

A Non-Adversarial Dispute Resolutions: Studying Of Japanese Non-Litigious Country And Society

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ABSTRACT

In line with the changing of times, the transition from small-scale trade to global trade has invoked changes to the existing trade system to a more challenging one. This has made the impact being felt by the consumers. Users are getting more repressed in many forms of trade that are becoming more and more challenging besides testing the intellectual capabilities of consumers. The latest trading trend needs a change in its dispute resolution system to become more efficient and meet the demands of consumers and traders. The current trade scenario as well as the rise in matters of consumerism have made it crucial to outline a perfect and complete set of laws that is capable to protect the consumers' rights and solve disputes that are usually arise in consumer-trader contract matters, that is sometimes unexpected. The laws formed can be beneficial if transparent and able to protect consumers involved in trade with traders, both nationally and internationally. This research aimed to discuss on the Japanese non-adversarial dispute resolutions which popularly known as non-litigious country and society. Being a library based-research, reference will be made to relevant authoritative texts, case studies, and applies the method of literature review through content analysis of documents. Overall, this paper finds that, without looking at the different theories introduced, until today, the Japanese still believe that disputes should not occur. If disputes do occur, the resolution is through a mutual resolution agreement contract. In this situation, they will give honest effort to compromise or resolution that they mutually agree upon.

Keywords: Dispute, resolution, adversarial, non-adversarial, law and claims.

INTRODUCTION

Related in-depth studies conducted by scholars have outline a set of laws and dispute resolution system that is efficient in protecting consumers in any trade disputes they are involved in. As discussion on globalization issues and requirements of the best consumer trade dispute resolution mechanism is done, most of the discussion highlights the best practices of developed countries in the subject matter. Countries such as Australia, United Kingdom, United States of America, Japan, Hong Kong, Singapore and India have advanced and time-tested dispute resolution systems that have been proven to be efficient from time to time and can be a benchmark to Malaysia. Nonetheless, Malaysia needs to adapt the system according to a personalized mould and needs based on the difference in civilization, humane values, social structure, local community scene and behavior traits that exist in Malaysia.

The dispute resolution mechanism and the related laws exist due to the support of parties that make an effort to move and expand them according to the customs and local social situation. By implementing practices and mechanisms used in the West without any screening may caused negative consequences to the local consumers since the function and method of these practices are different from the needs of the local community. The said model and mechanism need consistent re-evaluation via transformation that can enhance the customs and social values of Malaysians.

For most Asian countries, not all concepts and models taken from Western countries are effective when implemented in their own countries even though in the West, they are widely popular. Therefore, it is important for every relevant party to understand the complex relationship between the formal laws and the informal ones in dispute resolution. The understanding of the development of formal litigation as well as the various ADR mechanisms is closely related to the societal situation that is becoming more complex and modernized. The community too shared the effects of both and is slowly transitioning from formal litigation to a less formal system which is the dispute resolution mechanism or ADR according to the time and need of the dispute. For example, in 1994, the Court Dispute Resolution scheme or CDR is introduced in Singapore.

This court dispute resolution scheme allows any party in the dispute to apply for a resolution conference chaired by the District Senior Judge that is responsible of handling the CDR scheme. Besides the statement that stated the offered service under the CDR scheme is free, another benefit of using this scheme is that the results of the comments given by the judge regarding the case merit can be used by the involved parties. This serves as a logical sign to all parties whether they have a case and have a possibility of winning or not. This enables them to revise their positions and help them to decide whether they want to proceed for a full trial or not.

THE JUSTICE SYSTEM IN JAPAN

It cannot be denied that the Japanese have little faith in their litigation system and the trial proceedings that they have to go through in court. The community here prefers to solve their disputes through the conciliation or mediation methods. Japan has a history of being known as a community that believes in and hold on to a non-adversarial dispute resolution method. Litigation is an unfamiliar method to them until foreign countries have managed to influence and introduce them to the system during the late 1800s. Until today,[1] Japan is still known as a non-litigious country and society. This statement is disputed by a Professor Haley from Washington University in his controversial article entitled *'The myth of the reluctant litigant'*. [2]

He stated that the Japanese are like the Americans who are litigious but they are forced to solve their disputes outside of the judicial system. This is because cases that are intended to be brought to court require a lot of money and time consuming. In fact, it is hard for them to be enforced. This opinion is still being debated in America and other countries in the Pacific region.

