

Japan's Treatment of Unfair Labor Practices: The Interplay of Adjudication and Mediation

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Introduction

Japan's Labor Relations Commissions (LRCs) are independent expert administrative agencies established in 1946 at both the prefectural and national levels. They are authorized to conciliate both collective & individual labor disputes presented by either party, and to adjudicate complaints of Unfair Labor Practices (ULPs) presented by the union. The conciliation of Individual Labor Disputes (ILDs) was officially added in 2001, through the Act on Promoting the Resolution of Individual Labor-Related Disputes (Law No. 112 of 2001, article 20 paragraph 3). Historically, the LRCs' main role had been the resolution of Collective Labor Disputes (CLDs), through their adjustment by conciliation, mediation or arbitration (based on the Labor Relations Adjustment Act, Law No. 25 of 1946) and adjudication of ULPs (authorized in the amendment of 1949, Labor Union Act, Law no. 174 of 1949; herein LUA), such as discrimination against union members or refusal to bargain collectively with a labor union (Article 7, LUA). Indeed, until the 1980s, the LRCs were dominant in the resolution of CLDs. However, with the decline of CLDs since the late 1970s and the rise of ILDs since the 1990s, the weight of labor disputes gradually shifted to the ILDs². Currently, over half of the prefectural LRCs handle annually 0-3 CLD cases³. Thus, to date most of the prefectural LRCs also conciliate ILDs. Based on the knowledge the LRC has accumulated over 70 years history, according to the Central LRC chairperson, Professor Ryuichi Yamakawa, it strives to continue to support the smooth development of Japan's economic system, as an impartial and specialized institution for the resolution and adjustment of labor and management disputes⁴.

While assorted Japanese institutions resolve labor disputes (mainly individual), by mediative means, the LRC's authority to issue orders regarding employers' ULPs, once settlement facilitation has failed, is unique. This authority includes interplay between the adjudicative function of issuing remedial orders and the mediative function of facilitating settlement. The big question is, however, how to combine adjudication and

² Sugeno 2015: 21, 15.

³ Regarding ULPs, in 2015 in 26 out of 47 Prefectural LRCs there were 0-2 new cases (Chūrōi Nenpō Heisei 27, Kanmatsu Tōkeihyō, Table 1-1, p. 1). Regarding adjustment of CLDs, 30 Prefectural LRCs received 0-4 new cases in 2015 (there, table 11, p. 11). <http://www.mhlw.go.jp/churoi/nenpou/dl/h27/kanmatsu.pdf> (last entry June 4th, 2017).

⁴ Greetings by the Central LRC chairperson Ryuichi Yamakawa, <http://www.mhlw.go.jp/churoi/soshiki/aisatu.html>.

mediation? Combining adjudication and mediation requires tuning the correct balance between “natural” justice, due-process rights, and efficiency. This becomes more crucial when mandatory rights are involved, economic powers are imbalanced, or if any of the disputants is an organization or a group. Labor disputes brought to the ULP procedure usually involve all three features.

In order to facilitate the evolution into a new role in labor dispute resolution, gaining a deep understanding of the LRC’s uniqueness in the field is essential. Analysis of the interplay between adjudication and mediation in the ULP procedure serves two goals: (1) Deeper knowledge of a main characteristic of the LRCs, important background knowledge when thinking of the re-activation of the LRCs, and (2) Deeper knowledge in dispute resolution, regarding the inter-relations between adjudication and mediation, important knowledge in the quest to improve dispute resolution. This article aims to provide a better understanding of these both directions through a long-term analysis of the ULP system⁵.

The framework I used in this article extends a 3-dimensional model I previously developed (Ben-Sade, 2001; 2013), for analyzing the interplay between mediation and adjudication. Emerging from that research, both empirically and analytically, my present working hypothesis is that the close coordination between adjudication and mediation found in the LRCs (and in the Labor Tribunal System) , reflects a common view in Japanese conflict resolution practices, by which both processes are seen as complementary ways to restore what is perceived as "harmony" (*Wa*). Through a longitudinal research, I examine to what extent this view is held by participants and practitioners in either system, and how this view affects the merits and demerits forecasted by my model.

⁵ This article is part of my PhD dissertation (in statu nascendi), at the Hebrew University of Jerusalem, in which I develop an integrative framework for analyzing the interplay between adjudication and mediation; apply this framework to comparative analyses of two Japanese public institutions for resolving labor disputes, namely the LRCs and the Labor Tribunal System, and use this framework to examine whether these two systems constitute a new paradigm of dispute resolution.

In what follows, this article closely examines the interplay of adjudication and mediation in the ULP system up to the 2004 reform⁶. Chapter 1 presents the research field in a nutshell: The theoretical model used in this article is described in sub-chapter 1.1. Sub-chapter 1.2 outlines the empirical research it is based on. The framework of the interplay model in the context of the ULP system is explained in sub-chapter 1.3. Next, chapter 2 analyzes the interplay model in the ULP system following three axes: Process-Distinction Level (2.1), Issues-Overlap Degree (2.2) and Process-Sequence Flexibility (2.3). Chapter 3 concludes the discussion by grading the interplay intensity in each axis, based on the analysis in chapter 2. (3.1). Finally, the implications of this interplay in the role that the LRC played, the need for reform, and future research topics are briefly discussed in The Concluding Remarks (3.2).

This article is based on a longitudinal research enabled by generous logistical and financial support from several institutions. My sincere gratitude goes to Professor Ehud Harari who introduced me to the field of Japanese labor relations when I was an undergraduate student at the Hebrew University of Jerusalem, and has actively believed in me ever since. I feel very lucky to have received the (then) Monbuscho scholarship from October 1997 to March 2001, under the superb guidance of Professor Kazuo Sugeno. Ever since, he has provided wise direction and active support without which the continuation of this research would not have been possible. I thank for invitation to Japan in 2009 by the Global Centers of Excellence program of Tokyo University, in 2016 by the Japan Institute for Labour Policy and Training (sic; JILPT), and in 2017 by the Labor Research Center, to advance my comparative research of the Labor Tribunal System (LTS) and the LRCs. Special thanks are due to Professors Kazuo Sugeno, Takashi Araki and Masahiko Iwamura for having made these visits possible and fruitful. In addition, I am extremely grateful to Professor James Blum for his generous support. I would also like to express my sincere gratitude to all my interviewees over the years, for their helpful interviews, their patience with follow-up questions by emails and their indispensable help in enabling me to achieve a better understanding of the LTS and the LRCs. My deepest appreciation goes to my teachers and colleagues at Rohan and in

⁶ In 2004, as part of a large-scale judicial reform, the Trade Union Act was amended (see 3.2 Conclusions, paragraph one before last). On the 2004 reform, see Sugeno 2013: 5-9, Sugeno 2017: 1050, Yamaguchi 2016: 17.

JILPT who have provided me with indispensable support and critique. I also thank Mitsuji Amase, Shinichi Nakamura, Kayo Amano and Masaki Otsuka for their support and hospitality during my term at JILPT and beyond it. Special thanks are due to Professor Ryuichi Yamakawa for his illuminating comments on the manuscript. My deepest sense of appreciation lies with my dear friend, Mrs. Mardy Ogilvie Barak, for her precise linguistic editing. Finally, my sincere gratitude goes to my supervisor Professor Nissim Otmazgin, for his endless support and advice.

Chapter 1: The Research Field

1.1 The Theoretical Framework of Interplay

In the matrix of the inter-relations between adjudication and mediation, the two extreme positions, total separation and complete integration are rather rare whereas variations of interplay are abundant. Adjudication and mediation are often combined, whether within a dispute resolution process, such as in court-settlement or med-arb, or within a dispute resolution system, such as court annexed mediation; in advance or in retrospect; the merits and demerits of this interplay depend on the features of the specific interplay and are constantly debated⁷. For example, the debate regarding neutral impartiality is greatly affected by whether the same neutrals are involved, and whether the same issues are discussed, in both functions. In the access to justice debate, the matter of the parties' consent is of great consequence. Considerations of efficiency, effectiveness and fairness are influenced by the timing and flexibility of switching from one process to the other.

In order to analyze the interplay between adjudication and mediation, I shall focus on an interplay model comprising three axes: (1) Processes-Distinction Level – if and what kind of “wall” separates the two processes, (2) Issues-Overlap Degree – the degree of overlap between the issues subjected to adjudication and the issues subjected to mediation, and (3) Process-Sequence Flexibility – the degree of the

⁷ Ficks (2008), comparing the procedures of Sweden, Australia and Japan, has identified five models of general court-connected conciliation and mediation in commercial disputes. However, that research was limited to informal dispute resolution procedures connected to the general courts, excluding arbitration and private ADR institutions.

interchangeability between the two processes. The analysis of each axis affects the merits and demerits of interplay.

1.2 Empirical Research

My longitudinal qualitative research spans a period of 18 years and samples Japanese labor dispute resolution systems over three periods (between 1999 and 2017). In addition to literature review, I used interviews (some with repeated interviewees), and observation of ULP cases and LTS cases. Following is a brief description of my empirical research, focusing on the system relevant to this article, the LRCs.

