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## Commercial Arbitration: A Dimensional Concept of Mediation —Korean Experience—( I )\*

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### I. Philosophy for Conciliation/Mediation

Friction, conflicts and disputes are natural consequences of human interactions. Attempts to deal with such problems may occur in a variety of ways.

A dispute arises out of disagreement between persons (individuals or subgroups) in which the alleged rights of one party are claimed to be infringed, interfered with, or denied by the other party. The second party may deny the infringement, or justify it by reference to some alternative or overriding right, or acknowledge the accusation; but he does not meet the claim. The right-claimant may, for whatever reason, accede to this, in which case no dispute arises. If he is unwilling to accede, he then takes steps to attempt to rectify the situation by some regularized procedure in the public arena. The intent is to gain the rights affected, to secure freedom from further infringement, perhaps to obtain compensation or the administration of retribution, and to gain some definition of the relevant rights. No dispute would exist unless and until the right-claimant, or someone on his behalf, actively raises the initial disagreement from the level of dyadic argument about the denied claim.

The word settlement, in reference to a dispute, may also appear arbitrary, for final resolution is not always gained; indeed, sometimes it is not even sought. But once a disagreement becomes an actual dispute, some kind of result

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must follow. This may be a clear-cut decision. The plaintiff, the right-claimant, may be unable to bring the matter to any decisive consideration for lack of sufficient evidence and support, inadequacy of institutional means, political interference, direct social pressure to desist, failure to persist in the face of relative disadvantages (such as costs) that accrue, and so forth. But in that event, no decision is, in fact, a decision more or less in favor of the defendant. Beyond that, some sort of a positive result is reached in any dispute as the action proceeds and eventually ends in the settlement. The original quarrel may be solved more or less, or it may continue and be reactivated into a further dispute. The outcome will depend on the nature of the dispute process in the particular society.<sup>(1)</sup>

Briefly, there are three main stages: the prehistory of the dispute, the dispute itself, and the social consequences that follow settlement.

The prehistory consists of two parts that, though obviously related, need to be kept analytically separate. First, where we are concerned with fairly small-scale societies, dominated by status relations of a multiplex kind, it is necessary to understand as fully as possible the previous development and state of relations between the two parties, both dyadically and in their interconnection with other involved persons. Seemingly simple cases of theft, adultery, or slander may often be shown to be more complex, and more understandable, in the context of the prehistory. Second, account is required of the occurrence of the alleged infringement and the emergence of disagreement. Much of this will reappear during the phase of active dispute settlement (that is, in the evidence provided). But it should not be assumed that all the significant information will appear in evidence. Claims, counterclaims, rebuttals, emphasis of evidence, tactics, and so on, may all change during the process, and it is most important to recognize these changes in order to take them into account.

A full consideration of the consequences of a dispute settlement is equally

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(1) Lon L. Fuller, The Forms and Limits of Adjudication, 92 *Harvard L. Rev.*, 353 (1978.12), pp. 353-365.

important, both of general analysis and in the examination of social processes among a particular cluster of people. The dispute may be settled, but the form and content of the settlement, and its subsequent enforcement as relevant, must necessarily affect relations between the disputants and others involved in some way or other. Dispute settlement does not occur in a social vacuum, insulated from the continuous stream of interaction that makes up ongoing social life. In any case the settlement in effect defines, or redefines, status, rights and obligations, both for the disputants themselves and for other people. Status expectations may be reaffirmed, weakened, strengthened, or altered, and all this has some effect on subsequent relationships and social action. Take the example of a divorce case: The couple may be induced or compelled to remain together, yet the marital relationship is most likely going to be different thereafter—better or worse or something of each, but different. If divorce is obtained, then an important set of relationships is obviously affected. The settlement of a dispute may effectively resolve the disagreement.

The study of the actual processes of dispute settlement should as a first step distinguish at least two structurally different modes. One is dispute settlement by negotiation between the disputants, each assisted by socially relevant supporters, representatives and spokesmen. Each party seeks to exert what strength it can against the other, such strength ranging from forensic argument and skill to the threat of physical force, from moral pressures to offers or denials of other advantages. Here the result, the settlement, is in effect some mutually acceptable, or tolerable resolution of the matter in dispute, based on the assessed or demonstrated strengths of the parties. It is useful to distinguish further between straight negotiations between the two parties and negotiations mediated by some third party or one who is a member of both parties, who has no ability to issue any binding decision.

