COURT - ANNEXED CONCILIATION IN JAPAN: Viewpoint from Japanese experience of ADR

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I. Introduction

A movement toward alternative dispute resolution (ADR) is one of the recent dominant phenomena in most western countries. Facing an explosion of increasing numbers of litigation, these countries are trying to lead their citizens avoiding court proceedings and relying more and more to ADR. As to Japan, we can also find a tendency to encourage the ADR. The underlying circumstances, however, seem somewhat different from that of most western countries, since the number of lawsuits in Japan is not so large. One of the remarkable difference in Japan is that *the court-annexed conciliation has already been playing an important role as an institution for resolving disputes between citizens for a longer period.* For example, in 2014, 40,063 cases of "disputes over civil cases" were filed with the Summary Courts and 3,792 with the District Courts.[1] As to "disputes over domestic matters", 137,214 cases were filed with the Family Courts.[2] On the contrary, compared with the success of the court-annexed conciliation, *other kinds of ADR, not only arbitration but also out-of-court conciliation were generally very slack.* Now Japanese government is trying to facilitate the use of arbitration and ADR other than court-annexed conciliation; the first and fundamental question is why only the court-annexed conciliation has prevailed in Japan?

In this contribution, therefore, I will focus on the court-annexed conciliation as a typical Japanese ADR institution. Especially, I will mainly deal with the conciliation for resolving "disputes over civil cases" which is called *minji-chôtei*, the Civil Conciliation, regulated by the Civil Conciliation Act (*minji-chôteihô*; Act No. 222 of June 9, 1951, enforced October 1, 1951). The conciliation for resolving "disputes over domestic matters", which is called *kaji-chôtei* or Family Conciliation, is now regulated by the Domestic Relations Case Procedure Act (*kajijiken-tetsuzukihô*; Act No. 52 of May 25, 2011, enforced January 1, 2013; the revised former Domestic Relations Trial Act [*kaji shimpanhô*] Act No. 152 of December 6, 1947, enforced January 1,

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1) General Secretariat, Supreme Court (ed.), Annual Report of Judicial Statistics for 2014 Vol. 1 Civil Cases (Heisei 26 Nen Shiho Tokei Nempô Minji-Gyôsei-hen), p. 3.

2) General Secretariat, Supreme Court (ed.), Annual Report of Judicial Statistics for 2014 Vol. 3 Family Cases (Heisei 26 Nen Shiho Tokei Nempô Kaji-hen), p. 9.

1948). This special conciliation shall only be slightly mentioned, since domestic matters have their own specialties, compared with ordinal civil disputes; and for the Family Conciliation, there is a special provision that requires parties to undergo mandatory conciliation before filing their action (the *Conciliation First Principle*; § 257 of Family Affairs Procedure Act).

II. Historical Background of modern Japanese systems of dispute resolution

1. Establishment of the "western-styled" court system and "modern" civil procedure

The court system and civil procedure system are inevitable for protecting the rights of citizens. The establishment of the Japanese court as well as the modern procedural system are dating back to the days just after the *Meiji Restoration* (1868). By following their policy of a total modernization of the Japanese society especially in accepting the "*western-styled*" *legal system*,[3] the new government worked intensively to arrange the establishment of a new court and civil justice system.[4] Already in the early days of the Meiji period a new court system was introduced, based on the ideas of French system.[5] Shortly after that, because of political changes in Europe, the Japanese government changed its policy. By the Courts Constitution Act (Act No. 6 of February 6, 1890, enforced November 1, 1890)[6], the court system was reorganized and now orientated at the German model. The first Japanese Code of Civil Procedure (Act No. 28 of April 21, 1890) was promulgated, which mainly adopted the German style of Civil Procedure.[7] Now the disputes over the rights and duties between citizens were to be resolved by this "ordinal" civil procedure.

2. Development of court-annexed conciliations

The court-annexed conciliation, which handles the conciliation resolving "disputes over civil cases" today, was

3) It is not clarified, whether these modern systems were completely extinct from the legal system of the *Tokugawa period* (1603-1867) or already had its basis in it.

4) There were some political purposes for establishing "westernized" justice system in Japan. The former *Tokugawa shogunate* agreed to international treaties with powerful western countries (United States, UK, France, the Netherlands and Russia), which regulated unequal provisions of consular jurisdictions of these countries in Japan. To revise these provisions, the establishment of a "western-styled" judicial system was seen necessary.

