



press release

For Immediate Release

Broad-Based Coalition Joins ACCJ in Urging Japanese Government to Avoid Restrictions on Who Can Practice Alternative Dispute Resolution

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accj press release

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—The American Chamber of Commerce in Japan (ACCJ) and several other business and legal organizations submitted public comments on September 1 urging the Japanese government to permit all persons and organizations to participate freely in arbitration, mediation, and other forms of alternative dispute resolution (ADR) and dispute avoidance.

The organizations including the European Business Community, Foreign Lawyers Association, Japan Subcommittee of the East Asia Branch of the Chartered Institute of Arbitrators, German Institute of Arbitration, and Foundation for International Dispute Resolution were responding to a report by the ADR Study Group of the Judicial System Reform Promotion Headquarters issued in late July that suggests new ADR legislation might:

- Require licensing of ADR neutrals (arbitrators, mediators, experts, etc.)
- Require licensing of ADR advisors, representatives, consultants, and industry experts
- Establish a restrictive system of licensed organizations that would provide ADR services, and require the use of such licensed institutions
- Create a new bureaucratic agency to license and regulate ADR

The organizations were united in their opposition because the proposed changes will spawn unnecessary costs and barriers to market entry that promise to cripple the healthy development of ADR in Japan. In particular, they threaten to undermine cross-border ADR processes, since foreign arbitrators, mediators, and other dispute resolution professionals will not have easy access to the licenses needed to practice here.

“Enacting a basic ADR law that clarifies the duties, responsibilities, and rights of ADR neutrals is an important step toward strengthening the foundations and environment of ADR in Japan,” stated ADR/Arbitration Task Force Chair Dick Eastman. “However, everyone should be allowed to serve as an arbitrator or mediator regardless of whether he or she is a lawyer or otherwise registered or licensed by the government,” further adding that “this is not only an issue of international barriers it will hinder development of private sector ADR within Japan.”

The U.S. government also submitted a public comment to the Prime Minister’s Office (<http://tokyo.usembassy.gov/wwwwh20030901e1.html>) on the subject. Similarly, the American Bar Association’s Section on Dispute Resolution submitted an eight-page legal analysis indicating that the provision of ADR services should not be considered the practice of law.

For more information about this press release, please contact Media Relations Officer Emi Ogawa (03 3433 6542; eogawa@accj.or.jp).

joint statement

Allow All Persons and Organizations to Work Freely in Arbitration, Mediation, and Other Alternative Dispute Resolution

recommendation

The American Chamber of Commerce in Japan (ACCJ), the European Business Community (EBC), the Japan Subcommittee of the East Asia Branch of the Chartered Institute of Arbitrators (CIArb), the German Institute of Arbitration (DIS), the Foundation for International Dispute Resolution (FIDR) and the Foreign Lawyers Association of Japan unanimously urge the Japanese government to permit all persons and organizations to work freely in arbitration, mediation, and other forms of alternative dispute resolution (ADR) and dispute avoidance. All should have the right to work as a professional arbitrator or mediator regardless of whether they are admitted as lawyers or otherwise registered or licensed by the government.

issue

The organizations that join in this viewpoint applaud the Judicial Reform Council and its successor, the Judicial System Reform Promotion Headquarters (JSRP Hombu), for their excellent work to date. These bodies have improved legal procedures, increased the number of legal professionals in Japan, moved toward unrestricted freedom of association between foreign lawyers and Japanese lawyers (bengoshi), and designed other measures that serve the needs of the general public and international commerce. Particularly welcome are the recent enactment of the new Arbitration Law and the current efforts of the JSRP Hombu's ADR Study Group to develop a comprehensive alternative dispute resolution framework to cover all disputes not directly decided by the courts, including arbitration, mediation, and court- or government-annexed procedures.

The declared objective of the ADR Study Group and the JSRP Hombu to expand and improve ADR in Japan is a worthy goal. Better access to ADR will help businesses and individuals resolve disputes more quickly and economically and

serve Japan and its economy well. Enacting a basic ADR law that clarifies the duties, responsibilities, and rights of ADR neutrals—particularly in such areas as disclosing conflicts of interest and protecting the confidentiality of information divulged to them—can be an important step toward strengthening the foundations and environment of ADR in Japan.

However, the ADR Study Group report released on July 29, 2003, concerns us deeply. It appears the Study Group is recommending a direction contrary to accepted international practice. This would be potentially harmful to international commerce and may prevent the Study Group from achieving its declared goal of fostering the healthy development of ADR in Japan.

