SESSION I

Dispute Resolution Process in Asia: Theory and Reality

GLOBALISM AND LOCALISM IN DISPUTE RESOLUTION

by

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I. Introduction: Globalism in the Field of Dispute Resolution?

Under the flag of "globalization" almost all Asian countries are now trying to adapt to the Western model of financial and business transactions. Law and dispute resolution systems are expected to serve as a foundational framework in which each transnational business transaction takes place. Law as a standardized universal system of rules is considered to enhance transparency and assure the safety of business transactions. For this purpose, legal scholars have carefully studied the law systems of Western countries and made efforts to reform and modernize their own legal systems.

However, when examining this issue of globalization in the field of law and dispute resolution, we should take account of many other factors such as cultural diversity, specific social structure, people's patterns of behavior and so on. Law and dispute resolution systems do not work in a vacuum; they operate within concrete cultural and social settings. Even if we transplant the same Western model, it can play quite different roles in each specific situation, influenced by local power structure, economic situation and cultural belief system. Transplanting a universal system does not mean simply the copying of a system from one society to another. It always requires subtle rearrangements and autonomous transformations, to be effective within each society where other modes of social ordering and dispute resolution are embedded. It means that even if we accept and transplant the common global law system, we inevitably face conflicts caused by cultural and social diversity.

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To some Asian countries, the concept inherent in the Western universal rule of law is itself completely new, and the distribution of power between government and legal system is sometimes ambiguous. Moreover, the local dispute resolution mechanism embedded in the local social structure is still vigorously working. In this situation, introduction of the Western model of a universal law system tends to be limited to the superficial level only, and ad hoc negotiation among a multiple rule system would be required.

Even in some Asian countries that long ago transplanted the Western law system and which have rich experience with ordering society based on that system, its real function in the society is very different from that in Western countries. Japan, for example, has a long history of ordering society through a transplanted capitalistic law system. However, it is true that business practices and the behavior of Japanese companies in handling disputes have their own characteristics, which sometimes became a cause of conflict and have been criticized by Western countries. Despite this fact, the behavior or Japanese companies still maintains features that are deeply rooted in that country's culture.

In order, therefore, to understand the meaning of "globalization" in the field of law and dispute resolution in Asian countries, we must scrutinize the reality of these culturally based operations and the function of the legal system in specific social and economic settings. For example, we must examine how everyday social and business transactions take place under the shadow of the law and local rules, how conflicts are settled when a contract is breached, and under what circumstances local people and businesses use or avoid official litigation.

From this point of view it is essential to understand the complex relationships between the formal legal system and the informal local mode of dispute resolution. One simple way to understand this issue is to assume that development of formal litigation is directly proportional to the decline of informal alternative modes of dispute resolution. According to this hypothesis, as society becomes more complex and urbanized, people prefer formal court to local methods of dispute resolution when they become involved in disputes. In urban industrialized settings, relationships

among people tend to be impersonal, temporal and diffuse. As a result, local community and primary groups such as kinship lose its power to control people's behavior and to settle disputes within them. Instead, people turn to a more formal approach to dispute resolution to regulate their behavior. In short, industrialization and urbanization cause the decline of informal modes of dispute resolution and the concurrent development of a formal legal system.

Although this stereotyped view is correct in a broad sense, it is too simplistic and partial to be applied to the problem of globalization and localism in Asian countries. It is unrealistic to suppose that local modes of dispute resolution and social ordering will disappear completely as a result of introducing the Western legal system. There must be much more complex relationships between a formal legal system and informal local modes of dispute resolution and, accordingly, globalism and localism.

This paper examines this complex relationship between the formal legal system and informal modes of dispute resolution

II. Paradox of Western Model of Legal System

One common view regarding development of the modern Western legal system holds that it was brought about by commercial demand for transparent and stable written rules that could be universally and generally applied to business transactions beyond each local community. The Western modern legal system encouraged development of capitalistic economies by offering a unified framework that enhanced the predictability and safety of transactions. In this view it is logical that the modern Western legal system confronted, and tried to erode, ambiguous local ways of social ordering and customs. It freed people from communal convention and unreasonable tradition.

