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## **Mediation In Indonesian And Wakai/Chotei In Japan: A Comparative Study**

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### **Abstract**

Indonesian basic laws such as Civil Code and Code of Civil Procedure are those legislated in the Dutch colonial era and effective in written in Dutch language as genuine text as mentioned in other parts of this paper. Therefore you need amendment of laws to reform civil litigation system including reconciliation and mediation. Indonesians understand this point and they pointed out the issue of amendments of colonial laws at policy level and the do list up Code of Civil Procedure in the National Legislation Program in the parliament with draft written already. One issue of negotiation with the Supreme Court as one of Indonesian governmental body in relation with this project is about who to be sent to training in Japan. Training in a foreign country is a very attractive kind of technical cooperation. If the Japanese side paid much attention toward selection of trainees, then the training would be treated as a mere reward before retirement by the counter part. Those who we cannot expect a good performance or those who cannot make impact upon their bureaucracy might by chance participate the training.

**Keywords:** Mediation; Wakai/Chotei; Alternative Dispute Resolution.

### **Introduction**

The Indonesian judicial reform had been an issue from the beginning in 1990's,<sup>1</sup> but it was after the World Bank took out the report entitled "Judicial Reform in Indonesia" in 1997 that it became conspicuous specifically.<sup>2</sup> There were three problems that could be identified from the report: 1) Basic Indonesian laws such as

<sup>1</sup> YAMASHITA Terutoshi, 'Indonesia No Shiho Seido To Shiho Kaikaku No Jokyo (Current Situation of Judicial Institution and Judicial Reform in Indonesia)' 3 ICD NEWS.[157-190]. to look over the whole situation of Indonesian judicial system, judicial reform and actual circumstances.

<sup>2</sup> JICA Regional Department Asia I, *Indonesia Kyowa Koku Shiho Kaikaku Shien Yosei Haikei Chosa Dan Hokoku Sho (Study Team Report on the Background of Request of Assistance for Judicial Reform in the Republic of Indonesia)* (JICA 2002).[31].

Civil Code and Code of Civil Procedure are dependent on the Dutch colonial law introduced in the 19th century, and they can't correspond to financial development, internationalization of economic activity and therefore new-style dealings and thus the development of legislation that can correspond to these are needed;<sup>3</sup> 2) The number of case backlogs of the Indonesian Supreme Court amounts to about 13,000 as yearly average from 1995 till 1995,<sup>4</sup> which is a state far from the one we can acknowledge that there is a judicial system to solve disputes in swiftness and appropriateness. In particular, judicial system to solve disputes on bankruptcy case, intellectual property rights as well as other economic cases are insufficient, and establishment of special court of commercial affairs and substantiality of the ADR are necessary; and 3) Basic issues such as rule of law and the independence of the judicial power are not established in the first place. For example the Indonesian administration of justice is affected by politics and the executive branch and the corruption of the judicial personnel such as lawyers spreads. In addition to that, people's trust to judiciary is extremely low because acquisition of judgments and the casebook is difficult, and there is a problem with transparency.<sup>5</sup>

Indonesia formally requested Japan for technical legal assistance on judicial reform in 2001, and the Government of Japan accepted this request. Japan International Cooperation Agency (JICA) and International Cooperation Department (ICD) of Research and Training Institute of the Ministry of Justice were in collaboration to implement the technical legal assistance cooperated for Indonesia. Subsequently, ICD in cooperated with JICA invited Indonesian legal personnel to Japan for five times from 2002 to 2006 and carried out Japan-Indonesia "Comparative Study on Judicial System" seminar. Comparative study on institutional operation of fair and efficient legal and judicial systems for civil dispute Wakai-settlement was set as a basic theme for three year plan from fiscal year 2004, then conducted a series of

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<sup>3</sup> World Bank, 'Law Reform in Indonesia: Diagnostic Assessment of Legal Development in Indonesia (IDF Grant No. 28557)' [1997] 1 Cyber Consult.[2-3,175].

<sup>4</sup> *ibid.*[123].

