

Party Autonomy in Korean and U.S Court-Annexed Mediation System

한국과 미국의 법원내 조정제도에서 당사자 자치 원칙

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Key Words : Court-Annexed Mediation, Civil Conciliation, Mediation, Conciliation,
Non-binding Arbitration, ADR

I . Introduction

Alternative Dispute Resolution (ADR) has recently become a preferred method of resolving disputes in U.S and Korean courts. ADR may reduce court dockets and decrease litigation delay and cost. However, in order to achieve this goal it is required to establish more favorable legal environment for mediation practice which is based on the principle of party autonomy. This is because the principle of party autonomy would ensure the fair and efficient ADR system including the court-annexed mediation. In this sense there are many differences in law and practice of court-annexed ADR systems between Korea and U.S. This paper will examine how each system accommodates the principle of party autonomy in mediation process and how far the court intervene the mediation process. By doing so it will highlight the salient features of Korean court-annexed mediation system by comparing with US court-annexed mediation. Finally, this paper will suggest the possible improvements for the effective and fair civil mediation system.

II . Legislation for Court-Annexed Mediation

Both Korea and U.S have recently established the legal regime on court-annexed mediation. In 1990 Korea enacted the Civil Mediation Act to introduce court-annexed mediation system and revised it in 1992, 1995 and 2002. This law declares the policy of settling civil disputes by mutual agreement between parties on the basis of the principle of equity and the circumstances according to a simplified procedure.¹⁾ It allows both voluntary mediation and also non-binding arbitration. However, in the practice a judge mostly order to refer pending cases to mediation rather than parties initiate court mediation. In addition, the average referral rate to mediation among all cases assigned to judges does not exceed 20%.²⁾

On the other hand since late 1980s in U.S nearly every state court has offered the diverse forms of ADR and over 30 states have arbitration and mediation program for civil cases.³⁾

1) Korean Civil Mediation Act (KCMA), Art. 1 For details of background of this Act, Kang Yonghyun, "The Possible Improvement for the Effective Civil Mediation System (I)(II)(III)," *Judicial Administration*, vol. 318-320, 1987; Sohn Sooil, "Civil Mediation from the Perspective of a Mediation Judge," *Bobjo-Choonchoo*, vol. 145, 1997.

2) For the data of civil mediation practice, see Hahm, Youngjoo, "Civil Justice and Civil Mediation," *Ahnam Bobhak*, Korea Univesity, vol. 15, 2002.

On the federal level, almost all federal district and appellate courts have established court-annexed ADR. Among US states this paper chose Florida and Texas to highlight characteristics of the US court-annexed mediation system. This is because these two systems are forerunners of U.S court ADR program and are considered to be better operated than others.

In 1988 Florida state implemented "Mediation Alternatives to Judicial Action", which gave judges the statutory power to refer pending cases to mediation or arbitration.⁴⁾ Florida has also implemented procedural rules, ethical standards, grievance procedures, training standards, and continuing education requirements for mediators.⁵⁾ In 1987 Texas enacted Alternative Dispute Resolution Procedures Act⁶⁾. This law authorized courts to refer pending disputes to ADR procedures and established ADR confidentiality standards. The law expresses the policy of encouraging the peaceable resolution of disputes and the early settlement of litigation through voluntary settlement procedures. It also provides the appointment, qualifications, standards and duties, compensation, and qualified immunity of impartial third parties.⁷⁾

III. Salient Features of Korean and U.S Court-Annexed Mediation

1. Commencement of Court-Annexed Mediation

In order to understand the difference of court-annexed mediation system in Korea and U.S it is, first of all, necessary to examine who initiates civil mediation and how often the court intervene the mediation process. In Korea there are two ways to commence court-annexed mediation. Firstly, a party may initiate civil mediation by filing the motion for mediation orally or in writing.⁸⁾ The party may file the motion for mediation from the beginning or during the litigation. When the motion for mediation was filed, the complainant should pay a fee equivalent to one fifth of the litigation fee.⁹⁾ In the case of an oral filing for mediation, the