In 1999, as part of my LL.M. thesis in Tokyo University about coexistence of adjudicative and facilitative functions in the LRCs, I interviewed 20 labor, management and public members, and administrative staff, of six local⁸ LRCs (Hokkaido, Tokyo, Kanagawa, Osaka, Kyoto, Fukuoka) that handle 70% of the annual ULP cases, and of the Central LRC. All public members (PMs) were labor law professors. In addition, I attended hearings (*shinmon*) of ULP cases in two local LRCs (one session in each), and followed an ULP case submitted to review of the Central LRC (hearing and facilitated settlement attempt; five sessions over a period of six months).

In 2009, invited by the Global Centers of Excellence Program of Tokyo University, in addition to interviews regarding the then newly implemented LTS, I conducted follow-up interviews regarding the LRCs. I examined whether the 2004 LRC reform has affected the settlement practice. I also attended an ULP case in Tokyo's LRC (one session, *chōsa* stage)⁹.

In May-July 2016, invited by JILPT, I examined whether the balance between adjudication and mediation has changed 10-11 years after implementation of the LTS and of the 2004 LRCs reform (respectively). Regarding the LRCs, I conducted interviews with PMs from Tokyo LRC (former), and the Central LRC (former & current), and Central LRC administration staff. I conducted several follow-up interviews in February-March 2017, when I was invited by the Labor Research Center (*rōdō mondai*

⁸ Prior to the 2004 reform the Prefectural LRCs were called Local LRCs.

⁹ In all four ULP cases I have witnessed, the PM heading the tripartite team was a labor-law professor.

risāchi sentā), including PMs from Tokyo LRC (current), and the Central LRC (former & current).

In principle, each interview was based on a questionnaire submitted in advance, conducted in Japanese¹⁰, lasted 60~180 minutes and was recorded. Several interviews involved follow-up questions for the sake of clarity or interest.

The strength of this survey stems from its extent, spanning over a period of 18 years. This has enabled the attainment of deep insight of the resolution philosophy of labor disputes in Japan. Surveying the LRC and the LTS at different times of their evolution has gained me a historical perspective of their development, and through it, of the general development regarding dispute resolution philosophy in Japan. My research findings demonstrate that the basic philosophy, which sees the mediation and the adjudication paradigms as complementary ways to resolve a dispute and restore the relations between the parties, seems to have remained unchanged. This article presents the practice of interplay between mediation and adjudication in the LRCs until the 2004 reform, knowledge of which is essential in order to understand in depth the later-developments in labor dispute resolution in Japan, such as the Labor Tribunal System, or the reform of the LRC in 2004.

1.3 The Framework of the Interplay Model in the ULP System

Following the above description of the general framework of The Interplay Model between Adjudication and Mediation (sub-chapter 1.1.) and The Empirical Research (1.2), in this sub-chapter I shall present the framework of the interplay model within the specific context of the ULP system.

a. The Adjudicative Function of the LRCs in the Unfair Labor Practice System

The main adjudicative function of the LRCs is its power to investigate and remedy ULPs¹¹. The ULP remedial procedures are formal adversary trial procedures in which

¹⁰ In 2016-2017, anticipating the dissertation to be in English, interviews with PMs of the Central LRC were conducted in English.

¹¹ Arbitration of labor disputes as prescribed by the Labor Relations Adjustment Act is rare and beyond the scope of this work (see Sugeno 2015: 9).

the complainant (union or worker), and the respondent (employer), confront one another. Following a complaint, the LRC conducts an investigation (*chōsa*), and a hearing (*shinmon*). Following these, the LRC determines according to the evidence whether an ULP has been committed, and issues an order, dismissing the complaint or providing administrative remedies.

Each LRC comprises equal numbers of persons (5-15) representing labor, management, and the public interests (Paragraph 1 of article 19, LUA). This is the tripartite structure of the LRC. Usually a tripartite team of three members, chaired by the PM, is assigned to a specific case¹². Labor and Management members are limited to participating in the remedial procedure prior to the decision. The authority to decide each case is exercised through a conference process, in which all the PMs of the commission, and only they, participate¹³. In spite of their adjudicative function, PMs need not be members of the Japanese Bar (*hōsō*), or graduates of legal education. Rather, expertise in labor problems is emphasized¹⁴; thus, they include journalists and writers. Indeed, this dearth of legal expertise is possibly one of the factors behind the high reversal rate from which the LRCs orders have suffered in the 90s, which eventually led to the 2004 reform¹⁵.

It should be noted that the ULP remedial system has been enacted as a system that regulates only acts of the employers, not those of the unions¹⁶. This historical legal-based bias, favoring the unions in its adjudicative function, has portrayed the LRC as a pro-union institute. This pro-union profile has influenced the operation of the LRC throughout the years, as well as its development. The LRCs needed to creatively find ways to balance this institutional bias, and this has intensified the motivation to facilitate settlements rather than issuing orders. The refusal of management to consider giving the LRCs additional adjudicative powers, when a forum for resolution of ILDs was

¹² Recently, in prefectural LRCs receiving at the most a case per year, a tripartite team of six, and sometimes even nine members (two or three of each category) preside over a case, to gain experience. Interview with an administration staff member of the Central LRC, July 14th, 2016.

¹³ However, since the 2004 amendment, in the Central LRC most cases are handled by a five-member panel (2004 Amendment to the LUA, article 24-2(1)).

¹⁴ See Araki 2002: 192.

¹⁵ Currently, the vast majority of PMs are either practicing lawyers or law professors. Sugeno 2015: 6.

¹⁶ Sugeno 2002: 693.

sought by the government around the turn of the century, also appears connected to the institutional bias against employers¹⁷.

b. The Mediative Function within the Unfair Labor Practice System

The mediative function of the LRCs in the ULP system comprises three categories: (1) Facilitated Settlement (*Kanyo Wakai*), (2) Un-facilitated Settlement (*Mukanyo Wakai*) and (3) Withdrawal. (1) In Facilitated Settlement (FS), a settlement is reached thanks to counseling, conciliation etc. by the tripartite team. This is the mediative authority of the LRC, legalized in the LRCs' 2004 reform (article 27-14, LUA➔). In practice, since the ULP system was enacted in 1949, FS has accounted for the majority of the settlements¹⁸, and each year the number of FSs exceeds that of cases in which a decision or a remedy is given¹⁹. This abundance reflects the LRCs' prevalent attitude that FS is more important than its adjudicative function. The LRCs' orders are seen as ineffective in improving labor relations, as the loser will often appeal the case (to either the Central LRC or the District Court), and the unstable (*fuantei*), situation will continue. Therefore, instead of deciding right and wrong by an order, by facilitating settlement which fills an educational and guiding role, one can advance the building of healthier labor-management relationship²⁰. Accordingly, settlement is advanced with great dedication.

The labor and management members, distinguished figures in their respective community (often retired), play a major, or even decisive role in the achievement of settlement²¹. Interestingly, the legal basis for this mediatory authority of FS has been officially added only in the 2004 reform (article 27-14, LUA). Settlements may be facilitated at any stage²².

¹⁷ Derived from interview with PM C former member of the Central LRC, May 25th 2016.

¹⁸ For example, in 1998, out of 343 cases concluded in all the local LRCs, 255 cases ended in settlement or withdrawal. Facilitated Settlement accounted for 158 of those cases and un-facilitated settlement for 52. Ishikawa 1998: appendix p. 2.

¹⁹ At the end of the 20th century the percentage of FS cases has gradually increased, compared with remedial orders. During the years 1994 to 1996, FS cases were 1.2~1.3 times the remedial orders (36%-39% of the total number of cases), in 1997 they amounted to 1.6 times (42% of the total number of cases) and in 1998 they increased to 1.9 times of the remedial orders (46%) (derived from Ishikawa (1998) Table 2-2 in the statistics appendix). The percentage of FS has remained high also in recent years. In 2010-2014 FS accounted annually for 40%-48% of the cases which have ended (computed from table 2-1, p. 3, Chūrōi Nenpō 2015).

²⁰ Ben-Sade 2001: 124.

²¹ Ben-Sade (2001: 120) noting that one of the interviewees estimated their role as 70-80% of the reason for settlement success; PM C former member of the Central LRC, interview with author, July 2016.

²² According to all the local LRC statistics, FS cases are concluded either before or after the hearing (about 50% of

(2) Un-facilitated Settlement refers to a settlement reached by labor and management without the assistance of the LRC, although have reported to it. (3) Until the 2004 reform, withdrawal of the complaint by the union or the worker was the principal means for terminating the case, pursuant to a conclusion of settlement (of either kind)²³. However, under the statistical categories of case conclusion, FS and Un-Facilitated Settlement are recorded separately, in distinction from “withdrawal”. Thus, the statistical category of “withdrawal” includes both real withdrawal cases²⁴ as well as un-facilitated settlement cases in which the settlement was not reported to the committee²⁵.

