Articles

ADR IN JAPAN: DOES THE NEW LAW LIBERALIZE ADR FROM HISTORICAL SHACKLES OR LEGALIZE IT?

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ABSTRACT

Japanese society has been famous for frequent use of Alternative Dispute Resolution [hereinafter ADR] for civil disputes, rather than court proceedings. The recent tide of justice system reform in Japan includes the development and enrichment of ADR in general. In the "Recommendation of the Justice System Reform" issued in 2001, ADR is regarded as an integral factor of the justice system, aiming to provide people with various and attractive means of dispute resolution, in addition to litigation at Courts. In 2004, the Law on Promotion of the Use of Alternative Dispute Resolution was enacted (Act No. 151 of 2004). This law provides the fundamental ADR policy in general and establishes a certification scheme for conciliation/mediation services delivered by private ADR organizations. Two years have passed since its coming into force in 2007, it is the author's intention to analyze this law's impact on private ADR organizations, as well as other ADR practitioners including Courts and administrative agencies. We are able to observe the tension between the gravities of legalization or standardization of ADR on one hand and of liberalization or de-

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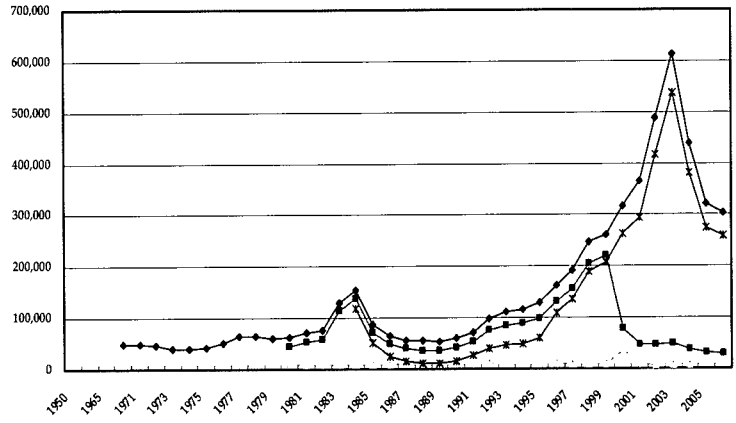
legalization of ADR on the other by following the steps of this article.

KEYWORDS: *Alternative Dispute Resolution, ADR, conciliation, mediation, arbitration, unauthorized practice of law, rule of law, justice system reform.*

I. INTRODUCTION

Japanese society has been famous for frequent use of Alternative Dispute Resolution [hereinafter ADR] for civil disputes in lieu of court proceedings. It is difficult to evaluate if this is true from the numerical perspective. In 2007, the caseload of Court-Annexed Conciliation for civil disputes [*Minji Chotei*] was around 255,000, while those cases filed for trial numbered almost 658,000 including cases filed in both District and Summary Courts.[1] Indeed, if you add the dockets of small claims and *Tokusoku* cases (summary proceedings for debt collection) to the latter, the total number of cases filed for judge's adjudication (in forms of a judgment or a decision on legal merits) would be over 1 million (1,044,701). In this context, we cannot assume that Japanese society prefers ADR to trial proceedings.



On the other hand, the trend of Conciliation cases can be misleading. The graph above shows the trend of the caseload of civil Court-Annexed Conciliation. The x (×) denotes consumer credit/debt cases and the triangle (▲) shows landlord/tenant cases (mandatory conciliation). They are special Conciliation proceedings under two different laws. The square (■) indicates the caseload of general Conciliation proceedings under the Civil Conciliation Law [*Minji Chotei Ho*], and the rhombus (◆) shows the total caseload of all Civil Conciliation proceedings.

You can observe the caseload has fluctuated from more than 600,000 cases in 2003 to 254,000 cases in 2007. It does not mean that Japan has come

[1] The judicial statistics in Japanese can be found at Courts in Japan, http://www.courts.go.jp (last visited May 30, 2009). For a summarized version in English, see Supreme Court of Japan: Statistical Tables, http://www.courts.go.jp/english/info/statistical_table.html (last visited May 30, 2009).

to be litigious; rather, we should view the situation around the year 2003 as exceptional. During the Heisei recession, the *Tokutei* Conciliation proceedings had been playing a special role to provide remedies to the debtors in danger of insolvency. This was established by a special law (Law on Promotion of Adjustment of Specified Debts, Act no. 158 of 1991), as one of the special Conciliation proceedings. The proceedings start when the Court (Summary Court) accepts the debtor's application to mediate over his/her unpaid debts with creditors.[2] During the proceedings, the Court re-calculates the total amount of the payment and allots them to the payment of the principle, not to the interest, even when it has not been agreed upon. Then, it proposes to the parties (the debtor and the creditors) an installment plan for the rest of the debt (if any). However, the Supreme Court judgments rule the multiple debts in general and restrict the interest rates of creditors, so that these *Tokutei* Conciliation cases have decreased dramatically.

The third factor which makes the discussion complicated is that many lawyers in Japan, academic or those in practice, have thought that when the legal consciousness among Japanese people develops, litigation would be preferred to Court-Annexed Conciliation and other ADR proceedings. A world-famous essay written by Takeyoshi Kawashima in 1963 theorized this notion, explaining that the non-litigiousness was a reflection of Japanese culture and a symptom of a lack of modernization.[3] Under this powerful theory, a considerable proportion of lawyers including attorneys tend to evaluate ADR as a vehicle of second class justice. Up to, at the earliest, the 1980's, Court-Annexed Conciliation had been seen as such, although it was virtually the last resort for ordinary disputes, because of the delay and inefficiencies of court trial proceedings and the relatively high price of attorneys' fees. Later, the evaluation of Court-Annexed Conciliation has changed "from negative to contingently positive";[4] however, the other private ADR proceedings including arbitration have not been trusted by disputing parties or by lawyers.

The recent tide of justice system reform in Japan includes the development and enrichment of ADR in general. In the "Recommendation of Justice System Reform" issued in 2001, ADR is regarded as an integral factor of the justice system, which should provide people with various and attractive means of dispute resolution, in addition to litigation in the Courts.

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[2] The *Tokutei* Conciliation has been functioning as an informal financial rehabilitation proceeding, while in 2001, the amendment of Civil Rehabilitation Act starting to offer rehabilitation proceedings to person with multi-debts.

