Recent Legislative Development of ADR in Japan

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I. INTRODUCTION

Litigation is a system in which the disputing parties resolve their civil dispute by the enforceable judgment of a court. Such a dispute cannot be solved by dialogue because every party hopes for a favorable court decision for itself. Litigation is a typical process for dispute resolution and is important as a means other than self-help for eliminating injustice from our society.

Litigation, however, does not represent the only process for resolving civil disputes. By its nature, a civil dispute can be left to the parties concerned for their own resolution under the principle of private autonomy. A number of cases are more appropriate for resolution by the consent of both sides of the disputing parties rather than by a lawsuit. Particularly in the early 1970s, processes of dispute resolution other than litigation were collectively named "Alternative Dispute Resolution" (hereinafter referred to as ADR), and the theories and practice of ADR developed strongly, mainly in the United States.[1]

There has recently been progress in this subject in Japan as well. The Judicial Reform Council (*Shihô Seido Kaikaku Shingi-kai*) decided to position ADR as an option for dispute resolution parallel to litigation, and it is engaged in enhancing and

1 See, *e.g.*, F. SANDER, Varieties of Dispute Processing, in: 70 F.R.D. (1976) 111; P. EDELMAN, Institutionalizing Dispute Resolution Alternatives, in: Justice System Journal 9 (1984) 134.

stimulating this practice.[2] As a result, the Law Concerning the Promotion of the Use of Alternative Dispute Resolution[3] (hereinafter referred to as the ADR Law) was enacted on November 19, 2004, and was subsequently promulgated on December 1, 2004. A lot of studies and efforts are still under way for the review of this law scheduled five years later,[4] and for the establishment or improvement of other legislation to further enhance ADR.

As is represented in the catchphrase *schlichten statt richten* (ADR as the alternative to a court decision), growing interest in ADR can also be found in Germany.[5] The legislative trend in Japan may serve as a meaningful reference to understand the further development of the theories and practice of ADR in Germany.

With this intent, this paper aims to introduce the latest legislative developments of ADR in Japan. First, an overview of the development leading to the ADR Law enactment is presented (Section II). This will be followed by an explanation of the outline of the ADR Law (Section III) and then by an evaluation of the law and an observation of issues remaining for the future (Section IV).

II. DEVELOPMENT LEADING TO THE ADR ENACTMENT

1. Various ADR Processes

As is also known in Germany,[6] Japan has various long-established processes that are intended to resolve a dispute in a form as close as possible to a completely autonomous resolution by and between the disputing parties when such a resolution is difficult to reach. Major ADR processes are settlement (*wakai*), mediation (*chôtei*), arbitration (*chûsai*), settlement assistance (*assen*), and consultation (*sôdan*).

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2 Fundamental reform of the Japanese judicial system was attempted from the viewpoint of citizens – the users of the judicial services. For this purpose, the Judicial Reform Council met from July 1999 until June 2001 when the recommendation report was published as the outcome of its work. Here, ADR enhancement and stimulation is mentioned as one of the tasks of judicial reform.

3 *Saiban-gai funsô kaiketsu tetsuzuki no riyô no sokushin ni kansuru hôritsu.*

4 See Art. 2 of the supplementary provisions to the ADR Law.

5 Based on the recent statutory amendments, for instance, it is now possible to apply the principle of mandatory pre-trial mediation under a law for specified cases (§ 15a EGZPO, which was newly created after legislation for ADR promotion in 1999). A settlement conference (*Güteverhandlung*) prior to oral proceedings is now principally required, and courts are allowed to recommend the use of ADR to the disputing parties (§ 278 ZPO, which was amended under the law for amendment of civil proceedings in 2002). In addition, there are relevant attempts to put these laws into practice.

6 See, *e.g.,* H. PRÜTTING, *Streitschlichtung nach japanischem und deutschem Recht*, in: *Recht in Ost und West, Festschrift zum 30 jährigen Jubiläum des Instituts für Rechtsvergleichung der Waseda Universität* (Tokyo 1988) 719; ID. (ed.), *Außergerichtliche Streitschlichtung* (München 2003) 9; A. ISHIKAWA, *Problempunkte im Bereich der außergerichtlichen Streitbeilegung*, in: Zeitschrift für Zivilprozeß international 5 (2000) 393.

Various organizations administer the processes of ADR (or part of them) according to their respective functions. They may be divided into courts (judicial), bodies established under the national government or local public entities (administrative), and bodies established by non-profit corporations and industries (private).

The judicial ADR processes include mid-trial settlements, in-court civil mediations, and family dispute mediations.