<sup>5</sup> *ibid.*[120-159,161,169].

seminars aiming at gathering policy proposals for the realization of an efficient civil dispute resolution procedure in Indonesia focusing on the following three points: 1) summary procedure for small-scale disputes; 2) appeal restriction; and 3) Wakai-settlement and Chotei-mediation system.

ICD and JICA also appointed trainees specifically from those who had shown ability to make policy proposals or high rank officials with authority of decision making (Vice Chief Justice of the Supreme Court) and those trainees have made policy proposals based on not only lectures but also experience attending the Chotei-mediation and Wakai-settlement in the Japanese court and having mock Chotei-mediation in the training. An issue characteristic in the policy proposals is that introduction of a system to enable judges to attempt Wakai-settlement at anytime like the Japanese Wakai-settlement system is expected very eagerly.

In 2003, Indonesian Supreme Court enacted Supreme Court Regulation No. 2 of 2003 on Mediation (SCR No. 2/2003). This mediation regulation was established with Australian support, which was an Anglo-American type of mediation that underwent influence of the method performed in the United States, Australia and Singapore. The former regulation stipulated that mediator who conducts mediation must be a different person from the judge who took charge of court trial procedure and that all records of the mediation must be destroyed when the mediation failed and had been taken back to the court trial to keep the secret of the mediation.

The policy proposals, which formulated from the training recommends the following five points:

1. Many problems with the mediation in practice based on the SCR No. 2/2003 are indicated. Therefore, it is necessary to form a team for revision and amendment of system of mediation based on above regulation as soon as possible. Introduction of Wakai-settlement system like court annexed Wakai-settlement in Japan and increasing of citizen's participation to the judicial procedure can be possible by doing so;
2. It is a sensible and appropriate choice to promote and enrich mediation as an ADR in Indonesia for reduction of the number of litigations brought to trial courts. Therefore, it is extremely important to make mediation system as an ADR being understood and widely known to judges in every stage from trainings before appointment to become a judge to skill training after appointment to become a judge;

3. It is clear that dispute resolutions by mediation are functioning the most thinking in view of Indonesian culture. Indeed, many merits are found in this way of resolution compared to resolution by court trial. Therefore, it should be added to the curricula of legal education in universities;
4. In near future, it is an important to legislate laws and regulations concretely, which becomes the basis of the rule for mediation. Also, we will introduce Chotei-mediation system, which achieves a success in Japan in the legislation. Yet, that legislation must not be the one to deny principles and distinctive features of unique and traditional mediation in Indonesia. In other words, the legislation must be the one to fit the Indonesian society, which considers the tradition of unanimous consensus through discussion (*musyawarahmufakat*). Therefore, the legislation must not be a regulation which allows various interpretations that lead to contesting arguments in practice as a result;
5. Efforts to take up demands from citizens who desire for the establishment of mediation centre for ADR should be continued. Also, amendment of Article 6 in the Law No. 30 of 1999 is needed to enable the agreement of the parties concerned which is formed by interference of private ADR institution becomes an enforceable title of obligation.

This article will elaborate some issues to create a better understanding on Wakai-settlement and Chotei-mediation, which is developed in Japanese legal system, compared to mediation in Indonesian. The comparison may be adopted as part of amendment of Supreme Court Regulation on mediation.

### **History of Wakai-Settlement&Chotei-Mediation**

Japan's modernization (Meiji Restoration) has begun in 1868 and trial courts independent from executive branch has been established in 1875. However, there were no modern laws nor personnel who conduct court trials based on them at that time. Japan hired French and German lawyers to assist develop legal system, dispatched talented personnel for study abroad and established universities that had law faculty to produce bachelor of laws. Even so, because court trial based on law was yet to be realized, legal disputes were disposed by KANKAI-conciliation until the Code of Civil Procedure was put into operation in 1891. Kankai-conciliation has been said to be modeled on French conciliation. In fact, Kankai-conciliation was modeled on the Japanese traditional agreement resolution system existed before Meiji era in which cases were accepted orally and can be solved by the agreement between parties concerned without depending on laws.

