A Small Experiment in International Negotiations: Chuo Law School, Japan and Chulalongkorn Law Faculty, Thailand

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I. BACKGROUND

This brief Report describes a small experiment in transnational negotiating between law students from Thailand and Japan. Unlike the experiments described by Professor Foote and Professors Anderson and Eizumi in companion articles in this issue[1], it did not involve new technology or even the negotiation of an entire contract. Further, it did not involve negotiations between Western and Asian cultures, but between two groups of Asian law students. Rather, the project I oversaw involved the willingness of one group of students to travel abroad, a focus on negotiating dispute resolution clauses for a commercial contract, and the opportunistic use of my involvement in law programs in Japan and Thailand. I believe these differences provide some interesting comparative lessons when set against Foote's and Anderson/Eizumi's conclusions. More importantly perhaps, the results of my project were satisfying enough for all involved to plan to repeat the experiment in the next two academic years.

For several years I have been teaching a subject "Alternative Commercial Dispute Resolution in Asia" in the LLM (Business Law) Program at Chulalongkorn University, Thailand (commonly abbreviated to "Chula").[2] My co-teachers are Judge Vichai Ariyanutaka, formerly Deputy President of the Central Intellectual Property and International Trade Court of Thailand, and since October 2004, Chief Justice of the Labor Court of Thailand, and Professor Richard Garnett of the University of Melbourne Law School. The Chula program is taught entirely in English, as it has been developed to train a new generation of Thai lawyers for international legal work. Judge Vichai has been a leader in ADR circles in Thailand, and in Asia in general. He was the first Director of the Thai

1 See the contributions in this issue by D.H. FOOTE, Information Technology Meets International Contracting (p. 69), and K. ANDERSON / Y. EIZUMI, Cross-Border Legal Education (p. 101).

2 The program website is at: <*http://www.law.chula.ac.th/en/02/structure.html*>.

Ministry of Justices' Arbitration Office, now more widely known as the Thai Arbitration Institute. Professor Garnett specializes in International Commercial Law.

I have always tried to include a practical element in my part of the subject, usually in the form of class presentations in a classroom mini-conference on ADR. In December 2004, I had the opportunity to try something a little more ambitious. In April 2004, I joined the new Chuo Law School, to be part of the experiment in graduate legal education which began in Japan in 2004. On that day 68 new graduate Law Schools began operations as part of a restructuring of legal education and admission to practice in Japan.[3] In mid-year we were asked for suggestions for international programs for our students as part of a grant application for "Good Practice" programs to be funded by the Ministry of Education, Science and Culture. I contacted Chulalongkorn Law Faculty and they readily agreed to allow me to bring students from Japan to participate in my segment of the Chula subject. We adjusted the curriculum of one of my Chuo subjects to parallel the Chula ADR syllabus and so allow Chuo students to include the Chula experience in their course credits.

In the meantime, I had been asked to participate as an assessor in the third Intercollegiate Negotiation and Arbitration Competition in Japan. This is a relatively new competition between teams from law faculties which spend a weekend first putting their cases in the arbitration of an international business dispute and then negotiating a settlement.[4] It inspired me to think about using a negotiation segment in my ADR subject at Chulalongkorn.

II. THE PLAYERS

To the delight of my Chuo colleagues and myself, twenty-seven Chuo Law students signed up for the Bangkok experience. This turned into a logistical issue when it transpired that only six Chulalongkorn students had signed up for the subject. More of that later. The Chuo students were either in the second year of the program, and were already graduates of an undergraduate law faculty, or were at the end of their first year, having graduated from a faculty other than law, or in some cases from a law faculty. There were some mature age students with commercial experience, as the first year of the Japanese Law Schools had attracted some interesting people looking for a career

3 A great deal has already been written on this development. My own thoughts, along with two of my Chuo colleagues, are set out in OMURA / OSANAI / SMITH, Japan's New Legal Education System: Towards International Legal Education?, in: International Consortium on Legal Education, Second Annual Conference "Internationalization of Legal Education", Yeditepe University, Turkey, July 3-6, 2005 (on file with author).

4 A home page for this Competition may be found at *http://www.osipp.osaka-u.ac.jp/inc/comp3rd>,* and the problem can be accessed at *<http://www.osipp.osaka-u.ac.jp/inc/comp3rd/problem_e1109.pdf>* (trans. ANDERSON).

change. The Chulalongkorn participants were all law graduates, including one graduate from the Philippines. Several were working in law offices, one worked for the government, and several had just finished their undergraduate programs.

III. THE NEGOTIATION

To prepare the Chuo students, I held three hours of classes in Tokyo and then a three hour session in Bangkok before we joined with the Chula students. In those sessions, we reviewed Japanese ADR law, and introduced the students to Thai ADR law.