Chapter 2 Analysis of the Interplay Model in the ULP

What kind of interplay materializes in the ULP system, and accordingly, what are its prominent merits and demerits? In order to answer these questions, I shall analyze the interplay between the LRCs’ adjudicative authority, to investigate and remedy ULP cases, and mediation authority, to facilitate case settlement, using the triple axes interplay model described above : (1) Process-Distinction Level – assessing the extent to which the ULP system distinguishes between the adjudicative process (from complaint, through hearing and up to the PM’s conference, and finally the issuing of a remedial order), and the mediative process (attempting to facilitate settlement); (2) Issues-Overlap Degree – assessing the degree of overlap between the issues the order will (potentially), deal with once settlement facilitation fails²⁶ and, the issues dealt with within the settlement facilitation attempt; (3) Process-Sequence Flexibility – assessing the process-interchange design, and the flexibility to change from the adjudicative process to the settlement attempt, and back to the adjudicative process and so forth.

each). See Ishikawa 1998: 6.

²³ Even after the 2004 reform, FS cases in the prefectural LRCs are often terminated by withdrawal by the union, and not by article 45(2) of the LUA (interviews with PM B of the Tokyo LRC, March 6th 2017 and with PM D of the Central LRC, March 7th, 2017).

²⁴ For example, a case in which pursuant to the bankruptcy of the company, the union withdrew its complaint (example given by PM D of the Central LRC, interview on March 7th, 2017).

²⁵ The term “mediative function” will refer to the settlement function of the LRCs, without distinguishing between the different categories. In contrast, the term “mediative authority” will refer specifically to settlement facilitation.

²⁶ The term “Fails” stands for “non-achievement of settlement”, and is not meant to be judgmental.

2.1 Process-Distinction Level

The extent to which a system distinguishes between the two processes is a continuum; location and settings, procedural rules, identity of neutrals – are all features in which differences create distinction, and similarities beckon integration of the two processes.

Assessing the level of distinction between the two processes in the ULP system of the LRCs (remedial procedure and FS), shows that generally there is a partial distinction. Two kinds of sessions are used in the ULP remedial procedure: *Chōsa* (investigation), and *Shinmon* (hearing). The formal role of the *Chōsa* is to sort out the issues (*sōten seiri*). However, when appropriate, the possibility of settlement is explored²⁷. Thus, the *Chōsa* has both an adjudicative role (sorting out the issues in preparation for the hearing), and a mediative role (FS attempt). In the hearings, fact-finding regarding the alleged ULP act is done (article 27(1), LUA).

Hearings and FS meetings are distinguished by name (*Shinmon vs. Chōsa*), differ in dates, in the rooms allocated to them within the commission²⁸ and also in the procedural rules governing them. Mainly, in the hearings both parties are present, and an adversarial procedure of fact-finding is conducted through direct and cross-examinations of the parties and other needed witnesses (article 27-7, LUA). The fairness of this adjudicative process is further guaranteed by it being, in principle, open to the public (article 41-7(2), of the regulations).²⁹ In contrast, FS meetings are usually conducted in caucus³⁰ (however, announcing the beginning or the ending of a settlement attempt³¹, or sorting out the issues, is conducted when both parties are present). FS meetings are held behind closed doors.

²⁷ That point that the formal role existed also prior to the 2004 reform was verified with PM D of the Central LRC, interview with author on March 6th, 2017.

²⁸ Based on the author's experience in Tokyo's LRC and the Central LRC.

²⁹ Exceptionally, the hearing may be conducted behind closed doors, by a decision of the PMs' conference, that this is necessary (same article), see Yamakawa 2009: 334. For further details regarding the hearing procedure, see Sugeno 2017: 1060-1062.

³⁰ Ben-Sade 2001: 118; Interview with PM A of the Central LRC, May 19th, 2009. Other examples of situations in which both parties attend the settlement table are: Following a specific request of a party; when direct communication following a prolonged dispute is important; in the final stage of settlement; when the PM decides one or two last points of dispute in front of the parties.

³¹ Ben-Sade 2001: 118.

While the distinction between the hearing and the *chōsa* is quite clear, the distinction between the FS attempt and adjudication roles of the *chōsa* are at times blurred; blurring is inevitable if caucusing is used in both.

The integration between the adjudicative process and the mediative process is further strengthened, as shown below, by (a) the personnel overlap and (b) the use of information from the FS attempt in the final adjudication stage within the LRC.

a. Personnel Overlap

A tri-partite team is designated to deal with a specific ULP case. The hearing and the FS attempt are both conducted by the same tri-partite team. This means that there is much personnel overlap between the adjudication and the mediation. However, this does not reach 100% overlap. Moreover, the overlap is asymmetric (the answer to the question “How many of the adjudicators are also the mediators?” differs from the answer to the question “How many of the mediators are also the adjudicators?”), due to two unique features of the LRCs: (1) The labor and management members’ role in the settlement attempt, and (2) The PMs’ conference role in the ULP remedial procedure.

(1) The labor and management’s members’ role in the LRCs is to represent the interests of their respective groups and they are not expected to be neutral (though in practice they often are and their help in softening their party’s position and in bringing it to compromise is often invaluable). The labor and management’s members’ expected non-neutrality is reflected both in the mediation practice and in the adjudicative role that they fill. In the FS process, the labor and management’s members caucus alone with the party they represent (without the rest of the tripartite team), to learn its true opinion (*honno*), or to advance concrete settlement suggestions. In such meetings not only do they express their own legal impression of the case, but often they also convey the PM’s view as a settlement persuasion technique³². In contrast, in their adjudicative role, the labor and management members are limited to participation in the hearing. This comprises an informal discussion with the PM of their team once the hearing has ended and submitting an opinion to the PMs’ conference before its deliberation (on whether an ULP has been committed and the order is to be issued) (LRC regulations, article

³² PM D of the Central LRC, interview with author, May 2009.

42(2))³³. Thus, a mere 33% of the tri-partite team conducting the mediation has the power to decide the order. Because the labor and management members are mainly mediators, their practice as mediators is more flexible.

In contrast, the PM holds a full adjudicative role. This apparently limits his or her role as a mediator. PMs do not caucus alone with a party, but only as part of the tri-partite team, and tend to avoid revealing their legal impression of the case. If PMs do express their legal impression, this is often done implicitly, e.g. via indirect questions (“How good is the evidence proving a certain point?”, or, “According to precedence, the situation is such and such, how does this affect your opinion?”³⁴).

The explanations given for this tendency to avoid revealing the legal impression varied and mostly were directly related to the structure of the personnel overlap. Three practical explanations were given: (1) FS is generally a conciliatory settlement, and the PM cannot advance it based on his legal impression of the case; (2) If the PM expresses his legal impression, the parties react to it, and achieving settlement becomes difficult³⁵; and (3) If the PM expresses his impression and eventually settlement attempt fails and the order differs from the expressed forecast (because of the conference system), the trust in the LRC will be damaged³⁶. In practice, thanks to the intermediary role that the labor and management’s members fill between the PM and the parties, the PM does not need to directly persuade the parties³⁷.

Cultural and legal explanations also exist as to the PMs' practice of with-holding his or her legal impression of the case. The cultural explanation argues that in Japanese society one avoids expressing directly what the other should do³⁸. According to the legal explanation, the PM may not disclose his legal impression of the case, to maintain his neutrality, in case the settlement attempt fails, necessitating him to write the order³⁹.

³³ Apparently in 1999 the practice in the local LRCs was divided between oral, both oral and in writing, or only in writing; the practice in the Central LRC was oral (Ben-Sade 2001: 138-139). See also interview with PM A of the Central LRC in 2009 and 2016.

³⁴ Examples given by PM D of the Central LRC, interview with author, May 2009.

³⁵ PM C former member of the Central LRC, interview in 2016.

³⁶ PM D of the Central LRC, interview with author, May 2009.

³⁷ Ben-Sade 2001: 119,133; PM D of the Central LRC, interview with author, May 2009.

³⁸ Ben-Sade 2001: 132-133.

³⁹ Ben-Sade 2001: 132-133 & PM D of the Central LRC, interview with author, May 2009.

Personally, I find these two explanations less convincing; disclosing a legal impression in the ULP remedial procedure is avoided, although, in the LTS and the courts, the cultural norm is contradicted, as the judge expresses his or her legal impression; similarly, this practice of expression in the LTS and in court, performed by the adjudicators, acting as mediators, considered legitimate, contradicts the neutrality infringement explanation. Thus further research is required why disclosure of legal opinion is acceptable in the LTS and in court, but not in the ULP remedial procedure.

(2) As mentioned above, the adjudicative authority to decide each case is exercised through a conference process, in which all the PMs of the relevant commission, and only they, participate⁴⁰. Normally, conference is conducted at least twice regarding each case in the local LRCs, reaching up to five times in difficult cases⁴¹. Mostly, the PM who presided over the case prepares the draft of the order. Numerically, normally between 7.69%~20%⁴² of the PMs who decide the order have participated in the FS process, depending on the size of the commission (5-13 members), and the number of PMs who were part of the team (normally one; however, in small LRCs with almost no cases, also two PMs conduct the process, multiplying the personnel overlap to two out of five, e.g. 40%⁴³). However, the functional role of the PM who presided over the case is likely to be much more significant than his numerical value. According to the surveyed LRCs, the order's draft's conclusion, which the PM prepared, is usually approved by the conference, though it does happen that a certain part of the fact finding, the reasoning and even of the conclusion is corrected⁴⁴. Moreover, if there is general disagreement among the PMs, they will tend to follow the involved PM's opinion

⁴⁰ However, since the 2004 amendment, in the Central LRC most cases are handled by a five-member panel, according to article 24-2(1) of the amended LUA. Interview with an administration staff member of the Central LRC, July 14th, 2016.