Kankai-conciliation was abolished after enactment of the Code of Civil Procedure modeled on German law and judgment depending on law became principal dispute resolution. Modern court annexed Wakai-settlement, Chusai-arbitration, ShiharaiMeirei-order for payment and ImmediateWakai-settlement were newly introduced. After this, judgment became principal dispute resolution. On the other hand, Wakai-settlement was placed as a supplemental resolution method in cases when the conclusion of judgment was not appropriate and the number of disposition was not significant even if adding together with ImmediateWakai-settlement cases. ShiharaiMeirei-order for payment was applied very often as a way to obtain an enforceable title of obligation easily but CHUSAI-arbitration was not applied at all.

After Code of Civil Procedure and Code Civil were put into operation, along with the development of the capitalism in Japan, contradictions in the society became apparent and disputes of Land Lease & House Lease, Farm Tenancy, Commercial Affairs, Cash Lending and Debts and Personal Status Affairs increased. Chotei-mediation was newly born considering that win-or-lose judgment cannot produce appropriate conclusion to dispose these disputes and consciousness of the Japanese in those days who did not willingly apply for litigation. Unified code of Chotei-mediation was not introduced but legislations were made one-by-one for each type of disputes. Code of Chotei-mediation for Land Lease & House Lease disputes was legislated firstly and put into operation in 1922 followed by legislations of Code of Chotei-mediation for Farm Tenancy disputes, Code of Chotei-mediation for Commercial Disputes and Code of Chotei-mediation for Personal Status disputes.

Chotei-mediation was not applied as expected in the beginning but when the Great Kanto Earthquake occurred on 1st September 1923, the situation completely changed. 13 branch office of court were set up within then-city of Tokyo on 25th September, more than 20 judges and more than 100 Chotei-mediation committee members disposed cases. Applicants rushed and 12,000 cases were accepted up to July next year and 9,000 Chotei-mediations were reached. After this incident, people set a high valuation on Chotei-mediations and it established itself.

After the World War II (hereinafter called as “WWII”), most civil affairs related Chotei-mediations were unified into Civil Affairs Chotei-mediations law which was put into operation in 1951. Yet CHOTEI-mediation for Personal Status disputes was not unified, renamed as Chotei-mediations for Family Affairs along with the establishment of the Family Court to maintain peace in families and sound cooperative life of relatives based on individual dignity and the essential equality of sexes and regulated in Family Affairs Adjudication Act which was put into operation in 1948.

Court annexed Wakai-settlement which has had placed as mere supplemental system to judgment in its start, has become often applied after the WWII and has gained higher valuation than judgment and establishes itself today. We suppose reasons why Wakai-settlement has increased is that firstly, increase of number of cases made it hard to dispose them solely by judgments and secondly, the people were in favor of disposition by Wakai-settlement. The people were in favor because resolution by Wakai-settlement was suited to real conditions of parties concerned therefore competent as a result aside from the Japanese tradition that the Japanese do not like solutions as if you were cutting the Gordian knot deciding black and white.

Code of Civil Procedure was amended and put into operation in 1998. Wakai-settlement in writing and Wakai-settlement that can be ruled by judges were newly introduced to make Court annexed Wakai-settlement be more useful and indeed it has become much more useful. As for Civil Affairs Chotei-mediations, multiplex debtors cases increased sharply forming serious situation so that much powerful “Specific Chotei-mediation law” was newly enforced in 2000 to contribute economical revival of debtors who might fall to insolvent.

In Japan, Ordinary Civil Litigation Cases at The Court of First Instance (District Courts + Summary Courts) summed up to an average about 520,000 cases per year in five years from 2003 to 2007 while Chotei-mediation cases (Civil Affairs + Family Affairs) summed up about 530,000. This presence of Chotei-mediation cases reduces burden of the courts for litigation cases and helps judges be able to examine trials precisely.

### **Distinguishing characteristics of Wakai-settlement**

Provisions are made simple. (Only two principal provisions Code of Civil Procedure Article 89, the court, irrespective of to what extent a suit has progressed, may attempt to arrange a settlement or have an authorized judge or commissioned judge attempt to arrange a settlement). Code of Civil Procedure Article 267, when a settlement or a waiver or acknowledgement of a claim is stated in a record, such statement shall have the same effect as a final and binding judgment.