The second mode of dispute settlement is by adjudication, where a binding decision is given by a third party with a degree of authority. Such a decision is in part coercive in that the adjudicator (judge or the like) has not only

both the right and obligation to reach and enunciate a decision but also power to enforce it.

Essentially the difference is between judgment by an authorized third party, on the one hand, and negotiated agreement without judgment, on the other; that is the difference between the presence or absence of overriding authority. Adjudicators may, and often do, attempt to obtain the agreement of the decision and to reconcile the disputants both to the judgment and to each other. They need not attempt this, and they may fail in the attempt; but the judgment stands, nevertheless, as the decision and settlement. The adjudicator may be to some extent ignorant, biased or unskillful, or he may be as just and able as is humanly possible; but he is committed to giving the decision. The disputants may argue their cases before him, seeking to influence his decision, suggesting compromise, appealing to rational and irrational factors. That is, they seek to affect the judgment in their own interests, but they do not participate in the decision-making. In contrast, in negotiations with or without a mediator the disputants and their parties participate directly in the settlement; and they must be in agreement with it and must accept it as the best that can be obtained under the circumstances. Such agreement is not the result only of consideration and application of norms and rules and of standard expectations. Indeed, there is no one in this situation to determine which norms apply, and how. There may be no ultimate agreement on that score. There is, however, the additional and critical factor of the relative strengths of the two parties, in terms of physical numbers and force, political power, supernatural power and various social advantages and disadvantages to be gained or lost, offered or withheld. <sup>(2)</sup>

Some societies are characterized by the absence of adjudication, but probably no society is without some forms of negotiation as a means of dealing with disputes. Negotiations may operate within fairly distinct subsystems (such as small clusters of neighbors, kin groups, voluntary associations) where the

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(2) Sang Hyun Song, *Civil Procedure* (1) (Kyungmoonsa, Seoul, 1981), pp. 1-3.

members are roughly equals who wish to avoid outside interference. Here negotiations may well be the regular method of treating disputes between members, even though access to adjudication remains a possibility. Negotiations may, however, be a preliminary or a possible alternative to adjudication.

Many disputes are subject to treatment by a combination of the two modes operating in different phases. The adjudicator may be content to accept, and perhaps formalize, the agreed results of negotiation; he may be the instigator of those negotiations; he may step in when they falter; or he may set limits within which they take place. Negotiations may serve to clarify the area of dispute in which adjudication is required. The possibility of a resort or appeal to adjudication will be likely to affect the course and results of negotiations. All this requires much more examination by anthropologists. For instance, what determines whether a dispute goes to negotiation or adjudication — the kind of matter in dispute, the nature of relations between the disputants, the desire to avoid or to appeal to authority? It is of some importance to understand the differences in the kinds of settlements reached by the two processes in the same society and the kinds of social consequences entailed by them.

The distinction between those two modes of dispute settlement seems to be not only valid but also analytically useful. This fact need not, however, lead to an insistence upon rigidly exclusive categories of social processes. Such rigidity is always likely to be dangerous. In this instance there is no absolute dividing line between the two modes. Certainly intermediate cases occur where it is difficult, and scarcely worthwhile, to attempt to allocate them firmly to one category or the other. These cases may, instead, teach us a good deal about the similarities, rather than the differences, in these phenomena. For instance, it is obviously hard to say when an adjudicator begins to become more a mediator between the disputants than a decision-maker. Alternatively, a mediator may in certain circumstances arrive at a position where he is able, or allowed, to give a more or less binding decision. In negotiations without a mediator, a spokesman for one party may have sufficient influence and skill to

come to a position where he can act in effect almost as an adjudicator; whereas an adjudicator may sometimes find it convenient or political or more efficient to act as a mediator.

In the Eastern society like Korea the pervasive influence of close personal relations upon almost any conceivable human transaction is to be noted. An individual is viewed in total context—that is, as a son, as a nephew, or the like. This is in contrast to the detached and impersonal relations that characterize Western industrialized societies where modular or functional relationship usually prevails.

In fact, conciliation/mediation in modern civil justice does not play a major role. Tendency in Korea is that in practice the number of cases disposed of through conciliation/mediation is not very significant and, moreover, is not likely to increase in the immediate future. On the contrary, all the legal systems show a trend in favor of judicialization of controversies, still viewed as the most important instrument to implement rights.