⁴¹ Ben-Sade 2001: 137-138.

⁴² In the largest Prefectural LRC, which is Tokyo LRC, the PM, who also presided over the case constitutes only 7.69%.out of the 13 PMs who participated in the conference (in the Central LRC, prior to the reform, the percentage was as low as 6.66%, one out of 15 PMs). In the smallest LRCs, with only five PMs, the percentage will be as high as 20% (one out of the five adjudicators had participated at the FS attempt).

⁴³ Very rarely, three PMs are part of the team, comprising 60% of the conference.

⁴⁴ Ben-Sade 2001: 141.

(especially if he is a law professor), as he has experienced the real essence of the case⁴⁵.

b. Use of Information from the Facilitated Settlement Attempt

One of the reasons why performance of adjudication and mediation by the same neutral intensifies the debate, whether the integration of the two is "fraught with danger or ripe with opportunity"⁴⁶, concerns the usage of information from the mediation attempt in the adjudication process⁴⁷. Information which is not supported by evidence and especially information learned while caucusing without having given the other party a chance to refute it, is considered infringing natural justice⁴⁸.

In the LRCs, information from the settlement attempt is likely to become common knowledge of all the PMs in that commission through two venues. First and mainly, via the PM who presided over the case, who has an active role in the discussion at the PMs' conference. Indeed in 1999 almost all interviewees answered positively, that information regarding the settlement attempt was offered, because it deepens the understanding regarding the nature of the case, its background, the content of the antagonism between management and labor, the attitude of the employer etc. If the settlement attempt was not mentioned at first by the concerned PM, it will likely be questioned- about during the discussion and answered then, so that practically it is often discussed, one way or another⁴⁹. Second, via the labor and management's members who voice their opinion in front of the conference, and mention the circumstances of the settlement

⁴⁵ In 1999 two local LRCs specifically talked about the leading role that the presiding PM holds. Ben-Sade 2001: 140. See also the description regarding the decision process when there are opposite opinions in the conference, there, 142-143.

⁴⁶ Elliot 1996: 175.

⁴⁷ Pappas (2013: 42). Wissler (2011) notes that lawyers view settlement conferences with the judges assigned to the case less favorably than other models of settlement procedure. Among other, involvement of the same judge at the settlement stage raises questions of bias and prejudice re later decisions (p. 321). Most judges (in the Southern District of Ohio) preferred staff mediation than self-involvement in settlement (p. 299); one of the most important benefits they saw in staff mediation was that it allowed them to avoid the risk of not appearing objective after they had conducted in-depth settlement conferences (p. 288).

⁴⁸ One attempt to mitigate this problem is by introducing an evidence rule that only information introduced during caucus by either party independently will be admissible for the adjudicative stage (Pappas 2013: 42 describing Weisman's suggestion re Med-Arb). However, this relies on the dubious assumption that professionals successfully ignore inadmissible information. Wistrich, A.J., Guthrie, C. & Rachlinski, J.J. (2005: 1323-1327) discuss their findings that judges have difficulties disregarding inadmissible information (especially if review by a higher court is considered unlikely) and therefore suggest separating "Managerial judging" from "Adjudication".

⁴⁹ Ben-Sade 2001: 140.

attempt⁵⁰. Therefore, the question arises, whether use of information from the settlement attempt, especially one learned during caucus, is permitted and to what extent, in deciding the remedial order.

In the LRCs, evidence to be used for the order must have been submitted at the hearing. All other information should be disregarded. However, once it has been decided that an ULP had been committed, information from the FS attempt may be taken into account when deciding the content of the remedial order. While this was the rule in 1999, disregarding information learned during settlement improved significantly, since the 2004 reform required meticulous referral to evidence within every written order.

2.2 Issues-Overlap Degree

Once the processes-distinction level has been identified, the next step in assessing the interplay level is inquiring to what degree the issues subjected to adjudication overlap with the issues subjected to mediation. A conflict brought to adjudication usually comprises a legal conflict and an emotional conflict. Within the legal system we tend to ignore these latter elements and "focus" on the "physical", or "external", world, in which the legal conflict manifests. A dispute resolution system can distinguish between the two, assigning adjudication to deal with the legal conflict and mediation with the emotional conflict. To tell an extreme example given in my survey, a union leader was fired: the legal conflict was whether it was an ULP, whereas the emotional conflict was that the union leader's wife offended the company's president⁵¹.

The broader the overlap between the issues dealt by the two processes, the more intense the interplay between the two and vice versa. Put differently, a narrower issues-overlap means that fewer issues are subjected to both processes and thus mitigates the effects of the potential overlap. For example, the chilling effect in mediation might be partially mitigated, when the topics discussed in the mediation are irrelevant for the adjudication stage.

⁵⁰ Pointed out by one interviewee, Ben-Sade 2001: 141.

⁵¹ Example given by PM A of the Central LRC, interview with author, July 12th 2016.

To complicate things further, the issues-overlap is not necessarily symmetric regarding the two processes. Thus, the degree of overlap between the issues subjected to adjudication and the issues subjected to mediation necessitates asking the question twice, once from the perspective of each process. Exemplifying this on the LRCs, (a) the degree to which FS issues, are issues that are subjected also to the remedial process, and (b) the degree to which issues dealt within the remedial order, were issues previously subjected also to the FS attempt, are two separate questions.

For example, in a given company with two unions, only workers who were members of the major union were given company towels, as a symbolic recognition of their good services to the company. The minority union sued for ULP, claiming the non-receipt of the towels was discrimination. The minority union did not necessarily feel passionately about the towels, but rather, wanted not to be discriminated against⁵².

Let us assume that the towels discrimination issue weighs 25% within the broader issue of the whole relationship between the employer and the minority union. Settlement facilitation attempted to resolve the parties' whole relationship, whereas the order was limited to the towels issue (assuming that the FS can be on broader issues than in the application, see discussion in (1) below). In such a case, the answer to (a) to what degree the FS issues, are issues that are subjected also to the remedial process, is only 25%, whereas the answer to (b) to what degree the issues dealt within the remedial order, were issues previously subjected also to the FS attempt, is 100%. All of the issues subjected to adjudication (the towel discrimination), were dealt with also by mediation. This numerical example shows that when the scope of the issues dealt with by one process is broader than the scope of issues subjected to the second process, the issues-overlap of the first process will be narrower than the issues-overlap of the second process.

A narrower issues-overlap means that interplay is potentially less intense, on both its merits and problems. More specifically, when the degree of mediation issues-overlap is only partial, problems known to arise in mediation, because of the adjudication expected to follow, such as the chilling effect, might be mitigated.

⁵² Yamakawa 2014: 19-20.

To what extent will the problems in the mediation be mitigated by the partial overlap, and how the difference in issues-overlap degree between the two processes will impact the participants (the parties and the neutral(s)) are questions requiring further research (see discussion below in a(2)). Another way to mitigate the issues-overlap of integration is to restrict the adjudicator's authority. The limited adjudicative role that the labor and management members possess enables them to play a larger role in the mediative stage (see discussion above in 1(a)(1))⁵³.

a. The Scope of Facilitated Settlement

(1) Restriction of FS by the Scope of the Complaint

When examining to what extent FSs are restricted by the scope of the complaint, one needs to distinguish between two questions: (i) Whether the content of settlement is restricted to the relief requested in the complaint, and (ii) Whether one can add to the settlement table an issue not mentioned in the complaint.

Regarding the first question, there seems to be a consensus that the parties are not limited to the relief requested in the complaint, as even the LRC in deciding the remedial order is not limited by the relief requested in the complaint, but being an administrative body has discretionary power to decide otherwise, in order to improve the labor relations between the parties. A typical example may be a dismissal case of a union member in which the parties agreed on monetary damages for the dismissed worker coupled with his voluntary retirement, instead of his returning to work, as originally requested in the complaint.

Regarding the second question, attitudes vary among the PMs between a strict attitude and a more moderate one, depending also on the circumstances. The strict attitude negates adding new issues to the settlement table, and requires instead a submission of a new ULP case regarding the new issue (eventually the cases may be handled together). This attitude derives from the concern that adding a new issue is likely to prolong the settlement attempt, countering the wish to resolve the case in a timely manner.

⁵³ Another example is the MedALOA dispute resolution process (Mediation And Last Offer Arbitration). In MedALOA the participants first attempt voluntary settlement through mediation, but if they reach an impasse, then they submit their final offers to an appointed arbitrator, who must limit the award to one of the final offers (Landry 1996: 268).

In contrast, the moderate attitude emphasizes settlement-oriented handling, and enables adding new issues to the settlement table, subject to the employer's consent. By this perspective, settlement is regarded best and the parties' (common), wish regarding the settlement scope should be respected. If the other party negates adding issues, the original claim will define the settlement scope. Furthermore, if the settlement attempt fails, the scope of the order will be limited to the original claim⁵⁴. The conflict between the strict and moderate attitudes regarding addition of a new issue to the settlement table is one manifestation of the constant dilemma between swift resolution (limiting the time allocated for settlement attempt), and settlement-oriented handling that may lead to procrastination⁵⁵.

