

9-1-2015

The Emergence of Mediation in Korean Communities


Peter Robinson

J. Youngjin Lee

J. Kwang Ho Lim

Ryul Kim

Follow this and additional works at: <http://digitalcommons.pepperdine.edu/drlj>

 Part of the [Comparative and Foreign Law Commons](#), [Courts Commons](#), and the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

Peter Robinson, J. Youngjin Lee, J. Kwang Ho Lim, and Ryul Kim, *The Emergence of Mediation in Korean Communities*, 15 Pepp. Disp. Resol. L.J. 515 (2015)
Available at: <http://digitalcommons.pepperdine.edu/drlj/vol15/iss3/3>

This Symposium is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Dispute Resolution Law Journal by an authorized administrator of Pepperdine Digital Commons. For more information, please contact paul.stenis@pepperdine.edu.

[Vol. 15: 515, 2015]

The Emergence of Mediation in Korean Communities
PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

The Emergence of Mediation in Korean Communities¹

Moderator: Peter Robinson

Speakers: J. Youngjin Lee, J. Kwang Ho Lim & Ryul Kim

Peter Robinson: Professor Jack Coe and I were inspired by a recent visit to Seoul, where we became aware of Korea’s very vibrant mediation agenda and activities. We were hosted magnificently with great hospitality, and we are delighted to ask some of those people to come and share about mediation in Korea. We have three panelists for this conversation about the emergence of mediation—or rather the current status of mediation. I was recently advised that mediation is not new in the Korean community, and has deep cultural roots for decades. There are recent developments that we especially want to hear about.

We have invited three panelists. Judge Youngjin Lee is the presiding judge of the High Court in Busan, so he is an appellate court level judge. Before this appointment, he was the presiding judge of the Central District Court in Seoul, and before that, he was the judge responsible for the court-annexed mediation program for the Seoul Central District Court. My understanding is that he energized and reformed an existing program, to

1. This is a transcript of the third of four panels from the “Dispute Resolution in the Korean Community” Symposium, co-hosted by Pepperdine’s Straus Institute for Dispute Resolution and the Pepperdine Dispute Resolution Law Journal, which was held March 6, 2015 at Pepperdine Law School in Malibu, CA. This panel was moderated by Peter Robinson, Managing Director, Straus Institute for Dispute Resolution, and Professor of Law, Pepperdine University School of Law, with participation from Judge Youngjin Lee, Presiding Judge, Busan High Court, Judge Kwang Ho Lim, District Court Judge, Seoul Central District Court, and Professor, Judicial Research and Training Institute in Seoul, and Ryul Kim, Esq., mediator and arbitrator. Special thanks to Grace Jiyun Moon, LLM, Pepperdine University School of Law, for providing interpretation services throughout the panel.

[Vol. 15: 515, 2015]

The Emergence of Mediation in Korean Communities

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

make it much more dynamic and effective. We invited him to describe to us about the Seoul District Court mediation program.

We will then ask Judge Kwang Ho Lim, who is a sitting judge in Seoul, to describe his experiences as a district court judge encouraging mediations. Before his current position, Judge Lim was a professor at the Judicial Research and Training Institute (JRTI), which is the school that people who wanted to be judges had to attend until the last few years. Now I understand there are other paths to become a judge, but until the last few years this school had a monopoly. If you wanted to become a judge, you needed to receive your training there. Judge and Professor Lim was on the faculty there. I'm also very proud that Judge Lim took a sabbatical and came and earned his LLM here at Pepperdine five years ago. We are very proud of him and delighted that he would come back and share his expertise with his alma mater.

After that, we have invited Ryul Kim, who is a prominent arbitrator and mediator in Southern California who conducts many of his cases within the Korean community here. We asked him to share his experiences as far as anything unique about mediating in the Korean-American community and to gain the benefit of his experience and wisdom.

I will also let you know that Grace Jiyun Moon will intermittently be available for interpretation, so there might be times where she steps in and assists with interpreting.