3) Edward J. Bergman, *Court Annexed Mediation : Critical Perspectives on Selected State and Federal Programs* i (1998)

4) Florida statute chapter 44, "Mediation Alternatives to Judicial Action

5) Florida Rules of Civil Procedure, Rules 1.700 1.830; 2005 Florida Mediation & Arbitration Program : A Compendium, 18th ed. (Florida Dispute Resolution Center) See also [http : //www.flcour.org](http://www.flcour.org)

6) Texas Civ. Prac. & Rem. Code Ann., Chapter 154

7) Id.

8) KCMA, Art. 5(1) See Ministry of Justice, "Civil Mediation System," *Law and Life*, 2005, pp 2-5.

complainant should make a statement in the presence of the concerned court official who will make a court record of filing for mediation.¹⁰⁾ Secondly the trial court may order to refer a pending case to civil mediation at any time if the court considers it appropriate.¹¹⁾ In this event a mediation judge¹²⁾ manages the mediation process. He may work as a mediator or refer the case to mediation commissioners.

In U.S courts a judge may also refer all or any part of civil disputes to mediation or arbitration.¹³⁾ In most cases the parties may file a written stipulation to mediate or arbitrate any issue between them at any time. This stipulation is incorporated into the order of referral.¹⁴⁾ However, oral filing is not allowed, while Korean civil mediation does so. In details Florida court offers several ADR methods : court-ordered mediation, non-binding arbitration and voluntary binding arbitration. Firstly upon request of a party court may initiate mediation in association with any filed civil action.¹⁵⁾ Court also may refer to mediation if the court itself considers appropriate and necessary. Secondly a court may initiate court-annexed non-binding arbitration.¹⁶⁾ Thirdly both parties who are involved in a civil dispute may agree to submit the controversy to voluntary binding arbitration; court-annexed arbitration.¹⁷⁾

Apparently both Korea and US law allow parties and court to initiate mediation. However in Korea court-referred mediation are common while in US parties more often commence it. In this regard Korean court-annexed mediation system needs to facilitate parties to initiate mediation rather than to rely on court-referred mediation.

2. Forms of ADR available

Prior to examining the forms of ADR methods available to parties, it is worthwhile to define ADR such as mediation and conciliation because those terms are sometimes misleading. The distinction between mediation and conciliation is often debated among legal practitioners and academics. Some people suggest that conciliation is non-binding arbitration whereas me-

9) Civil Conciliation Rule, Art.3(1). When the lawsuit value is US\$5000, the litigation fee is US\$25(US\$ 5,000X0.5%) and mediation fee is US\$5 (\$25X1/5). However the sliding scale of charging litigation fee applies depending on the amount of the lawsuit value.

10) KCMA Art. 5(2)(3)

11) KCMR, Art. 6.

12) Since a chair mediator is appointed among judges, he is herein called "mediation judge".

13) Florida Rules of Civil Procedure Rules, Rule 1.700(a)

14) Florida Rules of Civil Procedure Rules 1.700 1.830

15) Florida Mediation Alternatives to Judicial Act. S.44.102

16) Florida Mediation Alternatives to Judicial Ac. S44.103

17) Florida Mediation Alternatives to Judicial Act. S. 44.104.

diation is merely assisted negotiation. Others assert that conciliation involves a third party's trying to bring together parties to assist them reconcile their differences whereas mediation goes further by allowing the third party to suggest terms on which the dispute might be resolved. However there is no consensus about what the two words mean and they are now generally interchangeable.¹⁸⁾ Thus, although the English version of Korean Civil Mediation Act uses "conciliation", this paper will preferably use the term "mediation" in association with court-annexed ADR in comparing with U.S mediation system.