[3] *See generally* Takeyoshi Kawashima, *Dispute Resolution in Contemporary Japan*, *in* LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 41, 41-72 (Arthur Taylor von Mehren ed., 1963).

[4] Koji Shindo, *Nihon Ni Okeru Chotei Seido No Hyoka* [*Evaluation of Conciliation/Mediation in Japan*], *in* MINJISOSHO HOGAKU NO KISO [THE FOUNDATION OF CIVIL PROCEDURE THEORY] 309, 322 (1998) (based on his speech at Association of Comparative Law first published held in Taipei in 1986).

In 2004, as a result of difficult discussion, the Law on Promotion of Use of Alternative Dispute Resolution [hereinafter ADR Law] was enacted (Act No. 151 of 2004). It provides the fundamental ADR policy in general and establishes a certification scheme for conciliation/mediation services delivered by private ADR organizations. Two years have passed since its coming into force in 2007, I would like to analyze this Law's impact on private ADR organizations, as well as other ADR practitioners including Courts and administrative agencies. We can see the tension between the gravities of legalization or standardization of ADR on one side and of liberalization or de-legalization of ADR on the other.

II. OUTLINE OF MODERN ADR IN JAPAN

A. Court-Based ADR: Some History

1. Genesis of Court-Annexed Conciliation. — The first Court-Annexed Conciliation [*Chotei*] system was established by the Landlord-Tenant Conciliation Law of 1922.[5] Even before this enactment, the Court had discretion to recommend settlements to the parties during the trial proceedings. The new Conciliation system was designed to mediate the dispute from the outset of the proceeding.

When the Law was enacted, the booming economy after the World War I and the concentration of population in large cities caused a housing shortage and gave rise to many landlord-tenant disputes. It was the policy of the government to channel these disputes into an amicable settlement by Court-Annexed Conciliation, because such proceedings would bring about a better solution for the parties than adversarial litigation would. At the same time, however, the government wanted to minimize the increase in judicial budget due to increasing trial caseloads. In addition, at that time, the traditional mechanism of settling disputes within each local community had been weakened. This may be the other possible reason for creating public institution to mediate civil disputes.

This Conciliation system did not enjoy popularity at the beginning, but in the year following enactment, an earthquake disaster hit Tokyo and brought about a rapid increase of landlord-tenant disputes. Parties then found the utility of Conciliation, which was more accessible, speedier and equitable than formal court litigation. Because of the success of this first Conciliation system, some special proceedings were successively created: Agricultural tenancy Conciliation in 1924, Commercial Conciliation in 1926, and Monetary Debt Arrangement Conciliation in 1932.

[5] This Law of 1922 was repealed by the Civil Conciliation Law of 1951.

Here we have some statistics of Court-Annexed Conciliation in comparison with litigation. In 1928, when the first three special proceedings were ready to function, the total number of Conciliation petitions was 15,224 nation-wide. But it increased in 1935 to 113,270, including petitions for the Money Debt Arrangement Conciliation proceedings. The number of filings of law suits in the same years in the District Courts nation-wide was 22,041 in 1928 and 20,150 in 1935, and in the Ward Courts (lowest courts before the WWII) 180,843 and 171,613 respectively. From these figures, the conclusion could be drawn that the Court-Annexed Conciliation system had become a popular method of dispute resolution among the Japanese people.

2. *Court-Annexed Conciliation Modernized.* — After the World War II, the various *Chotei* systems were integrated in 1951 under the single Civil Conciliation Law [*Minji Chotei Ho*] with special provisions for differential treatments of various kinds of disputes. When traffic accident disputes increased and various kinds of public nuisance (air/water pollution, noise, etc.) started causing social conflicts, new provisions for the traffic *Chotei* and public nuisance *Chotei* were added to the Law in 1974. When the Landlord-Tenant Law was amended in 1991 to add a provision which required a *Chotei* before filing a case for the increase of rent, the Civil Conciliation Law was amended to respond to it. More recently, in 1999, when the troubles arising from consumer financings (e.g., consumer loan, credit card loan, credit sale) increased dramatically, the Law of Conciliation for Specific Cases [*Tokutei Chotei Ho*] was enacted to deal with the proper arrangement of multiple debts. Under this scheme, the debtor (not the creditor) applies to this Specific Cases *Chotei* to have his/her multiple debts reorganized. One of the most important features is that once a *Chotei* is filed, the creditor is prohibited from starting judicial execution while *Chotei* is going on. During the sessions, the conciliator panel [*Chotei* committee] orders creditors to hand out the contract papers, recalculates the debts based on the Interest Restriction Law, makes a payment plan for all creditors, and persuades creditors and debtors to agree on the plan. The current legislative anomaly of a double standard in interest control is being corrected through the Consumer-Debt Conciliation on the basis of an agreement of the parties concerned, an individual and a money lender.[6]

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[6] The anomaly consists in that the Interest Restriction Law limits the interest to maximum 20% per annum but makes a payment of interest in excess valid if paid voluntarily. On the other hand, the Capital Advance Law makes it punishable that a business money lender charges an interest higher than 29.2% per annum. Therefore, most consumer loan companies charged an interest between 20% and 29% and most customers paid the interest "voluntarily". When a debtor becomes insolvent and resort to *Chotei*, assuming that the payment was not on the debtor's clear intent, the debt is recalculated on the basis of the 20% interest and an agreement is reached or a decision au lieu de agreement is entered. However, *Chotei* is not a panacea for the debtors who have less expectations of income to pay for the reduced debts in a few years.

At last, in January 2006, each Bench of the Supreme Court rendered judgments not to admit the voluntariness of payment of interest beyond the Interest Restriction Law. *See* 60-41 MINSHŌ [*Supreme*

B. Administration-Based ADR: Consultation, Mediation and Arbitration

1. General. — Many administrative agencies have their own ADR to deal with the disputes arising in the areas of their respective administrative authorities. For example, the Ministry of Health and Labor oversees the pharmaceutical industry and has a general interest in establishing an ADR system of its own to solve disputes arising therefrom. Most of these administrative ADR programs offer consultation, mediation, and adjudication/arbitration services.