Administrative ADR bodies include the Environmental Dispute Coordination Committee (*Kôgai-tô Chôsei I'inkai*) and Pollution Review Boards (*Kôgai Shinsa-kai*, prefectural-level bodies), the Central Labor Relations Committee (*Chûô Rôdô I'inkai*) and Prefectural Labor Relations Committees (*Todô Fuken Rôdô I'inkai*, prefectural-level bodies), the Central Committee for Adjustment of Construction Work Disputes (*Chû'ô Kensetsu Kôji Funsô Shinsa-kai*) and Committees for Adjustment of Construction Work Disputes (*Kensetsu Kôji Funsô Shinsa-kai*, prefectural-level bodies), the National Consumer Affairs Center (*Kokumin Seikatsu Sentâ*), Consumer Affairs Centers (*Shôhi Seikatsu Sentâ*, prefectural-level bodies), the Fair Trade Commission (*Kôsei Torihiki I'inkai*), the National Tax Tribunal (*Kokuzei Fufuku Shinpan-sho*), and so on.

Private ADR bodies include Japan Commercial Arbitration Association (*Nihon Shôji Chûsai Kyôkai*), Japan Shipping Exchange, Inc. (*Nihon Kaiun Shûkai-jo*), Japan Center for Settlement of Traffic Accident Disputes (*Kôtsû Jiko Funsô Shori Sentâ*), Japan Credit Counseling Association, Automobile Product Liability Consultation Center (*Jidô-sha Seizô-butsu Sekinin Sôdan Sentâ*), and centers for various product liabilities related to consumer goods (pharmaceuticals, house-building components, and so on). In addition, regional bar associations have also set up bodies for ADR processes such as arbitration centers, general legal counseling centers, settlement assistance, and arbitration centers.[7]

Only parts of these bodies are regulated by individual law. There has not been comprehensive law to regulate them.

2. *Circumstances Leading to the Start of Legislative Action*

In Japan, the use of an ADR process has not always been positively regarded. On one hand, Japanese people have faith in litigation (or courts *per se*) and have no doubt about the fact that litigation is the main process to reach civil dispute resolution. On the other hand, the users of litigation processes are not satisfied with the litigation system due to the time-consuming nature and complicated access to a court.

Consequently, ADR was reluctantly accepted and used in practice as legally permitted processes of dispute resolution supplementing litigation. The role of ADR, however, eventually increased, especially in the areas of consultation and complaint handling,

7 For the details of this classification, see <*http://www.kantei.go.jp/jp/singi/sihou/kentoukai/adr/dai1/1siryou1_2_04.html*>.

where proceedings are not so strict and are highly flexible. Theoretical models for dispute settlement systems have also been advocated on the basis of awareness that litigation and ADR are equal in that they are both dispute settlement processes.[8]

ADR is now also recognized favorably in Japan. This is because it has been realized that ADR has several advantages relative to litigation. First, ADR allows a dispute to be resolved behind closed doors with privacy and trade secrets protected. Second, ADR provides dispute resolution easier, faster, and more inexpensively in comparison to litigation. Third, ADR can provide resolution of a dispute with technical content by referring to the knowledge and opinions of specialists in various fields. Finally, a resolution for the litigation of actual circumstances of the dispute can be reached, beyond a sheer judgment on the existence or lack of legal rights and obligations.[9]

Despite those advantages, however, not all aspects of ADR have been functioning well even recently, with the exception of in-court ADR schemes. The following points are raised as the cause for this. First, citizens neither recognize nor fully understand the existence and significance of ADR processes. Second, dispute resolution bodies run by private entities are in most cases set up by the industry and insufficient information is available to people; therefore, those who might commit themselves to using them (*i.e.,* victims) are apprehensive as to whether the ADR process is equipped with the proper rules and functions to consistently help them. Furthermore, the procedures required for ADR are not very convenient for those who proactively wish to use ADR. There are also other issues: involvement of professionals is insufficient because they are restricted under Art. 72 of the Japanese Attorneys Law; the statute-of-limitations period (*Verjährungsunterbrechungsfrist*) is not subject to toll even if a petition for ADR use has been filed; and there is not enough coordination in relation to litigations.[10]

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8 The *Tetsuzuki hoshô no daisan no nami* [third wave in due process assurance] doctrine and the *Seigi no sôgô shisutemu* [integrated system of justice] theory are typical examples. The doctrine named *Tetsuzuki hoshô no daisan no nami* emphasizes the dialogue between disputing parties and states that any code of conduct which applies to dispute resolution processes, including out-of-court negotiations, should also apply to litigation processes. The theory called *Seigi no sôgô shisutemu* attempts to position various dispute resolution proceedings as one integrated system to realize justice, while placing the nation's court and litigated judgment as the core method. See T. KOJIMA, Civil Procedure and ADR in Japan (Tokyo 2004) 3, 10-12.