Among the PMs surveyed in 1999, the moderate attitude was prevalent. It was explained as suiting the LRCs' mediation practice. In the LRCs the passage of time enables the relationship between the union and the employer to develop, thus the original dispute may wane while other issues may gain importance. Sometimes a FS is reached on entirely different issues than those in the original claim⁵⁶.

(2) Restriction of FS by the Framework of the ULP System

Among moderate-attitude PMs, another question arises, whether the scope of FS is restricted by the limitations of the ULP system: Can FS handle issues that do not constitute an ULP (article 7 (1)-(4), LUA), therefore being beyond the ULP system's scope to begin with⁵⁷?

In the 1999 survey, the answers to this question can be classified as (i) rigid doctrine, (ii) semi-rigid doctrine and (iii) flexible doctrine⁵⁸. The rigid doctrine and the semi-rigid doctrine both view the authority of the LRC to facilitate settlements in ULP cases as derived from the LRC's adjudicative authority defined in the LUA. Therefore, both view the scope of FS as limited by the scope of the ULP system. However, these

⁵⁴ Ben-Sade 2001: 125. From Yamakawa's description (2014: 19-20) it seems that he holds the moderate attitude.

⁵⁵ Regarding the conflict between settlement-oriented approach and procrastination in Tokyo LRC, see discussion by Araki 2015: 69-72.

⁵⁶ PM D of the Central LRC gave an example of a specific case: the original claim had been that the company had not bargained in good faith (ULP by 7(2)). While settling the dispute the issue of summer bonus became important and the compromise dealt mainly with it; by now the parties have attached much less importance to 7(2).

⁵⁷ Issues that are beyond the scope of the system are likely not to be part of the written complaint, hence will constitute new issues brought to the settlement table, a practice that is negated by the strict attitude from the outset.

⁵⁸ Ben-Sade 2001: 126.

two doctrines differ once the parties wish to discuss issues beyond the scope of the ULP system: A rigid-doctrine-PM will ask the parties to agree on these issues separately, as an un-facilitated settlement (on an external piece of paper which the LRC will not sign). On the other hand, a semi-rigid-doctrine-PM will guide the parties to file for conciliation of these issues as a CLD. The LRC will thus continue to assist the parties' negotiation under its CLD conciliation capacity.

The flexible-doctrine too approves of the active involvement of the LRC with issues beyond the scope of the ULP system. However, in contrast with the semi-rigid-doctrine-PMs, the flexible-doctrine-PMs incorporate such issues within the FS attempt, often with even higher motivation (settlement being the only real chance to resolve the case, as in an order the commission will have no choice but to dismiss (*kikyaku*), the claim⁵⁹ or give an order that misses the real issue of the case⁶⁰). Legally, the emphasis here is on the parties' power. The argument being that since FS depends on the consent of both parties, there is no need to add the system's limitations to it. In addition, practically, if the parties are already sitting to the settlement table, and the issue is one that they may dispose of, it is desirable to encourage this momentum and enable them to continue talking and reach an agreement.

An ILD dressed as a CLD presents a classic example. A typical scenario would be as follows: a dismissed worker joins a community union following his dismissal and asks the union to help him out. The community union demands the employer to conduct collective bargaining regarding the dismissal of the worker, who has in the meantime become a union member. A refusal by the employer to bargain in good faith would be formally an ULP. However, the real issue is whether the dismissal was justified (*seitōna riyū*). The dismissal itself could not be an ULP, having occurred before the worker joined the union. As one interviewee explained in the 1999 survey, "Obviously, it is more a matter for the LRC as conciliator or for the regular civil procedure (in 1999, the special administrative services of the LB, as well as the LTS, did not yet exist – W.B.). However,

⁵⁹ In practice the LRCs have dealt in FS in cases that did not belong to the system. For example, a case of a worker who had been dismissed due to mental sickness caused by work was brought by the union to the Tokyo's LRC as an ULP case. To the commission it was obvious that if the parties fail to reach an agreement the commission will have no choice but to reject the claim of the union as no ULP had been committed (interview with PM A of the Central LRC, May 2009).

⁶⁰ For example, ordering an employer to bargain in good faith with a community union, when the real issue is the dismissal of the worker (see description in next paragraph).

if the union brings it as an ULP case, the LRC will accept it, unless the employer refuses to deal with it. The LRC can deal in a conciliatory manner also within FS, so there is no need to move the case to the Conciliation Procedure”⁶¹.

Is conciliating under the remedial procedure appropriate? Presumably, the employer might fear that the LRC misunderstands the situation and will mistakenly issue a remedial order of reinstatement (seeing it as an unfair dismissal), if the FS attempt fails, even though no ULP act was committed in relation to the dismissal. This concern is especially relevant in the ULP process, because of the asymmetric authority of the remedial process. However, this concern was dismissed in 1999, because since a disputed-issue was unrelated to ULP, it did not press the employer to have it handled under the ULP process⁶². While I am not sure that this opinion is empirically correct, in light of the lack of an adequate DR forum for ILD in 1999, this flexible doctrine supplied a reasonable substitute.

(3) The Legality of the Content of Facilitated Settlements

Another issue related to the possible content of FSs, is how strictly they abide by legal rules. One of the merits when a judicial body has a second function of mediation, is that one can expect the settlements facilitated by the judicial body to be legal: Greater sensitivity to the law and its spirit is expected when the facilitator comes from the judiciary⁶³. This is the fringe benefit from the increased sensitivity to legality (the negative side-effect being that non-legal dispute issues, e.g. emotional, are at a higher risk of being ignored). Similarly, when the LRC, a body the goal of which is “to defend the workers’ exercise of association and promote the fair adjustment of labor relations” (LUA, article 19-2, paragraph 2), offers a settlement proposal, one can expect that this will not be one that allows the continuation of an ULP act. Indeed, in the 1999 survey most interviewees answered that an agreement that permits an ULP cannot be (or

⁶¹ Ben-Sade 2001: 126-127 (translated from Japanese).

⁶² One member’s reply, Ben-Sade 2001: 127.

⁶³ Wissler’s (2011: 293) finding that lawyers view judges as having more credibility regarding settlement than mediators supports this assumption.

rarely is), both in a FS agreement and in a conciliated agreement under the conciliatory capacity of the LRC⁶⁴.

b. **The Scope of the Order**

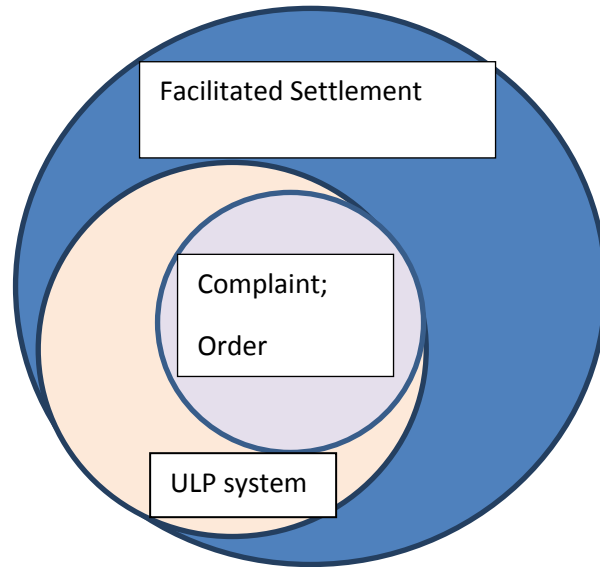


Figure 1. Issues Overlap Degree.

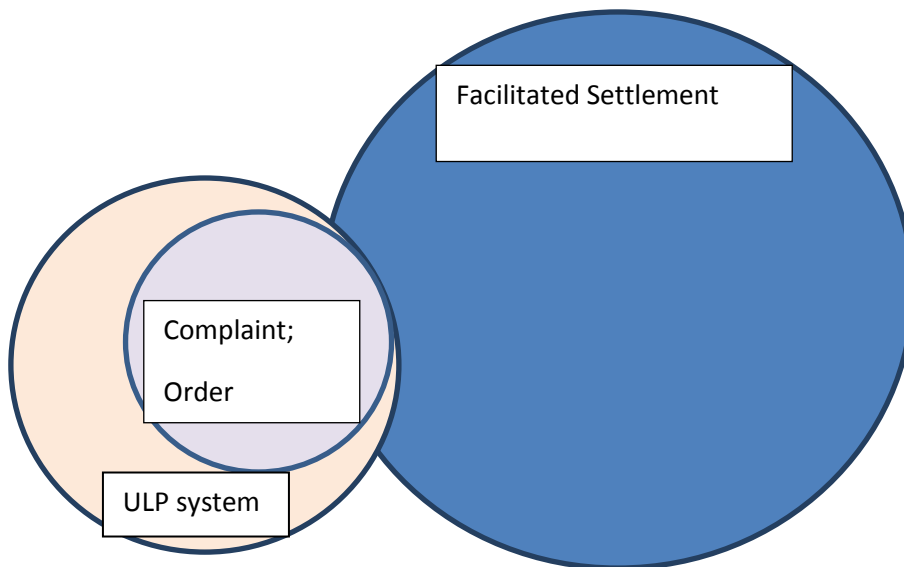


Figure 2. Issues Overlap Degree.