However, we should also carefully note another aspect of this phenomenon. Did the modern legal system always contradict local ways of social ordering? Were

the people at that time really satisfied with the legal mode of dispute resolution; did they dislike their local customs? In order to answer these questions we should consider some features and limits of a legal system as a dispute resolution device.

First of all, the legal approach to dispute resolution can treat only some specialized aspects of all social conflicts between parties. Before bringing the case to a court, the litigant has to translate his/her problems into legal language that is often inadequate and insufficient from his/her point of view. For example, in some tort cases, the plaintiff may want a sincere apology from the defendant or he/she may want future improvement of the defendant's behavior or its organizational reform to avoid furtherdiscord. However, such demands are usually beyond the scope of a legal system, and the litigants have to limit their claims to a legally articulated solution, namely, compensation. As the result, in many cases, a legal system as a dispute resolution mechanism cannot deliver a responsive and satisfying solution.

Secondly, in this process of translating social conflicts into legal language, the legal profession's assistance is indispensable. The language of law is too complex and jargon-filled, so people usually have to depend on the specialized knowledge of legal professionals. This means that the modern legal system is transparent and predictable only to legal professionals. It has kept people in a subordinate relationship to legal professionals. To lay people facing disputes with others, the local ways of ordering and communal customs may have been much more transparent and predictable.

Thirdly, this formal approach to a dispute resolution system is very costly compared to informal local methods. In order to maintain specialized dispute resolution institutions such as courts, it is not only the society, but also particular parties who have to share the burden. This naturally influences the accessibility of the formal court system.

Of course, these characteristics of a modern legal system are unavoidable limits in order to maintain its neutrality, objectivity, universality and fairness. Nevertheless, we should note that this modern legal system, as a very special and

partial mode of dispute resolution, has to contain a paradox within itself. That is to say, even though it confronted and tried to erode local ways of ordering, it also paradoxically required them as supportive devices in order to keep hidden its limits and disadvantages as a dispute resolution system. In situations where local ways of ordering are still vigorously working, the legal system can play its expected roles as a universal rule system by delegating disposition of extra-legal aspects of disputes and minor cases to the local mechanism. Here, the legal system and local ways of ordering and dispute resolution are working cooperatively, and they support each other.

The Western legal system in the modern era stands on this subtle balance of cooperation and, at the same time, it confronts the relationship with local ways of dispute resolution. What will happen, however, when such local ways of social ordering and dispute resolution gradually disappear as a society grows increasingly urbanized and industrialized? We can find the answer in the experience of the United States.

III. Causes of ADR Movement in the United States

In colonial America small religious communities, where churches and priests kept their authority and power of social ordering, it was considered immoral to mobilize a legal system from outside the community in disputes among its members. As industrialization and urbanization proceeded, these colonial religious communities were destroyed and local ways of social ordering grew increasingly weaker. Finally, following the Civil Rights movement and consumer rights movement, the United States had to face the litigation explosion and became the most litigious society, under such institutional incentives as punitive damages, contingency fees and the jury system.

What was the reaction of the US government and bar associations after this litigation explosion in the late 70's and 80's? The US, including the Ministry of Justice, bar associations and law schools, began eagerly to search for alternative

dispute resolution methods. Some law and social scholars began researching informal modes of dispute resolution in societies where social order is maintained without mobilizing a formal legal system. Others, drawing upon sociological data and organizational analysis, tried to design more efficient procedures to dispose of some types of grievances and disputes such as consumer complaints, automobile accidents, medical malpractice, environmental conflicts and so on. Stimulated by these studies, a variety of alternative dispute resolution (ADR) institutions were experimentally founded. Some of them were successful and others eventually failed.

Three different social requirements were operative in bringing about this ADR movement in the US and other advanced countries, each of which could be seen as means to compensate for the deficits of the formal legal system as a dispute resolution institution.

First of all, the court system, which is designed to dispose of any kind of legal dispute, is often inadequate and has no ability to deal with cases that include highly developed technological or specialized scientific issues. Here emerges the need to establish a specialized ADR capable of disposing of some particular types of disputes in which a specialist in the field, rather than a judge, examines the cases.