9 See, *e.g.*, S. TANAKA, *Gendai shakai to saiban* [Modern Society and Judicature] (Tokyo 1996) 46; T. HAGISAWA, *Saiban-gai funsô shori no genjô to shôrai* [Present Condition and the Future of ADR], in: Y. AOYAMA / M. ITÔ, *Minji soshô-hô no sôten* [Issues of Civil Procedure] (Tokyo 2003) 38.

10 See, *e.g.*, K. UCHIHORI, *Saiban-gai funsô kaiketsu tetsuzuki no riyô no sokushin ni kansuru hôritsu no gaiyô* [Outline of the ADR Law] in: Minji Hôjô-hô 221 (2005) 17; T. KOBAYASHI, *Saiban-gai funsô kaiketsu tetsuzuki no riyô no sokushin ni kansuru hôritsu* [The ADR Law], in: Jurisuto 1285 (2005) 26; ID., *Saiban-gai funsô kaiketsu tetsuzuki no riyô no sokushin ni kansuru hôritsu no gaiyô* [Outline of the ADR Law], in: JCA Journal vol. 52 no. 3 (2005) 9.

3. Enactment of the ADR Law

Under these circumstances, the Judicial Reform Council recommended in its report of July 2001 that it is necessary to discuss available measures for the development of ADR, including the possibility of legislation. This was done to meet the various demands of disputing parties by making ADR an equally attractive option to litigation. The recommendations list "establishing a foundation for an integrated ADR system" and "promoting strengthened coordination between related bodies" as specific issues that are needed to enhance and stimulate ADR.[11]

Based on the recommendations, the ADR Discussion Group (*ADR Kentô-kai*) was set up within the secretariat of the Headquarters for Judicial System Reform to examine issues on ADR. The group held discussions on the idea of establishing a foundation for an integrated ADR system in Japan.[12]

In August 2003, the ADR Discussion Group published an interim report. It described some basic and general issues, as well as suggestions for possible actions, *e.g.,* developing what might be called mediation procedure rules, having the statute of limitations interrupted (*Verjährungsunterbrechung*) in the case of ADR use, making an ADR settlement enforceable, excluding the application of the principle of mandatory pre-trial mediation in the case of ADR use, having litigation proceedings suspended where ADR procedures have been commenced, providing courts with the power to recommend settlement negotiations, qualifying ADR for legal aid, involving specialists, and so on.[13]

The ADR Discussion Group solicited practical and academic opinions on its interim report from relevant organizations (for example, ADR bodies, the organizations of various legal professions, and the American Chamber of Commerce in Japan) and scholars. The group then held further discussions mainly on the divided issues. What particularly drew debate from the group was whether or not to apply a system of certification, in which the national government would certify the propriety of procedures, as well as how such a system should be formulated if applied. Although the group had difficulty in unifying divided opinions, the majority of the members in the end supported the idea of applying a certification system to private ADR bodies and approved the establishment of a law legislating that content.

In response to this approval, the secretariat of the Headquarters for Judicial System Reform drew up the bill for the ADR Law. It was submitted to the 161st Diet Session (an extraordinary session) on October 12, 2004, enacted on November 19, 2004, and

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11 JUDICIAL REFORM COUNCIL, Recommendation of the Judicial Reform Council, No. 1.8.

12 For further details of the discussions, see Y. AOYAMA, *Nihon ni okeru ADR no shôrai ni mukete* [For the Future of ADR in Japan], in: Jurisuto 1284 (2005) 160.

13 See <*http://www.kantei.go.jp/jp/singi/sihou/pc/0729adr/seibi.html*>.

promulgated on December 1, 2004, as the ADR Law.[14] The law is scheduled to come into force within two years and six months from the promulgation date (*i.e.,* by May 31, 2007; see Art. 1 of the Supplementary Provisions to the ADR Law).

III. OVERVIEW OF THE ADR LAW

The purpose of the ADR Law is to facilitate for disputing parties the choice of a process suitable for the desired resolution of their dispute, and to contribute to the appropriate realization of the basic interest of citizens who are potential parties of civil procedures (Art. 1 of the ADR Law). In order to achieve that purpose, the ADR Law is first equipped with rules applicable generally to ADR procedures as a whole (Chapter 1 of the ADR Law), then with rules for private dispute resolution procedures (Chapter 2 of the ADR Law), and additionally with rules for certified private dispute resolution procedures (Chapter 3 of the ADR Law).