Wakai-settlement can be attempted as many times as wished after filing lawsuit until the judgment is final and binding. No term limits either. It can be attempted during an oral argument or an examination of evidence and also can be made out of court. There are Wakai-settlement in writing and Wakai-settlement by ruling. It can be attempted not only at courts of first instance but also at appellate courts, the court of final appeal and even in retrial procedure. You can invite a third party as an interested party or add other disputes that have not yet become court trial to have an overall resolution.

A record of Wakai-settlement in which reached agreement is written has the same legal effect as a judgment of final and binding therefore becomes an enforceable title of obligation that can result compulsory execution. In the Japanese courts before around 1980, a lesson; “Do not become a judge of WAKAI-settlement.” was told and the judges examined cases considering for judgment in their mind, and it was common to process a case in poker face fashion in the actual trial and settlement process.

After 1980, judges eager to attempt Wakai-settlement have increased and current situation shows that attempting Wakai-settlement actively becomes common practice. It is widely practiced too that judges try to persuade parties concerned by indicating conclusion of judgment with disclosing his/her determination in mind. “Argument on the Art of Wakai-settlement” which discusses about the smart way and skill on Wakai-settlement has also become popular<sup>16</sup>.

Ratios of disposition of Ordinary Civil Litigation Cases at The Court of First Instance (District Courts + Summary Courts) taken from average of past 5 years from 2003 until 2007 are 25.0% for Wakai-settlement, 15.3% for judgment

(parties attended) and 26.7% for judgment (default) 26.7%. "Others" includes a significant number of withdrawal cases in which parties concerned have reached Wakai-settlement substantially thus withdraw therein. Therefore, far many court trial cases, of which party concerned have attended, have ended up with Wakai-settlement. In addition, as mentioned before, as many as about the same number cases of court trials are disposed with Chotei-mediation and also considering that we have ShiharaiTokusoku-demand for payment and ImmediateWakai-settlement, we can conclude we have small number of cases which are end up with judgment (parties attended) in Japan.

The judge who attempt Wakai-settlement and the judge who hands down a judgment is the same person as principle in the Japanese courts. It is common to apply the caucus system in which the parties concerned meet the judge taking turns, rather than the trial system in which the parties concerned sit together, as the way to conduct Wakai-settlement.

### **Distinguishing Characteristics of Chotei-Mediation**

Chotei-mediations that are annexed to the Japanese courts are divided to Civil Affairs Chotei-mediations and Family Affairs Chotei-mediations. Principal provisions that are relevant to court annexed Wakai-settlement are as follows. Chotei-mediations system is considered as a guardian like system by which the country encourages dispute resolution for the people in Japan. Unlike court annexed Wakai-settlement, a number of regulations to make petition for Chotei-mediation easier and to promote the success of it are introduced as its distinctive feature.

Civil Affairs Chotei-mediation: Civil Affairs Chotei-mediation law Article 2, When a civil dispute occurs, party concerned can file a petition of Chotei-mediation to the court. Civil Affairs Chotei-mediation law Article 16, When an agreement between the parties concerned is reached in a Chotei-mediation, and is stated in a record, the Chotei-mediation is deemed as reached, such statement shall have the same effect as a court annexed Wakai-settlement. Family Affairs Chotei-mediation: Family Affairs Adjudication Act Article 17, Family Court shall conduct Chotei-mediations of cases



related to Personal Status court trial case and other Family Affairs cases in general. Family Affairs Adjudication Act Article 21 Paragraph 1, when an agreement between the parties concerned is reached in a Chotei-mediation, and is stated in a record, the Chotei-mediation is deemed as reached, such statement shall have the same effect as a final and binding judgment or a final and binding adjudication.