However, their ultimate objectives vary. Some appear to be with more emphasis on information gathering. When an administrative ADR openly aims at consumer protection, certain procedural settings which would raise the success rate are strongly desired. In fact, some such ADRs are provided by law and given powers of inspection, publication of name of the company whose behavior is being complained about and/or the contents of the terms of mediation which was proposed but rejected, monitoring of the performance the agreed terms, and so on. Certain administrative ADRs are given by the law a power of administrative adjudication [*Gyosei-Shimpan*] without any arbitration agreement. This appears similar to administrative tribunals in other countries. They can be called "quasi judicial organization". The stronger the power of an administrative ADR is, of course, the greater independence must be guaranteed to the ADR organization from the administrative agency concerned.

The examples of these administrative ADR include the Environmental Dispute Coordination Commission,[7] the Labor Relations Commissions,[8] the

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Court Civil Reporter] 1 (2d Bench of the Sup. Ct., Jan. 13, 2006); 1926 HANREI JIHŌ 23 (1st Bench of the Sup. Ct., Jan. 19, 2006); and, 60-1 MINSHŪ 319 (3d Bench of the Sup. Ct., Jan. 24, 2006)). These judgments have triggered the amendment of these Laws in the end of the same year.

[7] It is an external agency of the Ministry of Internal Affairs and Communications. The Environmental Disputes Settlement Law was enacted in 1970, following the Basic Law for Pollution Control of 1967, to establish an efficient system to solve pollution and public nuisance disputes outside the court. Two years later, this system and another dispute resolution system for land-use were consolidated into the Environmental Dispute Coordination Commission system as it is today. This system has two tiers: (1) one Central Commission in Tokyo which deals with large and/or inter-prefectural cases, and, (2) the local Commissions which are located in each prefectural government and deal with smaller cases. The former has settled 736 out of 743 cases received from 1970 (before consolidation) to 2001. The latter altogether disposed 1,122 out of 1169 cases, which consists of conciliation (1,152), arbitration (4) and recommendation to perform the duty (13). The settlement rate seems over 90%. For more details, *see* Gateway to Determination of Environmental Disputes, http://www.soumu.go.jp/kouchoi/english/index.html (last visited May 30, 2009).

[8] The local Labor Relations Commissions, located in each prefecture, and the Central Labor Relations Commission (receiving appeals from local LRCs) in Tokyo, give decisions on a claim of unfair labor practice under the Labor Union Law and settle labor disputes by conciliation, mediation and arbitration. This system was established in 1946 after the American model. The Commissions are external agencies of the Ministry of Health, Labor and Welfare.

Construction Dispute Committees,[9] consumer affairs centers of local governments,[10] and so on. The first two are "strong" ones that have power of adjudication.

2. *Short History of Administrative ADR.* — Many administrative organizations, either local or national, have developed ADR and consultation systems for the disputes which occur between the business under their regulation and the consumer or other affected persons. The disputes dealt with vary and increase in variety as new laws promulgate new rights or legal relationships.[11] The administrative agencies have played a big role in regulation of the economy, through legally authorized regulation and administrative guidance which is not authorized by law. In this context, ADR run by administrative agencies could make the most of their power as resources to run ADR systems effectively.

The development of administration-based ADR started in late 1940's, immediately after the World War II. Under the influence of US law, to provide ADR for unfair labor practices and other labor disputes, the Labor Committee system was established by Labor Union Law in 1946. Three years later, ADR for construction disputes and a remedial system for human rights were promulgated by the Construction Business Law and the Law of Committee Members for the Protection of Human Rights respectively. The first two are independent, tribunal-type administrative committees, and the purpose of these three is to protect the newly established rights of workers,

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[9] Local Committees are administered in each prefecture and the Central Committee which deals with larger cases is located in Tokyo. This administrative ADR system was established by the Construction Business Law of 1949 to settle construction disputes rapidly with expert mediator's intervention, and is administered by the Ministry of Land, Infrastructure and Transport. It has mainly entertained business to business disputes, but reflecting an increase of defective housing claims, consumer to business disputes have also been increasing. The caseload of this system, summing up the local and the Central Committees, is as follows; in 2007, 216 new cases were received, consist of 34 for *Assen* [*passive conciliation*], 146 for *Chotei* [*advisory conciliation*], and 36 for arbitration.
The number of arbitration cases may appear very few. In Japan, however, this number is exceptionally large as domestic arbitration. The background is as follows. The model construction contract, which Ministry of Land, Infrastructure and Transportation "recommends" to the construction companies to use, includes an arbitration clause for arbitration with the Committee. Validity of an arbitration agreement based on such an unnegotiated clause was questioned but the Supreme Court upheld its validity in 979 HANREI JIHŌ 53, (1st Bench of the Sup. Ct., June 26, 1980). Following this decision, the model contract form was modified, although it was legally unnecessary. At present the arbitration clause is printed on a separate page of the contract and must be signed separately. Thus, the Construction Dispute Committees have dealt with certain number of true arbitration cases, an interesting difference from other ADR organizations in Japan.

[10] There are hundreds of consumer affairs centers instituted by local governments and they network with each other. The National Consumer Affairs Center of Japan [NCAC] is functioning as the core of this network by gathering risk information from local centers, examining product safety, and announcing the result of information analysis, in addition to the regular business of dispute resolution. It was established in 1971 and the government agency concerned is the Cabinet Office.

[11] For example, in 2000, for dealing with disputes over public nursing care service, an ADR system, *Un'ei Tekisei-Ka Iinkai* [*Committee for Reasonable Administration*] was institutionalized.

subcontractors, and human rights, rather than mediating the disputes between parties.

In the 1960's, social problems such as public nuisance, environmental damage and consumer disputes have increased and administrative agencies in charge of these problems thought that ADR offered victims more accessible and speedier remedies in comparison to court proceedings.

In 1972, the Prime Minister's Office integrated some administrative ADR organizations dealing with disputes arising from specific nuisance into a Committee for Arrangement of Public Nuisance at national level and a similar dispute resolution organization at local level. This system, especially the Committee at national level is authorized to exercise rendering adjudication without the parties' consent, in addition to mediating between the parties.[12]

Regarding consumer problems, the Economic Planning Agency (at that time) established the National Consumer Life Center in 1970. At the outset, its business focused on information gathering and research of events related to consumer life. The founding law was amended in 2008 and it provides the Center with the power of mediation with authority to order to produce evidence relevant to the proceedings and also provides for arbitration of important consumer disputes, the resolution of which has a great effect in consumer life in general.