Firstly, Korean Civil Mediation Act allows parties to initiate two forms of ADR methods such as voluntary mediation and non-binding arbitration.¹⁹⁾ Since a mediation judge may provide recommendation or render non-binding decision to resolve impasse between parties, Therefore, Korean court-annexed mediation may be classified as "non-binding arbitration". It may be also referred as non-binding Med-Arb, in which a mediator may decide over disputing issues after parties fail to reach agreement. Another form of court-annexed ADR is "court settlement" or "compromise" (called "hawhae" in Korean) which Korean civil procedure law allows parties to do during lawsuit.

On the other hand, US court-annexed mediation offers the diversity of ADR methods in association with civil justice system. Under Texas Alternative Dispute Resolution Act (1987) ²⁰⁾ parties may refer five different dispute resolution processes : (i) mediation, (ii) mini-trial, (iii) moderated settlement conference, (iv) summary jury trial and (v) arbitration. Although all of these processes have been used by a number of courts, it is the mediation process which has been most utilized.²¹⁾ Especially Texas ADR Act defined that mediation is a forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement or understanding among them.²²⁾ Thus, Texas Mediation law does not allow mediators to decide on the case.

Florida Statute also provides several forms of court-annexed ADR method such as court-ordered mediation, non-binding arbitration and voluntary binding arbitration.²³⁾ However, in Florida the definition of mediation include the term "voluntary." It is defined as an "informal and non-adversarial process with the purpose of helping the disputing parties reach a mutually

18) Black's Law Dictionary 8th ed.(Thomson 2004), p.1003.

19) Korean Civil Mediation Law. Art. 2, 30.

20) Texas Civ. Prac. & Rem. Code Amm Ch. 154 (Alternative Dispute Resolution Procedures); Florida Rules of Civil Procedure Rule. 1.700

21) Mike Amis, *The Texas ADR Experience, in Court Annexed Mediation* 370 (Edward J. Bergman ed.1998)

22) [http : //www.austindrc.org/adrllegislation.htm](http://www.austindrc.org/adrllegislation.htm)

23) Florida Statute chapter 44, Mediation Alternatives to Judicial Action

acceptable and voluntary agreement.²⁴⁾ In mediation the decision making authority rests with the parties. Although the court orders that a party attend mediation hearings, the parties are asked only to attempt to reach a mutually acceptable and voluntary agreement.²⁵⁾

As above mentioned U.S courts provide the diversity of ADR methods in association with civil justice system while Korean courts provide two forms of ADR methods such as voluntary mediation and non-binding arbitration. In this regard Korean courts needs to develop the diversity of ADR methods available to parties. Additionally, in order to ensure party autonomy in mediation process, a mediator had better focus on facilitating communication between parties to promote reconciliation, settlement or understanding among them without rendering a non-binding decision or recommendation.

3. Administrative Authority or Supporting Agency

Once the court-annexed mediation is commenced, it is important to examine who will manage administrative work for the mediation process and which authority will support mediation training and research program. Under Korean Civil Mediation Act a chief judge of district or high court is to designate a "Mediation Judge" who is commissioned exclusively to handle court-annexed mediation cases at court.²⁶⁾ The mediation judge may work as a mediator or he may refer civil disputes to mediators among mediation commissioners. Each district or high court maintains the list of mediators who are called as mediation commissioners. However Korean courts do not create any independent body which sponsors mediation training program and develops research program. The mediation judge of each court manages all administrative works for the mediation process as well as educating mediators and researching on ADR program.

On the other hand in U,S courts a judge does not work as a mediator but he may refer the case to the mediation. In 1986 the Florida created Dispute Resolution Center (DRC) in association with Florida Supreme Court, which assists courts developing ADR programs and conducting education and research on ADR in general. The DRC also provides staff support to the Supreme Court's two Standing Committees on ADR Rules and Training, the Mediator Qualifications Board and Mediation Training Review Board. The Texas ADR Systems and

24) Sharon Press, *Florida's Court Connected State Mediation Program in Court Annexed Mediation* 57 (Edward J. Bergman ed.1998)

25) Florida Statutes 44.101(2)

26) KCMA, Art. 3.