I arrived in Bangkok several days before the Chuo students and had two three-hour sessions with the Chulalongkorn students in which we covered the same material. Both countries had recently adopted the UNCITRAL Model Law on International Commercial Arbitration[5] – Thailand in 2002 and Japan in March 2004 – so there was a good basis for comparative discussions.

Following the separate sessions, we had our first three-hour joint class on ADR developments in China, Hong Kong and Singapore. At the end of the joint session I distributed a negotiation problem and divided the Thai students into two negotiating teams of three members each. Since the negotiation was to be in English, and many of the Japanese students lacked confidence, we selected two Japanese teams with three lead negotiators, and the rest of the Japanese members provided advisory support. The teams then had a rest day to prepare themselves, and we held two separate, parallel negotiation sessions for two hours on our last day, followed by an hour of class evaluation and discussion.

Unlike the Intercollegiate negotiation competition, which had extensive facts and an extensive contract, I asked my teams to focus only on negotiating suitable ADR clauses for a Japan-Thai joint venture (JV) that was to use Japanese technology in establishing a manufacturing plant in Thailand to export the product to China. The teams had to consider appropriate clauses for a JV contract and for the export contracts. At the last minute I withdrew a technology transfer agreement from discussion due to lack of time. The class material had all the necessary information to assist the teams in dealing with possible cultural, practical and legal issues. Since the focus was on the ADR clause, an extensive amount of information about the business background of the parties, or the transaction, was not necessary. Participants were asked to note when such information might have affected the negotiation.

I also made clear at the outset that there would be no losers. Since this was a negotiation about how to settle possible future problems, there could be no "right" answer, so long as they discussed the options.

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5 UNCITRAL Model Law on International Commercial Arbitration. For the text and the status of the Model Law see: <*http://www.uncitral.org/uncitral/en/index.html*>.

IV. THE EVALUATION SESSION

The final hour proved to be very valuable. It became clear that an actual negotiation had forced the participants to think through what was involved in each of the main ADR processes, and to consider why one process might be more appropriate than another. Negotiation, mediation, conciliation and arbitration were no longer mere words. Further, the negotiation forced the parties to justify their requests on choice of law and choice of venue issues, as well as consider the merits of the New York Convention 1958.[6] We also had the results of two separate negotiations on the same facts to compare. This resulted in a last minute "reality check" for the teacher, since one negotiation had concluded with a perhaps circular agreement to arbitrate followed by an agreement to go to court if either party was unhappy with the arbitration decision. We spent the last part of the class discussing just what ADR means!

I included an optional question on the Chulongkorn exam paper, held in January 2005, which invited the students to discuss the most important legal issues that had arisen during the negotiation session. I received one thoughtful answer, which touched on the points I hoped would have been considered. It was interesting that in an earlier part of their subject the Chula students had been introduced to some of the literature on negotiations. In observing the two negotiations, it did seem that the Japanese students were more inclined to argue for positions, rather than to try to discover the other party's real interest. The Chula students were better prepared in this regard, and I will revise my approach with the Japanese group for 2005 and 2006, as happily we have funding support to continue the experiment.

V. POST-NEGOTIATIONS

The program concluded with a joint lunch. It was very gratifying to see the extent to which in only three days the two groups of students had built up a mutual interest and regard. In particular, it was rewarding to observe the attempts by many of those Japanese students who had been worried about their English to engage in conversations with their Thai counterparts. I hope in future years to even up the numbers to enhance the experience even further. However, I am persuaded that the experience of actual negotiations broke down many barriers very quickly.

The willingness of the Japanese students to invest in an international experience was important in the context of the demand for subjects in the new Law School (*hôka daigakuin*) curriculum that are not covered by the new Bar Exam in Japan. The fear has

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6 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards – the "New York" Convention. For the text and the status of the New York Convention see <*http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html*>.

been that students would only select those subjects of immediate relevance to the Bar Exam. The original demand for a revision of the Bar Exam (*shihô shiken*) was based on a view that the old exam, with its very low pass rate, was producing a lawyer with a very narrow vision. The format for the new exam for graduates of the Law Schools was announced in August 2004 by the Bar Exam Committee of the Justice Ministry, before students signed up for the program in Thailand. There will be three required subjects and a fourth optional subject, chosen from a list of eight subjects, only one of which covers international business topics.[7] Coupled with a reduced expectation of actually passing the exam, it would not be surprising if students veered away from unusual options. The fact that twenty-seven students from Japan did participate was a very encouraging sign that many students do have a broader vision.

7 See Japanese Ministry of Justice, Memorandum from Chair of Bar Examination Committee of 2 August 2004 at <*http://www.moj.go.jp/SHINGI/SHIHOU/040803-1.pdf*>.