On the other hand, in 1965, a local government, Hyogo prefecture, started the first Consumer Life Center. Other local governments, whether at the level of prefecture, city or town, have established such consumer ADR Centers or divisions, following the Hyogo model[13] These are located basically within the administrative organization, and the personnel in charge provide consumers with information on legal and factual matters and advice for negotiation with the business with whom they have issue in the consultation phase. Further, it is not unusual that the personnel directly negotiate with the business, on behalf of the consumer. The next phase is called *Assen* [passive conciliation], but, the line between the negotiation by the personnel and mediation presided by the personnel is blurred. This means that the neutrality of the personnel is not clear, and it is not clear to the complainant which process he/she is using.

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[12] Articles 42-2 *et seq.* of the Law of Resolution of Public Nuisance Disputes allows the Committee to render adjudication on responsibilities and on causes of public nuisance. The former judges the amount of damage, if any, and if one or both parties file a case into court within certain period, the adjudication will be regarded as a settlement. The latter evaluates the causation between the damage and the action of the opposite side and it does not decide the existence and the extent of legal rights directly.

[13] This Hyogo Center became a model for following local governments, and, as of the year of 2007, 532 Centers exist in Japan as whole. However, in this decade, the budget of local government has been tight, so that there appears a tendency to downsize this section.

Although negotiation per procuration of clients and mediation between parties can be regarded as a practice of law and entrusted only to licensed lawyers (Article 72 of *Bengoshi Ho* [*Attorney Act*])these personnel are interpreted as an exception to Article 72, because their practice is not business-based and the personnel have expertise as certificated consumer-life counselors or advisors.

3. Features of Administration-Based ADR. — One of the advantages of the administrative ADRs is that they can utilize administrative influence, formally or informally, to make the ADR process efficient. For example, the respondent party (company) will appear at the ADR session and negotiate with the claimant (consumer) faithfully, because it wishes to avoid the risk of negative evaluation by the administrative agency. Under the umbrella of the administrative agency whose influence over the companies is strong, ADR may give the claimant better remedies than those he/she would be awarded in court. It is also expected that the agency monitors the implementation of the promised remedies. For the consumers, the administrative ADR can be more effective than court proceedings. For the company, because of the confidentiality of the process, administrative ADR is more desirable than court proceedings.

At the same time, administrative ADR can be beneficial to the relevant administrative agency itself because a "dispute" is full of useful and specific information about the companies which the agency must regulate. It alerts the administrative agency to the necessity of regulation not only of the accused company but also the industry as a whole. In addition, due to the recent reforms in the Japanese governmental style, the administrative agencies are expected to refrain from exercising too much precautionary regulations so that administrative controls would not deter free economic activities. In this context, the administrative ADRs come to be a good means for the agencies to find out where a problem is and to regulate the respondent company properly.

Let me point out the features of administrative ADR, in terms of cost effectiveness and public interest.

First of all, the service is free or much cheaper than court proceedings.[14] However, in fact, generally speaking the major monetary cost is the attorney's fees. It is a common feature among ADR processes that they do not adopt an adversarial system, but rather a non-adversarial system, more precisely, the *Verhandlungsmaxime* originated from German Law. This principle governs civil procedure and allocates the parties the responsibility of presentation of facts and evidence. In theory, then, the ADR provider or

[14] For example, suppose you have an environmental problem whose amount at risk is 10 million dollars, you need only 73 dollars to pay to use conciliation service at Committee of Arrangement for Public Nuisance, which is much cheaper than 250 dollars for Court-Annexed Conciliation and 500 dollars for filing a case for litigation.

the neutral party can actively inquire, regardless of the party's presentation. If it works well, the party does not need attorneys. Although many ADR providers do not have such personnel to make inquires as to the facts and evidence on behalf of the parties, administrative ADR has some advantage in that it may have adjunct research institutions, personnel with expertise, or an administrative network which can assist the neutral party to collect adequate information or evidence. Of course, this kind of inquiry is at the discretion of the ADR provider or the neutral party, so, hiring an outside attorney is a safer and better way for the party. However, administrative ADR is widely regarded as independent and trustworthy, and saving on the attorney's fee is tremendously attractive to the complainants, who, if they were to take the matter to court, need to pay the fee regardless of the result and would not win much money in comparison with punitive damage in the U.S.

C. Private ADR

1. Private ADR as a Late Starter. — The oldest private ADR in Japan is an arbitration organization for maritime disputes, which was established in 1926 and was reorganized as the Japan Shipping Exchange in 1933. It remains the only ADR method for maritime disputes in Japan, and recently it added mediation to its ADR method. In 1950, for commercial disputes where at least one foreign party is involved, an international arbitration organization was created by the Japan Chamber of Commerce and Industry.[15] The other private ADR organizations started to develop on a full scale in the 1990's, with the exception of ADR for car accidents which was established in 1978.

There may be some reasons why the private ADR started later than court-based or administration-based ADR. One reason is the necessity. Those publicly supported ADR have wide jurisdiction and have plenty of resources such as personnel, public trust, administrative power, budget, legal expertise, and so on. The fees for their service are nominal, if any, and the process is quicker than court litigation. The result of the process could be more equitable than court judgment. The second reason is the general perception of authority accompanying to the decision made by public organizations. A tendency could be observed that not only individuals but also businesses respect public organizations as authoritative, rather than private ordering through negotiation and settlement by the parties. This tendency may relate to the strict perception of neutrality. The private organizations need funding from someone, and then automatically people doubt their neutrality, even when the mediator or arbitrator is institutionally insulated from such funding.

[15] It became Japan Commercial Arbitration Association, which deals with domestic commercial disputes as well and started mediation service for commercial disputes in general.

The third one relates to ADR generally, the easiness of foreseeing the judgment. For some decades, the judicial precedent and positive law have been stabilized in Japan. In this context, the incentives for parties to negotiate outside of the court are not high; if a party wants to foresee the judgment, the Court-Annexed Conciliation is the shortest way.

2. *Bar Association-Based ADR.* — The situation has been changing, though slowly. The important actors in promoting private ADR are attorneys [*Bengoshi*] and their national association, the Japan Federation of Bar Associations. The first big change occurred in 1978 when the JFBA decided to cooperate to run private ADR, the Center for Resolution of Traffic Accident Disputes, funded by an alliance of various insurance companies. At that time, many attorneys defined their mission as to pursue legal rights in court, through judgment, without compromise. On the other hand, at that time, all lawyers including judges had serious concerns in common that appropriate remedy should be given to each victim as soon as possible.

