Journal of Engineering and Applied Sciences 13 (3): 766-770, 2018
ISSN: 1816-949X

Mediation as a Means of Dispute Resolution under the Information Security Industry Act of Korea

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Abstract: With the increasing reliance on information and communication technology giving rise to fears of cyberthreats, the advance prevention of potential industry disputes and the establishment of reliable processes for the resolution of disputes that do arise are crucial systematic issues for the Korean information security industry. The creation of the Information Security Industry Dispute Mediation Committee for the purpose of resolving disputes within the industry is a positive step forward in this regard. The Mediation Committee would be able to resolve even more disputes more efficiently, however, if it could be more versatile in its use of Alternate Dispute Resolution (ADR) methods of resolution and if it were also empowered to utilize arbitration processes like the World Intellectuar Property Organization Arbitration and Mediati Center. The legal bases for party autonomy should be clarified in consideration of the procedural economy of the mediation process and more varied types of ADR should be used.

Key words: Information Security Industry Dispute Mediation Committee, ADR (Alternative Dispute Resolution), mediation, information security industry dispute, dispute mediation, ICT (Information and Communication Technology), efficiency

INTRODUCTION

With the reliance on information and communication technology growing in all walks of life, the losses from cyber threats are also, on the rise. Against this background, the government of Korea enacted the Act on the Promotion of the Information Security Industry (hereinafter, "the act") which includes as its main points the expansion of the domestic information security market, the training of information security professionals, the creation of new demands and markets for the development of world-class information security products and support for global information security enterprises. In particular, building trust by preventing disputes between businesses and supporting the resolution of disputes that arise is a crucial policy issue in raising the level of national cybersecurity while developing the information security industry as a new engine for growth and legislating the basis for such policy as these disputes are potential hindrances in the growth of related industries (Min-Ji, 2008; Sung-Uk and Sang-Ho, 2008; Woo-Soo *et al*., 2014; Pereira *et al*., 2017). The centerpiece of such trust-building is to support an infrastructure to resolve information security industry disputes at low cost in a timely and rational manner. In countries such as the United States and Great Britain, the use of Alternative Dispute Resolution (ADR) is becoming more popular and the OECD published its Guidelines for Consumer Protection in the Context of Electronic Commerce where it recommended that consumers be able to choose ADR procedures (Soon-Bok, 2015).

The current dispute mediation system, presided over by the Information Security Industry Dispute Mediation Committee (hereinafter, "The Mediation Committee"), supports the ex post facto resolution of information security industry disputes which is a great contribution to the development of the industry. However, the committee would be able to resolve even more disputes more efficiently if it adopted a suitable arbitration system and operated all forms of ADR including good offices, mediation and arbitration like the World Intellectual Property Organization's Arbitration and Mediation Center. This would in turn, contribute to the development of the information security industry.

ADR FOR INFORMATION SECURITY INDUSTRY DISPUTES

ADR and private autonomy: ADR is a series of methods to resolve legal disputes outside the courts for the interest

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of all parties and for the purpose of decreasing the costs and delays of traditional litigation and of preventing the disputes from being brought to court. The various types of meditation and arbitration are leading examples.

The concept of the rule of law comes from two major streams of thought. The German theory of Rechtsstaat and the Anglo-American rule of law. The German commentators generally define Rechtsstaat as "the state which checks the arbitrary use of its power in shaping national and social life by means of law, using such elements as the binding effect of the constitution, the separation of powers, the lawfulness of administration, procedural guarantees and the protection of trust there by serving the goals of political unity, legal peace and the realization of social justice" (Sang-Kyum, 2009). Korea has also, adopted the theory of German Reichtsstaat and has made the principle one of the bedrock principles of its constitution. It is "the organizing principle of a state which seeks to realize liberty, equality and justice which are the indispensable bedrocks of human life by preparing guidance for action in accordance with the principle of legal primacy and shaping and regulating state activities based on these guidelines" (Young, 2004) or "the state which holds as its aims legal peace and the realization of substantive social justice, wish elements such as the maximum guarantee of human rights, the binding of state power to the constitution and the separation of powers" (Sang-Kyum, 2009).

Private autonomy, meanwhile is a principle of modern jurisprudence that individuals generally regulate their private legal relationships under their own responsibility according to their own free will and that the state does not intervene in these relationships. The theoretical basis for the principle of private autonomy is human dignity and autonomy (Young, 2004). That is the constitution and statutes must guarantee private autonomy as much as possible and when limiting it do so within the bounds of proportionality (Cheol-Ung, 2006). ADR resolves disputes based on private autonomy but with the intervention of the state administrative apparatus and therefore exists on a broad spectrum from the type of ADR where private autonomy is primary and the type where the government's administrative intervention is at a high level. This difference may shape the design and direction of ADR systems (Seong-Yeob, 2013).