5) In 1875, *Taishinin* was established as the highest organ of Japanese judiciary. Together with the enforcement of the Criminal Procedure Law of 1880, which was drafted by French legal scholar *Gustave Émile Boissonade* (1825-1910), the names of the inferior courts were changed in 1882: *Kôso-saibansho*, *Sisin-saibansho* and *Chian-saibansho*. These are literal translation of *tribunal d'appel*, *tribunal de première instance* and *justice de paix*.

6) Supreme Court (*Taishinin*), Appellate Court (*Kôsoin*), District Court (*Chihô-saibansho*) and Local Court (*Ku-saibansho*); article 1 of Courts Constitution Act. Based on the former German Court System of *Reichsgericht*, *Oberlandesgericht*, *Landgericht* and *Amtsgericht*.

7) At that early period of Meiji, the model country for the modernization of Japan was France. However, in the meantime, Japan had changed its model state to Germany. The victory of Germany in Franco-Prussian War (1870-71) and the great strides of development of this country had a strong influence. The symbolic event of this reorientation can be seen in the establishment of the Meiji Constitution (1889), which modeled the Constitution of Prussia of 1850.

originally implemented as an *ad hoc* institution for resolving *specific fields of the disputes*. In 1922 the Land Lease and House Lease Conciliation Act (*shakuchi-shakuya-chôteihô*; Act No. 41 of April 12, 1922, enforced October 1, 1922) introduced the first system of court-annexed conciliation. During the last years of World War I, the Japanese society had changed dramatically; an eminent flow of population from rural to urban areas, especially towards the Tokyo region, caused serious housing problems. To improve the resolution of disputes relating to lease contracts and charges regarding houses or land, the court-annexed conciliation was introduced. Just after its establishment, the *Great Kantō earthquake* occurred on September 1. 1923. This disaster caused an explosion of private disputes relating to land lease and house lease matters. During this peak of disputes the newly introduced court-annexed conciliation could show its usefulness and potential.

The court-annexed conciliation was expanded its applicable field to disputes regarding tenant farming problems (*kosaku-sôgi*) by the Farm Tenancy Conciliation Act (*kosaku-chôteihô*; Act No. 18 of July 22, 1924, enforced December 1, 1924). The Japanese tenant farming relationships had long been based on traditional feudalistic ideas. However, the situation also in this area had gradually changed. The democratic idea prevailed among many people in 1920s in Japan, and as a consequence of such social tendencies, many disputes occurred as to the "feudalistic" tenant relationships. Due to this political situation around the tenant farming relations, the disputes alluded sensitive problems, which could not be resolved adequately by the ordinal litigation. Thus order-made conciliation for resolving such tenant farming disputes was regarded as a suitable instrument also for such cases. In 1926, the Commercial Affairs Conciliation Act (*shôji-chôteihô*; Act No. 42 of March 30, 1926, enforced November 1, 1926) and then on October 1, 1932, the Monetary Claims Temporary Conciliation Act (*kinsen-saimu-rinji-chôteihô*; Act No. 26 of September 7, 1932, enforced November 1, 1932) was promulgated. The court-annexed conciliation was originally prepared only for specific fields of disputes where the ordinary civil procedure was not appropriate. Here, not confirming rights and duties of the disputing parties but considering many other factors including the economic situation of the parties is sometimes more important. However, because of its simplicity and usefulness, the applicable fields of court-annexed conciliation were expanded. It has invaded the "ordinal" civil procedure.

During the Second World War, the court-annexed conciliation was expanded to be applied in all civil disputes by the Special Civil Act of Wartime (*senji-minji-tokubetsuhô*; Act No. 63 of February 23, 1942, enforced March 21, 1943, abolished January 15, 1946). Due to the serious shortage of manpower within the judiciary as well as of lawyers during the war time, it became difficult to resolve civil disputes by the ordinary litigation. To overcome these difficulties, the civil procedure was replaced by the simplified justice system of conciliation (§ 14 of Special Civil Act of Wartime).