SMALL CLAIMS PROCEDURE

Japan has introduced the Small Claims Procedure that is enforced on 1st of January 1998.[3] This procedure has taken up the approach of the American Small Claims Procedure and replicates it. All small claims cases will be tried in a summary court. The purpose of its establishment is to reduce the stress on the cases filed in the summary court which involves cases of deposit and credit claims.[4] The court considers the demand of a faster, comfortable and effective process. The main purpose of its establishment is to increase the access to justice through the formation of bodies similar to the court for the people or in other words, a people's court. This enables the public who has little knowledge of the law becomes the main party in the dispute resolution process.

Among the categories of dispute being resolved through the small claims procedure such as sale goods claims, collateral claims involving the landlord and tenant, interest payment and part-timers' salary and car repair payment claims for cars involved in road accidents. The advantages of the Small Claims Procedure include its simplified method, fast resolution and low in cost. Compared to the regular procedur or '*tsujo-sosho*', the proceedings process can be done in only one (1) day only. The involved parties such as the plaintiff, defendant and the attorneys appointed by both parties and witnesses will meet to resolve their issues at a Round Table Court. There are three (3) requirements that allow a case to be filed as a small claim, as follows:[5]

1. Article 368(1) Civil Procedure Code provides that the amount for claim must not be more than 600,000 yen.
2. Article 368(2) Civil Procedure Code provides that the parties making the claim must submit a statement for trial.
3. Article 368(3) Civil Procedure Code provides that the plaintiff is not allowed to file more than ten (10) actions a month at the same summary court.

With these three (3) requirements at least the small claims proceedings will not be similar to the the regular proceedings during trial in the summary court. The main matter stressed in the small claims procedure is that it limited to monetary claims only. Non-monetary claims even with a value less than 600,000 yen are not allowed to undergo this procedure. Meanwhile, the third requirement imposed aims to provide rqual rights for individuals in need to use the procedure.

The claim limit imposed functions to restrict big companies from monopolizing and misuse the small actions procedure for personal gain, especially involving financial institutions that give out loans to consumers. The plaintiff will be charged of the filing fee that is seen as reasonable and affordable. Proceedings will be conducted for one (1) day requires both parties to present their respective documents and witnesses. They are also allowed to present any related documents and evidence before the proceeding dates. Judgement made is binding and cannot be appealed to any courts unless a judgement protest at the same summary court where the small claims procedure proceedings is held.[6]

The effectiveness of the Japanese Small Claims will cause the increase in the number of filed cases receive a positive response every year since 1998 until 2003. This shows the increase in the number of individuals in the Japanese society who believe in case resolution through the litigation system that they are not comfortable with before this. Most cases are tried without the assistance of the appointed attorney. 94.9% cases are brought into trial without appointing a lawyer to represent or through the concept of DIY.[7] This scenario showed that a Japanese society wanted a resolution approach that is more consensual, harmonious and able to uphold the reputation of both parties.

Even though the procedure showed effectiveness in implementation in Japan but there are a few disadvantages identified. Through it, the Japanese judicial system becomes more efficient and gains the confidence of the community that has little knowledge of litigation via dialogue-styled hearings, intensive hearings and collective hearings. Nonetheless, there are still a few disadvantages that must be solved in order to ensure the posterity of this procedure. Among the disadvantages of the procedure are:[8]

First – Mental Pressure

In the small claims litigation, the disputed parties must resolve their dispute in a one-day trial. For less than expert litigants in matters of civil law and its practices, they will find it hard and tiring to go through with the proceedings even when the court that consists of clerks and judges use simple words and not legal jargons. They will also feel alarmed and anxious with the public in the gallery while the trial is going on. Japanese courts allow the trial to be conducted openly so that the community can be present and evaluate their justice system.