This does not mean that settlement out of court should not be promoted and that efforts of providing alternative fora for certain types of controversies should be discouraged. It means only that conciliation out of the court system can be a serious and important alternative only within certain boundaries and for certain controversies, such as, for instance, those arising within consolidated groups or those involving parties having an ongoing relationship with each other (relatives, neighbors, etc.). We should seek to avoid wasteful litigation through extra-judicial settlement. Such “preventive lawyering” functions in the private ordering of society needs to be emphasized.

## II. Inadequacies of the Formal Judicial System

The problem of delay in the judicial disposition of cases is the most serious problem and one of pressing urgency. Unless the problem is soon resolved satisfactorily, the capacity of the judiciary to serve as an effective and efficient

instrument of justice, will certainly be put in question. Furthermore, high costs including attorney fees, procedural technicality and unsuitability of adjudication for minor or certain kinds of disputes are reasons for popular dissatisfaction with judicial resolution.

For a set of complex reasons that no one quite seems to understand, the amount of litigation has increased enormously in the period following World War II all over the world. America, for example, has been adding judgeships and building courtrooms at an enormous rate. The bar has absorbed an incredible number of new lawyers — and they still have not caught up. For these reasons Americans have seen access to justice principally as a problem of lagging court calendars. Their energies have largely been devoted not to questions of who ought to have access to the courts, but to providing enough courts quickly enough for those who do have access to them. Far more time and money has been spent on meeting the demands of those who have the resources to find their own way to court than on assuring access to those not now clamoring for admission.

The concern with the problem of court overcrowding has had some unusual consequences. Americans have become increasingly interested in the many experiments with neighborhood courts, mediators and so on. While one occasionally hears Americans speaking about these experiments in social justice terms, the driving force behind this new interest is quite a different one. These “sub-judicial” modes of conflict resolution are attracting American attention because they are promising modes of cutting off disputes before they reach courts and thus reducing the overcrowding of court calendars. In this sense Americans may be backing into extending access to justice down the socio-economic scale through their desire to provide more efficient court services for those who can well afford to go to court.<sup>(3)</sup>

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(3) See Michael Zander, *Legal Services for the Poor, Access to Justice and the Welfare State* (edited by Mauro Cappelletti) (European University Institute, 1981), pp. 27-48.

### III. Philosophy of Compulsory Conciliation

There are a number of procedural devices that prevent a disputant from bringing his complaint directly to court.

In Korea notable provisions of conciliation/mediation are found in the Land-Lease and House-Lease Conciliation Law, the Environmental Preservation Law, the Small Claims Adjudication Act, the Domestic Affairs Adjudication Law, the State Compensation Law, the Labor Dispute Mediation Law, the Insurance Business Act and the proposed amendment to the Copyright Act.<sup>(4)</sup> Although most of these non-judicial schemes are not mandatory, in reality they function well to diffuse a lot of disputes that otherwise would have been brought to court.

The condition of compulsory conciliation, as provided for in the State Compensation Law, is sought to be made effective by requiring the parties to a dispute to personally appear and confront each other before the proper committee. It is only after conciliation under such conditions has been declared unsuccessful, as certified by the proper conciliation committee, that the dispute is permitted to be officially adjudicated.

Generally, social structure based on family relations and a slight rise of consciousness of rights contributes to the good functioning of traditional conciliation systems in Korea in addition to the above-mentioned statutory device. It must be pointed out, there are many instances where we are acutely aware of a big gap between legal norm and judicial system of the state and actual life of individual in modern Korean statutory order. This is because of the fact that most statutory order was imposed after being imported from the Western world. To fill up this gap, traditional conciliation schemes have been found useful.

In view of a national character of trying to avoid confrontation or taking dispute to the extreme this kind of dispute solution mechanism might be very

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(4) Sang Hyun Song, *op. cit.*, p. 2.



helpful and effective in Korean society. However, it is not fair to emphasize this point of view too much. Civil and domestic conciliations are conducted by the court; solutions for disputes accomplished thereby are legally enforced. In this sense, civil and domestic conciliations can be regarded as the court of equity, while adjudication as the court of common law.

The philosophy and structure of the access to justice and the reform movement have reached the stage that focuses on the entire dispute processing machinery, rather than on just providing legal representation to disadvantaged interests and groups. In particular, simplification of the substantive law and creation of alternatives to courts, lawyers, and adjudication have become especially important within this reform trend, for courts, lawyers, and adjudication are very costly modes of access to the law. In addition, in certain types of cases alternatives may provide a solution which is not only more economical, quicker and more efficient, but also of a better quality. For instance, provided that parties are assured of a comparable bargaining strength, "mending" solutions such as mediation and conciliation are always preferable to contentious adjudication whenever valuable relationships of a durable character are at stake.