Financing Act (1983) authorize courts to refer cases to Dispute Resolution Centers, other dispute resolution organization or forum for voluntary settlement of disputes through intervention of an impartial third party.

In this regard it is suggested that Korean courts may develop an independent administrative or supporting body for training and research program on ADR program. and do not allow judge to serve as a mediator at court to facilitate the fair and efficient mediation process.

4. Appointment of Mediators

The appointment of an impartial and experienced mediator is essential to maintain fair and efficient mediation process. Under the Korean Civil Mediation Act parties may select mediators as they prefer.²⁷⁾ However, it is rare in practice that parties appoint a mediator in court-annexed mediation. Rather, mediation judges play a major role in all stages of mediation process. He may directly handle the case as a mediator or refer it to mediation committee. When a mediation judge refers the civil case to the mediation committee, he will select two mediators from the list of commissioners and appoints a mediation judge as a chair mediator. Thus the mediation tribunal consists of three mediators : one judge working as a chair and others two commissioners who are not judges. Each year the chief judge of the district or high court designates mediation commissioners among lawyers or other experts who have special knowledge and experience in the field of each profession.

On the other hand, in Florida parties are free to choose a court-certified mediator or a non-certified mediator who is otherwise qualified by training or experience to mediator.²⁸⁾ Parties have 10 days from the trial court's order of referral to mediation to select a mediator by stipulation.²⁹⁾ If the parties do not make a selection, the court will appoint a certified mediator. The certification requirements for mediators are strictly stipulated by Florida Rule for Certified and Court Appointed Mediator. For example, for Florida circuit court mediators, the Rule requires completion of a minimum of 40 hours in mediation training program and being member of Florida Bar with at least five years of Florida practice or being a retired trial judge from US jurisdiction etc. Both Texas and Florida ADR rules established certi-

27) KCML Art. 7(2)

28) Id. The certification requirements for mediators are contained in Florida Rule for Certified and Court Appointed Mediator, Rule. 10.010.

29) Florida Rules of Civil Procedure, Rule 1.720(f)

fied mediator program.

In Texas parties are also permitted to select a mediator from the list of mediators certified by court or anyone qualified as a mediator under the state ADR statute. If parties failed to agree on a mediator, they may request the court or ADR coordinator to make a random selection from the list of mediators. However it is rare in practice that a trial judge designates or recommends a specific mediator in US court-annexed mediation.

As above mentioned Korean courts frequently select mediators and designate a judge as a chair mediator and parties rarely appoint mediators in practice. In addition there is no training requirement for mediators in Korea court-annexed mediation program. Therefore, it is desirable for Korean courts to facilitate the principle of party autonomy in selecting mediators and establish the court-certified mediator program and training requirement for court-annexed mediators.

5. Compensation of Mediators

In order to maintain a qualified and efficient mediator he should be properly compensated. In Korea when a party initiates mediation at court, he should pay a fee equivalent to one fifth of the litigation fee.³⁰⁾ However, courts pay mediators a fixed nominal honorarium (around US \$100) regardless of the complexity and hours spent for the case according rules of the Supreme Court. In addition a mediator may be reimbursed traveling expenses and daily allowance³¹⁾

In US court-annexed mediation, the mediator may be a voluntary but if the mediator is not a voluntary, he will be compensated according to rules adopted by the supreme court of each state.³²⁾ When the mediator is compensated by parties, the parties may determine the reasonableness of the fees charged by the mediator. In the absence of a written agreement providing for the mediator's compensation, the mediator will be compensated at the hourly rate set by the presiding judge in the referral order.³³⁾ Parties may object to the rate of the mediator's compensation within 15 days of the order of referral by serving an objection on all other parties and the mediator. In Texas the parties are also responsible for making payment arrangements with the mediator. If a party objects to pay part of a mediator's fee and the court finds a reasonable basis for the objection, the ADR coordinator will help the parties find a media-

30) Civil Mediation Rule, Art. 3(1)

31) KCML, Art.12.