1. General Rules for ADR

The ADR Law first articulates the basic principles of ADR as well as the responsibilities of the national government and local public entities with respect to ADR as a whole, as procedures intended to resolve disputes through involvement of neutral third parties rather than through litigation: ADR must, as processes of dispute resolution under law, be implemented in a fair and proper fashion while ensuring respect for the efforts of disputing parties to achieve an autonomous resolution. At the same time, ADR must be designed to facilitate a prompt process that is suited to the actual circumstances of the dispute through reflecting expert knowledge if necessary. ADR service providers are required to coordinate and cooperate with each other in accordance with this basic principle (Art. 3 of the ADR Law). The national government and local public entities must take the necessary measures to promote ADR use and make efforts to increase the general population's understanding of the good points of ADR (Art. 4 of the ADR Law).

It is stated in Chapter 1 of the ADR Law that the law is basic legislation on ADR as a whole. It is expected that such general provisions will increase the population's trust in ADR as a whole.[15]

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14 For further details of the development of legislative discussions on ADR, see, *e.g.*, T. SATO / F. YOSHIDA / S. HASHIMOTO, *Shihô seido kaikaku to ADR* [Judicial Reform and ADR], in: T. KOJIMA (ed.), *ADR no jissai to riron* [Practice and Theories of ADR] (Tokyo 2003) 26, 27.

15 K. YAMAMOTO, *Saiban-gai funsô kaiketsu tetsuzuki no riyô no sokushin ni kansuru hôritsu no igi to kongo no kadai* [Meaning and Problems of the ADR Law in the Future], in: Hôritsu no Hiroba 4 (2005) 16, 18.

2. *Rules for ADR in Private Bodies*

Subsequent to the provisions generally applicable to ADR as a whole, the ADR Law lays down provisions to be applied to private dispute resolution procedures. A private dispute resolution procedure refers to an ADR where a private entity accepts requests from both of the disputing parties, makes a contract with them, and intercedes between both sides of the disputing parties (mediation or settlement assistance) (Art. 2 No. 1 of the ADR Law).

The main rule of the ADR Law is the certification system for those parties which provide private dispute resolution services as a business (*Funsô kaiketsu jigyô-sha*, hereinafter referred to as a "dispute resolution entity"). Most of the particular provisions of the ADR Law are associated with this certification.

A dispute resolution entity may be certified by the Minister of Justice by making an application in writing, if all of the following circumstances apply (Art. 5 to 8 of the ADR Law). First, the entity meets the criteria set forth in Art. 6 of the ADR Law, under which the requirements necessary for the proper implementation of dispute resolution services are listed. For instance, the entity should have in place a method for selecting an appropriate person to implement the procedures according to the scope of the dispute and the subject of the service, and a method of excluding that person if he has a conflict of interest. Second, the Minister of Justice considers that the entity has enough knowledge, ability, and financial basis to conduct dispute resolution services (Art. 6 of the ADR Law). Third, the entity does not fall under any of the grounds for disqualification set forth in Art. 7 of the ADR Law, for example, membership in an organized crime group.

The Minister of Justice certifies an entity following procedures that include hearing from a council of certification judge (*Ninshô shinsa san'yo-in*)[16] and relevant parties (Art. 9 and 10 of the ADR Law).

A certified dispute resolution entity is under the following obligations:

(i) to display in its office the notice that it is certified, as well as information on its services (Art. 11 (2) of the ADR Law);

(ii) to explain, in connection with its services and prior to the conclusion of a contractual agreement under which it will implement certified dispute resolution procedures, certain matters provided in Art. 14 of the ADR Law (such as the fee and expenses payable by the disputing parties, and a standard process of procedures);

(iii) not to engage any organized crime group member in its services (Art. 15 of the ADR Law);

16 The council of certification judge is appointed by the Minister of Justice from those who have professional knowledge and experience associated with private dispute resolution procedures.

(iv) to create and retain records of actual procedures taken which describe the matters set forth in Art. 16 of the ADR Law;
(v) to notify of any merger or dissolution (Art. 17 and 18 of the ADR Law), and;
(vi) to submit to the Minister of Justice a business report each and every business year (Art. 20 of the ADR Law).

In the meantime, the Minister of Justice has the following obligations and rights:

(1) The Minister of Justice must officially announce in the Official Gazette the names and addresses of the entities having been certified (Art. 11 (1) of the ADR Law). In addition to this, the Minister of Justice must, for the benefit of users, publicize information about the entities to be certified (their names and addresses and contents and methods of their operation, for example) on the website (Art. 31 of the ADR Law).
(2) The Minister of Justice may, to the extent necessary to ensure proper operation of their services and in consideration of the characteristics of their business, require a report, conduct an examination, or issue a recommendation (Art. 21, 22 and 24 of the ADR Law). If a certified entity falls under any of the clauses in Art. 23 of the ADR Law, the Minister of Justice may revoke the certification.