If you will please join me in thanking our speakers for coming. I will now turn the microphone over to Judge Lee.

J. Youngjin Lee: Nice to meet you. I am Youngjin Lee, the Presiding Judge of the Busan High Court. It is a great honor and privilege to have the opportunity to be here and speak at Pepperdine University. I express my gratitude to the Pepperdine Law School and Professor Peter Robinson for the invitation.

I have been working at the Seoul Central District Court as a judge in charge of mediation cases for three years, from 2012 to 2014. I know well

[Vol. 15: 515, 2015]

The Emergence of Mediation in Korean Communities
PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

about how the mediation system is running in the courts. Please excuse my speaking through an interpreter.

I would like to give a brief introduction about the mediation program in court systems in Korea. Under Article I of the Judicial Conciliation of Civil Disputes Act in Korea, the purpose of mediation programs is to settle civil disputes according to simple proceedings based on the mutual concession between the parties, common sense, and actual circumstances. While there are various ADR systems including judicial type, administrative type, and private type, the judicial type is the most common in Korean courts. The advantages of mediation, as we all know, is that mediation is simple, fast, cheap, and provides a final and fundamental method of resolution. The Korean mediation programs have been improving due to not only the increase in studies within Korea, but also by comparing and learning from mediation programs in other countries.

There are two types of civil proceedings in mediation in Korean courts: first, parties may apply for mediation (case mediation application), and second, the court may submit the case for mediation during the process of litigation.

Do you know how many cases are submitted in the Korean courts? On average, there are over one million cases filed across the country each year. But unfortunately, only about 84,000 cases opt for mediation. Thus, you can see that there is a very low percentage of cases being resolved through mediation. In the past 6 years, approximately 65% of the cases were resolved through judgment, and only approximately 9% of the cases were resolved through mediation.

Korea has a population of 50 million people. There are about 2,770 judges and over 20,000 attorneys. However, while our population is much smaller than Japan (127.8 million), we have many more cases filed in court—we have over 1 million cases filed annually, whereas Japan has approximately 719,000 cases filed annually.

We have also done extensive case studies on U.S. courts and U.S. court mediation systems, where over 90% of civil litigation cases are solved

[Vol. 15: 515, 2015]

The Emergence of Mediation in Korean Communities

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

through negotiation and other ADR processes, and only 5% are processed through a court judgment. As you know, in American courts, there is a drastic decrease in cases being solved through court judgment: in 2002, there were just under 2% of cases resolved through court judgment in the U.S. federal courts.

In German courts, there is an obligation to first go through dispute resolution for property disputes under 750 euros, and for a few other claims. Also, in Japanese courts, there are obligations to go through mediation prior to trial for rent dispute claims. In comparing Korea to Japan, as you can see from the chart, Japan resolves about 33% of the cases through court judgement, and also about 32% through mediation (which is much higher than the 9% in Korea).

We have conducted many studies on why mediation is not as active in Korea compared to other countries, and found there are a few reasons. First, there is a lack of knowledge regarding ADR and mediation among Korean citizens. Also, Koreans seem to have a strong “K.O.” mentality, where they want to knock out the other party in a dispute instead of seeking a compromise. Many Koreans also strongly favor receiving a court judgement from a judge, instead of resolving the problem with a mediator. A related issue is that many attorneys are not experienced in ADR or mediation. Another problem is that mediations are led in court by the judges. Lastly, mediations are often not conducted until the latter half of the trial, instead of earlier in the case.

To solve these kinds of issues, the Korean courts have first set up a motto seeking to resolve problems through mediation instead of litigation. Second, we have also implemented systems that allow for earlier timing of mediations before parties’ emotions run too high. Third, we have revised the mediation programs to be run by mediators, instead of the judges who are overseeing the cases. There has been a rich history of private mediation in East Asian cultures, including Korea, where the village elders would solve the problems arising in their villages.