Distinguishing characteristics, there are Chotei-mediations that are not annexed to the court but run by other institutions in Japan. However, court annexed Chotei-mediation is the most popular one. Chotei-mediations that are annexed to the Japanese courts are divided to Civil Affairs Chotei-mediation and Family Affairs Chotei-mediation. Civil Affairs Chotei-mediation is a different procedure from the civil litigation procedure, for the benefit of those who do not wish to have judgments but rather wish to have resolution by mutual discussion. You can apply Chotei-mediation without filing civil litigation therefore the procedure has an effect to reduce civil litigations.

Family Affairs Chotei-mediation is a must procedure to file a Personal Status court trial case or a Family Affairs Adjudication case so that it contributes to reduce court trial cases and adjudication cases. Chair persons for Chotei-mediation are Chotei-mediation committee (judge + several Chotei-mediation committee members) in both Civil Affairs Chotei-mediation and Family Affairs Chotei-mediation in principle. Chotei-mediation, which is run by sole judge, is also allowed as an exception. A court in charge of a civil litigation can refer the case to Civil Affairs Chotei-mediation. It is possible to be conducted in the court of the same jurisdiction (JICHO Chotei-mediation) or in the court of the different jurisdiction (TACHO Chotei-mediation).

There are several merits for the court in charge of a civil litigation refers the case to Chotei-mediation. One of these merits is to make the most of the Expert Chotei-mediation committee member. In this pattern, in principle, the progress and contents of Chotei-mediation will not become direct basis for civil litigation court, but we instruct the parties concerned to submit opinion paper from the Expert Chotei-mediation committee member as evidence in practice.

When a Chotei-mediation is reached, filed civil litigation case is deemed as withdrawn as stipulated by law and disposed as so, therefore no more withdrawal procedure is needed. If an agreement cannot be achieved in a Civil Affairs Chotei-mediation, then the Court can hand down a decision that substitutes Chotei-mediation. Among Personal Status Dispute Cases, considering equity for both sides, based on all circumstance and within the limit of the purpose of petition, the Family Court can hand down decisions of divorce, dissolution of adoptive relation etc. in divorce case and dissolution of adoptive relation case if the Family Affairs Chotei-mediation does not reach an agreement. Chotei-mediation committee members are part-time public official and get payment of compensation from the National Treasury. Parties concerned do not obliged to pay the compensation for the Chotei-mediation committee members.

Cost of petition for Civil Affairs Chotei-mediation is reduced to half of cost of filing a civil litigation. If Civil Affairs Chotei-mediation is not reached and a civil litigation is filed, then the petitioner ought to add only the other half of the cost. Also, the system is arranged to keep the legal effect of interruption of prescription for petitioners to apply the procedure. Cost of petition for Family Affairs Chotei-mediation is also arranged for petitioners to apply by setting the uniform price 1,200 yen. Civil Affairs Chotei-mediation is conducted mainly at Summary Courts but it is also possible at District Courts. Reference to Chotei-mediation ex officio can be conducted at High Court, or the Supreme Court as long as at the Court in charge of the case. Ordinary interpretation of law in Japan indicates Family Affairs Chotei-mediation can be conducted only at Family Courts.

### **On *Perdamaian* and *Mediasi* of Indonesia**

*Perdamaian* (Equivalent to Wakai-settlement if in Japan. Amended Indonesian Code of Procedure (abbreviation: HIR (1848, amended in 1941) Article 130, Code of Procedure for Territories out of Java and Madura abbreviation: RBG) (1927) Article 154. If the plaintiff and defendant attend on the appointed date, attend the court, through presiding judge, attempts to gain *Perdamaian* (Wakai-settlement) between

the court trial parties concerned. If a *Perdamaian* (Wakai-settlement) between the parties concerned is gained then an *Akta Perdamaian* (deed of Wakai-settlement) is written and the parties concerned bear an obligation to obey this result. *Akta Perdamaian* (deed of Wakai-settlement) will be enforceable when an annexed *Putusan Perdamaian* (Wakai-settlement judgment) is handed down. No appeals can be made against *Putusan Perdamaian* (Wakai-settlement judgment).