⁶⁴ One PM said that within the ULP such an agreement is not possible, but outside of it, under the conciliation process, it is possible. Ben-Sade 2001: 128-9.

From the discussion above clearly the scope of FS is potentially broader than the issues written in the complaint, and even than the issues subjected to the ULP system (Figure 1). Thus, there are issues dealt within FS which will not be dealt with by the remedial order. However, what about the issues-overlap from the viewpoint of the remedial order? Have all the issues dealt within the remedial order been discussed (at least potentially), within the FS attempt? The answer is complicated, and depends on the nature of the case. If the real disputed issues are part of the complaint than the answer is yes (Figure 1). However, when the FS attempt and the remedial order concern different independent issues (e.g., the central issue for settlement is whether the dismissal was fair, whereas the order concerns whether the employer refused to bargain in good faith), it seems that the settlement attempt may include only a minor discussion relevant to the issue which is central for the order. In such a case there might be only a very small overlap from the viewpoints of both the FS and the remedial order (Figure 2). To conclude, from the view point of FS, there is partial issues-overlap with the remedial order. In contrast, from the view point of the remedial order, there is often full issues-overlap with FS.

Practically, this full issues-overlap of the order with the FS attempt requires discipline and efficient organization of the hearing materials, to distinguish between proven facts and information learned during the FS attempt, because when writing the order draft the PM sometimes does not recall in what context he had learned certain information⁶⁵. Had it been a system in which the mediated issues and the adjudicated issues differ, this problem would not have arisen.

In the 1999 survey, often PMs were more concerned with understanding the “reality of the case” and writing the order accordingly, than with the exact source of this understanding (information proven in the hearing, or rather, heard during the FS attempt). The acquired sense of the “reality of the case”, even if not supported by official evidence, was considered important for writing an effective order⁶⁶. To achieve this, the LRCs focused on the future relationship of labor and management⁶⁷. Focus on the

⁶⁵ Author's interview with PM A of the Central LRC, July 12th, 2016.

⁶⁶ Since the same attitude was voiced in 2016 (PM A of the Central LRC, interview with author, July 12th, 2016), it seems that this attitude has remained unchanged after the 2004 reform.

⁶⁷ Dōkō 1998: 88 and below.

parties' future relationship, instead of their past, is normally listed as characterizing mediation, not adjudication⁶⁸.

The LRCs have also managed to overcome their built-in legal bias against the employers. For example, if the actions of a dismissed union activist were excessive, the LRC may, together with finding the dismissal to be an ULP, reduce the amount of back-pay to him⁶⁹, or, in extreme cases, condition the order with the union's apology⁷⁰. Apology is usually cited in literature as a result achievable only by mediation⁷¹. Its existence here as a potential adjudicative tool, even if only rarely used⁷², is another manifestation of the strong mediative influence on the LRCs' adjudicative function.

2.3 Process-Sequence Flexibility

A basic variable in the interplay of adjudication and mediation, and the third and last axis of my model to be discussed here, is the process-sequence by which the two are linked. The process-sequence flexibility, combined with the process-distinction level and the issues-overlap degree (discussed above), affect the interplay, its merits and problems.

Classification of the linkage of adjudication and mediation might be performed according to the potential or the actual process sequence. Since the possibility of transition from one process to the other affects the behavior of the participants, I shall use it as the criterion for classification. In the LRC, first an application is submitted within the adjudicative procedure and next an investigation meeting (*chōsa*), is conducted to sort out the dispute issues. While investigation sessions may be employed for attempting FS, the initial role of the investigation is preparations within the remedial process. Moreover, when settlement facilitation is attempted, upon failure to achieve

⁶⁸ Sander & Rozdeiczer (2006: 12-13) note that mediation is much more likely to satisfy the goal of maintaining or even improving the parties relationship than adjudicating, grading them respectively 3 (satisfies goal very substantially) and 0 (unlikely to satisfy goal).

⁶⁹ Usually in the reasoning such a deduction will be explained. PM C former member of the Central LRC, interview on May 17th, 2016

⁷⁰ Id. For further details, see Sugeno 2017: 1072.

⁷¹ See generally Levi, D. (1997). Explanation how apology matches the features of mediation: Bolstad 2000: 544-545. On how apology and forgiveness affect dynamics of mediation process see Kaminskienė, N., Tvaronavičienė, A. and Sirgedienė, R. 2015: 223-232.

⁷² More often, in FS, the LRC includes in the settlement a sentence dealing with the emotions, e.g. the committee fully understands why the dispute became so antagonistic, and holds both parties responsible for improving their relations, etc. (PM C former member of the Central LRC, interview on May 17th, 2016).

agreement, a remedial order (or decision), is handed. Thus the process-sequence in the LRC matches the pattern of [adjudication→mediation→adjudication].

Looking closer, the process-sequence flexibility is determined by the following four components: P(1) The timing of the transitions from the adjudicative procedure to the settlement facilitation attempt and back to the adjudicative process; P(2) The initiative of the transition to the settlement facilitation – whether it came from the presiding PM, the tri-partite team, or the parties; P(3) Does the transition freeze the remedial procedure, or, may the processes proceed parallel to each other; and P(4) Is settlement facilitation limited to a single attempt, or may one try again?

a. Transition Timing

The timing of the transition from the adjudicative process to the mediative one has implications for the features of the interplay. For example, when mediation is conducted in an early stage of the adjudicative process, even if the neutrals are the same in both processes, the neutrals may feel less inhibited to reveal their legal impression because obviously it may still change following the fact finding process, and therefore will not limit their adjudication eventually.

In the LRC, the timing of FS is flexible, and settlement is attempted whenever it seems ripe to do so⁷³: When we subdivide the remedial process into the following four stages, FS can be concluded at any of them: (1) From the complaint until before the first investigation session; (2) From the first investigation session until before the first hearing session; (3) From the first hearing session until the closing of the hearing; (4) After the closing of the hearing. However, usually a FS meeting is conducted after the commission has formed a general legal impression of the case (i.e. not in stage (1)). In the 1999 survey it transpired that in the local LRCs settlement was mainly facilitated successfully at stages (2) and (3), mostly either just before the beginning of the hearing (in stage (2)) or in an advanced stage of the hearings, before things got further emotionally complicated (in stage (3)). According to 1998 statistics, among FS cases,

⁷³ Unanimous consent – 1999 survey, Ben-Sade 2001: 120.

54% were concluded prior to the opening of the hearings, and 46% after the hearings have started⁷⁴.

b. Transition Initiative

The identity of the initiator of an FS attempt varies with the timing of the attempt. Usually, in stage (2) at the end of the investigation or in stage (3) just before the closure of the hearings, the initiative is of the PM, following consultation with the labor and management members. At other timings the settlement attempt is triggered by the initiative of one or both of the parties. Depending on the case, the communication is done either directly from the tri-partite team to the parties (and vice versa), or indirectly, using the labor and management members as communication facilitators between the PM and each party. Sometimes a party consults the LRC's staff instead. When a party is interested to attempt settlement but wishes that the other party will not be aware of this, the initiative is expressed by the PM.

The dual role of the presiding PM, responsible both for the settlement attempt and for drafting the order, raises the question whether sometimes the motivation to settle the case is influenced by the forecasted adjudicative role. Indeed, the 1999 survey findings were positive: When the PM considered adjudication difficult (e.g., it is difficult to prove ULP; the decision is complicated, or writing the order will be notably difficult), it sometimes intensively motivates advancing settlement⁷⁵.

c. Parallel Progress

In the 1999 survey there was general agreement that it was possible to attempt settlement after the hearings have started. However, regarding the question, whether in such a case the hearings would be temporarily stopped or rather, would continue in parallel, opinions varied. In some local LRCs (perhaps more common in those handling few ULP cases), parallel progress was sometimes conducted, on different dates or even on the same dates, settlement attempt following the hearing. It was explained to me that unless antagonism was very intense, the parties distinguish between the two processes

⁷⁴ Rōdō Inkaï Nenpō 1998: 6.

⁷⁵ Ben-Sade 2001: 133-134.

within the same date and adjust their attitude accordingly. When settlement is attempted for a short period, usually this parallel progress is chosen, whereas when the settlement attempt is conducted over many meetings, usually the hearing procedure will be temporarily stopped. In contrast, other Local LRCs emphasized that almost never will FS meetings be conducted parallel to hearings, because in hearings one examines the other's faults, hindering settlement. Upon inquiry how is it that in other local LRCs parallel progress occurred, it was commented that when cases are very few it is possible to treat them very attentively (*teineini*)⁷⁶.

d. Multiple Transitions

In the 1999 survey, the importance of settlement for the collective labor relations (or for the individual worker, if it was a disguised ILD case), and the flexibility concerning its operation, were generally emphasized. No rule negating repeated settlement attempts was mentioned. One can infer that multiple facilitation attempts were possible. For example, if the tripartite team, upon checking with one of the parties the possibility to enter settlement meetings, got a negative response, the remedial procedure would continue until the team would feel that the time for settlement has ripened and would retry to settle the case.

