MEDIATION CASES: CORPORATION-RELATED DISPUTES*

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I. HOW TO SOLVE LEGAL DISPUTES SURROUNDING COMPANIES

Most companies, regardless of their legal form, from small single owner companies to mid and large sized, domestic or global, partnership, limited liability partnership or incorporated company, frequently face diverse legal risks from both inside and outside. And many of these risks can result in legal disputes, intended or not, including serious litigation with opponents such as former employees, retired board members, other parties of contracts, consumers, or governmental bodies. But litigation normally demands a lot of painstaking time and money from each side, exhausting thee vitality of management, and sometimes, during the legal war period or even after, causing the litigant companies to lose good business opportunities with the opposing party or even with third persons.

Compared to litigation, the option of arbitration may alleviate the burden of each party to some degree, but not so much in either a pecuniary or time consumption sense. Both parties must accept the final award no matter how unexpected or undesirable, without any opportunity to appeal. With a final judgment or arbitral award, there are left only a winner and a loser. Even with Arb-Med-Arb flexibility, the parties' autonomy is not fully realized in the arbitration procedure. A fatal result of a voluminous dispute sometimes shortens the life cycle of the losing party.

But if the disputing parties meet each other in a mediation room, the story might be quite different. Even in the worst cases, some creative, far-sighted 'win-win' scenario, unimaginable and never allowed in a courtroom or an arbitral chamber, can be born with the wisdom and concessions of both parties, assisted and guided

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by an experienced, passionate peacemaker, i.e., a mediator. The entire process of mediation is based upon the autonomous decision of the parties and an amicable, non-competing atmosphere. Any party may announce the end of the mediation process at any time, and the bargaining and concessions are totally up to the parties involved.At the same time, the independent, impartial mediator will guarantee and witness the propriety of the mediation process and the conformity of the settlement created by the parties. The legal principle of *pacta sunt servanda* (Promise should be kept) and the role of the mediator are the essential grounds to permit enforceability of the mediated settlement agreement,domestically or internationally. The confidentiality of each side will be respected and kept during the entire process of closed-door mediation and after its conclusion. Both sides can save time and money if the mediator successfully facilitates the parties' communication and, as a productive catalyst, actively helps them find a future-oriented, symbiotic solution for both.

Corporations in disadvantageous, desperate situations, legally or factually, may have the chance to sustain and revive owing to the win-win nature of mediated settlements. Flexible, face-saving, life-giving terms and conditions, such as a gracious period of payment, a reasonable decrease or total exemption of damages with the cooperative future business opportunities, long term installment payments of damages, re-supply of goods replacing defected ones, and so many other creative options, are available that would be impossible or forbidden in the 'all-or-nothing', 'win-lose' judgements or law based (if not governed by *ex aequo et bono*, i.e., natural law) arbitral awards. A party that conceded in some degree for the other in the pending case may develop much more advantageous and sustainable business environment for herself. In short, we can say 'half win' can be a more gaining and valuable strategy than 'total win'. And this theory is exactly right for both profit-seeking corporations and individuals.

II. DOMESTIC ENVIRONMENT FOR MEDIATION IN KOREA

Korea has double-tier mediation procedures; one in the court system and the other in the administrative ADR institutions. Both individual citizens and legal entities, including corporations, may

use either of them based upon their cases and legal positions. Basically, disputes for mediation do not have to be commercial, nor to have happened between corporations.

Firstly, the Korean Civil Mediation Act allows the disputing parties of civil cases to get judicial mediation in the court. The plaintiff may request a court mediation for her case from the beginning of the suit. A plaintiff seeking mediation at the time of filing pays only one tenth of the filing fee for an ordinary suit. However, in spite of this monetary incentive, the ratio of mediation filings has not been high and has not increased as the court had expected. The overall unripened ADR culture in Korea and the plaintiff's desire to not to be regarded as being 'in a weak stance' at the starting line could be the reasons. Importantly, civil suit cases can be mediated by the trial bench or by independent mediators after the cases were referred from the benches. Many lawyers and scholars point out that mediation by a presiding judge himself cannot be a real objective mediation because the judge still maintains the authority to impose a solution, i.e., a judgment for the case if it is not concluded by mediation. On the other hand, independent, well-experienced senior lawyers who have been appointed as a standing mediator in the court are normally appraised as essential sources for court mediation. Recently, young but ADR-specialized lawyers have begun to take active roles in court mediation. So far, court mediations conducted by independent mediators are considered relatively successful. Mediated settlement agreements made in the court are deemed to have *res judicata* and be enforceable the same as final judgments. Any kind of dispute involving a corporation can be handled through court mediation. It does not matter whether the opposing party is a corporation, an individual or a governmental body. The type of dispute and the trade or transaction the dispute is based upon also do not matter. But cases involving disputes between corporations may be mediated most successfully for each side with imaginative, creative, future-oriented, win-win terms and conditions. Intrinsic strong points and advantages of mediation can fully blossom in the corporation vs. corporation cases. Several real cases mediated by the author of this article will follow on the attached pages.