*Mediasi* (Equivalent to reference to Chotei-mediation ex officio if in Japan). The supreme court regulation on procedure of *mediasi* in courts 2003 (the former PerMA). Implementation of this regulation was attempted in five pilot courts but did not produce much fruits. Indonesian side said they had achieved two percent success rate. The supreme court regulation on procedure of *mediasi* in courts 2008 (hereinafter called as “new perma”) which was one of the targets of was enacted in July 2008 and put into operation from September 1st same year.

Authority of Wakai-settlement and Chotei-mediation is provided in laws in Japan but in Indonesia, it is provided in the translation of law from Dutch governance era and the SC regulation. We expect legislation of Code of Civil Procedure by Indonesian themselves but there is no prospect of that anytime soon. Accordingly, SC of Indonesia tries to fill the immediate needs solely by enactment or amendment of the SC regulations. Yet the enactment or amendment of regulations has limitation therefore Indonesian side often give half-hearted correspondence to some good suggestions from Japanese side by maintaining their claim that the given good suggestion cannot be enacted by SC regulation because it is law level matter. Because of that, it is necessary to have *Perdamaian* and *Mediasi* that have authority in law by legislating Code of Civil Procedure in the future.

### **Actual Difference of System and its Application Between Japan and Indonesia.**

Enforceability of Wakai-settlement, in Japan, if the agreement reached between the parties concerned is stated in a Wakai-settlement record created by the court clerk, then the agreement have legal effect the same as final and binding judgment and thus become enforceable. If a Chotei-mediation is stated

in a Chotei-mediation record, then become enforceable as well. In Indonesia, if a *Perdamaian* is reached but only stated in a deed of agreement, then the agreement does not become enforceable. Enforceability occurs after *Putusan Perdamaian* (judgment of settlement) is handed down. *Putusan Perdamaian* is necessary for *mediasi* as well.

Difference between settlement and mediation, in Japan, Chotei-mediation is diverse from court trial procedure and indeed its existence is expected to avoid court trial. Therefore people usually apply Chotei-mediation before filing court trial. The cost of procedure is cheap and the compensation for Chotei-mediation committee member is bore by the National Treasury therefore being applicant-kindly. In Indonesia, *Mediasi* is considered as one type of *Perdamaian*. Reaching *Mediasi* is deemed as reaching agreement of *Perdamaian* and then become enforceable by handing down *Putusan Perdamaian*. At Indonesian Courts, there are no other procedures apart from filing a civil litigation to resolve dispute. You cannot apply *Mediasi* without filing a court trial. It resemble to the Japanese reference to Chotei-mediation for the *Mediasi* takes place after filing a court trial. After paying for the cost of court trial, the cost of *Mediasi* (It is parties concerned' burden to pay the cost of private mediators. Will be added therefore the Indonesian system is relatively costly compared to the Japanese one.

Timing and opportunity of attempting settlement, in Japan, Wakai-settlement can be attempted whenever at all. In Indonesia, judges have long been considering that *Perdamaian* can be attempted only on the very first day of appointed date for the session at the court of first instance. In other words, they have considered that *Perdamaian* cannot possibly done after the first appointed date, appellate court nor the court of final appeal. Besides, though it is rare, there has been cases of handing down *Putusan Perdamaian* for agreement of parties concerned after the first appointed date and at the appellate court based on the request from the parties. There are no rules on provisions of HIR nor RBG that prohibit *Perdamaian* attempted other than the first appointed date. Therefore attempting *Perdamaian* at any time should not be any illegal issue. But it looked like the belief that they

should not attempt *Perdamaian* after the first appointed date strongly obsessing the mind in of Indonesian judges. In the new PerMA, it is positively stated that *Mediasi* is attempted on the first appointed date as a principle, and the court in charge of the case can attempt *Perdamaian* as many times as possible after that. This provision is an introduction of the Japanese sense based on Indonesian side's through understanding of the actual condition in Japan and is a remarkable move.