Secondly, people require much quicker, cheaper and easier methods of dispute resolution instead of the time consuming, costly and hard-to-handle procedures like formal litigation, especially in such areas of dispute as consumer claims or everyday neighborhood conflicts, in which only small amounts of money are at stake. It is natural for most disputants, from ordinary people to big business companies, to process their cases as efficiently as possible. The courts and the formal legal system are wholly incapable of meeting this demand.

Thirdly, because vital communal ties and informal ways of social ordering and dispute resolution embedded in community have been lost, social means to take care of emotional and relational aspects of conflicts have also disappeared. These relational and emotional aspects of conflicts, which were formerly taken care of by regional or kinship ties and local communal norms, require some treatment even in

highly industrialized and urbanized settings. Obviously courts and the formal legal system are not responsive to this need. Although people vigorously bring their cases to a court and obtain some legal decision or monetary compensation, even the winners are very often dissatisfied with the result, because such a decision can resolve only a limited part of their interests in the dispute. Even after the court decision has been obtained, conflict between the disputants can continue or sometimes escalate drastically. In this situation, it is natural that people want ADR that is responsive to their needs with respect to the relational and emotional aspects of their dispute. In other words, instead of the formal court system, whose scope is limited only to legal aspects, revitalization of ADR based on communal everyday norms and values is an indispensable need even in a highly industrialized and urbanized society like the United States.

To meet these social needs for ADR, numerous organizations have been institutionalized in a variety of areas of dispute, sometimes by the government and other times by the private sector. Clearly, the United States, known as the world's most litigious society, is, at the same time, where alternative dispute resolution has incomparably flourished. ADR is now playing an indispensable role in dispute resolution and social ordering in United States.

Thus, we can understand the ADR movement as the mixture of three social needs and requirements that the US and other highly developed countries inevitably must face. It is impossible for a globally unified legal system and formal courts to satisfy all social needs that were formerly dealt with by informal local ways of social ordering and dispute resolution.

IV. Different Perspectives and Arguments Regarding ADR

The progression of ADR worldwide is said to have been a reaction to the inability to cope effectively with small claims and relational disputes under a system where procedures have been rigidified as in normal litigation. There are now. However, various complications in levels of evaluation for situating ADR: positive versus

negative evaluations; emphasizing ADR's cooperative relationship with formal litigation processes versus its competitive relationship. This section of the paper will therefore briefly review both pro-ADR and anti-ADR positions, further dividing the perspectives into those which favor formal litigation processes and those which are critical of them.

(1) The Pro-ADR Pro-Litigation position

Probably the most common or typical appraisals of ADR belong in this category: the view that justice can be quantitatively improved by establishing the appropriate relationship between ADR and formal litigation. There are two major variants relating to the division of functions between ADR and litigation, stressing:

(a) the efficiency and smooth functioning of litigation; and

(b) the expansion of access to justice.

(a) Efficiency of formal court system

In this first variant, the most important objectives are improvement of performance and efficiency of the civil justice system centered on litigation, by expanding ADR. To prevent disfunctionalities in litigation, such as delays, cases are to be divided into those truly requiring resolution by formal processes and those which can be adequately dealt with more simply. Only the former would be dealt with by litigation. Thus, ADR is expected both to deal with appropriate cases under more simple processes such as mediation and arbitration, and to exercise a screening function transferring the more difficult cases to more formal processes. In this way, the formal judicial system can better fulfill the functions originally expected of it.

Numerous practical criticisms are raised against this variant. It is unclear to some whether establishing more ADR will in fact reduce the burden on the civil justice system or contribute to better achievement of its functions, or whether rational channeling is really possible. More important for the purposes of this paper is that the Western ideals of the formal litigation process are taken for granted and their better achievement becomes the objective.

Generally speaking, this variant is a narrower, more conservative reaction to the phenomenon of the ADR movement. A major, possibly primary focus is on reducing the burden on the formal judicial system. Typically, this sort of exercise is seen as "technical": improving productivity in processing cases through the system. Of course, a longer-term aim in so doing may be to increase overall access to the system - the "access to justice" variant discussed in paragraph (b) immediately below. Alternatively, however, the aim may simply be to cut costs to participants in the process - particularly to the state - without expecting or hoping for an expansion in accessibility of the system and a rise in the number of cases brought.