Secondly, people or companies may use administrative mediation systems in advance of or as a substitution for litigation. There are more than sixty administrative institutions or systems in charge of mediation services, covering diverse fields of civil

disputes. For example, consumer protection disputes, construction disputes, residential or commercial lease disputes, collective housing buildings disputes, environmental disputes, government procurement contract disputes, sub-contract disputes, copyright and intellectual property disputes, mass media-related defamation disputes, fair trade disputes, school violence disputes, labor disputes, medical disputes, etc. Statutes normally bestow the legal effect of *res judicata* and enforceability to mediated settlement agreements. However, regretfully, many of the administrative mediation services in Korea are far from ideal because the administrative agencies regard themselves as parental guidance providers and view the function or concept of mediation just as an administrative appeal system or higher decision-making procedure in advance of trials.

And there is no stipulated civilian, non-institutional mediation system presided over by professional non-lawyer mediators, nor any legal devices to grant automatic enforceability for mediated settlement agreements. Instead, attorneys-at-law or non-profit mediators may mediate a dispute and when the parties have reached a settlement, then they may go to Notary public's office and get an enforcement certificate to the settlement agreement by paying some fees. Unlike the Singapore Mediation Act of 2017, Korea has no provisions to authenticate civilian mediators and to allow an order of court for a settlement agreement mediated by non-institutional mediators.

III. ENVIRONMENT FOR INTERNATIONAL MEDIATION IN KOREA

Until now, like other countries, Korea has had no legally activating regime for an international mediation system, such as an international convention, bi- or multi- lateral treaties or a special law permitting foreign mediated settlement agreements to be enforced with recognition. Korea should quickly build an adequate environment for international mediation by joining the 'Singapore Convention on Mediation' and revising the Civil Procedural Act to allow easy enforcement of settlement agreements mediated domestically or internationally. Then, Korean companies as well as foreign corporations may easily use the mediation process as a useful, trustworthy tool to solve various disputes, without fear of

non-enforceability of the mediated settlement agreement. And then, Korea can be one of the substantial hubs for international civil and commercial mediations in the near future.

IV. BRIEF CONCLUSION

Companies, as well as individuals, seek peace and prosperity. The most essential way to achieve the goal of peace and prosperity is to co-exist symbiotically with others, just like other successfully surviving organisms do in the environment. The lonesome winner who takes-it-all may live alone in a short time, but eventually fades away not long after. The core value of living creatures, including legal entities, is lifesaving, not death-seeking, because all of them are ephemeral. Mutual respect and co-habitation of disputing parties with the help of mediators are the surest ways to get sustainable, healthy lives for all of them. In short, mediators who save lives and make peace in our society can be considered the secular delegates of the Creator.

(Attached)

Case 1. Dispute between shipbuilder and its subcontractor

Facts and Issues:

Subcontractor A filed a suit against shipbuilding contractor B. A claimed that B had breached the contract between them and not paid increased labor costs. A sought 4 Billion Won (USD 3.6M) in damages. B argued that it did not have to pay any more because their contract was based on a fixed bulk sum payment and was already paid in full. For more than four years, A and B had exchanged many other civil, criminal, and administrative complaints against each other and still had numerous pending cases in other courts or governmental agencies in addition to the current civil suit.

Mediated Settlement Agreement: (After Mediator let ex-CEO C intervene in the case and presided over four sessions of mediation)

1. C pays to A 350 Million won (USD 0.32M).
2. A drops all of the pending civil, criminal, administrative cases and provisional seizures against B, C and other related persons included in the current civil suit.
3. A, B and C concede no more liabilities on them and no more

suits or charges against each other.

4. A and B each cover their own trial and mediation expenses separately.

Case 2. Dispute between oil-seller and oil-buyer

Fact and Issues:

Oil-seller A filed suit against oil-buyer B. A contended that B had not purchased the promised quantity of oil from A and caused huge expectation damages on A. A sought 643 Million Won (USD 0.58M) in damages, contending separately that B forfeits the deposit money of 250 Million won (USD 0.28M). B alleged that it had to decrease its purchase quantum because of a sudden drop in the international oil price and a serious stock price increase caused by domestic economic recession.

Mediated Settlement Agreement: (After three sessions of mediation)

1. B owes to A 90 Million won (USD 82,000). Instead of the payment, A returns to B 160 Million won (USD 0.15M) deposit money after deduction of the sum above.

2. A and B, together, drop all other suits and countersuits related to enforcement of A's assets.

3. B returns to A the authenticated promissory note of 200 Million won (USD 0.18M) issued by A, without any reservations.

4. A gives up the rest of the suit.

5. A and B concede no more liabilities to each other and no more suits or charges against each other.

6. A and B each cover their own trial and mediation expenses separately.

Case 3. Dispute between pharmaceutical company and drug exporter

Fact and Issues:

Pharmaceutical company A filed suit against medicine buyer (exporter) B. A contended that it had developed new drug relieving rheumatism pain and B had ordered the drug for export but had not paid the rest of the payment even though B was supplied with all of the drugs ordered. A sought 103 Million Won (USD 94,000) of contracted payment. B alleged that B could not export the drug because A had not provided required cooperation for export, so B wanted to return all the drugs to A and hoped to counter-claim for

the down payment already paid. A refuted B's contention, arguing that the responsibility of failure of drug export was totally on B. It was found that B had failed to make injection devices essential for the drug use because B had no technology to do it.

Mediated Settlement Agreement: (After four sessions of mediation)

1. B pays to A 94 Million won (USD 85,450. ***reduction of 10% from the money due) in five installments.
2. A collaborates with B for the drug export.
3. A gives up the rest of the suit.
4. A and B each cover their own trial and mediation expenses separately.