518

[Vol. 15: 515, 2015]

The Emergence of Mediation in Korean Communities

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

In order to activate the court mediation programs and encourage mediation, we have expanded the judges, staff, and facility in the courts for mediation. We have also discounted the mediation application fee. These [referring to two pictures] are the pictures from the Seoul Central District Court's Mediation Center. The picture on the left is the picture of the waiting room, where there is a case search computer and electronic displays providing information to the parties, and the picture on the right is of the mediation room, where the mediations are actually conducted.

In February 2009 we also introduced the Standing Commissioner System to expand the mediation program and allow more people to be responsible for mediation in courts. These [referencing a chart] are the cases that were handled at the Seoul Court Mediation Center in 2014: there was about 6,700 handled, and the success rate was about 20%. In addition, we secured various professionals to serve as mediators with expertise in different subject matters. There are currently a total of 443 mediators serving in the courts. They vary widely in their range of occupations, including attorneys, legal staff, doctors, accountants, and professors.

Next, there is also the enforcement of the early mediation system. The early mediation system is to promote fast dispute resolution, submitting cases to mediation during the 2-3 month waiting period before trial. The process begins by each justice department initiating and sending the case to the judge in charge of mediation, who allocates the cases to different mediation entities, such as a court-attached mediation program like the Seoul Court Mediation Center, or to external ADR institutions, or to the judges who also oversee mediations. There are currently 15 external ADR institutions, which include the Korean Commercial Arbitration Board, Seoul Bar Association, and various law schools.

As you can see from the chart, in 2010, there were only 4,500 cases that applied for early mediation, but by 2014, there was a drastic increase as more than 11,000 cases were submitted for early mediation. And this chart does not include small claims cases. The efforts of the Seoul Central District Court has spread to other courts across the country, and in 2013,

519

[Vol. 15: 515, 2015]

The Emergence of Mediation in Korean Communities

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

there were over 30,000 cases that went to mediation. Also, the number of mediations that are run by judges have increased from 52 in 2011 to 823 in 2014.

The mediation process is as follows: first, the parties are notified of the mediation date; next, scanned copies of the records are e-mailed to the mediator; on the day of mediation, the judge introduces the mediator to the parties and leaves, and the mediator then mediates the case through various techniques; and lastly, whether or not the parties agree to a settlement, the judge returns to conclude the mediation. For very experienced and skillful mediators, we have a special committee, and they usually come once a week to serve and do mediations. As the chart shows, in 2014, there were over 10,000 cases submitted for early mediation, with an overall success rate of 30%.

There are also separate mediation programs available for small claims cases that are under \$20,000 USD. There are three types of small claims cases with different resolution methods. First, there is a trial day mediation, where any available court stand-by mediator will come and mediate. Second, there is in-house early mediation of general cases, where specific mediators are delegated for the cases. Lastly, there is in-house early mediation of traffic collision cases involving car insurance companies, where there are special mediations available.

The trial day mediation, which happens on the day of trial where both parties are present, has the highest success rate of 70%. The other small claims mediations have lower success rates. Each year, there are about 8,200 small claims mediations, and as mentioned earlier, approximately 11,000 general mediations, for a total of approximately 20,000 mediated cases per year.

We are encouraging Korean citizens to utilize mediation, and this is one of the posters that we used [referring to a poster with a picture of a ball of yarn]. It shows that you can unravel complicated disputes [like a ball of yarn] and seek resolution through mediation.

520

[Vol. 15: 515, 2015]

The Emergence of Mediation in Korean Communities

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

I would like to make a few final points regarding the future progress and direction of court mediations in Korea. First, we would like to expand and supplement the early mediation system. Next, we plan to secure more professional mediators and external mediation institutions with a diverse range of specialties, and continue to provide training and supervision for all mediators. My personal wish is that since Pepperdine has an excellent dispute resolution program, I hope Korean judges and mediators can come and attend classes at Pepperdine to receive further training.

We also believe that we need to continue to educate the Korean citizens about ADR. As judges like myself are actively involved in court mediations, we were growing concerned about who the mediation process was really for. Mediation has to be a process for the Korean people, not for the judges and lawyers. Thus, we also want to work for the Korean public and for the benefit of the Korean citizens, and I think that is the goal of our courts and the judges.