Time limit of attempt, In Japan, a provision stipulated in Court Trial Acceleration Law states that a civil case should be finalized in two years of time as long as it is possible. There is no provision that states time limit for attempting *Wakai*-settlement or *Chotei*-mediation. In Indonesia, there is a principle regulation that a court trial should be finalized within sixth month of time and *Mediasi* also have precise time limitation. The former PerMA stipulated time limitation of 22 days (30 days in exceptional cases) and some judges provided us opinion saying the limitation is too hard to attempt *Mediasi*. The new PerMA has eased this limitation to 40 days (and extendable another 14 days) but the limitation still exists. We have heard that judges who try to attempt *Mediasi* seriously take little attention to this limitation in practice.

Qualification of mediators, in Japan, there is no specific legal condition to become a *Chotei*-mediation committee member apart from being "competent person" and his/her status is a part time government employee. Judges can handle the *Chotei*-mediation as a matter of course. In Indonesia, qualification for becoming a mediator is regulated and not only civilians but also judges have to take training operated by one mediator training institutions which has obtained attestation from the SC to handle *Mediasi* in principle. The new PerMA also require judges to have certification in principle though it allow an exception stipulating that a judge without certification can attempt *Mediasi* when there is no judge at all who has certification at the concerned court. Parties concerned can select a mediator from among the following choices: the judge who handles the case, a judge in the same court in charge of the case but who does not handle the case, a lawyer or a bachelor of laws and a person who has special knowledge or experience on the case.

The former PerMA stipulates that a judge who handles the case is not allowed to become the mediator for the case but the new PerMA regulates it possible. As for *Perdamaian* after the first appointed date, it can be attempted at any stage of court trial as long as attempted by the judge in charge of the case. This is a switchover from Anglo-American type of *Mediasi* to Japanese type and a significant outcome of this project. As mentioned before, choosing a mediator from judges costs parties concerned no fee. Otherwise, daily allowance etc. of the mediator are borne by them therefore there is scarce probability for the mediators of non judges to be selected.

Principle of attempting *Mediasi* before filing court trial, in Japan, Chotei-mediations that must be attempted before filing court trial by law is limited to personal status case (Family Affairs Adjudication Act Article 18), case of increment or reduction of rent for land lease and house lease (Civil Affairs Chotei-mediation law Article 24-2) etc. In Indonesia, basically all the civil cases should go through *Mediasi* before being filed as court trials with following exceptions. The exceptions are litigation cases disposed at Commercial Court and Labor Disputes Court and objection cases for the decisions made by the Fair Trade Commission and the Consumer Dispute Resolution Agency. Judgments handed down without going through *Mediasi* are deemed as violation of HIR Article 130 or RBG Article 154 thus declared invalid.

Relation between *Mediasi* and court trial, in Japan, if a court trial case is referred to Chotei-mediation and is still not successful in reaching an agreement, then material gained during the Chotei-mediation is expected to be effectively used in the following court trial therefore the court clerks create record of the Chotei-mediation process. The judges of the court in charge of the case as a matter of course read the record of concerned Chotei-mediation to make use of it for presiding the court trial case. Especially, opinion papers submitted by Expert Chotei-mediation committee members are found very useful. In Indonesia, *Mediasi* was not open for the public and presence of court clerks was also not allowed. If a *Mediasi* is not reached, then the records are destroyed and case is taken back to the court trial as being zero based or from none.

However, the Japanese side insisted that cooperation of court clerk forms one cause of success in the Japanese Wakai-settlement and Chotei-mediation therefore new PerMA will achieve little success without implementing training for the court clerks to improve their capacities and making use of it in Indonesia as well. This notion become a turning point for the implementation of joint training for judges and court clerks for the first time in history under the enforcement of new PerMA. Yet, we have received explanation from WG of Indonesian side that presence of court clerks in *Mediasi* is not allowed because it is not open for the public but their presence is allowed in *Perdamaian* after *Mediasi* because the case goes back to court trial procedure which is open to the public.

