

## Briefing Memo

# **Suits and Alternative Dispute Resolution — Diverse Systems and Procedures for Dispute Resolution, and Their Respective Features —**

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### **1 Introduction**

A suit is the most representative example of a system or procedure for resolving disputes between parties of equal standing, such as disputes between private individuals in a country or disputes between countries in the international community. However, apart from suits, there is a diverse range of other systems and procedures aimed at resolving such disputes; these are generally known as Alternative Dispute Resolution (hereafter, ADR) systems or ADR procedures. Arbitration is one of the means of ADR. The arbitral award granted by the arbitral tribunal established in accordance with the United Nations Convention on the Law of the Sea (hereafter, UNCLOS) in July last year (2016), could also be described as an arbitration under international systems, or in other words, a part of international ADR procedures.

On the other hand, while a considerable number of examples in which the labelling of this “arbitral award” as a “judgment” were observed in Japanese media reports, a “judgment” is related to a suit, and the official translation in Japanese of the UNCLOS does not use “hanketu (= judgment)” as “arbitral award,” but “chusai-handan (= arbitral view)” instead. Regardless of that, the presence of cases, many, where “awards” are described as “judgment,” are believed to stem from the fact that there is generally poorer awareness of ADR in Japan as compared to suits, therefore making it difficult for people to recognize that ADR is different from suits.

In view of that, this paper elucidates the significance as well as differences between suits and ADR as systems and procedures for resolving disputes. At the same time, it attempts to organize how the two differ under the domestic system and the international system. To prevent digressing from the key points of discussion, the examination of domestic systems will be based on the Japanese system.

### **2 Suits**

A suit refers to a series of procedures which lead to the judgement of the court and/or judge and the expression of one’s intention related to the question (procedures where, in the event where one of the parties in the dispute requests the judicial authority for a resolution (interpretation) that is advantageous to himself or herself, the judicial authority in question makes a judicial judgement and forcibly establishes a legal relationship between the parties in dispute). So it is important to note that a suit that is contrasted against systems and procedures of ADR such as arbitration ultimately refers to a suit that takes the form of a (civil) suit. Furthermore, as explained by the expression “authoritative resolution to a private dispute,” a suit under the domestic system that is conducted as a dispute resolution system/procedure is a system/procedure that seeks to resolve the dispute forcibly through the enforcement of authority, and regardless of the intentions of the parties concerned. We should also note that in this sense, it differs from the systems and procedures of ADR, which seek to resolve the dispute based on the intentions and mutual agreement between the parties involved

in the dispute.

On the other hand, Professor Kisaburo Yokota offers the following explanation about the significance of an international suit, or in other words, a suit that functions as a system/procedure for the resolution of disputes between countries: An international suit is a suit that takes place between countries; it is a suit conducted between countries with the aim of resolving disputes that arise between these countries. While this is considered to be an extremely accurate definition and explanation, the repetitive nature of his words probably calls for some additional explanation. To that end, if we were to apply the definition of a suit under domestic law, an international suit would refer to the judgement and manifestation of the intentions of the (international) judicial authority in question, in procedures to impose a judicial judgement and forcibly establish a legal relationship between the countries that are parties to the dispute; however, the section on “procedures to forcibly establish a legal relationship,” and in particular, the word “forcibly,” are probably not appropriate to apply to an international suit. This is because under international law, a country is the entity that holds the highest dominance and control, and is not subordinate to any other authority. Hence, in order for the country to maintain this independence, a system that recognizes the authority of an international court would be inexpedient. Consequently, in the implementation of an international suit, the intentions of the countries in dispute to be a party to the suit in question would be positioned as the premise to the suit, and there is no guarantee of a system that will mandate the enforcement of the judicial decision.

In short, a suit under the international system is a system/procedure for resolving a dispute between parties of equal standing. Furthermore, while it is the same as a suit under the domestic system in the sense that it is positioned as the opposite of systems and procedures of ADR, we could also say that it is different from a suit under the domestic system in the respect that although a suit under the domestic system is the enforcement of authority as explained through the expression “authoritative resolution to a (private) dispute,” a suit under the international system is not characterized by the enforcement of authority.

In Japan, the judicial system or the system of suits was first established as a system for resolving disputes (between private individuals), while the system of ADR was later established to complement the existing judicial system. In contrast, as explained in the next section, within the international community, a system of ADR that includes conciliation was first institutionalized (in 1899) as a system of dispute resolution, while the system of international suits was established after that. Moreover, the first international court of justice (Permanent Court of International Justice) was established in 1921 after World War I, and it wasn't until 1996 before the International Tribunal for the Law of the Sea was established; hence, the establishment of a system for international suits is a very recent event in history. As such, the short history of the system of international suits as a system for the resolution of disputes between countries could be attributed to the fact that the idea of a suit as the enforcement of authority in and of itself, and the concept of such a system as a means for resolving disputes between countries, which are entities with the highest dominance and control, were basically concepts that we have not been accustomed to.