After the standardization of the amount of compensation was completed tentatively by the court, the Center could contribute to the efficient remedy. For this purpose, the Center adopted unique procedural features. Firstly, the insurance company which is allied and complained by the accident victim cannot deny participation in the mediation process (it keeps veto on the settlement of the case, though). Secondly, such insurance company has to accept the adjudication given by the Adjudication Committee. When the mediation fails and the claimant wants, the case is brought to the adjudication phase, where Adjudication Committee deals with the case as if arbitration agreement exists. The adjudication, different from arbitration award, does not deprive the claimant of his/her right of day in court. On the other hand, the insurance company has to accept it as far as the claimant accepts it. This system is called "one-side arbitration [*Henmen Chusai*]" in Japan, a kind of conditional arbitration.

We can see this event as a turning point; it took another ten years for the local Bar Association to create an ADR, dealing with all civil disputes. In 1990, the Tokyo Second Bar Association set up the first Bar Association based ADR, "Arbitration Center", offering mediation and arbitration for all cases where the parties have right to consent. In respect of the scope of disputes, it could be regarded as a privatization of Court-Annexed Conciliation. However, the quality of the process should be better and quicker than other ADRs because they are led by experienced attorneys, and, it should be cheaper than court litigation with representation by attorneys. In fact, the parties at Arbitration Center have to pay higher fee than Court-Annexed Conciliation [16] and the Court-Annexed Conciliation system's

[16] In many cases, it is impossible for parties to cover all amount of the fee which the attorney would have gained if he/she worked for ordinary clients. Most local Bar Associations compensate the fee of attorney, who is in charge of a mediator or an arbitrator.

resources are such that it is difficult for the Center to compete; however, the Center has been fighting bravely. The movement of creating such ADR has been spreading over the local Bar Associations nationwide. Now 25 local Bar Associations have this kind of ADR.[17]

3. Business Association-Based ADR. — An ADR which deals with disputes between a business and a consumer, and is funded by a business association in which the business involved in the dispute belongs to is classified as Business Association based ADR.

The typical Business Association based ADR is called "PL Center", which was institutionalized in accordance with the Diet's supplementary resolutions passed when the Product Liability Law was enacted in 1994. There are many ADR organizations of this type, each dealing with a category of products, such as automobiles, household appliances, cosmetics, chemical goods, and so on. Its scheme of dispute resolution is guided by the Ministry of Economy, Trade and Industry [METI] but its operation is not governmental.

Here again we see the Japanese preference for mediation over a lawsuit when coping with new social issues. These centers deal with product liability disputes (damages arising from deficient products), excluding consumer contract disputes. Generally, they have three procedural stages; the consultation, mediation, and adjudication by a neutral party which usually binds only the industry party. Each PL center receives more than one thousand consultations a year but cases reaching mediation or adjudication are often less than 10 per year. Such a gap is a common feature among ADR outside of court. It is said that the person in charge of consultation often mediates the parties *de facto* before referring a case to a neutral mediator or adjudicator.[18] If so, the real settlement ratio is higher than the published data which is only a fraction of 10% of the cases actually referred to mediation or adjudication.[19]

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[17] The name of ADR varies; especially the newly developed ADR organizations name themselves "Dispute Resolution Center", avoiding the use of "arbitration".

[18] Those who are in charge of consultation are usually sent from a manufacturer of the relevant industry because they need expertise about the products. Naturally they cannot be totally neutral, while the mediator and adjudicator must be. The neutrals are mostly lawyers. When *de facto* mediation is conducted by such "partisan" receptionists, a conflict of roles is well suspected.

[19] For example, the Automobile PL Consultation Center received 3,098 consultations in 2007. 63.8% of them were contract-concerned, claiming defects in function or quality of qutomobiles, and 29.8% were technical inquiry from consumer affairs centers described in *supra* note 10, or inquiry of troubles with dealers' repair shops, and only 6.4% (198 cases) were related to product liability. Although most consultations were not within its jurisdiction, the Center dealt with all of them.

The outcome of consultation was as follows; 22.5% were mediated *de facto* by the person in charge of consultation and 81.6% were disposed of without active intervention of the Center. For the latter category of cases, the person in charge gave the claimant technical information and/or advice which would help the claimant to negotiate with the company *pro se* or to understand that the claimant's complaint was groundless. In the same year, 22 cases out of those 2,555 cases were not disposed of and proceeded to the "formal" mediation process, which is presided by an advisory attorney of the

III. ADR LAW AND ITS IMPACT

A. ADR and the Rule of Law

The justice system in Japan has been small, in respect of budgets of the court system and markets of legal services. This situation simultaneously exists with the shortage in the number of lawyers, accessibility to legal system, and public perception of the usefulness and efficiency of court proceedings.

In 2001, the Prime Minister Koizumi started reform of the justice system, and for the purpose of completing the first ever radical reform since Meiji government has built the new, westernized justice system. He assigned variety of key figures as members of the Justice System Reform Council, which was established in the Cabinet in 1999. The Council issued "Recommendations of the Justice System Reform Council: For a Justice System to Support Japan in the 21st Century" in 2001. Following this Recommendation, a lot of changes have been discussed and realized.

In the Recommendation, ADR is taken up as a topic in "Chapter II: Justice System Responding to Public Expectations". Some points are excerpted below:[20]

> In addition to making special efforts to improve the function of adjudication, which constitutes the core of the justice system, efforts to reinforce and vitalize ADR should be made so that it will become an equally attractive option to adjudication for the people.
>
> From the standpoint of establishing a comprehensive institutional base for ADR, necessary measures should be studied, including the possible enactment of a law (such as "ADR Basic Law") that prescribes a basic framework to promote the use of

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Center. In this phase, 14 out of 22 cases were settled (success rate was 63.6%). Only 1 case was newly applied to the Adjudication Committee whose members are independent from the Center or the member companies in 2007. The case was settled before the adjudication was rendered. If rendered, the adjudication would bind parties only when the consumer side accepts it (conditionally binding arbitration). *See* Automobile PL Consultation Center, Katsudo Jokyo Hokoku 2007 [Activity Report for 2007] 19, 25-27.