Thank you for listening to my presentation. My hope and prayer is that we will all work together towards a peaceful resolution of conflicts.

Peter Robinson: Should we take a few questions of Judge Lee before we invite the next panelist?

Audience: In American systems, we usually have a confidentiality agreement in our mediations, so that what we discuss in mediation doesn't go to the courtroom and can't be used as evidence. Is that something that is practiced in Korean mediations as well?

J. Youngjin Lee: In the past, since the judge overseeing the case also ran the mediation, confidentiality was an issue. However, in the new upgraded system, there are different judges: there is a judge for the trial, and there is a judge for the mediation, so there are less confidentiality issues. But I do have concerns, because one problem is that when there is no settlement in mediation, the case is sent back to the trial judge, and the trial judge is usually very curious about why the case didn't settle. And if they are very persistent about learning about the lack of settlement in mediation, in some cases, the results are made known to the judge. However, that is

[Vol. 15: 515, 2015]

The Emergence of Mediation in Korean Communities

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

only upon the mutual consent of both parties; if they consent, then the information is revealed to the judge and the details kind of unravel.

Peter Robinson: I'll ask one question. When you mention that the goal is to have professional mediators, are they paid by the court? Or by the parties? Or are they expected to volunteer for free?

J. Youngjin Lee: The court mediators are paid through the court budget, so yes, they are paid. Usually per mediation they are paid about \$70. In the past, when there were not many mediation cases, the court budget could handle it, but in recent years, there has been a budgeting problem due to the explosion of mediation cases. Therefore, unfortunately, sometimes the mediators have to be paid the following year.

Peter Robinson: Let us please invite our second speaker. Judge Lim, will you please describe for us your experiences as a sitting judge encouraging mediation? What are your observations and experiences?

J. Kwang Ho Lim: My name is Kwang Ho Lim, and I am a judge at the Seoul Central District Court, and have been a judge for about thirteen years. In the middle of my career, I had a chance to come to Pepperdine, around 2010, to get my LLM degree.

I want to add one point because I know what is going on here, in California, in America. The whole set up of mediation is different here in the U.S. and in Korea. As you laughed earlier, in Korea, a mediator cannot make a living just by doing mediations, right? So are you curious about my retirement plan as an alumni of Pepperdine? I can't be a mediator. I can't make a living just by doing mediation. In other words, there is no private mediation market in Korea. That's why, as J. Youngjin Lee explained, the court must do everything to oversee mediations in Korea. The court must determine whether a case should be adjudicated or sent to mediation. As J. Youngjin Lee mentioned, nowadays, many cases go the mediation route first, and parties can get cases mediated with the help of the Korean courts. So parties do not need to pay much money to let their cases be mediated in a private market, and thus, there is a limitation in Korea to promote private mediation.

522

[Vol. 15: 515, 2015]

The Emergence of Mediation in Korean Communities
PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

There is philosophical question: can a judge be a mediator? How about here in the U.S.? As far as I know, in the U.S., a judge can conduct a mediation and the settlement conference. In the L.A. Superior Court there are 3-5 settlement judges who do the settlement conferences themselves. So it's a normal thing. Not only in Korea, or the U.S., or Canada. All over the world, judges are doing mediation as far as I know. But is it right? Yes, I think it is right. In this modernized society, people have more confidence in individualism and science. In this society, justice includes mediation provided by the courts. The conventional justice where the court declares justice has evolved. The courts have changed to fit into this modernized society. So we can call it mediational justice, alternative justice, or better justice. But if a court's function is declaring and realizing justice, then a court has to conduct the mediations as well. So I have a different view from J. Youngjin Lee about the separation of the judge and mediator. I partly agree, because it is good to have many mediators in the court, but according to Korean law, judges have the power to conduct mediations at any time and can make a choice of doing the mediation himself or sending it to a mediation center or court mediator. So I think judges will continue to conduct mediations in Korea and in the States as well. I think that's the different way to go—from judges exercising conventional justice [in an adjudication] to exercising mediational justice [in the role of mediators], instead of separating the role of the judge and the mediator.