After the Second World War, the Civil Conciliation Act (*minji-chôteihô*) and the Rules of Civil Conciliation (*minji-chôtei-kisoku*, Rules of the

Supreme Court No. 8 of 1951)[8] were promulgated in 1951, and the Land Lease and House Lease Conciliation Act, the Farm Tenancy Conciliation Act, the Commercial Affairs Conciliation Act and the Monetary Claims Temporary Conciliation Act were abolished.[9] Under the new Post-War Constitution a Family Court system was introduced. Within this newly established system the Domestic Relations Trial Act (*kaji-shimpanhô*) provided conciliation for disputes about domestic matters (§§ 17 et. seq.).[10]

3. The evaluations toward court-annexed conciliations

In spite of the widely prevailing use of the court-annexed conciliations now a days, their history was not always as happy. From the war period on, the court-annexed conciliations were seen as a shadowy justice and subordinated dispute resolution system. One influential academic argued that the conciliation was an instrument which facilitated the pre-modern cooperative personal relationships and was reluctant of definitive delineation of rights and duties through litigation![11]

As to the legal practice of the conciliation, there were some changes that should be mentioned: Just after the end of the War the new Japanese Constitution was promulgated (1946). This Post-War Constitution was introduced under the strong influence of the United States; the new constitution e.g. provides an American styled system of Judicial Review.[12] Under the new constitution, conciliations for civil disputes and domestic matters should be proved by the new aspect of the "constitutionality".

In 1960 in *Nomura v. Yamaki* the Supreme Court (Grand Bench)[13] decided that a decision of inferior courts based on a "judgement in lieu of settlement

8) The Civil Conciliation Act regulates the basic structures of Civil Conciliation in Japan. The Rule of Civil Conciliation regulates its details. Cf. Article 77 of the constitution of Japan: The Supreme Court is vested with the rule-making power under which it determines the rules of procedure and of practice, and of matters relating to attorneys, the internal discipline of the courts and the administration of judicial affairs.

9) The reason for having enacted a unified law of civil conciliation is explained as follows: Previous laws relevant to conciliation were enacted one by one according to the *ad hoc* demands. They should be consolidated, because they are too complicated from the viewpoint of paperwork at a court as well as of the parties concerned. The 10th Diet House of Representative, Committee on Judicial Affairs, No. 20, 1951, p. 6.

10) See also II. 3.

11) *Takeyoshi Kawashima*, Dispute Resolution in Contemporary Japan, in: Arthur von Mehren (ed.), Law in Japan: The Legal Order in a Changing Society, Harvard University Press, 1963, pp. 41-72; against this 'orthodox' view, *Haley*, The Myth of the Reluctant Litigant, Journal of Japanese Studies Vol. 4, No. 2, 1978, pp. 359-390.

12) Japan did not establish a special court for reviewing the "constitutionality" of state activities like the German Federal Constitutional Court (*Bundesverfassungsgericht*). Article 81 of Japanese Post-War Constitution says that "the Supreme Court is *the court of last resort* with power to determine the constitutionality". So, this provision implicates that *all inferior courts* have also such a power to review constitutionality.

13) The court system has also changed under the new constitution. First, there is one *Supreme Court* (*Saikô-saibansho*) located in Tokyo (Article 76 of Constitution, § 6 Court Act). Then, there are four kinds of *inferior courts*: 8 Appellate Court (*Koutô-saibansho*) (6 branches), 50 District Courts (*Chihô-saibansho*) (203 branches), 50 Family Courts (*Katei-saibansho*) and 438 Summary Courts (*Kann'i-saib ansho*) (§ 2 Court Act).

(*chôtei-ni-kawaru-saiban*)", also called "coercive settlement (*kyôsei-chôtei*)", was to be seen as unconstitutional.[14] The Grand Bench states as follows: As to the *final judgment on the parties' rights and duties* (judgment on a pure Litigating Case), the fundamental constitutional guarantees of trial and publicity (Article 82 of the Post-war Constitution) and therefore the right to access to Justice (Article 32) are mandatory required. The judgement in lieu of settlement, which permits *appeal* to the dissatisfied party, is nothing but a final judgement. From the view point of the Post-War Constitution, therefore, this judgement shall be only confined to those of ordering the alternation of interests, terms and so on: i.e. judgement on the matters of having Non-Contentious Case character. The pending case was not a Non-Contentious Case but a pure Litigating Case, since the case concerning the surrender of residential real estate. Therefore, the resolution of the inferior court by the judgement in lieu of settlement in this case was unconstitutional.