[20] SHIHO-SEIDO KAIKAKU SHINGIKAI [JUDICIAL SYSTEM REFORM COUNCIL], SHIHO SEIDO KAIKAKU SHINGIKAI IKENSHO: 21 SEIKI NO NIHON WO SASAERU SHIHO SEIDO [RECOMMENDATIONS OF THE JUSTICE SYSTEM REFORM COUNCIL – FOR A JUSTICE SYSTEM TO SUPPORT JAPAN IN THE 21ST CENTURY] 35-38, (June 12, 2001), English version *available at* http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html (last visited May 30, 2009) (It is on the website and is not paged. The text is excerpted from: "Chapter II. Justice System Responding to Public Expectations – Part 1. Reform of the Civil Justice System – 8. Reinforcement and Vitalization of Alternative Dispute Resolution (ADR)".).

> ADR and to strengthen coordination with trial procedures. In doing so, the following measures specifically should be studied: coordination of conditions for giving the effect of interruption (suspension) of the statute of limitations; granting execution power; including ADR as an object of the legal aid system; and coordination of procedures for using trial procedures for the whole or a part of an ADR proceeding, and vice versa.

As a result, the "ADR Basic Law" suggested in the Recommendation became Chapter I of the ADR Law. It does not provide legal rights and duties, but demonstrates the general policy of ADR promotion as a means of appropriate realization of rights and interests of the people (Article 1), and provides basic principles and definitions of ADR (Article 2 and Article 3(1)). It also contains the duty of ADR organization to cooperate with each other, as well as the responsibilities of the state and local government to promote ADR by providing relevant information or by other appropriate means (Article 3(2) and Article 4).

Some basic procedural rules such as "confidentiality" failed to be incorporated, which the "ADR Basic Law" might implicitly adopt.[21] Instead, a certification scheme focusing private ADR was established by the Law. This was not included in the Recommendation. When the certification scheme appeared as a topic of the Law, a heated argument occurred within the ADR Study Committee (which was established to consider and to propose the way of realization of the Recommendation) as to whether legal regulation of ADR was consistent with the nature of ADR. To conclude, the Study Committee stated that if there was no legal guarantee of the quality of private ADR, public trust in private ADR would be extremely difficult to gain. A Certification scheme is regarded as one of the ways of quality control of private ADR.

The other argument was whether ADR promotion was consistent with the "rule of law", which was the ultimate goal of the Justice System Reform. Suppose you see ADR as an informalized trial, then, ADR would not contribute to the rule of law as far as the result of ADR process differs from foreseen judgment at court.

I propose, on the other hand, that ADR should be analyzed from the negotiation side. It should play an important role to ratify the negotiation process through equalization of parties, making parties informed, and

[21] Firstly, the UNCITRAL Model Law on International Commercial Conciliation was thought to be adopted, as if the UNCITRAL Model Law on International Commercial Arbitration was adopted by new Japanese Arbitration Law. However, it failed, because adoption of procedural rules on mediation/conciliation was thought to be too early. The more substantial reason would be that for Court-Annexed Conciliation, already the laws (Civil Conciliation Law and Act on Adjudication of Domestic Relations) have existed, and such procedural rule was thought to restrict the power of conciliators too much.

facilitating negotiation between the parties. As for the civil matters, private ordering by the parties through making contracts, especially settlement contracts, is the principle. However, in many cases parties are not informed well or do not know how to negotiate with others, and the settlement agreement may not be that which is best suited to the dispute. ADR can assist such parties by agreement-based dispute resolution methods, such as mediation/conciliation or arbitration. In this context, the rule of law and promotion of ADR do not necessarily conflict each other.

B. Outline of the ADR Law

1. Principles of ADR: Chapter I of the Law. — Chapter I governs all kinds of ADR, private or public, mediation or arbitration, certified or not. Article 3, which provides for the basic principles of ADR, reads: "Alternative dispute resolution procedures shall, as procedures for settling disputes legally, be executed in a fair and appropriate manner while respecting the voluntary efforts of the parties to the dispute resolution, and be aimed at achieving prompt dispute resolution based on specialized expertise and in accordance with the actual facts of the dispute." It is highly demanding, but at the same time, it shows variety of expectations towards ADR.

It should be noted that ADR is provided "as procedures for settling disputes legally." This "legally" does not mean the result of ADR procedure shall be the result of strict application of law and precedents at court. It should be interpreted more liberally, allowing creative options of settlement and producing individual justice. Needless to say, the Law aims not to admit illegal or legally invalid procedure or results of procedure. The word "legally" should be interpreted in this context.

2. Certification Scheme of Private ADR: Chapter II of the Law. — The Ministry of Justice [MOJ] has the authority of certification of mediation/conciliation services provided throug private ADR[22]. As a result of the long discussion mentioned above, this scheme is not licensing, but certifying certain quality in ADR service providers. Under this scheme, anyone can establish and manage a private ADR organization (or individually provide ADR services) and offer ADR service to the society without this MOJ certification. The only but serious concern is that ADR service is generally regarded as practice of law, which is prohibited and criminalized by Article 72 of the Attorney Act. The exceptions to the application of this provision is that (i) when the service is not offered on a business basis; (ii) when the service is interpreted as a legitimate act; or (iii)

[22] As for the arbitration services, the Arbitration Law is to regulate. However, some scholars say that arbitration should be regulated more strictly than mediation/conciliation because the arbitration award become binding without party agreement.

when other law provides differently. The certification based on ADR Law comes under the (iii) exception. [23]

This is better understood if taking the policy of utilizing non-lawyer professionals, such as those from fields adjoining law (quasi-legal professionals) into consideration. The Recommendation of 2001 suggests clarifying the requirements of Article 72, considering the changes of the services which non-lawyer professionals provide. [24] It can be seen as a liberalization of legal service.

However, again, the situation is complicated. The MOJ scheme requires ADR organizations to guarantee an attorney is available for consultation when specialized knowledge on the interpretation and application of laws and regulations is required in the process of providing private dispute resolution (Article 6(v)). It not only excludes illegal settlement, but also guarantees the parties decide when they are fully informed from the viewpoint of law. Benefits of ADR which are sacrificed in favor of additional legal input will be non-legal creativity, non-legal mutuality and casual negotiation between parties, because parties tend to focus on the virtual judgment of their disputes offered by the consulting lawyer.

Let me introduce the other legal effects of the MOJ certification scheme. They are provided by the Articles 25 to 27 of the Law.

