

Mediation in South Korea

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Abstract: In Korea, there is a common notion that mediation is conducted mostly by the court, and many civil disputes are in fact handled by court-annexed mediations. Court-annexed mediations are commenced either by the parties' application or when the court hearing a litigation case decides to refer it to mediation. Mediation cases are handled by a designated mediation judge in each court, but the judge may appoint a standing mediation member or a three-member mediation committee to mediate the case instead. When a court hearing a litigation case decides to refer the case to mediation, it may also determine to conduct mediation by itself instead of sending the case to a designated mediation judge. A successfully concluded mediation will be recorded as a "record of voluntary mediation", and such record is granted the same effect as a final and conclusive judgment. Meanwhile, private mediations that are conducted outside the court as well as international mediations are prevalent in Korea as yet, but interest in those fields is recently growing among legal practitioners.

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1 The Concept of Mediation in Korea

In Korea, mediation is an alternative dispute resolution mechanism to a court's judgment in which a third party in a neutral position recommends that the disputing parties make concessions and resolve their dispute by mutual understanding and agreement. Parties engage in dialogue and negotiation through mediation with the help of the mediator and settle the dispute according to reason and the actual circumstances rather than by legal principles. Compared to litigation, mediation has many advantages, such as being able to resolve disputes amicably and autonomously by simple, prompt, and inexpensive procedures.

There are primarily three types of mediation in Korea – *i.e.*, (a) court-annexed mediation, (b) administrative agency mediation, and (c) private mediation.

- a) Among these, court-annexed mediation,¹ meaning mediations of cases which began by either a party's application to resolve a dispute via mediation under the auspices of a court (called "court mediation by application") or a court's referral of a pending litigation case to mediation (called "court-mandated mediation"), is the most prevalent type of mediation in use. According to the 2022 Judicial Almanac published by the Korean Supreme Court, in 2021, 88,715 civil cases were handled by the courts in Korea through civil mediations and 13,502 family law cases were handled by the courts of Korea through family mediations.²
- b) In addition, various administrative agencies conduct mediations in accordance with relevant laws and regulations, as will be explained below.
- c) Private mediations, conducted by mediators privately paid by the parties,³ have historically been rarer in Korea.

Court-annexed civil mediation is a widely used mechanism for alternative dispute resolution in Korea. Out of the 88,715 civil mediation cases handled by the court in 2021, 78,368 cases (about 88%) were cases referred to mediation by the court during the course of a litigation, and the remaining 10,347 cases began as mediations via a party's application.⁴

In Korea, there is a common notion that mediations for civil and family law cases are conducted through court-annexed mediations. Such court-annexed mediations are actively conducted, and the success rate is also relatively high. Particularly in the cases where mediations are conducted by the judge hearing

¹ On court-annexed mediation cases in Brazil see FERREIRA; SEVERO 2021. See also: BRAGANÇA; NETTO, 2020, On non-violent communication (NVC) in Brazil see: MORAIS; WOHLKE, 2021. See also: FARIAS, 2020. See also SERPA, 2020.

² THE SUPREME COURT, 2022, p. 690; p. 706.

³ For mediations under (a) and (b), remuneration for mediators are determined in accordance with the relevant legislations and generally not directly paid by the parties.

⁴ THE SUPREME COURT, 2022, p. 690.

the case, the success rate is higher as the parties are more likely to accept the suggestions made by the judge who may review the dispute again if the case is transferred back to litigation. The success rate is also higher when the mediation is conducted in a later stage of the litigation.

In civil cases, mediation is not required as a mandatory prelude to legal proceedings. However, mediation is mandatory in certain types of family law cases. Article 50 of the Family Litigation Act provides that a person who intends to institute a litigation or request an adjudication from the family court for certain family litigation cases, such as cases relating to marriage or adoption, is required to first make a request for mediation. This is also called the principle of prefixing mediation for family affairs.

As disputant parties in Korea generally understand mediations to be conducted during the course of litigation, out-of-court private mediations conducted by mediators appointed by the parties have been rare in Korea to date.