32) Florida Statute s 44.102(5)(b) : Florida Rules of Civil Procedure, Rule 1.720(g)

33) Id. Rule. 1.720(g)

tor who will work on a pro bono or nominal fee basis.

In this regard it is suggested that Korean courts had better develop the reasonable compensation schedule such as hourly-based compensation for mediators in consideration with the complexity and hours spent for the case when the parties agreed so.

6. Managing Mediation Process

Regarding mediation process it is important to examine who manages the mediation process and how far courts control it. In Korea a mediation judge manages all mediation process³⁴). He makes a mediation conference date and notifies the parties of it.³⁵) He may also allow an interested third party to join the mediation process. When the plaintiff fails to appear in the mediation conference twice, the motion for mediation is considered to be withdrawn.³⁶) However, when the defendant fails to appear in the conference, the mediation judge may make a decision on the dispute in the default of defendant.³⁷) Regarding the place of mediation hearing a mediation judge may choose the place out of court as she considers proper.³⁸) In Korea the court-annexed mediation process may be held publicly although it is rare in mediation practice. However, even when the mediation process is not to be openly held, the mediation judge may allow other disinterested people to attend the mediation process if it is considered appropriate.³⁹) This provision gives a power to a mediation judge to control the mediation process, and however might reduce the advantage of mediation based on the principle of party autonomy.

On the other hand in US a mediator, not a judge, manages all stage of mediation process and in continual control of mediation sessions and procedures to be followed.⁴⁰) Mediators may reschedule or adjourn the mediation session at any time. In US court-annexed mediation all parties are represented by counsel, who is required to attend the mediation and frequently play a major role in the negotiation. However, mediation may proceed without the presence of counsel if the parties agree and mediators consider it appropriate.

Regarding the mediation procedure court-ordered mediation may differ from traditional me-

34) KCMA. Art. 11.

35) KCMA. Art. 15.

36) KCMA. Art. 31

37) KCMA. Art. 32.

38) KCMA. Art. 19

39) KCMA Art. 20 (non publicity)

40) Florida Statutes. Ch. 44.403(4)

diation primarily in the means of referral.⁴¹⁾ In Florida the first mediation conference should be held within 60 days of the order of referral and mediation should be completed within 45 days thereafter.⁴²⁾ This is to prevent from using mediation as a delay tactic as well as to make a mediation speedier and less costly means. In addition the mediator may meet and discuss privately with any party or their counsel.⁴³⁾

In this regard Korean courts had better allow mediators to manage all stage of mediation process and in continual control of mediation sessions and procedures to be follow.

7. Confidentiality

The confidentiality of mediation process should be protected especially when parties do not want to settle their own dispute publicly for the reason of the business relation or privacy. In addition without the protection of the confidentiality parties might be unwilling to provide all the evidence and to present all the issues in mediation. Under Korean Civil Mediation Act the parties can not use statements of opposing parties or interested persons, which were made during the mediation proceedings, as evidence in subsequent civil litigation.⁴⁴⁾ Furthermore, a mediator (called “mediation commissioner”) will be punished for disclosure of information obtained during the process.⁴⁵⁾

However, Florida ADR Statutes separately implemented “Mediation Confidentiality and Privilege Act, which includes scope of application, definition of term, duration of mediation, exceptions of confidentiality and civil remedies of confidentiality.⁴⁶⁾ The Texas law also established broad confidentiality provisions in an ADR procedure with few exceptions such report of abuse and neglect pursuant to the Family Code, and the subject to or exception of disclosure for a final written agreement to which a governmental body is a signatory pursuant to the Public Information Act.⁴⁷⁾

In this regard, Korean court needs to develop and establish broader confidentiality provisions in court-annexed mediation law because the protection of confidentiality in mediation process is one of advantage of mediation process.

41) Sharon Press, *Florida's Court connected State Mediation Program*, in *Id.*, 63.