On the other hand, in cases where the countries involved in the dispute are not willing to yield to the other party, it may be difficult to reach a resolution through ADR that seeks to gain the mutual agreement of both countries that are party to the dispute based on mutual concessions, particularly through mediation and conciliation. Furthermore, even though arbitration imposes binding power on the decision of the third party (arbitrator) through an agreement between the countries that are party to the dispute, the hearing and review proceedings are not as precise as in a suit. For that reason, there are concerns as to whether the assertions of one's own country will be fully considered and reviewed, and there is the possibility that the greater the degree of the dispute, the weaker the desire to commit to arbitration may become. Hence, even if a system for ADR had been established as a system for resolving disputes between countries, it would not be surprising to arrive at the conclusion that such a system alone would not suffice. Therefore, even though an ADR system had been established at the beginning as an international system for resolving disputes between

countries, and the elements for the enforcement of authority were removed afterward, the establishment of an international suits system may have been inevitable in a certain sense.

The first international court that conducts suits as an opposing concept to ADR, or in other words, the first international organization to handle litigation for the purpose of resolving disputes between countries, was established in 1921 under the League of Nations in the form of the Permanent Court of International Justice. In 1945, the International Court of Justice was established as an organization under the United Nations, and as a successor organization to the Permanent Court of International Justice. (The Permanent Court of International Justice itself was dissolved in April 1946.) Other than the International Court of Justice, the International Tribunal for the Law of the Sea, established in 1996 based on the UNCLOS, is another international organization that handles litigation related to disputes between countries. Matters that come under the jurisdiction of the International Court of Justice extend to all incidents entrusted to the court by the countries that are party to the dispute, as well as matters that are provided for particularly under the Charter of the United Nations and existing treaties; on the other hand, matters that come under the jurisdiction of the International Tribunal for the Law of the Sea are disputes that concern the interpretation or application of the UNCLOS, and which are entrusted to the tribunal in accordance with the provisions of Section 15 of the UNCLOS (Settlement of Disputes), as well as disputes concerning the interpretation or application of international agreements that are related to the objectives of the Convention, and which are entrusted to the tribunal in accordance with the agreements in question.

### **3 Alternative Dispute Resolution**

Alternative dispute resolution is a form of dispute resolution that takes the place of civil suits under the domestic system, and is often known by its abbreviation “ADR.” The major systems and procedures of ADR in Japan involve mediation, conciliation, and arbitration. The organizations that implement these procedures can be broadly categorized into three groups: courts, administrative organizations, and civil organizations (organizations that have been certified by the Minister of Justice as organizations for resolving civil disputes; includes bar associations, associations of judicial scriveners, associations of land and house investigators, associations of licensed social security consultants, etc.).

The need for such dispute resolution systems and procedures, separately from the suit system/procedures, is based on the following reasons, among others: (1) The need to complement the processing capability of the court (judicial organization) due to a significant increase in the number of suits; (2) The need to reduce the burden of time, cost, and labor as far as possible for the parties requiring dispute resolution; (3) The possibility of identifying solutions that both the parties to the dispute can agree on. However, (1) and (2) can theoretically be satisfied through an increase in the number of courts (judicial organizations) and improvements to court proceedings; in that sense, it is difficult to justify them as truly fundamental and essential reasons behind the need for ADR systems/procedures. Rather, (3) can be considered as a fundamental and essential reason. In other words, in mandatory dispute resolution systems and procedures as a power action that is unrelated to whether or not the parties involved agree on the solution (such as a suit), there are situations where one party does not agree; in such situations, the party in question may appeal for illegal recourse to force, so it is unlikely that the party that had been victorious in the dispute can feel at ease. To prevent the occurrence of such situations, it is necessary to resolve the dispute between the parties amicably, and to that end, it is necessary for both parties to the dispute to agree to the method of resolution (even if they are not necessarily satisfied with it). To convince both parties involved in the dispute, it is necessary for each party to listen to the views of the other party, and to reach a compromise and meet each other halfway. However, drawing out the agreement of both the parties to the dispute based on compromise is fundamentally difficult to achieve in a suit. Therefore, to achieve that, it is necessary to have systems and procedures that are separate from a suit. We could say that this is a fundamental

and essential reason behind the need for ADR systems and procedures.