First, Article 25 provides that where the MOJ certified ADR procedure is terminated without reaching settlement, and a party brings a suit within one month from the date of being notified of the termination, prescription shall be nullified as if the suit had been brought on the date on which the "claim" was presented during the certified ADR procedure. Different from the complaint submitted to court, at the outset of ADR procedure, the "claim" does not need to identify the legal right whose limitation may be at risk, or, precisely, such legal claim itself need not to be included.

Secondly, when a lawsuit is pending, and the parties agree to use certified mediation/conciliation procedures or such a procedure is already being carried out, the court may make a decision that the legal proceedings shall be suspended for a period of not more than four months (Article 26). The court has the authority to forward the pending case to Court-Annexed Conciliation, suspending the legal proceedings with no restriction of period. It's within the discretion of the court, so, no party agreement is required

[23] In fact, potential private ADR organizations without MOJ certification still withhold their full-scale activities because they may be criminally charged with unauthorized practice of law.

[24] The Recommendation reads: "study must be given to each such profession individually, taking into account each profession's actual situation, and the status of such non-legal professionals should be legally defined as part of the revision of Article 72 of the Attorney Act. That article should at least clarify the contents of restrictions in an appropriate way, including the relationship with persons engaged in corporate legal work, from the standpoint of responding to changes in the contents of services provided by professionals in fields adjoining law and the diversification of company forms, in order to ensure the predictability of the scope and modes of activities that are subject to restrictions."

(Article 20 of Civil Conciliation Law). In comparison with this authority, this treatment of private ADR is understated.

The third legal effect is to substitute certified ADR for mandatory Court-Annexed Conciliation. For example, divorcing parties need to apply for Family Court-Annexed Conciliation first, and if it fails, either party can file a case into the Family Court.[25] Article 27 of the Law provides that if such parties try to mediate their dispute using a MOJ certified ADR service, and if it is terminated without reaching settlement, either party is permitted to bring the suit into the Family Court. This substitution is applicable to disputes related to the appropriate amount of rent fee of land or house (Article 24-2(1) of Civil Conciliation Law).

3. Certification Standards. — Article 6 provides the standards for certification according to sixteen criteria, as well as one more request in its main clause that the ADR organization shall have the "financial base" to carry out its service. Article 7 provides the reasons for disqualification on the basis of 12 criteria. Many of them are common with international standards such as the UNCITRAL Model Law on International Commercial Conciliation, the ISO 10003 for External Dispute Resolution, and the Unified Mediation Act of the US. They include, for example, (a) a mediator whose expertise and competence should be suitable to the individual dispute (Article 6(i)); (b) fairness and impartiality of mediator and ADR organization (Article 6(ii)); (c) adequate and certain notice of process (Article 6(vi)); (d) standard operation process from the commencement to the termination, including clear grounds for termination of ADR procedure and operation of notice (Article 6(vii), (xii)); (e) secure management of submitted materials and range of confidentiality (Article 6(x), (xiv)); (f) appropriate handling system for complaints arising from ADR procedure (Article 6(xvii)).

On the other hand, at least two considerations are unique to Japanese society. One is that the request for the availability of a consultation attorney (Article 6(v)). The other is that Article 7 provides a number of disqualification reasons many of which aim to exclude Japanese mafia [*Yakuza*] from becoming ADR providers.[26]

As you will see, most standards are related to procedural matters. The exception is the third one, ensuring the availability of legal advice, which was (and is still) the most controversial standard, provided by the Article 6(v) of the Law. If the scope of necessary consultation is broadened, the ADR

[25] *See* Article 18 of Kaji Shimpan Ho [Act on Adjudication of Domestic Relations], Act No. 152 (1947). As for its real functioning and potential problems, see Aya Yamada, *Divorce Mediation in Japan: Legalization, Privatization, and Unification* (*presented at* Sho Sato Conference at University of California Berkeley on Japanese Family Law in 2008) (forthcoming 2009).

[26] Article 7 includes disqualification reasons such as: a person who was declared bankrupt and has yet to have his/her rights restored; a person who was sentenced to a fine for violating the provision of this Law or the Lawyers Law; a person who is a member of mafia; a corporation whose director or an employee comes under the disqualification reasons.

procedure becomes more law-like and adversarial, the procedure tends to focus only on legal issues, rather than to develop the settlement options or try to understand each other's perception of the dispute. On the other hand, needless to say, illegal settlements or those with serious deficiencies in terms of legal characteristics shall be prohibited, and, the parties should be fully informed when they decide to agree on a settlement and dispose of their rights to sue.

This standard is a result of compromise between these two values. At this moment, when the availability of an attorney's consultation outside of the ADR procedure is not easy, in terms of economical and psychological barriers, and when the ADR itself has not yet been trusted by public, this kind of institutional safety-net is necessary. However, the practical problems remain: how and when the legal advice should be disclosed to the parties; should it be in the joint session or in caucus settings; what if the potential problem is not noticed by the mediator so that the settlement is reached without legal consultation; how deeply the attorney should be involved in the procedure, and so on.

It is quite difficult to give comprehensive answers to these questions. Here I just put some theoretical cues to think about the detailed interpretation for the actual cases. First of all, legal advice should be taken as a tool for parties to reach a better self-determination, not as the final decision rendered by the other person. In fact, many legal advices would encompass some latitude depending on the probabilities of proof, foreseen judgment on fault, and estimation of damages (especially the amount of psychological compensation). They restrict excessive claims and offer a basic framework of negotiation. In this sense, such legal advices can be delivered in the joint session. If parties understand that the legal consequence shall not be the only and the best fitting resolution for their dispute, the mediator can continue to facilitate the negotiation between the parties to develop a mutually beneficial resolution, considering values other than law, such as continuing business relationship, prevention of future wrongdoing, psychological satisfaction, confidentiality of the disputes, and so on.

Secondly, however, we should take care of the third party's interest and the public values of protection of social disadvantaged persons from exploitation or being defrauded. If the dispute encompasses such interest or values, the mediator should intervene actively into the mediation process.

Thirdly, the role of attorneys who represent his/her client at mediation has not been theorized yet. Some do more careless work at mediation, while some do adversarial arguments the same as in litigation. The attorneys should assist their client to reach a better self-determination and a better settlement agreement. Before and during the mediation proceedings, the attorney should check if the client's needs and preference are well communicated to the mediator and the other party, assist the mediator to offer proposals or options

to reach mutually beneficial settlement, and to calculate the timing to quit the process if necessary. The ultimate purpose of the representation at mediation is to reach a resolution, not to fight over legal rights.