Types of ADR: There can be many different taxonomies of ADR methods but one leading categorization is by the body in charge. The body in charge of dispute resolution may be a court an administrative agency or a private body. Here, we will call each administrative ADR, adjudicatory ADR and private ADR (Seong-Yeob, 2013). The types of ADR usually discussed are negotiation, mediation (Yong-Sup, 2004) and arbitration. Negotiation is an autonomous dispute settlement method between the parties whereas in mediation a third party mediator aids the parties in reaching a resolution where they cannot resolve the dispute on their own through negotiation. Arbitration is distinct in that the parties make an agreement ahead of time that they will be finally bound by the decision of the arbitrators. Arbitration has some commonality with litigation in that an arbitral decision is binding on the parties unlike a mediated settlement which is not. Unlike a trial, however, arbitral proceedings are simplified and are final in the first instance without appeal (Kyung-Bae, 2005).

First, in the category of ADR conducted by administrative agencies there are ADR proceedings that replace civil litigation and those that replace administrative litigation. Leading examples of the former are systems for mediation whose legal bases for establishment and operation are found in administrative regulatory statutes. These generally seek to present reasonable solutions to disputes between private individuals through rational interpretations of the administrative regulatory law involved. Another type of "administrative ADR" is a replacement procedure for administrative litigation where an administrative agency seeks to present appropriate resolutions to disputes between private persons and administrative bodies. This is a self-correction function to vindicate private rights and to secure the legality of administrative measures and constitutes a dispute resolution procedure internal to the administrative agency. Second, ADR conducted by the courts (adjudicatory ADR) includes such examples as a ruling of recommendation for compromise under the Civil Procedure Act, judicial conciliation under the Judicial Conciliation of Civil Disputes Act and family conciliation under the Family Litigation Act (Hee-Gon, 2008). Third, private ADR refers to dispute settlement organized and operated privately without legal provision in administrative regulatory statutes. Private ADR may be categorized again into the type where a statute provides that a private body establish a dispute resolution body and the type where such a dispute resolution body was established at will without such statutory basis.

MEDIATION IN THE INFORMATION SECURITY INDUSTRY

The establishment and composition of the Mediation Committee: The Mediation Committee, established to mediate disputes concerning developing, using, etc. information security products and information security services shall be comprised of at least ten but not more than 30 members including one chair person. The Minister of Science, ICT and future planning shall appoint or commission members of the Mediation Committee from

among persons with certain qualifications (Article 25 (1) of the act). The Secretariat shall be established in the Korea Internet and Security Agency under Article 52 of the Act on Promotion of Information and Communications Network Utilization and Information Protection, etc. To assist affairs of the Mediation Committee. The dispute mediation of the Committee has the force of judicial conciliation and therefore, requires particularly high levels of fairness and independence in hearings and decisions. Accordingly, members of the Committee receive certain protections, no member shall be removed from office or dismissed against his/her will except where at least suspension of license is imposed on him/her or he/she is unable to perform his/her duties due to a mental or physical disability (Article 25 (6)) (Choi *et al*., 2014).

The dispute mediation procedure: The Mediation Committee shall prepare a proposed agreement within 60 days from the date on which it receives an application for dispute mediation. Provided that where it intends to extend the period in extenuating circumstances it shall notify the parties to the dispute of the ground for extension and the extended period (Article 26 (2) of the act). In addition to matters provided for in this chapter, necessary matters concerning the organization and operation of the Mediation Committee, methods and procedures for dispute mediation, the management of affairs concerning mediation, etc., shall be prescribed by presidential decree (Article 33).

Information security industry dispute mediation proceeds as in Fig. 1. This information is available in Korean at the Korea Internet and Security Agency website.

Problems with dispute mediation and suggestions for improvement: First, there is inadequate space for the partie's private autonomy in mediations. The greatest merit of ADR is judicial economy in saving the expense and time required for litigation. In order to maximize these gains, mediation procedures should be based on the principle of private autonomy (Moon-Chul, 2007; Sang-Chan, 2012, 2013).

Second, there should be more varied means of dispute resolution. Supporting dispute resolution only through good offices and mediation has limited effect in resolving the unfamiliar and diverse types of disputes that arise. There are cases where mediation is processed but one or more of the parties do not accept the mediation proposal and there are cases that are more appropriate for arbitration rather than mediation. For instance, if the parties want an answer given to them because the amount at stake in the dispute is large and there is only a narrow