However, this arrangement has received protest from several parties that stated the permission to listen to the case must be asked to the litigants. The stressful situation too can be felt when the losing party in the proceedings are not allowed to appeal and refile the case at any other court. This causes certain disputed parties to undergo the regular proceedings due to the risk of them not able to re-appeal. In the regular proceedings, they are allowed to make an appeal if lost.

Confusing and inaccurate facts

Since the time provisioned is too short, there is a possibility that the disputed parties will not reveal the whole truth or give sufficient documents. Whether they wish to win or to hide relevant facts related to the time provisioned is not known. The desperation of adhering to the time limit causes that not all of the facts of the case being presented.

Third – Serious disputes

Complicated disputes are not suitable to be resolved using this process. It becomes complicated since it is time consuming to present all the facts and evaluate the documents presented or calling too many witnesses to be interrogated. There is a possibility that they require an opinion of a specific expert to explain an issue more clearly or the judge in session needs to visit the place of occurrence in case there is a counter claim by the defendant. Due to this restricted condition, the access to justice is still a major problem.

Openness

The procedure to switch trials of a case through the small claims procedure to a regular procedure in court can cause problems to the plaintiff. The plaintiff will suffer loss in time and money more

than expected since their case is switched under the orders of the judge or a request made by the defendant. This is a common scenario in the small claims procedure and the case to be having problem during the process of resolution.

Issues with the judge

The judge that is handling the small claims procedure is usually a conservative and experienced one. Therefore, they are potentially to recommend conciliation without giving the needed judgement by the plaintiff when it is clear that the plaintiff should win.

Geographical issues

The location of the court that is far away from the residences of the disputed parties will cause time and cost issues to both parties.

Claim amount

The claim value that must not be more than 600,000 yen causes difficulties to the disputed parties especially in cases of returning the deposit paid for house purchase that may be more than that value.

Cross/counter action

The provision of Article 369 of the Small Claims Procedure causes problems since the time needed to hold a trial session for a counter claim takes up more than the one-day small claims proceedings.

Objections

Without an appeal process being provisioned under the Small Claims Procedure, it is still permissible for any parties to present their objection on the judgement given that may cause confusion on the basis of its decision is made. This causes the objection process to be conducted in the same court and judged by the same judge. If no new evidence is presented, the re-trial of the same case by the same judge may lessen the substance of the case.

JAPAN'S ALTERNATIVE DISPUTE RESOLUTION (ADR) AND JUSTICE THEORIES

The community in Tokugawa, Japan (1603-1867) is divided into four social classes. The hierarchy is as follows:[9] samurai-bureaucrat, farmers, artists and traders. The samurais are the head of the four class categories.[10] The farmers, artists and traders must respect the samurais and show their loyalty as well as forbidden from behaving indecently to the samurais.[11] In this organized society, they are exposed to the belief that disputes are morally wrong. It has become the responsibility of those who are more knowledgeable and with authority in the society to maintain peace in their territory or area so that disputes does not happen easily. If a dispute occurs, it will be resolved in the best possible way. During the contemporary age in Japan, the social class hierarchy is replaced with a vertical structure based on a relative status between any two individuals.

The concept of a vertical society is known as '*tate shakai*' and it indirectly opens up more space for the Japanese to interact with one another.[12] Every individual will placed himself as a relative to another based on age, gender, education and occupation and this is seen as a determinative situation. This social hierarchy is actually being formed based on the teachings of Confucianism and Buddhism that stress on the responsibility of harmonizing the social loves of the local community.

They believe in a consensual concept and peace among individuals.[13] This can be realized with ADR and not through a win-lose situation of the litigation system.

Based on the statement given by Joseph W.S Davis,[14] there are three (3) main theories that can explain the reason the litigation trial process rarely takes place in Japan. The theories are as follow:

- a. The Japanese are a race-based society and they see anything controversial as negative and bad per se. This theory is based on a sociological perspective.
- b. This theory exists to counter the first theory. They think litigation should be avoided since the system restricts the access of the public to the court since there are many challenges posed by the system created by the institution itself.
- c. This theory is related to the availability of empirical information that can be used by both parties, the plaintiff and defendant to foresee the results if the case is brought into court. They will choose a resolution between two disputed parties compared to a trial process in court.