As to domestic matters, the situation is quite different. Upon the equality of men and women declared by the new constitution (Article 24), the legislator aimed to abolish the whole old traditional family system within Japanese society, based on the feudalistic ideology prevailed before the war. For that purpose, the Family Law in the Civil Code was totally reformed and the Family Court was newly established.[15] Here the court-annexed conciliation was expected to undertake an important role in establishing appropriate domestic relations by the support of the Family Court. Against many attacks to the procedure of newly established Family Court, the Supreme Court confirmed its constitutionality here!

The different evaluation of the court-annexed conciliation for civil disputes and domestic matters shows that it is not easy to decide whether the court-annexed conciliation is good or bad. Therefore a more detailed analyses is required.

III. The structure and some features of Civil Conciliation

1. The problems

As mentioned above, the court-annexed conciliation was accepted in our society as a successful instrument for resolving some kinds of disputes. But it was criticized partly by some influential academics: It was argued that it had something of a shadowy justice and it was influenced by pre-modern ideas.[16] But soon these opinions became not decisive for the following development of the conciliation! Successful experiences in the area of Civil Conciliation inspired legislator to encourage the use of other ADR systems. Comparative studies of new trends toward ADR in the United States pushed back as well to promote the conciliation and other ADR systems. For further development of ADR, it is necessary to reconsider the basis of the

14) A decision of the Supreme Court on July 6, 1960 *Saikôsai Minsyû* (Report of Supreme Court Civil Cases), Vol. 14, No. 9, p. 1657.
15) See the text at footnote 10) and also footnote 13).
16) See the text at footnote 11).

court-annexed conciliation, especially its legal structure.

2. Fundamental structure of Civil Conciliation

(1) The panel or the Conciliation Committee

Civil Conciliation is performed by a panel, but somewhat different from that of ordinary litigation. A case brought to the competent Summary Court or to the District Court, generally by the petition of a party, shall be normally carried out by the Conciliation Committee (*chôtei-iinkai*). A Conciliation Committee consists one Chief Conciliator (*chôtei-shunin*) and two or more Civil Conciliation Commissioners (*chôtei-iin*) (§ 6 CCA). The Chief Conciliator will be designated by the District Court and has to be a judge (§ 7 para 1 CCA) or a part-time judicial officer (*chôtei-kan*) (§§ 23-3 CCA). Part-time judicial officers are appointed by the Supreme Court from attorneys with five years or more experience in practice (§ 23-2 para 1 CCA). Before the amendment of 2004, only a judge could be the chief. However, in the practice of those days, the judges did not attend the whole process of conciliation: they joined the proceedings at the beginning for explaining the proceedings and at the final stage of the proceedings for checking the agreed settlement plan. As a result, only two of the Civil Conciliation Commissioners had heard the case and proposed their settlement plan. The practice at that time was based on the unsatisfactory number of judges. Under the criticism of this practice, in the year of 2004, the part-time judicial officers were introduced to have control over the whole process of Civil Conciliation from the point of law.

The Civil Conciliation Commissioners shall be appointed by the Supreme Court among the individuals of (a) attorneys, (b) experts who have skills and experiences useful for resolving civil disputes, or (c) have skills and experiences in companies and also with good personality and an excellent insight, and ages from 40 to under 70. They can be from different professional backgrounds not only the attorneys, former judges and professors but also doctors, tax advisors, certified public accountants, real estate appraisals and architects. Proper specialists can be named as a conciliator for particular cases; for instance, architects for disputes of building defects and doctors for medical malpractice disputes. They can join as a conciliator, analyze the case from the beginning of the proceedings and decide it properly by their professional knowledge. Technical difficulties can be analyzed by them and unnecessary procedural difficulties can be avoided. The discussion therefore can be directly focused on the core problems of the disputes. It is also remarkable that the charges of the Civil Conciliation Commissioners shall be paid not by the parties, but from the state (§ 9 CCA).

(2) Structural comparison with the ordinal civil litigation

(a) Commencement

Only the parties can decide whether to resort their dispute to Civil Conciliation, ordinal civil procedure or choose other ways of out-of-court conciliation; the Civil Conciliation bases on the voluntariness of the parties. From the applicant's perspective there are various reasons why the Civil Conciliation could seem more attractive compared to the ordinal civil procedure. The fee for conciliation is cheaper than

the one of ordinal civil procedure; the proceedings of conciliation are not complex so that they can be performed by laymen themselves. Therefore there is no need to pay additional expensive attorney's fee.

