a small-scale business, there are even cases where there is only a simple order form without any written provisions about the specifications. As a result it is often the case that the understanding of the two sides as to the contents of the contract is contradictory. Further, there noticeably are cases where the process of modification of the contents of the original contract (additions to the specifications) is obscure. There are many examples of disputes being difficult to resolve because of these kinds of circumstances. In addition, even in large-scale development contracts in which the contract amount is in excess of one hundred million Yen, there are many examples of where although the written contract is itself fully prepared there are great differences in the understanding of the two parties as to the basic details of the contract.

3. Disputes Involving Contract Termination on the Ground of Failure to Perform During the Course of Development

Recently cases can be seen here and there in which contracts are terminated by reason of failure to perform, midway through the software development. In this type of dispute the most important point as to the time for performance is whether or not there has been a failure to perform in light of socially-accepted standards, but attention should be paid to the fact that there is a fair amount of difficulty as to proof when adjudicating the dispute, including forecasts based on such fluid elements as the investment in system engineers and so forth. Further, as a procedural problem when breaking off a contract midway through its term, an important element for consideration is the process of inspection by both partie´s project managers, so as to overcome obstacles. In addition, in this type of case there are difficult questions under the theory of damages as well, about how to calculate evaluation of the work as at the time the contract was discontinued and evaluation of expenses that have become unnecessary (personnel costs and so on). In just the unrealized problems of how to evaluate the allocation of expenses to each stage of the software development and how to evaluate the payment for workers on stand-by, the issues of proof and evaluation are problematical.

4. Points to Consider in the Prevention of Disputes from a Legal Viewpoint

First of all, in confronting the fact that often there is a considerable disparity between the parties to the contract as to the amount of information about IT technology, the duty of the software developer to provide a sufficient explanation to the party who placed the order is important. It is common that while the ordering party has unreasonable subjective expectations as to the IT technology (a decision to invest in IT based on the assumption that the introduction of the relevant software will speedily make its currently-existing management of business more efficient), it does not have sufficient expertise. Accordingly, in order to avoid misunderstandings arising from this kind of disparity in the quantity of information, at the time the contract is entered into the provision of accurate information about not only the specifications of the relevant software but also the details of the management that can be attained therefrom and the limits thereof is important. Moreover, points that should be taken into consideration in these cases are the problems caused by difficulties in understanding the technical terms related to IT and the disunity of concepts of the parties. In addition to the difficulty that the party who ordered the software has in understanding the specialized

technical jargon, there are also cases where the software developer employs its own constructions for terms, different from the meanings commonly used in the industry. These things often are primary factors in causing misunderstandings on the party of the party who placed the order.

Next, notwithstanding the fact that software development is impossible without the collaboration of the order placer and the software house, there are many cases where, especially on the part of the party who made the order, it has the impression that it can leave development to the software company and that it can be expected that the software can be completed by that means alone, and it lacks the knowledge that it itself ought to play a role in the development. Further, it lacks qualified personnel to be in charge of the collaborative work (a basic knowledge of IT is necessary). An indispensable element for the smooth execution of the development work is a set of procedural provisions regulating the collaborative relationship. For example, insufficient preparation of the following procedural matters leads to disputes: provisions for determination of each side´s project manager; methods of coping with obstacles when they come up, including the suspension of the project; procedures for amendment of the contents of the contract; methods for preparing and preserving the minutes of meetings; procedures for inspection, and so on. Furthermore, there have been many cases where failure to make such preparation has resulted in difficulty in resolving disputes that may arise. Also, when it is taken into account that the main part of the cost of software development is the personnel expenses for system engineers and the like, it is important to have a common perception of how the prototype models, waterfall models, compound models and so on will be utilized with respect to the methods of software development, which will exert a great influence on personnel costs.

Upon giving sufficient consideration to the various points mentioned above, describing the details of the partie´s agreement concretely and precisely in the written contract will be an important measure for preventing disputes.

No. 6 Conclusion

Disputes involving software development contracts have details with a high degree of expertise. Furthermore, since such contracts have the special characteristics of collaboration by the two parties in the process of performance of the work and uncertainty about the contents of the contract itself arising from a disparity in information among the parties to the contract, as a system for dispute resolution it is possible in such cases for mediation proceedings which, with the participation of expert mediators, can flexibly induce the various conditions mentioned above in order to come up with a reasonable mediation proposal, to be better than litigation proceedings, which are controlled by strict rules of evidence, burdens of proof and so on, and which tend to result in all or nothing conclusions. Thus mediation can be thought of as a suitable system for dispute resolution.

However, the role of the specialist expert mediation commissioners is very important in the resolution of IT disputes in mediation, and their responsibilities are very great. In Civil Cases Part 22 we are enjoying the achievements of the IT-related mediators who bear these heavy

responsibilities, and we celebrate the tremendous results that they have produced. It is incumbent that we express our respect for these IT mediation commissioners.

(Appendix 1)
Breakdown of the Main Fields of Expertise of the Specialist Mediation Commissioners Assigned to Civil Cases Part 22

(Legal Profession)

Lawyers:	131 persons
Former judges:	7
University professors:	8

(Technical Field)

Architects/builders:	99
Real estate appraisers:	36
Medical doctors:	22
IT specialists:	16
Patent attorneys:	8
CPAs:	8
Tax attorneys:	5

(Appendix 2)
Changes in Number of Mediators and in Number of IT-Related Cases, by Year

Year	1995	1996	1997	1998	1999	2000	2001	2002	
No. of persons	2	3	4	5	6	10	15	16	
No. of Cases	2	7	18	21	15	56	19	14	total: 152

(Note: for the year 2002, the figures are up until August)

(Appendix 3)
Number of Cases Already Completed, According to Reason for Completion;
Average Time Period for Mediation
(Total number of completed cases from 1995 through June 2002)

122 cases; successfully completed:	81	12 mos. 14 days
unsuccessfully completed:	22	10 mos. 12 days
Art. 17 determinations:	18	14 mos. 23 days
withdrawn:	1	