3. Rules for Certified ADR

The dispute resolution procedure certified by the Minister of Justice has special legal effects as follows:

(a) where the requirements prescribed in Art. 25 of the ADR Law (for example, a shift to litigation procedures within one month after the termination of the certified procedures) are met, the statute of limitations becomes subject to toll effective retroactively from the time of request for the said procedures;
(b) where the certified dispute resolution procedures are being implemented between the disputing parties or have been agreed to by the disputing parties as a means by which to have the said dispute resolved, and where the disputing parties have made a joint petition, the court receiving the petition may decide to suspend litigation procedures by specifying a period of suspension of up to four months (Art. 26 of the ADR Law);
(c) for some of the cases to which the mandatory pre-trial mediation principle applies, a mediation no longer needs to be conducted prior to trial if the certified dispute resolution procedures have been implemented (Art. 27 of the ADR Law); for example, a case of a request for a land or housing rent increase or decrease (Art. 24-2 (1) of the Civil Conciliation Law[17]), or a case of a personal lawsuit (Art. 18 (1) of the Domestic Affairs Adjustment Law[18]).

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17 *Minji chôtei-hô*, Gesetz Nr. 222/1951 i.d.F. des Gesetzes Nr. 128/2003.
18 *Kaji shinpan-hô*.

The application of the certification system leads to diminishing the difference of the capability for the dispute resolution between the nation and the private bodies, although whether it is functioning perfectly is still uncertain. And it is expected to provide citizens with guidelines for their choice of private dispute resolution procedures and also to enable them to use those procedures and negotiate a settlement without worrying about inconveniences such as the expiration of the statute of limitations.

IV. Issues Remaining for the Future

1. Evaluation of the ADR Law

The ADR Law was legislated mainly for the purpose of establishing a foundation for an integrated ADR system which was suggested in the Recommendations of the Judicial Reform Council.

With the exception of its general provisions part, Chapter 1, the ADR Law is basically designed to apply to private ADR schemes. Nevertheless, it is expected that the enactment and enforcement of the ADR Law will also contribute to improving the quality of judicial ADR and administrative ADR, respectively, and thereby lead to the further development of ADR in Japan overall.[19] This is because the requirements for the certification and the obligations of certified entities are something that should naturally be met not only by certified private ADR bodies but also by judicial ADR bodies and administrative ADR bodies. In the future, the focus is likely to shift to theoretical examinations of issues concerning the matters stipulated by the law; for example, categories to be applied to the judgment of specialization as certification criteria, the possibility of establishing a system for ensuring neutrality of mediators and settlement assistants, and having an ADR evaluated by people other than council of certification judges.[20]

The content of the ADR Law is, however, a substantial reduction from what was intended in the interim report of the ADR Discussion Group and is therefore neither complete nor sufficient. For instance, legislation of mediation procedure rules did not materialize, although it was envisioned in the interim report. Likewise, in terms of the legal effects of certified ADR, no provision was created with respect to, among other suggestions, the granting of enforceability to ADR results or court-given recommendations for ADR use. Any legislative steps regarding those issues are left open to debate.

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19 T. Nakanishi / K. Yamamoto, *Zadan-kai: minji tetsuzuki-hô kaikaku no naiyô to hyôka* [Round-Table Talk: Contents and Evaluation of the Law Reform on Civil Processes], in: Hôritsu Jihô 77 (2005) 4, 27; Y. Aoyama, *supra* note 12, 162; K. Yamamoto, *supra* note 15, 23.

20 A. Yamada, *ADR-hô seitei to riron-teki mondai* [Enactment of the ADR Law and Its Theoretical Issues], in: Hôritsu Jihô 77 (2005) 35, 39.

2. *Remaining Issues*

As discussed, there are still a number of issues to be addressed in order to achieve the establishment of a foundation for ADR and its further development in Japan. This viewpoint is also shared by the legislators,[21] and a discussion about further legislation has already started. The main remaining issues are as follows.

(a) Coordination between ADR-Associated Bodies

In April 2004, the action plan for the strengthened coordination between ADR-associated bodies was published.[22] The purpose of the said plan is to provide for the enhancement and stimulation of ADR. It was stated in the plan that the related governmental agencies should focus their efforts on the issues of promoting the understanding of ADR among the general population, improving access to ADR bodies, and ensuring the presence of ADR service providers.