International ADR aimed at resolving disputes between countries, similar to domestic systems, includes methods such as good office (known as mediation in the domestic system) and conciliation. As I have explained earlier, while the ADR system was established after the establishment of the suit system in Japan, ADR preceded suits in the international system. Hence, while ADR as a domestic system was established to complement the suit system in the domestic system, it has mainly served as a system for resolving disputes between countries in the international system. The Convention for the Pacific Settlement of International Disputes of 1899 and the revised Convention in 1907 clearly indicate that the procedures related to such ADR as a part of the international system, and establish good office, conciliation, and arbitration as some of the specific procedures related to ADR. However, in the official Japanese translation of this Convention, the term “arbitrage international” used in the French text as authentic is translated into Japanese as “international arbitral suit,” and the word “arbitre” is translated as “judge.” So in Japan, arbitration as an international system has traditionally come under the discourse of suits in the academic circles. However, under French law, “arbitrage” refers to arbitration, and is regarded as a different type of system/procedure from a suit. Furthermore, “arbitre” refers to an “arbitrator”. While there are cases in British and American law where “sentence” is used to refer to the passing of a sentence in a civil case, there are cases under French law where it can mean the conclusive view and opinion of the arbitrator in an arbitration procedure. In the Convention for the Pacific Settlement of International Disputes, “sentence arbitrale” is officially translated as “judgment” in Japanese; however, the standard translation for “sentence arbitrale” under French law is “arbitral award.”

Just as courts in Japan handle conciliation despite not presiding over arbitration cases, courts sometimes also preside over ADR cases; under the Convention for the Pacific Settlement of International Disputes, it is not unusual for the court (Permanent Court of Arbitration) to serve as the implementing organization of the arbitration. On the other hand, is it an outrage to regard arbitration as a kind of suit because the court treats it? Incidentally, the official translations in Japanese for the UNCLOS define the French word “arbitrage” as “arbitration,” “arbitres” as “arbitrator,” and “sentence” as “arbitral award.”

Apart from the Permanent Court of Arbitration, established based on the abovementioned Convention, other organizations that handle international arbitration related to disputes between countries include the arbitral tribunal, which is institutionalized in accordance with Annex VII of the UNCLOS, and the special arbitral tribunal, which is institutionalized in accordance with Annex VIII of the same Convention. The award for the arbitration between China and the Philippines in 2016 was issued by the tribunal institutionalized under the aforementioned Annex VII of the UNCLOS. Incidentally, during an arbitration, both for the Japanese system as well as the international system (Convention for the Pacific Settlement of International Disputes), the premise is for the parties involved in the dispute to commit to entrusting the dispute in question to the arbitration; however, in the dispute between China and the Philippines mentioned earlier, as China refused to have any involvement in the arbitration, it would appear that this agreement was not reached. Nevertheless, under Paragraph 3 of Article 287 of the UNCLOS, in cases where the party to the dispute is a state party to the Convention that has not specified a resolution method for disputes, this party “shall be deemed to have accepted arbitration in accordance with Annex VII.” Hence, the tribunal proceeded with the arbitration procedures based on this provision.

#### **4 Conclusion**

In relation to disputes involving the rights and obligations between private individuals, a means known as “self-help,” which involves the use of force by a private individual to protect his or her own rights, is not recognized in Japan from the perspective that it obstructs peace and stability in society. In place of that, suits and alternative dispute resolution systems have been established as official means of resolving such disputes.

On the other hand, in the international community, where a unified authoritative entity that surpasses the level of the state does not exist, the use of force by the state to protect the country's rights has traditionally been recognized as a form of "self-help" (equivalent to self-help under domestic law). The positioning of war as a legal act under international law in the past was also backed by such circumstances. However, as the use of force as a means of "self-help"—and particularly the use of military force—is undesirable from the perspective of peace and stability in the international community, the use of force such as military force became regulated under international law from the beginning of the 20th century; at the same time, systems that each country can protect their own rights without resorting to the use of "self-help" have been established. It was against this background that the systems of suits and ADR were developed as an international system for resolving disputes between countries. Based on these developments, we could say that the ultimate objective for establishing systems of suits and ADR is to secure peace and stability for society.

In the event that a country or a person becomes party to a dispute, it is necessary to resolve the dispute swiftly and smoothly. To that end, there is a need to quickly identify an appropriate procedure for resolving the dispute. However, as we can see from the explanation provided in this paper, the respective procedures for dispute resolution have their own merits and flaws, and there is no other way but to assess and decide on the most suitable procedure on a case-by-case basis, based on the type, nature, and extent of the dispute. Consequently, in the case where a dispute with an opposing party or country is anticipated, it is vital to conduct an in-depth study into the procedures of suits and ADR.

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