Since the Civil Conciliation is based on the voluntariness of the parties and does not know coercive features like the ordinal civil procedure, there is no fear of a default judgment. To ensure a solution, the cooperation of the opposing party is expected and necessary. But there are also incentives for opposing party to attend the court-annexed conciliation. First and foremost, this institution has the reliability due to the dispute resolution instrument provided by the courts or the judicial power.[17] The Civil Conciliation is court-annexed dispute resolution system and the Chief Conciliators are from law professional, the result of the conciliation will be checked from the point of law.[18] Of course, the opposing party may ignore the procedure. But in that case, it is almost certain that the applicant will then file a lawsuit. If so, he should finally go to court, whether he likes it or not. Taking this into the considerations, participating in the conciliation process must be a wise choice.[19]

(b) Procedure

In the conciliation procedures, the settlement of disputes could be achieved by the adoption of a settlement plan by the parties. Thus the most important task for the conciliator is to establish an adequate settlement between the parties in dispute; the key to the successful conciliation is to facilitate the active participation of the parties. For this purpose, it is necessary that the conciliator should hear their opinion frankly and adjusts the interests between the parties properly. In the ordinal civil litigation, on the contrary, judges have duty to decide the case by applying the law.

In the conciliation procedure, the Conciliation Committee must first and foremost gain the proper information on the case from the written application. In its procedure, the Committee will obtain more detailed information by hearing both parties.[20] Compared with the

17) *Malte von Bargen*, Gerichtsinterne Mediation — Eine Kernaufgabe der rechtsprechenden Gewalt, 2008, pp. 201 ff.; *Malte von Bargen*, In-Court Mediation — A Basic Function of the Judiciary, in: Laura Ervo / Anna Nylund (Ed.), The Future of Civil Litigation — Access to courts and court-annexed mediation in the Nordic countries, Springer, Heidelberg, New York, Dordrecht, London 2014, p. 92.

18) The introduction of a part-time judicial officer was very remarkable for controlling the case in this respect. See, § 90 of Japanese Civil Code: "A legal transaction with any purpose which is against public policy is void."

19) To ensure the attendance of parties, CCA provides that the court could impose a fine up to the amount of 50,000 yen (about 400 euros), when the party has received the summons and he or she disregarded the order without any ground for justification (§ 34 CCA). However, it is rare in practice that the Conciliation Committee sends such an official summons. Usually the attendance of the parties is ensured by other means, for example, a postcard or a telephone call to the party or their representative. Because of this practice, there are almost no cases in Japan that the court sanctioned the non-appeared party with a fine.

20) In practice, these hearings of the parties are generally performed by one-sided conversations (so-called caucus). The reason of using this technique is that parties are not thought to express their mind frankly, if the opponent attends. It is sometimes criticized in the literature that this practice has some fairness deficits and biased information can be supplied to the conciliators. However, parties can at all times abandon the conciliation procedure, if they are dissatisfied with the ongoing process. Therefore the arguments concerning the deficits might be seen as not as important.

ordinal civil litigation, the law allows the Conciliation Committee to investigate the facts, or if necessary to examine the evidence by *ex officio* (§ 12 para 1 CCR) and more freely.

(c) Termination

By gathering the necessary and adequate information from both parties, the Conciliation Committee refines the settlement plan and provides it to the parties. Because of the voluntariness of the conciliation, parties are free to decide whether to accept this plan or not.

If both the parties are satisfied with the settlement plan and reach to an agreement, the result should be recorded. The record of conciliation is given the power of a title of enforcement: The Act says that "the record has the same effect as a *settlement in the litigation* of pending civil procedure" (§ 16 CCA).[21)]

In case the Conciliation Committee finds no prospect for agreement between the parties or considers the planned agreement inappropriate, it may terminate the case as a failure of conciliation (§ 14 CCA). For the case of failure of establishing the settlement of the Conciliation Committee, there is also another option very specific to Japanese court-annexed conciliation: the so-called "court order in lieu of settlement (*chôtei ni kawaru kettei*)": if the court considers it impossible to achieve the settlement provided by the Conciliation Committee and the court finds it appropriate, after hearing the opinion of said Civil Conciliators, considering equity for the parties and taking all the circumstances into account, the court may give an order necessary for the resolution of the case, so far as the order is not against the purpose of petition of the parties (§ 17 CCA). This actions has not the same coercive nature, like the judgement in the ordinal civil litigation, because it improves the means for reestablish a good relationship between the parties. Such a replacement can be only possible and effective in cases where *the most parts have been substantially agreed*, but only slight disagreements still remain on the way to a solution. Because of the fundamental principle of conciliation as a voluntary settlement of both parties, the court order in lieu of settlement cannot be coerced; it ceases its effect if a party or interested persons file an objection against the ruling within two weeks (§ 18 CCA).[22)] In case the objection is not filed within this period, the ruling shall have the same effect as a settlement in the court (§ 18 para 3 CCA), so has a power as a title of enforcement.[23)]