42) Florida Rules of Civil Procedure, Rules 1.700(a) and 1.710(a)

43) Florida Rules of Civil Procedure, Rules 1.720(d)(e)

44) KCMA, Art. 23.

45) KCMA, Art. 41.

46) Florida Statutes, 44.401 44.406.

47) State Bar of Texas, *Dispute Resolution : Texas Style* (3rd ed. 2005) [http : //www.texasadr.org/drtexas.cfm](http://www.texasadr.org/drtexas.cfm)

8. Completion of Mediation Process

When the mediation process is completed, how can the mediator conclude the case? Under the Korea law mediation process can be completed in five prongs of conclusion. First, when the notice of mediation conference date can not be served, the mediation judge may dismiss the motion for mediation without prejudice.⁴⁸⁾ In addition when the defendant fails to appear on the conference date, he may dismiss it. Secondly, a mediation judge may decide to reject the motion for mediation when he considers that the nature of the case is not appropriate for mediation or the party filed for mediation by bad faith, such as a motion for mediation only as a delay tactic.⁴⁹⁾ Thirdly, when the parties reach no agreement or the agreement reached is impossible, the mediation judge may terminated the mediation procedure. In this event the mediation judge will transfer the case to the civil trial court.⁵⁰⁾ Fourthly, when the parties reach an agreement, the agreement should be filed with the court. Finally when the parties reach no agreement, the mediation judge makes a decision for a possible settlement within the purpose of mediation motion in consideration of the interest of parties and other concerned circumstances.⁵¹⁾ This prong is very unique and quite different from US counterpart.

Under the Florida Rules of Civil Procedure when parties fail to reach agreement, a mediator is to report the lack of agreement to the court without any comment or recommendation.⁵²⁾ However with the parties' consent the mediator may facilitate the possibility of a settlement without making any decision or recommendation.⁵³⁾ When the parties reach a partial or full agreement, it should be reduced to writing and signed by the parties and their counsel. A report of the agreement is submitted to the court or a stipulation of dismissal is filed. However, when a court ordered mediation agreement is breached, the court may impose sanctions including costs and attorneys' fees.⁵⁴⁾

The essential difference between Korean and U.S courts is that when the parties fail to reach agreement, a Korean mediation judge frequently will make a decision or recommendation for a possible settlement but the U.S mediator will only report the lack of agreement to the court without any comment or recommendation. In order to maintain efficient and

48) KCMA, Art. 25

49) KCMA, Art. 26

50) KCMA, Art. 27

51) KCMA, Art.

52) Florida Rules of Civil Procedure, Rules 1.730 (a)

53) Id.

54) Florida Rules of Civil Procedure, Rules 1.730 (c)

fair mediation procedure it is necessary for a Korean mediator to report the lack of agreement without any recommendation or decision.

9. Enforcement of Mediation Agreement

Finally, an issue can be raised as to what the effect of court-annexed mediation agreement is. In Korea when the parties reach an agreement in mediation it has the same effect as a settlement agreement in court. Concurrently the effect of the agreement is same as one of final and conclusive court judgment. However when a mediation judge made a decision for possible settlement is not immediately binding on the parties. When the losing party does not object to the decision within two weeks, the mediation decision becomes binding and enforceable.⁵⁵⁾ This agreement also has the same effect as a final and conclusive judgment. In this regard Korean court-annexed mediation is different from traditional concept of mediation outside of court. Voluntary mediation is a consensual process between the parties and even if they reach an agreement, it has only contractual effect.

In US court mediation, when the parties reach an agreement, it would likely be enforceable as a matter of contract law. The Texas law enforces the effect of a written settlement in the same manner as any other written contract.⁵⁶⁾

IV. Conclusion

The essential difference between Korean and US court-annexed mediation is that the Korean court plays a leading role in settling disputes while US counterpart only assists and facilitates disputing parties to reach a settlement by themselves. Korean law allows the form of non-binding arbitration for court-annexed ADR and US law prefers the form of voluntary mediation. Although Korean court-annexed ADR could reduce the burden of courts' docket, it might lose the advantage of mediation based on the principle of party autonomy, which leads to settle their own disputes peacefully by themselves.