The situation in Japan prolonged until the 70s wherein they dislike litigation based on their strong desire to avoid any confrontation in any way possible. The belief of their forefathers that they inherited make them believe that disputes is a threat to the main fundamentals of harmony or 'wa', and destroys the social arrangement and system by turning the compromising values as impossible to achieve and non-existent. This is further supported by their faith in Confucianism that teaches societal values such as 'giri' which requires all members of the society to comply their obligations to one another. For them, systems formed such as litigation threatens the long-term relationship of the two disputed parties. Meanwhile, Port has identified and divided four (4) different theories[15] that explains the reason the Japanese do not like the litigation process in resolving any disputes between them. The theories are as follow:

First – The Traditionalist Theory

According to Kawashima, the influence brought by the teachings and old doctrines of Confucian has influenced this traditional theory. He believes in a harmonious social relationship that has managed to build a societal culture in which disputes should not occur and can be avoided. If disputes still occur, they must try to resolve it by making a mutual agreement. However, Kawashima admits that the transformation on the familial life of the Japanese and weak social control have caused the collapse of the long-maintained social harmony. Indirectly, this has change their attitudes toward dispute resolution.

The Revisionist Theory

This theory rejects the traditional theory above. They believed that the delay in the trial process at court is due to the civil procedure laws and lack of judge in courts, the cost in handling court proceedings, the inefficiency in enforcement and the authority given as well as the government's policy that restricts the number of lawyers admitted into the Training and Law Research Institute.[16] These issues have been pointed out by Haley who acted as a representative to the revisionists.

The Rationlist Theory

The scholar for this theory used the rational method to instate their theory. Their believe that the Japanese society understands the state of their legal system well and thus, believe in the best choice

for resolution is through mutual agreement, rather than wasting time and energy by going through the litigation process. They opined that rational litigants will solve any case and issue of dispute outside the court since they are already aware of the effects of litigation toward them. In fact, litigation does not bring any benefits to them if proceed.[17]

Informalist Theory

The scholars who came up with this theory believed that the legal responsibility in Japan is informal. Due to this fact, therefore, the Japanese believe that the law used is to repress the society and begin to create social pressure among them. Scholars who supported the informalist theory viewed ADR being used to find opportunities by certain parties that are responsible solely to gain popularity and defend their authorities.[18]

Based on the results of the four (4) theories brought by scholars on the legal system in Japan, it can be concluded that these theories are somewhat rather, true and are reasonable in different perspectives, especially in explaining the importance of the ADR system in Japan. The theorists have successfully contributed several ideas and important issues to further improve the legal system in Japan. However, without looking at the different theories introduced, until today, the Japanese still believe that disputes should not occur. If disputes do occur, the resolution is through a mutual resolution agreement contract. In this situation, they will give honest effort to compromise or resolution that they mutually agree upon, i.e. the process of '*jidan*'.

According to Joseph W.S Davis,[19] more than 95 percent of disputes in Japan are solved through negotiation and compromise. However, the method is not able to successfully used to solve all types of disputes whereby they are parties who requested resolution via conciliation or '*chotei*' or even through mediation or '*assen*'. The difference between these two methods are based on the degree of involvement of an appointed third party to participate in the resolution process. Based on the system created by the Japanese, conciliation uses an active middleman to give any recommendation to resolve the dispute faced. The third party acts as a middleman that has full responsibility to resolve the dispute, legally or morally. In the mediation process, the third party acts as a middleman that stimulate discussion between the two disputed parties in the effort to achieve mutual resolution. They may make any recommendation that may help the two parties but does not pressure in order to achieve a resolution to the said difference of opinion between the two. The mediation process is conducted in an informal environment compared to conciliation.