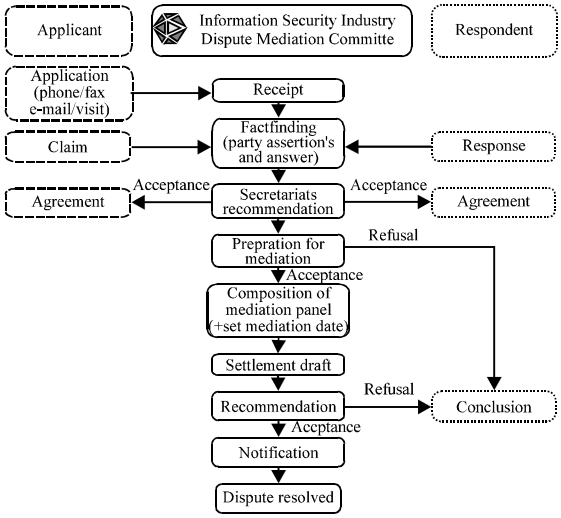

Fig. 1: Process of dispute mediation in information protection industry

margin for negotiation, arbitration may be the advisable means of dispute resolution. In arbitration, one or more arbitrators appointed by the agreement of the parties reach a decision by agreed-upon rules and the resulting decision is enforceable. It is the form of ADR closest to a judicial decision. In the entertainment industry of the United States, the mediation-arbitration hybrid med-arb method was born due to such strengths as confidentiality, the credibility of the intervening third party and the maintenance of ongoing business relations. Med-arb is a dispute settlement process in which the third party is a mediator at first but then takes on the role of arbitrator and makes an arbitral decision if the mediation breaks down (Suh, 2013). Recently there have been calls to adopt arbitration in many different areas. In consumer dispute mediation there are situations such as rejection of mediation proposal where the consumer has no choice but to give up on their rights. In these situations, the argument goes, adopting consumer arbitration would help vindicate consumer rights. Under the Korean family Litigation Act, family disputes may only be resolved by litigation or conciliation. Some argue however, for the use of arbitration by enacting a Family Arbitration Act (Sang-Chan, 2013). The information security industry would similarly see a broader range of disputes resolved if the menu of available options expanded to include arbitration.

Third where the Mediation Committee prepares a proposed agreement, it shall immediately present the proposed agreement to each party to the dispute and each party to the dispute to whom a proposed agreement is presented shall notify the Mediation Committee of

whether he/she accepts the proposed agreement within 15 days from the date the proposed agreement is presented to him/her (Article 29 (1) and (2) of the act). Where the parties to the dispute accept a proposed agreement and the Mediation Committee prepares a mediation agreement and notify the parties to the dispute of the mediation agreement, a settlement on the same terms as that of the proposed agreement shall be deemed reached by and between the parties to the dispute (Article 29 (4) of the act). However, as a rule the third party (mediator or mediation panel) in a mediation process, unlike arbitrators in arbitration proceedings, support the resolution of the dispute rather than make a final decision on it. Therefore, even when a settlement is reached by mediation there is generally no decision with judicial binding effect such as res judicata (Byung-Hyun, 2004). In contrast, settlements mediated by the Mediation Committee have the effect of judicial conciliation and therefore have binding effect and cannot be revoked even if defenses such as fraud, duress or mistake arose in the conciliation process. If a mediated settlement is given the same effect as judicial conciliation such settlement may not be revoked unless one or more of the grounds for retrial under Article 451 of the Civil Procedure Act exist (Byung-Hyun, 2004). There are a number of statutes that give the effect of judicial conciliation to a mediation agreement by an administrative ADR body, however, this is far from ideal in light of guaranteeing citizen's right to a trial. On the contrary, the Mediation Committee should be able to process more mediation cases if the effect of mediated settlements is less binding rather than more on par with compromise under the civil act (Sun-Hee, 2003).

The amount of damages and other aspects of dispute cases that arise in the different areas of the information security industry are widely disparate. Dispute settlement should be similarly varied to include not only good offices and mediation but also such methods as arbitration (Dong-Hak, 2013). The act on remedies for injuries from medical malpractice and mediation of medical disputes as a point of reference has only two study on arbitration proceedings providing for arbitration application, the composition of the arbitration panel and the effect of arbitral decisions. As to the procedure for arbitration, the provisions governing the procedure for mediation in the same act shall apply primarily and the arbitration act shall apply mutatis mutandis supplementarily (Article 43 (4) of the act on remedies for injuries from medical malpractice and mediation of medical disputes). This is a simple and efficient method of legislation. Finally, the effect of the mediation settlement by the Mediation Committee should be amended to "the effect of an agreement between the parties". Arbitration proceedings should be used in order to obtain the effect of a final court judgment (Byung-Hyun, 2004).

CONCLUSION

The Mediation Committee is expected to contribute to the development of the information security industry in Korea by resolving the many disputes that crop up in the course of the industry's growth. Despite its short time in operation, it has resolved disputes rationally and in a timely manner, proving that it has the potential to minimize the social cost of disputes. As seen above however, the mediation system has certain shortfalls that require improvement. For the operation of the Mediation Committee in addition to matters provided for in the act, necessary matters concerning the organization and operation of the Mediation Committee, methods and procedures for dispute mediation, the management of affairs concerning mediation, etc., shall be prescribed by presidential decree (Article 33) and in addition to matters provided for in the act and this decree, the chairperson of the Mediation Committee shall prescribe matters necessary for operating the Mediation Committee following a resolution thereby (Article 25 of the enforcement decree to the act). However, the secretariat refuses to publicize the detailed rules for dispute resolution, citing confidentiality and the general public is unable to access these rules. Matters of general application to dispute resolution should be made public and shared online for the development of the information security industry. Furthermore, the Mediation Committee needs the legal basis to utilize varied ADR methods ranging from good offices and mediation to arbitration. We expect that the procedures and operation of the Mediation Committee will be improved through amendments to the act. Information security industry dispute mediation occupies a middle ground between administration and adjudication and as such it should function as a more complete and effective alternative means of dispute resolution.

ACKNOWLEDGEMENT

Joo-suk Park and Sung-jun Kim equally contributed to this research.

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