Briefly, the Study Group's report suggests that the new legislation might:

- Require the licensing of ADR neutrals (arbitrators, mediators, experts, etc.)
- Require the licensing of ADR advisors, representatives, consultants, and industry experts
- Establish a restrictive system of licensed organizations that would provide or administer ADR services, and require the use of such licensed institutions
- Create a new bureaucratic agency to license and regulate ADR

We oppose these proposals because they will result in unnecessary costs and barriers to market entry that promise to cripple the healthy development of ADR in Japan. In particular, such moves threaten to undermine international, cross-border ADR processes, since foreign arbitrators, mediators, and arbitral institutions will not have easy access to the requisite licenses to practice here.

Most of these ill-advised ideas stem from the ADR Study Group's premise that the practice of ADR inherently involves the practice of law. Almost everywhere else in the world, acting as an arbitrator, mediator, or other neutral, or serving as an ADR administrator, is not viewed as the practice of law. Moreover, regardless of

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how Article 72 of the Lawyers' Law is interpreted, non-bengoshi do act as arbitrators and mediators on a regular basis in Japan. For many years, in fact, institutions such as the Japan Commercial Arbitration Association and the Tokyo Maritime Arbitration Center have indicated that no legal qualifications are required to act as an arbitrator. If the ADR Study Group's interpretation of Article 72 is correct, immediate amendment to eliminate restrictions on acting as a neutral or administrator in ADR is imperative if Japanese ADR is to have any chance to flourish.

Likewise we urge that the right of representation in ADR, particularly in international mediations, should not be limited to bengoshi. Historically, many jurisdictions, including those in the United Kingdom and the United States, permit persons not locally admitted as lawyers to practice both as ADR advisors and representatives. There is a wide consensus among ADR practitioners that local legal qualifications should not be required of ADR representatives. With few exceptions outside Japan, that is the situation today.

Autonomous parties are capable of deciding by contract or agreement how they will avoid a dispute or settle a case or controversy out of court. Around the world, new methods and processes are constantly being discovered to avoid disputes and achieve settlements. Japan should pursue deregulation to enable that to happen here, avoiding the creation of new and stifling licensing requirements and bureaucracy.

The JSRP Hombu and ADR Study Group have an historic opportunity to create a thriving ADR market in Japan by adding one simple legislative provision declaring that arbitrators, mediators, and other neutrals are not engaged in the practice of law. Furthermore, representation of or advising parties involved in ADR processes should not be deemed the practice of law.

Unfortunately, the practice of ADR can be open to abuse. However, such abuses should be addressed not by prior restraint and the creation of costly new institutions and requirements, but by measures to curb the abuses and foster

a healthy free market for dispute resolution services. We suggest the following approach:

- Allow (and indeed encourage) voluntary organizations to raise ADR standards in Japan through training programs, experimentation, and codes of conduct for their members. As experience in the United States and Europe demonstrates, ADR flourishes in such an environment, and the market will soon sort out which techniques, programs, and professionals are successful and which are not.
- Subject those who misbehave or abuse the system to civil and criminal liability and sanctions. This is particularly applicable to criminal elements that employ coercion, intimidation, extortion, or other methods that rob parties of their ability to settle cases voluntarily. Coerced settlement agreements, or settlement agreements obtained by fraud or without full disclosure of conflicts of interests—such as those arranged by some *seiri-ya* and *jidan-ya* who “advise” insolvent parties while often increasing their indebtedness—should be considered void from their inception under Articles 90 and 96 of the Civil Code as a matter of law, and all relevant statutes, both criminal and civil, should be vigorously enforced against such settlements.
- If existing laws or procedures are insufficient, the government should enact clearer laws and more severe penalties applicable to ADR-related criminal behavior, and devote more resources to public education and the elimination of criminal elements abusing ADR. At the same time, increasing the availability of alternative, reputable providers of ADR services will reduce the public's need to resort to such dubious methods of dispute resolution.

Japan has won international recognition for the great strides it has made in judicial system reform. In the area of ADR, Japan should emulate other countries that have, in the course of a very few years, permitted market forces to create a vibrant dispute settlement culture. Conversely, creating more regulation, bureaucracies and barriers to voluntary, private ADR will stifle the development of ADR in Japan and further complicate Japan's legal infrastructure.