Chapter 3 Conclusions

3.1 Summary of the Interplay Model in the ULP System

To conclude the discussion of the interplay model in the ULP system, I shall grade each of the three axes discussed above, based on a seven grade scale: zero(=separation), low, medium(-) , medium, medium(+), high, very high_(=total integration)⁷⁷.

However, in view of the asymmetric nature of the interplay in the LRC, each axis will be graded twice, once for (i) the interplay intensity of adjudication within mediation and once for (ii) the interplay intensity of mediation within adjudication. This is so

⁷⁶ Ben-Sade 2001: 121-122.

⁷⁷ The Likert scale used here is of a cardinal type. For a discussion on the scale type and analysis method, see GÖB, R., McCOLLIN, C. and RAMALHOTO, M.F. 2007: 606 and onward.

because for two of the axes the analysis of the ULP procedure in the LRC yielded different values, depending whether examined regarding mediation or regarding adjudication. This double grading system will display in each variable whether there is an asymmetry in the interplay intensity and to which direction it is. Obviously, each pattern of symmetric or asymmetric interplay intensity has implications on the merits and demerits of the interplay.

1) Process-distinction level: In mediation (=FS attempt) the tri-partite team attempting to settle the case includes one member who holds also adjudicatory powers, the PM. The PM administers both processes, adding to his weight, hence potentially intensifying the interplay. However, on the other hand: (a) When administrating either process, the PM will usually act only after consulting the other members of the tri-partite team; (b) Thanks to the intermediary role that the labor and management's members fill between the PM and the parties, the PM can relatively easily mediate in a manner which doesn't clash with his adjudicative function; and (c) Often the PM's awareness that his would be but one voice in the adjudicative remedial procedure that will follow if settlement fails, may reduce the natural tendency to use the prospected adjudication as leverage in the mediation process; all three effects mitigate the leading role of the PM. Indeed, interviewees have attributed less than a third of settlement success to the role of the PMs⁷⁸, reducing the potential intensification of the interplay. I therefore assess the process distinction level in the mediation stage as medium(-).

In the last stage of adjudication, the PM who participated in the settlement attempt is only one out of five (small prefectural LRCs or panel of Central LRC)⁷⁹, PMs who decide the order. From this numerical relation the interplay intensity seems to be between zero and low. However, the following features intensify the interplay: (a) The adjudication procedure, up to and including the final stage, is administrated by the same PM who had presided over the settlement attempt; (b) The PM who had

⁷⁸ Ben-Sade (2001: 120) noted that one of the interviewees had attributed to the performance of the labor and management representatives 70%-80% of the success of the settlement; PM C former member of the Central LRC, interview with author, July 2016.

⁷⁹ Alternatively, in the larger Prefectural LRCs the ratio may be as low as one out of seven or nine or 13 (depending on the size of the LRC).

presided over the case drafts the order; (c) In the PMs' conference, the concerned PMs' opinion is highly valued, as he has experienced the reality of the case; (d) The labor and management members voice their opinion in front of the PM's conference, potentially increasing the sharing of information from settlement towards the order stage. Thus, I assess the process distinction level in the adjudication stage as between medium(+) and high, depending on the size of the PMs' conference.

To summarize, the process-distinction level is asymmetric, ranging from medium(-) in the mediation to medium(+)-high in the adjudication. Thus the impact of mediation on adjudication will be greater than the impact of adjudication on mediation.

2) Issues-Overlap Degree: Issues-Overlap Degree in the mediation (FS), stage ranges from nearly nil to full overlap, depending on the case and on the attitude of the presiding PM or of the prefectural LRC. There are three main case categories: (a) Cases in which the disputed issues are beyond the framework of the system (e.g. ILD dressed as an ULP), but mediation (FS), is nevertheless attempted (under the flexible doctrine discussed above, see 2.2 a The Scope of Facilitated Settlement (2) Restriction of FS by the Framework of the ULP System). Unless settlement is achieved, the case will be dismissed, or an order will be given on an issue which is only the "costume" of the dispute. The issues-overlap with the prospected order is thus close to Zero. (b) Cases in which the disputed issues include the issues in the complaint, but also additional issues that arose in the meantime⁸⁰, that were difficult to spell-out in the complaint⁸¹, or that are beyond the scope of the ULP system. Since the order is limited to the issues in the complaint, the issues-overlap in these cases is partial. (c) Cases in which the issues disputed are identical to the issues in the complaint, constituting potentially an ULP. In such cases the issues-overlap degree is maximal.

In both the extremes (i.e, cases (a) &(c)) the issues-overlap degree is symmetric and is identical also in the adjudication stage. In other words, almost zero overlap in mediation transcribes to almost zero overlap in adjudication, and full overlap in

⁸⁰ E.g., complaint on 7(2) in which the settlement was mainly on summer bonus, see above fn 55.

⁸¹ E.g., the towels discrimination example, see discussion above in 2.2 Issues-Overlap Degree.

mediation means also full overlap in adjudication. However, in (b) cases the issues-overlap degree is asymmetric, being partial in the mediation, yet full in the adjudication. Thus three issues-overlap patterns emerge: (a) Almost zero overlap in mediation to almost zero overlap in adjudication (and a useless order or dismissal of the case); (b) Partial overlap in mediation to full overlap in adjudication; (c) Full overlap in both mediation and adjudication.

To conclude, in both Process-distinction level and Issues-overlap degree, the asymmetry is of the same direction, the interplay is stronger in the adjudication stage than in the mediation. One possible implication of this finding is the forecast that the direct impact of mediation on adjudication will be greater than the direct impact of adjudication on mediation. However, the expected impact might in itself affect the original process.

Let's analyze, for example, the doctrine negating use of facilitated (attended), collective bargaining as a FS technique⁸². In the 1999 survey, two main reasons were given explaining this opposition. First, attending the collective bargaining may undermine the PM's neutrality and therefore is not recommended⁸³. Second, if the complaint concerns 7(2) (lack of good faith in collective bargaining), then attended collective bargaining means that the employer has done collective bargaining and thus the case should be dismissed⁸⁴. The first reason demonstrates how the forecasted impact of the personnel-overlap on the infringement of neutrality in the adjudication stage (related to the medium(+)-high Process-Distinction Level), imposes a limitation on the mediators' technique. Similarly, the second reason shows how the forecasted impact of mediation on adjudication (the prospective dismissal due to attended collective bargaining; directly derived from the full Issues-Overlap Degree in the adjudication stage), imposes a limitation on the mediators' techniques.

⁸² Opinions vary between positive, partly negative and negative doctrines. See Ben-Sade 2001: 130-131.

⁸³ This was said to be the advice given in a national gathering of the LRCs in 1999 (Ben-Sade 2001: 131).

⁸⁴ Ben-Sade 2001: 131. This argument is far from obvious. When the employer voluntarily engages in bargaining after the ULP complaint was submitted, the issue may become moot (*kyūsai rieki ga ushinawareru*). However, when the bargaining was conducted under the supervision of the LRC, if in such a case the employer does not recognize his responsibility for the ULP, from the view point of normalization of labor and management relationship there may still be interest in ordering a relief regarding the employer's past conduct (Araki 2016: 611; Sugeno 2017: 861, 1073). Regarding the relief interest requirements (*kyūsai rieki ni kan suru yōken jijitsu*) see Yamakawa 2012: 339.

3) Process-Sequence Flexibility: the 1999 survey showed high Process-Sequence Flexibility at least in three out of four parameters: P(1) Timing: FS attempt is conducted at whatever stage of the remedial process it seems ripe to do so. However, usually FS is attempted after the committee has formed a general legal impression of the case. The 1999 survey results show that FSs are achieved mostly either just before the opening of the hearing (in stage (2)) or in an advanced stage of the hearings, before things become more emotional (in stage (3))(→ see discussion above).; P(2) Initiative: All may initiate, yet PMs have a dominant role in initiating at the two timings mentioned above. P(4) Multiple FS attempts are possible. As for P(3), apparently simultaneous parallel advancement of both FS attempt and remedial process is conducted by some (then), Local LRCs, and avoided by others (with larger case volume). Thus, I assess the Process-Sequence Flexibility for P(3) as between low and high, depending on the established practice of each LRC⁸⁵ (factors such as the length of the parallel progress, and the time gap between the meetings, impact the intensity grade).

To summarize, the total grade of Process-Sequence Flexibility ranges from medium(+) (the mean when P(3) is low, and P(1), P(2) and P(4) are high) to high (when also P(3) is high). As for symmetric vs. asymmetric, because process-sequence flexibility deals with the time axis itself, it cannot be graded twice in the same way it was done above (regarding Process-Distinction Level and Issues-Overlap Degree; for (i) the interplay intensity of adjudication within mediation and for (ii) the interplay intensity of mediation within adjudication).