More specifically, the ideas behind them are first, in order to deepen the understanding of ADR among the general population, it is necessary to proactively conduct public relations activities targeting citizens on the subject and details of ADR and to offer education, starting at a young age, about how disputes can be resolved. Second, in an attempt to enable citizens to easily and quickly select an appropriate ADR, it is also important that ADR bodies should establish access points, mutually cooperate, and disclose information on the organization, procedures, and organizer. And third, in an attempt to ensure the presence of ADR service providers, it is also critical that ADR bodies should mutually cooperate in their personnel development by, for instance, ensuring the communication of their respective personnel, providing training opportunities, and sharing case examples.[23]

(b) Involvement of Various Legal Professionals

It is useful for the purpose of promoting ADR use for users to be able to select appropriate legal professionals other than attorneys for dispute resolution. In Japan there are various legal professions in addition to those in the judicial community (judges, prosecutors, and attorneys), as listed below. Imaginable forms of their involvement with ADR include cases in which they would serve as administrators of ADR procedures for

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21 Issues listed below were also raised by the chairman, Prof. Yoshimitsu Aoyama of the ADR Discussion Group. See Y. AOYAMA, *ADR-hô no seiritsu to nihon ni okeru ADR no kongo no tenbô* [Enactment of the ADR Law and ADR's Prospect in Japan], in: JCA Journal 52 (2005) 4; ID., *supra* note 12, 162-165.

22 For further details of the plan, see <*http://www.kantei.go.jp/jp/singi/sihou/kentoukai/adr/h14actionplan/gaiyou.htm*>.

23 Needs for those actions were pointed out before the enactment of the ADR Law. See, *e.g.*, K. YAMAMOTO, *ADR kihon-hô ni kansuru ichi-shiron* [An Essay on the ADR Law], in: Jurisuto 1207 (2001) 26; SATÔ / YOSHIDA / HASHIMOTO, *supra* note 14, 35-38.

disputes resolved under the ADR Law or work as representatives for disputing parties, as well as other cases.

In November 2004, the Headquarters for Judicial System Reform issued a decision for promoting a future judicial system reform.[24] First of all, this decision aims at establishing a system specific to each of those professions that would apply when practitioners in the profession serve as representatives. In other words, for judicial scriveners (*shihô shoshi*),[25] chartered patent agents (*benri-shi*),[26] certified social insurance labor consultants (*shakai hoken rômu-shi*),[27] and registered land and building investigators (*tochi kaoku chôsa-shi*),[28] the decision envisions the development of relevant laws so that they can be engaged as representatives as soon as possible. For certified public tax accountants (*zeiri-shi*),[29] real estate appraisers (*fu-dôsan kantei-shi*),[30] and administrative scriveners (*gyôsei shoshi*),[31] the matter should be examined formally once their track records as mediators and settlement assistants under the ADR Law are reviewed. In addition to serving as mediators and settlement assistants or representatives, another possibility that is mentioned in the decision is to take advantage of their expert knowledge by having them serve as advisors to mediators and settlement assistants.[32]

(c) Rules for Mediation Procedure

The rules for the mediation procedure refer to general rules applicable where disputing parties fail to reach an agreement, as procedural rules to be applied to mediation-type procedures (mediation or settlement assistance) provided by an ADR body, from commencement to completion.[33] Such rules are not set forth in the ADR Law. Disputing parties might therefore be unable to predict how the information that they

24 See <*http://www.kantei.go.jp/jp/singi/sihou/kouhyou/041126kongo. html*>.

25 Real estate and company registration professionals who draft legal documents to be presented to the court and represent clients in summary court proceedings.

26 Industrial property system experts, helping people turn their hard-earned inventions into powerful ownership rights.

27 Professionals who provide advice to companies on appropriate labor management and insurance issues.

28 Experts who, on behalf of clients, perform land and building surveys and registration application procedures.

29 Experts in performing a broad range of professional services, mainly on tax matters.

30 Experts in providing real estate appraisal services (for example, valuation for purposes of national land price publications and prefectural land price surveys, and court-ordered valuation) and real estate-related consulting services.

31 Professionals who provide license application and registration services for incorporation, will-making, and inheritance procedures, and various other forms of contracts and notifications.

32 For further details of the possibility of involving various legal professionals, see T. EMI, *ADR ni okeru rinsetsu hôritsu senmon shokushu tô no senmon-ka no katsuyô ni tsuite* [Involvement of Various Legal Professionals in ADR], in: Hôritsu no Hiroba 2005, 35.

33 See website, *supra* note 13.

supply for ADR purposes will be used in litigation procedures and might, for that reason, avoid a frank dialogue during the ADR procedure. It will be necessary in the future to examine the establishment of a legislation modeled after the UNCITRAL Model Law on International Commercial Conciliation, which was adopted in June 2002. As ISO is working on creating an international standard for ADR as well, this will also have to be referred to during the discussion about such legislation.[34]

(d) Legal Effects of ADR

While the ADR Law regulates the interruption of the statute of limitations and the suspension of litigation procedures to certified private ADR, there are still no effective measures given on the grounds because it is still premature to do so.

The statute of limitations has a practical meaning, especially in ADR that is intended for a dispute whose statute of limitations is short (for instance, the dispute of tort).[35] And the suspension of the litigation procedure is also significant in practice, because the disputing parties can argue the case in accordance with ADR procedure to time.