(b) Access to justice

Although sometimes linked to the first, the second variant in the Pro-ADR Pro-Litigation perspective focuses less on fulfilling formal litigation processes themselves. Rather, the aim is to guarantee access to justice for more classes of people who have not traditionally been able to access the civil justice system, and to improve the performance of the legal dispute resolution system as a whole for them. By replacing litigation, with its high attendant costs in terms of time and money, with cheap, fast informal systems, this variant specifically hopes to suck up more disputes into the expanded legal arena and thus help legal dispute resolution become more prevalent in society. Invariably, dispute resolution by ADR is compared with model dispute resolution by formal litigation processes, and often the latter is evaluated as superior. That is because the "resolution" presented by the most procedurally refined formal litigation process is taken as correct, and thus the presentation of a resolution basically similar to the latter is taken as the ideal. Of course, there are occasions when original and flexible resolution differing from that presented by the litigation process is stressed. This is not, however, a general criticism of resolution through litigation, but is rather seen as adjustment to particular circumstances.

An example of this attitude can be found in the recent establishment of a variety of Product Liability Dispute Resolution Centers in Japan, which are considered indispensable in Japan where the number of lawyers is kept very low, making litigation an expensive and unpopular option. This view is also in accord, for instance, with the actualities of dispute resolution in Traffic Accident Dispute

Resolution Centers, generally seen as the most successful example of ADR in Japan. However, we must note that this second variant also undoubtedly takes the formal processes of litigation as the "core" of the entire dispute resolution system. Furthermore, we can note that the notion of access to justice really amounts to the access of the legal system to the furthest reaches of social life - an aspect of "legalization" of social life, which opens itself in particular to direct criticism from the Anti-ADR Anti-Litigation view mentioned briefly later.

(2) The Pro-ADR Anti-Litigation position: Community mediation

Amidst the movement favoring ADR, there is a contrasting view that raises fundamental doubts about the existing formal processes in litigation. Beginning with the apprehension that those processes not only fail to resolve the problems rooted in social relationships between the disputing parties, but that they often even lead to further disintegration of those relationships, this view proposes original ADR quite independent of the legal system. As with the San Francisco Community Board, for instance, even procedural matters can be dealt with by trained but non-lawyer community members, following an ideal typified by community revival. Dispute resolution becomes focused on restoring cooperative human relations, rather than legal considerations.

In highly industrialized and urbanized settings, however, there are doubts as to the practicality of this approach, in fragmented contemporary urban communities, where rights consciousness has also increased. In fact, this type of ADR has suffered from a perennial shortage of cases and difficulties in attracting funds in the US. As it comes to rely on funding support and referral of cases from the courts and the police, it becomes more difficult to retain its original ideals, and there are fewer and fewer functional differences between it and the (1)-(b) type ADR. We can expect, however, that in Asian society this community based ADR can work positively and play an important role in social ordering and delivering justice into society.

(3) The Pro-litigation Anti-ADR position: Second class justice

Negative perceptions of ADR can similarly entail seeing the traditional litigation process in both a positive and a negative light. The former view argues that

the price ADR pays for quick and simplified resolution of disputes is a reducing in procedural fairness through due process, and the loss of the opportunity for substantive review by judges, and thus, that ultimately ADR merely offers cheap but second-class justice which will reflect power imbalances between the parties to the dispute. The negative perception of ADR is further developed by arguments that court-assisted settlements come at the expense of the important role of litigation in setting clear standards by means of publicized and objective judgments, and can permit excessive intervention by managerial judges. Clearly, however, this Pro-Litigation Anti-ADR position shows great faith in the functionality and legitimacy of the Western model of formal litigation process on which it is premised.

(4) The Anti-Litigation Anti-ADR position

By contrast, a negative perception of ADR can follow from a consistently skeptical view of the Western litigation model. This view argues that not only does the existing legal dispute resolution system not add to fairness in society; it even adds to and solidifies unfairness. Yet ADR is said to work to hide this defect in the judicial system from critical gaze, and ultimately to act as a means for the state to expand its control into all areas of society. In particular, this view criticizes the expansion of (1)-(b) type ADR linked to the formal judicial system, premised on the provision of court-like dispute resolution, on the basis that it encourages the intervention of simplified legal control by legal professionals.