However in the two scenarios, both disputed parties are not required to accept all the recommendations made by the third party. Nonetheless, there is another resolution process that can be used, discussion. This process is a by product of a formal conciliation and negotiation processes. In this situation, the party who feels that they are wrongly treated or pressured unjustly is allowed to obtain advice from related parties or institution like the bar council, local authorities or other relevant parties, even the police if they can help, This situation usually occurs in accident cases and some cases that involve medical claims. In another situation, there are disputes that cannot be resolved with the aforementioned methods but only through litigation or arbitration only. In Japan, if the dispute involves a foreign party or race, usually they will choose either arbitration or litigation to solve the dispute. Below are several Alternative Dispute Resolution (ADR) situation in Japan:

SETTLEMENT-IN-COURT OR 'WAKAI'/COMPROMISE OR 'JIDAN'

'*Wakai*' or resolution in court/cmpromise is a voluntary resolution in any dispute based on a contractual agreement entered by both parties. '*Wakai*' is different than conciliation whereby this process begins with a judge during a trial of a dispute. The judge provides recommendation at any time during the trial.[20] However, the compromise procedure can be changed to a regular trial process at any time of the proceedings and the judgement made can be enforced and binding to the two disputed parties. Basically, '*wakai*' combines litigation and mediation[21] whereby the process begins with a case trial in court until at one level, it will be transferred to a resolution procedure that uses a combination of legal perspective such as consultaion and mediation.

CONCILIATION-IN-COURT OR 'CHOTEI'

This conciliation term refers to the agreement made between two disputed parties that is simplified with the involvement of the District Court.[22] However, the term is used in a technical situation as follow:[23]

- i. The institution and overall conciliation system,
- ii. The conciliation procedure,
- iii. The conciliation action,
- iv. The agreement substance or the compromise included in writing,
- v. The mutual agreement of both disputed parties in the agreement.

Basically, '*chotei*' represents the prelitigation procedure that is conducted with a regular summary and the lower court. According to the procedure, the dispute will be resolved through negotiation by the two parties with the help of a neutral facilitator that will assist the two parties to reach a resolution. The court will appoint a committee member that are usually joined by a judge who will chair it, one or two conciliators or commissioners, or sometimes, a judge only.[24] The other court staff appointed by the Supreme Court and given relevant training. Meanwhile, the conciliator or commissioner must be between 40 and 70 years old, qualified as a lawyer, have the knowledge and expertise as well as having useful experience in resolving the dispute or experience in living with a wide variety of community members.[25]

A commissioner will serve for two (2) years and can be re-appointed by the Supreme Court for an agreed period. The Japanese Government views the commissioner as important and encourages conciliation by organizing various training and related courses for them.[26] There is a variety of conciliation categories in Japan including one for family (*kaji chotei*) and civil (*minji chotei*). Both conciliation categories are regulated by statutes such as the Civil Conciliation Act (1951), the Law For The Determination of Family Affairs (1974), the Labour Union Law (1949), the Labour Relations Adjustment Law (1946), the Pollution Dispute Settlement Law (1970) and the Construction Business Law (1949). Based on the provision of 'mutual concession' plays an important role in the conciliation processs in Japan, whether it involves civil or family cases. Since the situation is different compared to the ADR theory used by the West which gives importance to creative solution that ensure the needs and the interests of the disputed parties are protected rather than the mutual concession one.[27]

ARBITRATION OR 'CHUSAI'

The Japanese arbitration system is modern and similar to the arbitration system in Australia, Germany and the United States of America. The arbitration system in Japan is divided into two (2

categories which are an arbitration between two parties in Japan and arbitration involving a Japanese and an external or foreign party. This situation is stated in Section 8 (Articles 786 until 805) of the Civil Procedure Code that provide a basic framework only and therefore, are subjected to several weaknesses. Among the weakness found in the provision of Articles 788 and 789 is in the statement

“which it provides for two arbitrators in the absence of an ‘arbitrator selection’ provision in the parties’ arbitration agreement”.[28]

Due to the weakness found in the said provision, the arbitration is monopolised widely in different industries for cases such as cases involving construction, environment, labour force and commercial. The method provided for every different aspect has assisted in adding to the existing provision in the Civil Procedure Code. Besides, this method is more effective since it is drafted to handle dispute issues in different aspects of industries. Among the main aspects that use arbitration in resolving disputes are:

Arbitration in the Construction Industry

The arbitration in the construction industry is enforced under the Construction Industry Law. [29] The law becomes a supplement and enhance to the arbitration scheme provided under the Civil Procedure Code by providing two (2) inspection bodies or parent body operated by the Ministry of Construction and the local bodies established by all the departments.[30] The arbitrating panel is appointed by the parent or local bodies. The panel consists parties such as lawyers and two (2) construction. The appointed panel will give full power to organize a case hearing and made an inspection to the case facts and dispute issues at the construction area, before any adjudication process can be carried out. [31]

Environmental Arbitration

The arbitration involving pollution to the public is handled under the provision of the Public Pollution Dispute Settlement Act[32] The provision provided acts as a supplement to the Civil Procedure Code and enforced against seven (7) pollution case as below; air, water, land, noise, smell, earthquake and land sedimentation. This Act has also established two (2) bodies, the parent and local bodies. The arbitration panel appointed is responsible to issue a related order such as the injunctive relief, besides they are also authorized to obtain any relevant evidence from any parties.[33]

Labour Dispute Arbitration

The arbitration for any labour dispute among the management and labour union is enforced under the Labour Relations Adjustment Law.[34] The Act has established a (1) body consists of representatives of the management, labour and the public. The arbitrating panel will be appointed among these body members and also members appointed via special methods.[35]

Commercial Arbitration

The Commercial Arbitrator at the international level is controlled by the Japan Commercial Arbitration Association or JCAA and the Japan Shipping Exchange that is known as the Tokyo Maritime Arbitration Commission.[36] For the Japan Shipping Exchange, the overall arbitration cases involved maritime or shipping disputes[37] They are authorized to conduct a maritime arbitration proceedings based on the provision provided by the Rules of Maritime Arbitration of the

Japan Shipping Exchange that functions as a supplement to the Civil Procedure Code. For the JCAA established in 1950 under the Chamber of Commerce and the Ministry of International Trade and Industry, it is authorized to hold arbitration, conciliation and mediation proceedings that are involved in commercial disputes.

[38] JCAA is proactively in a collaborative agreement with other foreign countries such as the American Arbitration Association or AAA. The JCAA is also providing a list of qualified arbitrators and most of them are Japanese which is around 90% of the overall 100 arbitrators named.[39] Besides, there are those who are qualified from America, Germany, Britain, France and other foreign countries. The appointed individuals are between 50 and 70 years old and the biggest group which is almost 60% of the appointed arbitrators is lawyers. The others are qualified as law professors, and some of them are successful and highly calibrated businessmen and there are retired judges appointed as arbitrators too.

The proceedings conducted after a party is required to submit their written application to JCAA, provided under the JCAA Commercial Arbitration Rules. Among others, the written request must include, inter alia, the arbitration claims under the provision and laws of JCAA, reference must be made to the arbitration agreement, applied relief, summary of the dispute faced, and also the basis of the claims and the forms of evidence. Together with the submitted request, the claiming party must provide the power of attorney by putting down a signature as a sign of agreement of appointing any of the attorneys in the the list to represent them, together with the application payment and administrative fee, providing a copy of the arbitrator agreement or the related arbitrating clause that provides authority to the JCAA as an appropriate forum to solve the dispute faced.

The JCAA, then will inform the claiming party regarding the claim forum appointment acceptance and the respondents have up to seven (7) weeks to file any response and up to nine (9) weeks to file any counter claims. If there is any amendment made, the Act allows the amendments to be made if the arbitrating tribunal has not been conducted. However, this situation may change according to the tribunal agreement if the amendments made after the tribunal is held. The parties involved in the proceedings are allowed to appoint one or more arbitrators according to the agreed appointing method. If the JCAA is not informed of the appointment, or both parties fail to achieve a mutual agreement on the appointment of an arbitrator, hence JCAA will appoint an arbitrator according to their own discretion. The arbitration proceedings will be conducted based on the submission of the agreement document and related evidencing document by both parties involved in the dispute. If the document is not submitted, there are three (3) phases of the proceedings that will be held which are:

- i. The presentation of facts and justifications
- ii. The inspection on witnesses and existing documents
- iii. The presentation of views and opinions

In certain situation during the proceedings, the tribunal has the right to recommend a resolution to both parties.[40] The arbitrator acts as a conciliator and mediator to facilitate resolution and regularly meet and discuss with the two parties ex parte. Until it is completed and the two parties agreed with the mutual terms, therefore the tribunal proceedings is considered to be completed. Rule 48 provided that the tribunal must give out an award in four (4) weeks since the completion

of the formal trial proceedings unless the issue is too complex wherein the award will be given out in eight (8) weeks. The provision under the JCAA Commercial Arbitration Rules too stated that the arbitrators can act as amiable compositeurs wherein they will make a decision and give out awards based on the common principles of equity, justice principles and impartiality, compared when including the substantive laws [41]. The decisions and awards given besides the proceedings carried out are done in confidence and no reports will be made to state exactly the dispute is being resolved. The award from the tribunal is a final decision and cannot be appealed based on the decision merit made.

It can only be challenged and can be invalid on the reasons of procedural such as when there is a party that is not represented legally and properly or if both parties are not listened in the arbitration proceedings. According to Hanlon, arbitration is not a preferred choice by the Japanese society as a resolution mechanism.[42] They have their own reasons and they see it as a litigation trial proceedings, resolved with the involvement of a third party[43] which is the arbitrator. In a domestic arbitration, the litigation becomes a main choice compared to the arbitration since they opined that it is based on the uncertainties and lack of control in the aspects of the procedural [44] Therefore, they become more confident in the court established by the government compared to an institution seen as private deciders whereby cases decided are solely by a third party, unknown to them.

The discussion showed several advantages and disadvantages of arbitration in Japan. The main advantage is the proceedings and all arbitration sessions are conducted in a closed area and not opened to the public. This is very crucial especially in the trading cases in order to protect the confidentiality of the business. Another advantage is that there is highly potential element such as flexibility. For example, the parties involved can choose the arbitrators wanted by them, stating the certain procedures to be followed, placing standards and certain laws to be used. However, according to Davis, in most issues arise, both parties still fail to compromise on the same situation even though there is no provision that are flexible.[45] The stress on the making a fair decision for both parties is also another advantage of arbitration in Japan. The JCAA is provided that the arbitrator is authorized to make a decision regardless of the rules of law. The arbitrator must not be binded to the substantive law in resolving the dispute but must include the fair decision made by both parties.[46]

The situation is different for foreign parties who are involved in the arbitration proceedings in Japan. They view the situation as an obvious weakness in the arbitration since they assume the decision made cannot run from the evaluation on the available substantive law. Besides, they feel that the tribunal is more interested in persuading the two parties to make their peace and agree to resolve their dispute by neglecting the reasonable award.

Nowever, Katja Funken opined that the West still give negative commentary eventhouh the situation occurred is aligned with the Japanese mentality.[47] Whereas, the weakness of the system is the cost and time taken to resolve an arbitration that is seen similar to the litigation system. The arbitrator quality is also disputed and make a comparison on the quality and competency possessed by the judges in the litigation system. For example, the professors and lawyers act as an arbitrator, although are experts about the law but are unsuitable to become a decision-maker as the judges are already qualified.

CONCLUSION

The discussion shows that a Japanese society wanted a resolution approach that is more consensual, harmonious and able to uphold the reputation of both parties. Eventhough the procedure showed effectiveness in Japan implementation, but there are a few disadvantages identified. Through it, the Japanese judicial system becomes more efficient and gains the confidence of the community that has little knowledge of litigation via dialogue-styled hearings, intensive hearings and collective hearings. Nonetheless, there are still a few disadvantages that must be solved in order to ensure the posterity of the procedure. Hence, until today, the Japanese still hold strongly on the belief that every dispute must be resolved with a way that can preserve the harmonious relationship and the reputation of the disputed parties. They believe in a consensuous concept and peace among individuals. This can be realised with ADR and not through a win-lose situation of the litigation system.

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