3. Some features of Civil Conciliation

Here, I would like to pick up some

21) *Masanori Kawano*, Effects of "Settlement in Litigation" in: Rolf Stürner/Masanori Kawano (Ed.), International Contract Litigation, Arbitration and Judicial Responsibility in Transnational Disputes, p. 383: Japan accepted the fundamental structures of German civil procedure, and in this system, "the court governs the case from the beginning of the case-filing to the very end of the procedure". If both parties reach a settlement in the court procedures, it must be recorded in the protocol of the court. A settlement that was confirmed and approved by the court can be used as a title for enforcement.

22) Comparable to the German law, the proper remedy against a "court order (*Beschluss*)" is a "miscellaneous appeal (*Beschwerde*)". Unlike the "coercive settlement", the Act chooses not this construction here.

23) The legitimacy of "the court decision in lieu of settlement" is, therefore, explained as "an agreement of the parties which is concluded subsequently and implied".

aspects for the successful development of the Japanese court-annexed Civil Conciliation compared with the ordinal litigation.

The Japanese court-annexed Civil Conciliation bases on a fundamental *voluntariness*. The remarkable point is that parties can at all times abandon the conciliation procedure itself, if they are dissatisfied with. Thus people can use Civil Conciliation more freely compared to the ordinal litigation and arbitration.

Civil Conciliation is regarded as a reliable, neutral procedure of the judicial power. Reliability of their conciliation should be one of the most important requirements for the success of out-of-court ADR!

The *profitable nature of costs* of Civil Conciliation is also important: The Civil Conciliation is organized by the courts and is like the ordinal civil procedure mainly maintained by taxes. Compared to the ordinal civil litigation, however, court-annexed conciliation is available at lower expenses.

Concerning with the profitable nature of costs, it has another profit: the *participation of professional persons* named as a conciliators for particular special case; the fees for these specialist are paid not by the parties.

Flexibility is also one of the most significant elements of Civil Conciliation. In Civil Conciliation, the resolution is not to be defined by the application of law. Therefore a variety of possible remedies can be considered: in money payment cases, the conciliator can not only consider the main requirements of the applicant, but also other relating problems, e.g. the possibility of the opponent's payment or financial situation.

Confidentiality can be also considered. In the ordinal litigation, a public hearing is required. Sometimes this requirement can be burdensome for one or both parties.

IV. Civil Conciliation as a model for 'private sector ADR'

1. Civil Conciliation and ADR

Compared with the successfulness of the court-annexed conciliation with long history, the newly developing out-of-court conciliations are not as successful in Japan.

The out-of-court ADR movement in Japan was partly encouraged by the movement in the U.S.A. The origins of the "ADR" movement in the U.S.A. go back to the judicial crisis by quantitative increase of litigation and malfunction of the court procedure in early 1970s. At the 1976 Pound Conference, Professor Frank Sander proposed that alternative forms of dispute resolution should be used to reduce the reliance on conventional litigation, and to overcome the reluctance to use other dispute resolution options. He indicated the concept of a "multi-door courthouse". This series of events led to many changes in the US justice system to provide more procedural choices to disputants.[24]

ADR movement in the United States

24) *Jacqueline Nolan-Haley*, Alternative Dispute Resolution, 4th. Edition, West Academic Publishing, 2013, p. 5 ff.; *Silvia Barona-Vilar*, Die Eingliederung der alternativen Streitbeilegung („ADR") in die Rechtsordnung und ihr Einfluss auf die Entwicklung des Prozessrechts, in: Bruns/Kern/Münch/Piekenbrock/Stadler/Tsikrikas (Hrsg.), Festschrift für Rolf Stürner zum 70. Geburtstag. Band II, Mohr Siebeck, 2013, pp. 1410 ff.

arose the interest of a part of the scholars in Japan. However, the discussions were mainly based on that of the United States. That's why the academic interest in the new movement didn't have a sufficient impact on Japanese practice. But the environment around the conciliation and ADR has changed dramatically from the beginning of the 21th century.