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This concludes a brief review of the various basic perceptions of ADR, according to whether they perceive litigation and ADR itself in a positive or a negative light. Due to limitations of space, this paper cannot fully explore the various positions, nor do I intend here to argue the merits of each.

The social conditions in each society dictate whether each of these articulations on relationships between formal litigation and ADR is appropriate or not. Accordingly, we should search for ideal balance and division of functioning between local dispute resolution and formal courts as a global legal system, examining each society's particular cultural, religious, economic and social structural settings. For this purpose, we must carry out empirical research to learn much more about the complex relationships between informal ways of social ordering and the function of a

formal legal system in concrete situations. Here, I will present examples from my own study of the behavior of Japanese-Thai companies during economic crisis.

V. Contract Law and Private Ordering of Japanese-Thai Companies

1. Japanese "Trust" and Thai-Chinese network--- Case of a small electric appliance producer

In the case of one Japanese-Thai joint company that produces and sells small electric appliances, the Thai partner is a famous Thai-Chinese family, and only one Japanese manager is sent from Japan. This company sells their products to comparatively small or medium-size wholesalers and retailers who are usually also members of Thai-Chinese family networks. Although there buyers may change their business partner at any time, if the price is cheaper, their relations tend to endure over time, and they never draw up any documents other than invoices. This one Japanese manager handles almost all aspects of the company's operation such as management of the company, sales negotiation and some dispute negotiation. However, if trouble arises, the Thai partner family usually appears on the stage and resolves matters effectively and informally. Neither the Japanese manager nor the Thai partner usually ever think of mobilizing formal legal rules and the court system.

We find two characteristics in this situation. One is the simple structure of decision making on both parts. Although it is a joint company, almost all power to make decisions is centralized in the Japanese manager, and the Thai partner takes a hand only in cases of difficult negotiations with Thai-Chinese buyers. On the other hand, Thai buyers are usually family companies, and their structure of decision-making is also simpler than that of a huge modern company. In this case, both parties have no need to consider complex organizational distribution of power and the writing of contracts for that purpose.

The other characteristic is informal social ordering through Thai-Chinese family networks and the Japanese way of building trust. There is no need to say that

the function of Thai-Chinese networks is based on a system of mutual support and trust. As for the Japanese manager's behavior, it is very impressive for its combination of reasonable and traditional aspects. He is in his late 40's and is critical of the traditional Japanese approach to business in which extra-business social intercourse such as eating, drinking, playing golf and going to Karaoke are indispensable. Although, to some extent, he has to participate in important events like funerals or parties held by the buyer's family, his efforts are mainly devoted to improving the quality of his company's products. He thinks the traditional Japanese ways of doing business do not work in Thailand, and trust can be gained through providing qualified products at good prices and establishing common bonds of friendship with buyers. Here, the quality of the products at good prices (economic dimension) and friendship (relational dimension) are considered to be the important factors for doing business in Thailand.

In this case, these two factors---the simple structure of decision-making in both parties and the relational (Thai and Japanese) and economic (Japanese) dimensions---allow them to do business without ever considering the legal aspect of contracts.

During the Economic Crisis, many of his buyers delayed paying their debts, or sometimes could not pay at all. Like other Japanese companies, his company renegotiated a plan of payment and almost all the buyers were sincere. At this point he never considered the possibility of bringing the case to a court. However, some of the buyers actually went bankrupt, and only in these cases did he take them to court. Here, we have to pay attention to the meaning of taking the case to court.

He had no expectation of resolving the problem or recovering the money, because the other party had no resources to make payment. Moreover, his company had to pay expensive lawyer's fees for just a nominal judgment. The reason he took the case to court was to persuade and satisfy the Japanese parent company that recovering the debt was really impossible by any means. It was indispensable to receive a court decision to get the parent company to acknowledge and dispose of the loss (150,000,000 Baht).

In my view, this is the most common and typical reason for Japanese companies to take a case to court. For them, courts are not a forum for resolving their trouble, but a kind of agency to get a document that is indispensable in persuading their parent company and the tax office.