C. *Impact of Enactment of ADR Law*

1. Increasing Certified ADR. — Since its effective date of April 1st of 2007, the number of applications from private ADR organizations for MOJ certification has been increasing. As of the end of January 2009, 26 providers have been certified.

The problem is that the caseloads have not increased dramatically. The causal relationship between certification of an ADR organization and the strengthened motivation to use it cannot be observed, so far. The concept of ADR has not yet spread in society,[27] and even among the professionals who run their own ADR, e.g., attorneys, judicial scriveners, land and house investigators [*Tochi Kaoku Chosa-Shi*], ADR is generally less trusted than courts and administration-based ADR.

However, some positive effects can be seen in repeat players. When a consumer bring a claim into the certified ADR organization, the first stage is a consultation where personnel gives advice to the claimant and exchanges the positions of both sides (consumer and business). Recently, in this stage, not few businesses have come to compromise for settlement more readily than before. This happens *prior to* the certified mediation/conciliation procedure, because they would like to avoid all "formal" procedures which interestingly include certified mediation/conciliation. This is an important effect of ADR Law because it equalizes the parties and leads them to a fair negotiation and an appropriate resolution.

2. Widening the Varieties of Jurisdiction. — As the certification scheme gets known not only to the active ADR organizations but also latent ones, the subject matter jurisdiction of certification applicants has been varied. The inspired organizations include ones such as Japan Industrial Counselors Association which has applied for and was certified by the MOJ for offering mediation for labor disputes and relationships of couples, married or not. It utilizes a facilitative method, based on the industrial counselor's expertise, not relying on the virtual judgment over the dispute.

In addition, administrative agencies other than the MOJ have become interested in the ADR certification scheme, instead of establishing their own administration-based ADR, which costs more. For example, in 2008, METI proposed the amendment of an Act on Special Measures for Industrial

[27] The public notice of ADR has been slightly better, the reasons of which including that now the MOJ advertises it on its costs, that newspapers sometimes introduce ADR, that legal aid center (Ho-Terrace) will start introducing ADR to the customers, and that some law schools had started to teach ADR in their formal curricula.

Revitalization, which established an additional certification scheme to MOJ certification. A provider dealing with voluntary revitalization planning of businesses can apply to METI for a Specifically Certified ADR Provider, if it has been certified by the MOJ scheme.

There are different kinds of legal revitalization procedures, but this scheme promotes the quality of revitalization processes outside of courts and urges businesses to utilize such processes to turn themselves around as early as possible. Most businesses in deterioration would postpone using revitalization procedures in court, because of their reputation in the market and the acceleration effect on debts. On the other hand, revitalization outside of courts has not been fair enough because it needs all creditors' agreement on the turnout plan without any institutional and professional support. METI's aim is to streamline the turnout process by private ADR provider with expertise and efficiency.

3. Pursuing Transparency of Disputing Process. — Many certified ADR providers are administrated by non-lawyer personnel. Before their preparation for certification, the processes of consultation, mediation and conditional arbitration were confused partly from the perspective of procedural fairness. For example, at the business association based ADR organizations, the de-facto distinction between consultation and mediation has been in blurred. At the consultation stage, advisor tended to mediate between the claimant and the business, even when the advisor had already listened to and given advice to the claimant. The duty of confidentiality of unbeneficial information of the claimant was not secured. The possible conflict between the partisan role of advisors (on the consumer/claimant side) and neutrality as a mediator was not considered seriously.

Under the certification scheme, this kind of conflict is not allowed, and the administration office now fully understands such risks. It tries to pursue the transparency of processes.

4. Promoting Competition and Networking Within Dispute Resolution Services. — From the viewpoint of caseload, the Gulliver of ADR is still the Court-Annexed Conciliation for civil disputes. In respect of legal effects of settlement agreements, which allows the parties to start execution of the agreement, the fee, and the public trust in Courts generally, the Court-Annexed Conciliation has an apparent advantage.

Nevertheless, some Court-Annexed conciliators started to think that competitors have appeared with new perspectives and techniques of mediation. Many conciliators have joined the training or study sessions organized by private ADR organizations. Courts started to promote the quality of Conciliation, considering the situation in justice systems in other countries.

At the same time, networking among private ADR providers has begun. For example, the Osaka Bar Association tries to network its ADR with those

run by other profession's associations. ADR Networking is essentially important, because the subject matter jurisdiction of ADR is narrower than Courts. It could ensure to develop the effective collaboration of training for mediator/conciliators, to offer multiple expertise for dispute resolution, and to invite more customers. It can be a fertile soil to breed comprehensive ADR.

IV. CONCLUSION

The ADR Law was enacted to promote quality and the use of ADR by liberalization of dispute resolution services. So far the liberalization proceeds smoothly, inspiring private and administration-based ADR providers. On the other hand, the certification standard has established a set of institutional requirements which ADR should satisfy, including ensuring the availability of a consulting lawyer. It may drive ADR to legalization and deprives ADR of incentives to develop facilitative or dialogue-centered mediation methods.

As a civil law country, the traditional image of "rule of law" is to spread the authoritative legal interpretation (in many cases, in the shape of estimation of court judgment) in every corner of the country. Then, the role of ADR is a vehicle of such interpretation.

On the other hand, when the importance of private ordering through mutual agreement is stressed, the "rule of law" is understood to ensure the quality of the private ordering and liberty of agreement. The wider the accessibility to litigation is, the fairer the settlement outside of court must be. The role of legal advice in certified ADR should be limited to this function of "rule of law", as far as the third party interest or the public interest is not concerned. This may be more influenced by the image of ADR in common law countries.

Some additional years are necessary to determine the effect of the new ADR Law. The worst scenario is that ten years later, certified ADR terminate their services because of the running cost of qualified ADR, including fees for consulting lawyers. Right now a business model for private ADR is not developed in Japan and there seems no chance to get monetary support from local or state government.

The better scenario is that various ADR services ranging from legal to non-legal are offered by mediators with various backgrounds, and they offer wide accessibility to ordinary people and businesses. Disputing parties appreciate that the way of dispute resolution and the resulted private ordering can vary, depending on the individual situation and priorities, and that the private ordering by the disputants themselves empowers them and brings better tailor-made results for them. This scenario may require the integration of the images of mediation and rule of law in Japan and in the common law countries.

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