2. Establishment of Act on Promotion of Use of Alternative Dispute Resolution

In 2001, the government established the *Justice System Reform Council*. The reforms articulated in the Recommendations aimed to realize, in the true sense, respect for individuals and to ensure that the rule of law would prevail throughout our society. The Recommendations intended to reinforce judicial functions, which protect people's rights and maintain and develop the rule of law. Furthermore, they pursued the transition from "small-scale justice" to "large-scale justice" by improving the institutional bases for making them easier to access. In this context, not only the reform of civil procedure but also the legislation for facilitating the ADR occupied an indispensable part. In 2004, the Act on Promotion of Use of Alternative Dispute Resolution (*saibangai funsôkaiketsu sokushinhô*, Act No. 151 of 2004) was promulgated. Section 1 says, "Owing to the changes in the social and economic climate at home and abroad, alternative dispute resolutions ... has become an important means of achieving prompt dispute resolution based on the specialized expertise of a third party and in accordance with the actual facts of the dispute. Bearing this in mind, the purpose of the Act on Promotion of Use of Alternative Dispute Resolution is to provide the basic concepts and the responsibilities of the government and other entities; and to establish a certification system; set special rules on nullification of prescription and other matters so as to make alternative dispute resolution procedures easier to utilize, thereby enabling parties of a dispute to choose the most suitable method for resolving the dispute with the aim of appropriate realization of the rights and interests of the people." This Act mainly provides regulations on the 'private sector ADR'. Different from the court-annexed conciliation, the private sector ADR has inevitable doubts regarding its neutrality. To eliminate such doubts, the system of certification of private dispute resolution services gives them the confirmation by attestation by the Minister of Justice (§ 6 of ADR Promotion Act).

Under the influence of the legislation, *Japan Association of the Law of Arbitration and Alternative Dispute Resolution* (*Chusai-ADR-Hôgakkai*) was established in 2004. Now, the time is ripe for the new theory, operations and the legislatives actions regarding Japanese ADR by the active discussion between the practitioners and the academicians!

3. Some successful examples of out-of-court conciliation

For establishing and reconsidering the ADR system within the Japanese society, our over 90 years of experience surely provide some useful aspects for the further development of the out-of-court ADR, too. One of the good examples can be seen in the most successful out-of-court conciliation by

the Japan Center for Settlement of Traffic Accident Disputes (JCSTAD).

JCSTAD, established in 1974 and reorganized in 1978, is an independent and neutral organization and its board of directors is composed of lawyers and legal scholars. This Center exists for the purpose of resolving disputes arising between the victims of car accidents and the insurance companies of assailants. They promote legal consultation, settlement conciliation and review procedures. Either one or both parties involved in a traffic accident can ask the JCSTAD for advice and help. Victims are able to claim directly against the insurance company, if the perpetrator bought the voluntary insurance. The conciliation is only available in cases in which the facts are not disputed. If there are some factual issues disputed between the parties, a court decision is necessary.

In such cases before JCSTAD, the main issue should be calculation of damages; we have detailed calculations references for traffic accident damages which are mainly formed by the Judge-made-law of the Section No.27 of Tokyo District Court exclusively handling traffic accident cases.

Why do the parties participate the conciliation by the center? The center's expenses are financed by investment gains accrued from compulsory automobile liability insurance premiums. So parties can conciliate without any charges. Moreover, as we have detailed calculation reference for traffic accident damages, parties (the victim and the insurance company) can predict the amount of the damages which must be paid by the insurance, if there are no disputes on the facts. The panel renders the decisions but its decisions do not bind the victims. On the other hand, insurers should admit and respect the decisions by the independent panel, as they already agreed in the terms of conditions for establishing the institute.

V. Final Remarks

Japan has over 90 years of experience with court-annexed conciliation. These experiences can give many information and suggestions for considering out-of-court ADR, too. Sometimes people say the special feature or myth of Japanese civil justice to avoid litigation and to prefer settlement from the special cultural explanation of the Japanese people. But it is not the time to explain such things by a cultural element; the point is that behind special feature of establishing the characteristic dispute resolution system in Japan, there were also detailed history and development. If you see them as a special judicial culture in Japan, then it is true!