But they are not sufficient to give the legal effect of ADR by the certified dispute resolution entities. More debate is necessary so that enforceability can be added to the settlement of ADR process. On the one hand, giving enforceability to an agreement made through a private ADR is important for the purposes of ensuring the effectiveness and promoting the use of a private ADR. On the other hand, it might result in a neglect of due process for its users. It is therefore necessary to hold a debate that takes into consideration the balance between the concerns raised above.[36]

(e) Other Points

If the budget for legal aid were raised to a sufficient level, it has been pointed out that a provision should be created that would make legal aid available in the case of ADR use as well.[37]

In order to promote the development of an ADR system, it has also been proposed that judges recommend that disputing parties make better use of ADR procedures.[38]

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34 Y. AOYAMA, *supra* note 12, 164.
35 K. YOSHIOKA, *ADR-hô no hyôka* [Evaluation of the ADR Law], in: Hôritsu no Hiroba 2005, 32; K. YAMAMOTO, *supra* note 15, 21.
36 Y. AOYAMA, *supra* note 12, 164 ; K. YAMAMOTO, *supra* note 15, 22-23.
37 Y. AOYAMA, *supra* note 12, 164; K. YAMAMOTO, *supra* note 23, 29.
38 K. YAMAMOTO, *supra* note 15, 23.

V. CONCLUSION: POSSIBLE FUTURE DEVELOPMENT

As is the case abroad, ADR is currently positioned in Japan as a process of civil dispute resolution parallel to litigation. As the society and economy became more complex, the people's values systems diversify further. With such a situation, litigation and ADR are both required to play their respective functions according to the nature and content of a given dispute, and thereby respond to the various needs of the citizens for dispute resolution.

It is based on these circumstances that the ADR Law was enacted in Japan. As the basic law for ADR in Japan, the ADR Law articulates fundamental principles for ADR as a whole along with the responsibilities of national government and local public entities. It also sets forth standards to be applied to dispute resolution services, particularly those offered by private entities, and introduces a certification system.

Nevertheless, there are a number of issues with the ADR Law that still remain to be solved, such as those regarding the establishment of mediation procedure rules, granting of enforceability, and the possibility of legal aid. In that sense, the ADR Law enactment and enforcement are not the goal of ADR enhancement and stimulation but rather a starting point for further actions in Japan.

Litigation and ADR are both systems in which a neutral third party functions as a resolution body and tries to resolve a dispute in accordance with standards that are deemed just in society and on the basis of the fact. These features are essential for a dispute resolution process that can be accepted and trusted by citizens. Litigation and ADR each have their distinct features. For ADR, such features include broad access to remedies that it provides to citizens through its inexpensive fees and simple procedures. Applying an ADR enables the achievement of a flexible and reasonable resolution of a dispute – with the involvement of parties other than legal professionals, behind closed doors, and according to the actual circumstances of the dispute. In contrast, litigation offers a strict legal judgment after providing the disputing parties with ample opportunities to argue and substantiate their arguments. Their respective features represent the results of one system contrasted with the other, so a mutually complementary relationship can be established between the two systems.

People in Japan traditionally have had high trust in the litigation process and, recently, various reforms in the area of civil procedure have made litigation processes easier for them to use.[39] In this situation, it is pointed out that ADR in Japan, especially

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39 The existing Law of Civil Procedure in Japan is relatively new and still in the process of improvement; it was enacted in 1996, enforced on January 1, 1998. In 2001, 2003, and 2004 it was partly amended to realize judicature that can be easily used and understood by the citizens. These developments have also been introduced in Germany. For the Japanese Law of Civil Procedure in 1996, see, *e.g.*, C. HEATH / A. PETERSEN (eds. and transl.), *Das japanische Zivilprozessrecht: Zivilprozessgesetz und Zivilprozessverordnung nach der Reform von 1996* (Tübingen 2002).

private ADR, is faced with severe challenges of having to compete with these improved lawsuits.[40] But if citizens take more disputes to court, ADR will have to share a portion of the work of dispute resolution with litigation. In such circumstances, the development of ADR will become the key for the overall development of civil justice in Japan. For the better realization of justice through ADR that is coordinated with litigation and well-established in its significance, it is critical that ADR should continue to benefit from consideration and creativity in its legislation, interpretations, and applications.