#### **IV. Adjudication vs. Conciliation/Mediation**

The adjudicative process necessarily becomes adversary in nature. The lawyers that the opposing parties engage to represent their respective interests, in consequence, become their partisan advocates. It is in this combative trial procedure that the lawyer has been professionally trained.

Conciliation/mediation, if it is to succeed, must be non-adversary, stressing the common points of mutual interest rather than the issue of divergence. The lawyer's adversarial skills are thus more obstructive rather than facilitative of effecting a compromise settlement of the parties.

Secondly, a highly structured trial procedure with strict rules of evidence have been adopted to ensure the accuracy of the fact finding process so essential to

adjudication. In contrast, there are no technical procedural rules in effecting a conciliation.

Some features that characterize two models: the adjudication model and the negotiation model. Their respective features are listed below:<sup>(5)</sup>

Adjudication	Negotiation Model
a. triad	a. dyad
b. coercive power	b. no coercive power
c. application of highly valued norms	c. pursuit of interests (values)
d. establishment of past facts (guilt)	d. not necessary to establish past facts
e. retroactively oriented reasoning	e. prospectively oriented reasoning
f. legal experts participate (that is, judge)	f. no legal experts participate
g. conclusion is a verdict	g. conclusion is an agreement
h. purely distributive decision	h. distributive/generative decision
i. either/or decision	i. a compromise
j. reaffirmation	j. no necessary implication concerning validity
k. affinity to legal scholarship	k. affinity to science or utilitarian thinking

Despite of all the advantages for which the conciliation/mediation takes credit the following are the situations in Korea that do not make the negotiation models flourish.

The fixation of the Korean bar on maintaining its monopoly on legal advice has to be seen in relation to its relatively weak position in the legal profession as a whole. This position can be demonstrated simply by comparing statistics concerning the Korean and American legal professions, which provide a clear indication of the differences between the legal cultures. However, in the United States, three fourths of all jurists are practicing lawyers. In Korea, the legal profession traditionally consisted of three groups about equal in size: judges, lawyers, and civil servants.

Legal training is centered around the role of the judge, whose tenured career

(5) Laura Nader, *Law in Culture and Society* (1972), p. 87.

begins immediately upon completion of his legal studies and training.

The emphasis on the judge's role is reflected in some of the features of procedural law. Korean court procedures are dominated by the judge, who is more active than his counterpart in the American adversary system. In civil as well as criminal courts, the Korean judge is obliged to fully investigate all the facts pertaining to the case. In his investigation, he does not rely upon the arguments presented either by the concerned parties or legal counsel, but prepares his cases, and especially the oral proceedings, upon the basis of well-documented files and briefs. Observations of courtroom activity show a range of judicial behavior from authoritarian to patriarchal, but they rarely show a judge allowing the parties or legal counsel to dominate the course of the oral proceedings.

The combination of these characteristics serves to explain why the American legal system has to look for more alternatives to adjudication in court. The reasons are related to some deficiencies of the American court system which act as barriers to litigation. The great number of lawyers, their relative freedom to advertise their services and the possibilities of arranging for contingency fees—all these make the "input organization" of the litigation system very strong. On the other hand, the court's limited personnel leads to delays which act as a barrier to the filing of cases. Even though in Korea there are frequent complaints about delay in, and the cost of, court cases, the problem is not nearly so serious as in American courts. Thus, the pressure to look for alternatives to conflict resolution is much lower in Korea. The decrease of the mediator institution demonstrates, as well, that there is little demand for extra-court alternatives in the Korean legal system. Alternative forms of conflict resolution are not considered as an urgent need in the Korean legal discussion, because Korean courts are successfully acting as a mediatory institution, where settlements can be reached with the help of a judge. In Korea settlements are generally worked out in court, with the judge acting as a mediator while in the American legal setting bargaining prevails, much of them taking place outside the

court.

There is a functional relation between the dominance of lawyers in the American legal profession and the fact that the scope of their activities extends beyond that of Korean lawyers. Some of the functions American lawyers have in registering real estate or building contracts are in Korea partly administrative, partly court responsibilities. Korean lawyers usually question witnesses in court shortly and they rarely enter into extensive out-of-court discovery such as American lawyers do.