2 The Process of Court-Annexed Mediations

Court-annexed civil mediations may be commenced either as court mediation by application at the parties' initiation, or as court-mandated mediation initiated by the judge. In the case of a court mediation by application of a party, the dispute resolution process begins as a mediation (*i.e.*, in lieu of commencing litigation). Additionally, the court hearing a case may refer the case to court-mandated mediation at any stage of the litigation proceedings, including the appellate level, for an attempted amicable resolution of the dispute. In recent years, early mediation has been emphasized in order to resolve disputes as soon as possible before full-fledged litigation commences (albeit mediations which commence in later stages of a litigation typically have a higher chance of achieving a positive result).

When a disputant party requests a court mediation by application, the case will be assigned to a designated mediation judge of the applicable court. The designated mediation judge can mediate himself/herself or appoint (i) a mediation committee or (ii) a standing mediator affiliated with the court, to mediate. When a standing mediator is appointed by the designated mediation judge to conduct the mediation, such standing mediator will have the same authority as the designated mediation judge would. In contrast, when a mediation committee is appointed by the designated mediation judge to conduct the mediation, the committee conducts the mediation and reports the result to the designated mediation judge, who will proceed with the next steps (as explained below).

When a case is referred by a judge to court-mandated mediation, a new case number is assigned for the mediation. While such cases are, in principle, sent to a designated mediation judge, the court hearing the case may nonetheless decide

to directly mediate the case if it deems appropriate to directly handle the case.⁵ If the court decides to appoint a designated mediation judge for the case, just as in the case of court mediation by application, the designated mediation judge can mediate himself/herself, or appoint (i) a mediation committee or (ii) a standing mediator, to mediate. The powers and authorities of a mediation committee or a standing mediator are the same as in a court mediation by application. If the judge hearing the case decides to mediate the case, he/she will have the same authority as a designated mediation judge would.

A mediation committee is comprised of three members who each serve a two-year term. Mediation committee members are appointed in advance by the chief judge of the high courts or district courts, from among those of learning and good reputation. They are appointed to hear mediations in panels of three mediators. Each court has different number of mediation committee members – for instance, the Seoul Central District Court currently has 344 mediation committee members with expertise in various fields.⁶

The standing mediator system was introduced in 2009 following an amendment to the Civil Mediation Act. Standing mediators work full time as mediators for cases sent to them by the courts and have the same authority as judges with respect to mediation matters. Unlike ordinary members of a mediation committee, standing mediators must be qualified as an attorney-at-law and they are appointed by the head of the National Court Administration of the Supreme Court from among those legal practitioners who have more than 10 years of legal experience, or who have more than three years of experience as a mediation committee member in civil or family law case.⁷ Standing mediators are prohibited from holding concurrent jobs and are in a position equivalent to public officials.

Once it has been decided who will mediate, a mediation hearing will be held. If the mediation is successfully concluded, the result will be recorded as a “record of voluntary mediation”, and such record is granted the same effect as a final and conclusive judgment which entails executory power and *res judicata*.⁸

On the other hand, if the parties fail to reach an agreement but are not very far apart in their positions, the mediator (*i.e.*, the designated mediation judge, the judge hearing the case who mediated, or the standing mediator who mediated) can issue a “decision in lieu of mediation” for a fair resolution of the case. Any party who is dissatisfied with this decision may file an objection within two weeks from the receipt of the written decision. If an objection is filed by any of the parties,

⁵ Article 7(3) of the Civil Mediation Act.

⁶ SEOUL CENTRAL DISTRICT COURT, [2023].

⁷ Article 10(1) of the Civil Mediation Act.

⁸ Article 29 of the Civil Mediation Act.

the case will be transferred (back) to litigation. Otherwise, the decision in lieu of mediation is granted the same effect as a final and conclusive judgment.⁹

3 The Mediation Ecosystem in Korea

A Local Mediation-Related Legislation

Court-annexed mediations for civil and family matters are provided for under the Civil Mediation Act and the Family Litigation Act, respectively.