ZUSAMMENFASSUNG

Das Gesetz zur Förderung des Einsatzes von alternativen Streitschlichtungsverfahren (Saibangai funsô kaiketsu tetsuzuki no riyô no sokushin ni kansuru hôritsu) *wurde am 19. November 2004 vom japanischen Parlament verabschiedet und am 1. Dezember 2004 verkündet. Es soll am 31. Mai 2007 in Kraft treten. Der Beitrag befaßt sich mit den Hintergründen, der Entstehungsgeschichte und dem Inhalt dieses Gesetzes.*

Seit langem bestehen in Japan Verfahrensmechanismen, die darauf abzielen, einen Streitfall auf eine Art zu lösen, die einer einvernehmlichen Entscheidung der beiden Parteien am nächsten kommt, so etwa der Vergleich (wakai) *oder die Mediation* (chôtei)*; auch das Schiedsverfahren* (chûsai) *läßt sich insoweit anführen. Jedoch waren alternative Schlichtungsverfahren in Japan nicht immer gut angesehen. Einerseits vertrauen Japaner tendenziell eher auf das Gerichtsverfahren (oder allgemein auf Gerichte) und sehen darin den wichtigsten Weg, um zivilrechtliche Streitigkeiten beizulegen. Andererseits beschweren sich an Gerichtsprozessen Beteiligte oft über das zeitraubende Verfahren und den komplizierten Zugang zum Gericht, weshalb die Zahl streitiger Verfahren in Japan im internationalen Vergleich bislang gering ist. In der Praxis wuchs deshalb die Bedeutung alternativer Schlichtungsverfahren als rechtlich anerkannte Ergänzung zu gerichtlichen Verfahren vor allem für Verfahren mit flexiblen Abläufen. Auch wurden Theorienmodelle für Streitschlichtungssysteme entwickelt. Heute sind in Japan die Vorteile alternativer Streitbeilegung anerkannt, so etwa die Möglichkeit, Streitigkeiten unter Wahrung der Privatsphäre und von Geschäftsgeheimnissen beizulegen, Zeit und Kosten einzusparen, die Expertise selbst ausgewählter Fachleute einzubringen und eine umfassende Regelung aller Umstände zu erzielen. Einige Probleme bestehen jedoch nach wie vor. Noch immer ist sich die Bevölkerung der Existenz und der Bedeutung der alternativen Streitbeilegung nicht hinreichend bewußt, und für Bürger ist der Bereich privater Streitbeilegung teilweise intransparent, wodurch es an Vertrauen fehlt.*

40 See, *e.g.*, Y. HASEBE, *Minkan-gata ADR no kanô-sei* [Possibility of Private ADR], in: Y. HAYAKAWA / A. YAMADA / R. HAMANO (eds.), *ADR no kihon-teki shiza* [Basic Standpoint of ADR] (Tokyo 2004) 135, 142.

Um diese Probleme anzugehen, wurde eine Diskussionsgruppe zum Thema eingesetzt, die im August 2003 einen Zwischenbericht veröffentlichte, zu dem sie die Meinung von Wissenschaftlern und Praktikern einholte. Inhalt des Berichtes waren etwa Vorschläge für die Entwicklung von Regeln für Mediationsverfahren oder für die Einführung einer Verjährungsunterbrechung beim Einsatz alternativer Streitschlichtungsverfahren. Am umstrittensten war die Frage, ob ein System eingeführt werden sollte, mit dem die japanische Regierung den ordnungsgemäßen Verfahrensablauf bescheinigt. Die Mehrheit der Diskussionsgruppe befürwortete schließlich die gesetzliche Einführung eines solchen Bescheinigungssystems, was zur Einbringung des hier besprochenen Gesetzes führte.

Der erste Gesetzesabschnitt enthält allgemeine Regeln, die für alle Prozesse alternativer Streitbeilegung Anwendung finden. So muß etwa eine gerechte, den Umständen entsprechende Durchführung gewährleistet sein, die dem Interesse der Beteiligten, eine autonome Entscheidung zu treffen, gerecht wird. Der zweite Abschnitt, der nur auf die Streitbeilegung unter Privaten anwendbar ist, regelt das Verfahren und die Voraussetzungen für die Erlangung der Bescheinigung des Justizministers darüber, daß ein geschäftlicher Anbieter das Streitschlichtungsverfahren ordnungsgemäß durchführt. Der dritte Abschnitt legt schließlich die besonderen Wirkungen (z.B. Verjährungsunterbrechung) der Durchführung eines Schlichtungsverfahrens bei Vorliegen der Anerkennung des Justizministers fest.

Das Gesetz verwirklicht die Vorschläge der Diskussionsgruppe jedoch nur teilweise. Beispielsweise werden die dort vorgesehenen Regeln für Mediationsverfahren nicht festgeschrieben, und auch über die Durchsetzbarkeit von Ergebnissen alternativer Streitschlichtungsverfahren wurde nicht entschieden. In diesen Bereichen besteht also nach wie vor Handlungsbedarf.

(Zusammenfassung durch d. Red.)