Based on the principle of party autonomy in mediation, the following possible improvements may be suggested for the effective and fair court-annexed mediation system. Firstly,

55) KCMA. Art. 34(1)(4)

56) Texas Civ. Prac. & Rem. Code Ann., Chapter 154.071

in Korea court-referred mediation are common while in US the parties more often commence it. In this regard Korean courts need to facilitate parties to initiate mediation rather than to rely on court-referred mediation. Secondly, regarding the form of ADR, Korean courts needs to develop the diversity of ADR methods available to parties. This will help parties to choose a better method of settling their own disputes in court-annexed ADR. Thirdly, it is desirable that Korean courts may develop an independent administrative or supporting body for training and research program on ADR program and do not allow a judge to serve as a mediator at court to facilitate the fair and efficient mediation process. Fourthly, Korean courts usually select mediators and designate a judge as a chair mediator rather than parties appoint mediators. In order to maintain fair and efficient mediation procedure, it is desirable for Korean courts to facilitate the principle of party autonomy in selecting mediators and additionally to establish the court-certified mediator program and training requirement for court-annexed mediators. Fifthly, Korean courts pay mediators a fixed nominal honorarium regardless of the complexity. In this regard Korean courts had better allow parties to pay mediators with hourly-based compensation for a mediator in consideration with the complexity and hours spent for the case when the parties agree so. Sixthly, Korean courts manage all mediation process. Korean courts had better allow mediators to manage each stage of mediation process and in continual control of mediation sessions and procedures to be follow. Seventhly, in order to protect the confidentiality of mediation process Korean courts need to establish broader confidentiality provisions in court-annexed mediation law. Finally, when the parties fail to reach agreement, a Korean mediation judge frequently makes a decision or recommendation for a possible settlement. However, it is desirable for a Korean mediator to report the lack of agreement without any recommendation or decision.

In conclusion, it is time for Korea to reform the legal environment for ADR system on the principle of party autonomy and further to establish ADR education and research program to achieve more efficient and fair court-annexed ADR system.

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국문요약

한국과 미국의 법원내 조정제도에서 당사자 자치 원칙

장 문 철

최근 한국과 미국 법원에서는 조정제도를 자주 이용하고 있다. 조정제도를 이용함으로써 법원은 사건부담을 줄일 수 있을 뿐만 아니라 소송지연을 막고 비용을 절감할 수 있다. 그러나 조정제도의 장점을 극대화하기 위해서는 일반 조정제도의 기본원칙인 당사자 원칙을 최대한 반영하고 법원의 개입은 제한하여야 할 필요가 있다. 이점에 있어 미국과 한국의 법원내 조정제도에 비교해볼 때, 전자가 법원의 개입은 필요한 최소한에 그치고 조정인과 분쟁당사자간의 당사자자치를 최대한 보장하고 있음을 알 수 있다. 이 글은 한국과 미국의 법원내 조정제도를 비교 분석하여 효과적인 법원내 조정제도를 정착시키기 위하여 개선해야 할 점을 제시하고자한다. 한국과 미국의 법원내 조정제도의 근본적인 차이는 조정절차진행에서 법원의 역할과 관련되어 있다. 특히 미국법원은 분쟁 당사자들 스스로 분쟁해결을 할 수 있도록 돕는 역할에 주력하는 반면, 한국법원은 조정절차 전 과정에서 분쟁해결에 적극 개입한다. 보다 공정하고 효율적인 민사조정절차를 위해서는 관련 법의 정비뿐만 아니라 조정인의 교육과 전문성을 강화하기 위한 제도적 장치를 마련할 필요가 있다.

주제어 : 법원내 조정제도, 비구속적 중재, 조정제도, 민사조정, 소송외적 분쟁해결제도