There are also a number of laws relating to administrative agency mediations in various fields. Examples include:

- Framework Act on Consumers, which provides for mediation by the Consumer Dispute Settlement Commission;
- Environmental Dispute Mediation Act, which provides for mediation by the Environmental Dispute Resolution Commission;
- Act on the Protection of Financial Consumers, which provides for mediation by the Committee for Mediation of Financial Disputes;
- Housing Lease Protection Act, which provides for mediation by the Housing Lease Dispute Mediation Committee;
- Monopoly Regulation and Fair Trade Act, which provides for mediation by the Korea Fair Trade Mediation Agency; and
- Internet Address Resources Act, which provides for mediation by the Internet Address Dispute Resolution Committee.

The results of these mediations do not generally have the same effect as final and conclusive judgments.

Korea does not have a framework legislation for private mediation.

B Availability of Trained Local Mediators, Mediator Training and Accreditation Bodies

The Civil Mediation Act stipulates that the courts should provide mediation committee members with regular education and training opportunities (although this does not apply to standing mediators).

Interest in private mediation has been growing recently and there are efforts to provide training for private mediators.¹⁰ For instance, the Korean Commercial Arbitration Board (KCAB) and the Korean Society of Mediation Studies (KSMS) provide a joint expert training program on mediation (basic and advanced courses)

⁹ Articles 30 and 34 of the Civil Mediation Act.

¹⁰ On the mediators' training in Brazil see AWAD, 2020.

on a regular basis. The Korea International Mediation Centre, which was established in September 2020, also holds expert training events on international commercial mediation.

Training programs for mediators and accreditation systems for trained mediators are still in their beginning stages in Korea. According to the KCAB and the KSMS, those who have completed both the basic and advanced courses of the mediation expert training program jointly conducted by the two organizations are eligible to apply for the KSMS's mediation expert certification evaluation.

C Mediation Venues and the Integration of Dispute Resolution Options in Korea

Court-annexed mediations are conducted in courts' facilities. Private mediation can take place anywhere as agreed by the parties, and the KCAB also rents out conference rooms and other facilities for mediation.

The Seoul Central District Court has implemented its early mediation system since March 2010, and the KCAB was designated as a court-linked mediation agency for such early mediations by the Seoul Central District Court and conducts such mediation cases.

Separately, Article 39 of the KCAB Domestic Arbitration Rules provides that "*the parties may at any time during the arbitral proceedings request mediation of all or part of the dispute upon a written agreement in accordance with the Mediation Rules of KCAB.*" The mediators should not be members of the arbitral tribunal hearing the arbitration. However, the KCAB International Arbitration Rules contain no such mediation request provision.

4 Foreseeable Developments in Mediation in the Near Future in Korea

Court-annexed mediation will continue to be favoured by disputing parties in Korea.

International mediation is not prevalent in Korea yet. Parties to an international arbitration sometimes consider resolving their dispute through international mediation, but this remains rare. Legal practitioners have recently begun to take interest in international mediation. For international disputes involving a Korean party, some parties and practitioners are increasingly making efforts to try conducting mediation during the course of the dispute, which may lead to further use of international mediation in Korea.

Korea signed the Singapore Convention on Mediation on 7 August 2019, but has yet to ratify it.¹¹ In order to become a contracting state, Korea needs to ratify the Convention and enact implementation laws. On 10 March 2021, Korea's Ministry of Justice launched a task force to conduct research on enacting an implementation law.¹²

A possible hurdle to Korea's ratification of the Convention is that private mediation is not yet an actively used dispute resolution mechanism in Korea. There is not even a framework legislation for private mediation.

There are also potential incongruities with the current Korean legal framework. For example, a settlement agreement under the Singapore Convention would not have the same effect as a final and conclusive judgment of a Korean court under the Korean Civil Execution Act, unlike the results of court-annexed mediations. It is also not clear under Korean law what legal effects such settlement agreements under the Convention would entail.¹³

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¹¹ On the Singapore Convention in Brazil see: MASON, 2021. See also: COMETTI; MOSCHEN, 2022.

¹² MINISTRY OF JUSTICE, 2021.

¹³ For further analyses on the Singapore Convention from a Korean law perspective, see SUK, 2022.

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