2. Helping, fostering and constructing strong ties---Case of motor industry

The motor industry's reaction to parts suppliers during the Economic Crisis was an impressive example of Japanese attitude toward contract relations and the formal legal system. In the Economic Crisis, most suppliers suffered a hard time, and some of them faced bankruptcy. Toyota Motors and other Japanese motor companies got together and discussed what measures to take. Finally, they decided to buy parts at twice the ordinary price from all suppliers so that most of them could survive the Economic Crisis.

Is this behavior economically reasonable? If viewed from a short-term point of view, of course it is not. However, the motor industry cannot continue to grow without qualified parts suppliers. The Japanese motor industry in Thailand is now trying to shift from the production of motor vehicles exclusively for the Thailand market to production for export. Thus, they need suppliers that can meet international quality standards. Accordingly, it is advantageous, from a long-term point of view, for the motor industry to help and foster suppliers and establish strong family-like ties with them. In this respect, I should add that the majority of suppliers in Thailand are also Japanese-Thai joint companies.

Even if it is economically reasonable in the long run, the reaction of the motor industry during the Economic Crisis is still unusual from a non-Japanese point of view. This typical Japanese attitude of maintaining good relations and to secure profits together is deeply rooted in Japanese patterns of social organization. Their contract behavior is to be REASONABLE within this cultural framework.

In addition, written contracts are again unimportant for both parties. Even a

large company such as Toyota Motors does not care about written agreements in many cases, although they have written contracts, which are required by the legal or document departments. Maintaining relations is much more important than contract law, because a contract legal system can only protect a short-term profit while many times destroying good relations and, therefore, long-term profits. Here, we can find an answer to the previously raised question: why do Japanese companies put dispute resolution clauses in writing more often than Thai companies, in spite of their recognition that Japanese are more flexible and less legally oriented than Thai? Although their complex organizational background sometimes induces Japanese companies to write out detailed clauses, their contract practices are still more flexible and far from a legal system.

Avoiding contract law and courts is, therefore, reasonable for preserving good relationships and pursuing long-term profits from the Japanese point of view. The expectation that both parties will cooperate to maintain this trust is the most essential part of their contract relationship.

VI. Conclusion: Globalism and Localism Dispute Resolution in Asia

As these patterns of Japanese companies behavior and attitudes for courts and formal legal system suggest, in Asian countries, where social values and tradition differ completely from Western ones, and where there is a high possibility that local informal ways of social ordering are still vigorously functioning, relationships between formal courts and local informal dispute resolution are much more complex.

Of course, in the era of globalization, when advanced technology and complex business transactions are spreading rapidly around the world, the need for ADR that is specialized in some specific area can be found everywhere including Asian countries. Moreover, the expansion of access to Justice may be one of the significant issues in dispute resolution in Asia. Although a crucial problem in making formal courts a more accessible forum for dispute resolution, it is also true that there are limits to this option, because court systems strictly following formal procedures logically involves

high costs to both society and users. Establishing more efficient and accessible ADR would be indispensable, at least as a supplemental device for distributing justice broadly into society. In these points, the requirements for ADR in Asia are based on common reasons with Western countries, even though the extent and specific situation may differ.

Informal methods of dispute resolution based on cultural and social values, however, raises a difficult question: whether it should be expelled by formal legal system transplanted from the Western model or be preserved while respecting local values. Of course, this question is too simplistic. Nowadays, each local area's methods of social ordering or dispute resolution cannot escape the shadow of a legal system. For example, the behavior of Japanese companies in Thailand is on the one hand based on its cultural patterns, but on the other hand it always proceeds under the shadow of legal sanction as the ultimate device and tactics reflecting the situation of the world economy. In this sense, the global system can penetrate even into the very local methods of social ordering. It is also true, however, that a court decision can often be based on local values or be strongly influenced by local customs. If formal courts always reject local values or customs and instead insist on universal and globally standardized rules, the result is that local people will avoid using them. In this sense, globalism can be acceptable only when it respects local values and establishes appropriate relationships with them.

If this understanding of mutually sustaining and penetrating relationships between global and local systems is true, then we must examine them more closely and search for the ideal model for a dispute resolution system in society as a whole. Our research project on dispute resolution in Asia will deepen and advance the progress of our understanding in this area.