Skill for *Perdamaian*, Indonesian SC have been suffering from increase of cases waiting for disposition and long been expecting to apply *Perdamaian* to dispose cases for reduction of judgments. For that purpose, the SC issued an official circular in 2002 to encourage *Perdamaian* saying those who will get favorable treatment including promotion if he/she achieves good outcomes but in vain. Response from judges in general at that time seemed that they did not have the skill for *Perdamaian* and indeed they were not motivated. Accordingly, Indonesian SC began to consider how to make judges in general to learn the skill for *Perdamaian* and asked the Japanese side before commencement of this project questions about how the Japanese judges learnt skill for Wakai-settlement in training in Japan. They have come to know about the publication “WakaiGijutsu Ron (Argument on the art of WAKAI-settlement)” of author Kusano Yoshiro through lectures of ICD. They then requested the translation of the book into Indonesian language. So Kusano made a brief version of the book deleting portions that were not easy to be understood by foreigners and published an Indonesian version titled “Wakai” in August 2009 .

Code of ethics for mediators and incentives for judges, in Japan, there is no code of ethics specifically for Chotei-mediation committee member apart from the general code of ethics for all government employees. If a judge attempted and reached many Wakai-settlements or Chotei-mediation, it is only regarded as doing his/her job and no special awards will be provided to him/her from the Supreme

Court. The new PerMA stipulates to establish a code of ethics for mediator and judges who are successful in achieving *Mediasi* will be given an incentive as a reward by Indonesian SC. It is unclear exactly what kind of code of ethics and incentives will be because these shall be regulated separately by Indonesian SC. This manner is one of the things we perceive difference from the Japanese style.

Specialty of judges and distribution of office work, in Japan, cases that are handled by judges are specialized to civil or criminal except in those smaller courts. Moreover, you see further specialization within civil and criminal in larger courts. This specialization contributes effective case disposition and proficiency of judges in specific cases. Allocation of cases are conducted automatically based on the regulation of distribution of office works therefore there is no space for the chief of the court to take part in allocating certain case. This case allocation way is thought to guarantee the fairness in Japan.

In Indonesia, judges handle both civil and criminal cases and there is no specialization in general. This system directs awareness of judges to the disposition of criminal cases and thus forming a cause that disables them to concentrate on *Mediasi*. In addition, actual case allocation is decided by the chief of the court considering the difficulty of the case and the progress of disposition of cases by judges etc. This system seems to be able to achieve the substantial fairness of amount of works among judges because of the flexibility of case allocation meeting with each actual context. On the other hand, this system enables chief of the court to arbitrary divide cases that produce money and cases that do not and loosely allocate the profitable cases to the disposition of the chief of court himself. Considering the reality of corruption in Indonesia, the Japanese system seems to be better in guaranteeing fairness. Therefore future improvement of the system to the automatic case allocation is recommended.

## Conclusion

In PerMA 2003, judges who has taken the case cannot become the mediator of the same case. PerMA 2008 states that judges who has taken the case can become the mediator of the same case as a matter of course. PerMA 2016 states in the article



3 paragraph 2, ‘presiding judge of the court of the first instance nominates a judge, who are not a judge who are not a member of the court in charge of the process of the judgement the case, as the mediator. However, the article 20 paragraph 4 states, ‘in the case, that there is no judge who is not a member of the court which has taken the case nor court staff who has the license to be a mediator, the presiding judge of the court which has taken the case, on a priority basis, nominates a judge who has the license to be a mediator among the members of the court which has taken the case, and let him/her conduct the mediation. Other than the point mentioned above, principles of the PerMA 2008 are almost maintained. There are more precise rules on duties of mediator and court in charge of the case (article 14 of the new PERMA), and advocates who represent in the litigation (art.18) to fulfill and clarify the issues of the old PerMA. These matters are deemed to be shared and accumulated in the practice of judges and mediators in Japan. Anyway, this clarification issue is very interesting to understand the difference of awareness of countries and judges. It is also a reality of Indonesia that we cannot expect the outcome of the rules as stated, just because we stated them as rules. In addition, PerMA 2016 improves sanctions against parties who act insincerely, clarifies the cost of mediators, clarifies the process from drafting agreement of the settlement to judgement of the settlement. PerMA 2016 tries to solve issues occurred in the operation of PerMA 2008. Contents of these amendments seems reasonable.

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