3.2 Concluding Remarks

Looking at the interplay between adjudication and mediation within the LRCs over a long period of time, a few insights can be discerned. Primarily, the two have been largely seen as complementary ways rather than contradictory. Settlement was viewed

⁸⁵ It is doubtful that many LRCs have an explicit policy on this point. This may be rooted in historical customs of process administration or even vary depending on the situation of each case (comment by Yamakawa, June 9th 2017, in file with author).

as the main function⁸⁶ in order to achieve the LRC's main mission, i.e. to improve the labor relations between management and union, built on mutual respect and understanding of each other needs, for the satisfaction of both. By facilitating settlement that fills an educational and guiding role, one can advance the building of healthier labor-management relationship⁸⁷. By contrast, the LRCs' orders were seen as ineffective in improving labor relations, as the loser will often appeal the case (either to the Central LRC or to the District Court), and the unstable situation will continue⁸⁸. Thus, over the years the basic understanding has been that settlement, not order, is the thread by which one can mend torn relationships between management and union, potentially solving additional problems below the surface⁸⁹.

Accordingly, the LRCs were willing to go through great efforts in order to attain settlement. The LRCs tended to be very open minded regarding settlement possibilities (e.g., discussion during FS of topics not only beyond the original complaint but also beyond the scope of the ULP system itself), and cautious not to upset the parties during the FS attempt (e.g., PMs usually refrain from direct expression of their legal impression to the parties). This attitude of the tripartite team helped to further mitigate typical demerits of the interplay at the mediation stage, such as limitation of topics or very evaluative mediation style. Demerits that were originally mitigated to a large extent due to the unique personnel overlap in the LRC, by which only one of the three mediators has adjudicative authority.

In contrast, during the adjudication stage the demerits of the interplay materialized to a large extent, the most obvious one being the procrastination of the ULP process. The sharp increase in the complexity of the ULP cases since the mid-1970s⁹⁰, coupled with the endless efforts to avoid issuing an order and facilitate settlement instead, resulted in cases lasting even years already at the local LRC level⁹¹.

⁸⁶ See Yamakawa 2005: 11.

⁸⁷ See Sugeno 2015: 8.

⁸⁸ Ben-Sade 2001: 124.

⁸⁹ For example, the settlement between East JR and *kokuro*, in which at one time about more than 30 cases were settled (*ikkatsu wakai*). PM D of the Central LRC, interview July 12th, 2016.

⁹⁰ Sugeno 2016: 1050.

⁹¹ The average remedial procedure duration in the local LRCs climbed steadily, from 600-700 days in the 80s, through 642-1,888 days in the 90s (1991-2000), peaking at 2,995 days in 2001. See Sugeno 2013: 5 Table 1.

A second demerit of the interplay materializing in the adjudication stage, that is considered a central due-process concern, regards the use of information learned during the settlement stage in the adjudication stage (i.e. deciding whether an ULP was committed and the remedy to be issued). This concern has materialized to a certain degree. As has been discussed above, within the ULP procedure, information from the settlement potentially passes to the adjudication's final stage via two channels: (1) the PM who writes the draft of the order is the same PM who presided over the case throughout the ULP procedure, including the FS attempt; (2) The labor and management members, who were part of the relevant tripartite team, voice their opinion before the PMs' conference prior to its decision.

My 1999 survey results show that regarding (1), even though learning new information during caucusing (from the view point of due process, using such information for adjudication would be the most problematic, if the other party hadn't had the chance to refute it), is rather rare, generally the settlement process does impact the PM's impression of the parties and thus potentially influences the order, especially in difficult cases in which it is hard to decide whether an ULP was indeed committed. Regarding (2), in practice, labor and management members often refer to the settlement attempt, either in their statement (oral or written), or when answering questions of the other PMs, during the PMs' conference.

Thus, information gained during the settlement process does influence the order. Meaning, the mediation attempt impacts the result of the adjudication. The question is whether this is "unfair". It is here that the philosophies of Common Law and of Japanese Law differ. From the view point of due process, it is a clear-cut yes: Adjudication should use only admissible information. Use of non-admissible information, such as personal impression gained during the settlement process, is improper. However, Japanese Law produces a different result. A good resolution in collective labor relations is one that will help the parties mend their relationship. A resolution based on a deeper understanding of the essence of the case and the real nature of the parties stands a better chance to achieve this. Thus there is need for a genuine discussion of the inter-relations between

good resolution, fairness and justice and their relations with the interplay of adjudication and mediation⁹².

The procrastination of the ULP remedial process (described above), coupled with the decrease in the satisfaction of the parties with the LRCs' role (reflected in the high appeal and reversal rates), led to the amendment of the Trade Union Act in 2004. This 2004 reform managed to significantly expedite the ULP process and decrease the reversal rate, by expedition and optimization of the adjudicative process of the ULP⁹³, along with legislation of the mediative authority of the LRCs. The 2004 reform has affected the interplay between adjudication and mediation in various ways (description of which lies beyond the scope of this article). However, my impression (based on my 2016-17 survey), is that this reform to date hasn't changed the basic view⁹⁴ of the PMs that understanding of the real essence of a given case (via the settlement process), facilitates good adjudication. Due process aims to facilitate good adjudication, not to encumber it. Thus further discussion of the inter-relationships between the basic concepts of good resolution, fairness and justice remains relevant. This discussion will likely have implications on the general debate regarding strong interplay, starting with the relations between settlement and court decision.

A noteworthy finding is that according to the LTS users' survey of 2010, employers view the professionalism of the labor and management members as being higher than that of their parallels in the Labor Tribunal System⁹⁵. Since the professional experts are nominated to both institutions on a similar basis⁹⁶, the difference in the employers' evaluation seems to derive from a difference in function. While in the LTS the lay judges avoid caucusing alone with a party, in order to maintain their neutrality, in the LRC the

⁹² When the parties to the DR procedure (or a given group, e.g., Japanese people in general), value the possibility that information gained in settlement proceedings may influence adjudication, the due-process concern about "unfairness" decreases.

⁹³ Yamaguchi 2016: 17.

⁹⁴ Notably, the 2004 reform did limit the practice of using information learned outside of the fact-finding process, by requiring meticulous referral to evidence within every written order (see discussion above in 2.1. Process-Distinction Level b. Use of Information from the Facilitated Settlement Attempt).

⁹⁵ In fact, lay judges at the LT were also respected less than the professional judges even regarding their understanding of labor relations: in the LTS Users Survey (*Rōdō Shinpan Seido Riyōsha Chōsa*) only approx. 36% of the employers agreed that the lay judges understood labor relations, whereas 49% agreed that the professional judges did (Satō, 2013: 38-42).

⁹⁶ Regarding the nomination of the labor and management members, see Sugeno 2017: 1028. Regarding the nomination of the lay judges, see Sugeno 2015b:40.

labor and management members caucus freely (even in the company's office)⁹⁷. During caucus, the professional member generally first listens to the party and sympathizes with it. It is surprising that the employers value more this venting of emotions (including of the other party, i.e., the union), than maintaining the appearance of neutrality by not interacting alone with a party. This is even more remarkable considering that the ULP system is a pro-union biased system. At the local level, this invites examination whether the LRC might evolve to be a more suitable forum than the LTS for complicated ILD cases, which naturally tend to require a longer process (than the three sessions - three month LTS limitation), and a stronger emotional ventilation of the feelings of parties⁹⁸. At the general level, further theoretical, empirical and comparative research is needed about the parties' emotional ventilation by lay judges (achieved during caucus), vis a vis the lay judges' neutrality, within procedural fairness⁹⁹. More specifically, the quandary is whether lay judges (who have also an adjudicative role, e.g., at the LTS), should caucus (in order to be able to vent party's emotions more efficiently), without it being perceived as hindering their neutral role as adjudicators (because parties tend to value more the emotional venting than the appearance of neutrality). The LRC thus continues to be both a unique institution of LDR and a platform on which general dispute resolution dilemmas can be re-examined.

⁹⁷ In fact, in the LT often the parties do not even know which lay member was selected by labor and which by management (interview with a Judge of the Tokyo District Court, July 6th, 2017). Nakayama (2013: 213-214) suggests that the low evaluation of the lay judges by the employers derives from 1) The lay judges relative speaking relatively little during the sessions, and 2) The gap between the labor relations perspective of the lay judges and that of the employers (who often come from small-medium-size enterprises). Nakayama's first reasoning was reinforced by the Tokyo Bar Associations' survey regarding the practice of the civil justice reform of 2014: Among the 41% respondents who thought that the understanding of lay judges was insufficient, 94% agreed that lay judges' confirmation (kakunin) and understanding of the parties' arguments and documents were insufficient (q. 91-92, Minji Shihō Jitsujō Chōsa Ankēto Kekka Hōkokusho 2014: 122). Nitta (2013: 230-232) analyzes this low evaluation as reflecting the good functioning of the LTS in enabling workers to fulfill their legal rights, naturally seen by the employers as unfavorable. Regarding the unique role of the labor and management members at the LRC versus their role at the LT, see Sugeno 2013: 13-14. Similarities and differences are also discussed by Ukai 2015: 28-29. For an elaborate discussion of the role of the lay judges in the LTS, see Yamakawa 2015:43-61.

⁹⁸ Difficult cases are likely to be accompanied by a stronger expression of emotions and therefore they require stronger emotional ventilation.

⁹⁹ The extreme detachment of the LT members from the parties (some judges even omit introducing them to the parties during the first session - interview with a Judge of the Tokyo District Court, July 6th 2017), perhaps is misunderstood by the parties as non-professionalism.

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