Regarding confidentiality, in the U.S., people cherish confidentiality with mediation. For example, in many mediations, there are two rooms—one for the plaintiff and another for the defendant—and the mediator goes back and forth, having private caucuses. But in Korea, while there sometimes are private caucuses, there is usually just one room with both parties sitting together with the mediator. The parties don't find communication in that setting uncomfortable because they are aware that the judge could possibly act as the mediator, and that they would have to disclose certain things in front of the judge/mediator and the other party. It

[Vol. 15: 515, 2015]

The Emergence of Mediation in Korean Communities

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

doesn't mean that these cases cannot be mediated due to this limitation on confidentiality. It's just a different approach.

In the Korean perspective, neutrality or impartiality is more emphasized than confidentiality. So even when I've had mediations with private caucuses, I get permission to share with the other party what was discussed and vice versa, and the parties feel comfortable with that. There is no manipulation. They know and share everything, and then they make a decision. That is the usual way that mediation is done in Korea.

Peter Robinson: Thank you, Judge Lim. Would you take a few questions?

Audience: In the U.S., there is a principle that if a party discloses a fact to the mediator in a private caucus, that fact will not leave the mediation and cannot be used in the litigation. Is there a similar principle in Korean mediation?

J. Kwang Ho Lim: As I mentioned, confidentiality is not a strong notion in Korean mediation. So there is no stipulation in any civil law, or procedural law, or judicial acts like the one you mentioned; there is no stipulation about confidentiality. You can maybe think of it in this way: in the early stages of a case, you can submit the case for mediation; a judge can also send the case to mediation at any time in the middle of the adjudication; it can also be sent at the end of adjudication. And by the end stages, almost all of the relevant evidence would have been disclosed through the adjudication process. Then, confidentiality would not be an issue due to the disclosure of the evidence. Rather, if we cherish confidentiality too much, we wouldn't be able to conduct mediations.

Peter Robinson: Part of what I learned at lunch is very interesting. Judge Lim described to me that he receives 100 cases every month, and that he is required to also complete 100 cases every month. He can either complete them by making a ruling or by encouraging mediation and getting settlements. And with this volume of cases, there is no jury for civil trials, so the trial judge will be the decider of fact and law. So I'd like to ask this

[Vol. 15: 515, 2015]

The Emergence of Mediation in Korean Communities
PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

question: Do the parties need to consent for the judge to serve as the mediator, or is it assumed that the judge will try to settle the case?

J. Kwang Ho Lim: So in Korea, you don't have to receive consent from a party to send a case to mediation. It's the opposite here, right? Mediation is standing under the proposition of voluntariness. But in Korea, you don't need any consent to send that case to mediation. So in some cases, the judge sends a case where both parties haven't agreed to mediation, but it still is successful sometimes. But in my case, I don't send cases to mediation if the parties don't agree to it, but theoretically, we can send cases without consent.

Peter Robinson: In the United States, I've heard lawyers describe a trial judge asking lawyers, "Please do me a favor. Would you please go try mediation?" And when you have the trial judge asking for a favor, it is very difficult to tell him, "No, thank you." Would this be true in Korea? Would it be okay for you, as a judge, to ask a favor for people to go to mediation, and would there be some kind of pressure on the parties to please the trial judge?

J. Kwang Ho Lim: What I am doing and what many trial judges are doing is they don't use their authority to make parties go to mediation. Rather, judges need to promote the parties' voluntariness and boost their eagerness to go to mediation.

Audience: Do you sometimes serve as a mediator for the case where you might ultimately be the trial judge?

J. Kwang Ho Lim: Sometimes. As J. Youngjin Lee described, there is a position called the mediation judge, like a settlement judge in the LA Superior Court. The mediation judges only conduct mediations. The trial judge can choose to conduct the mediation himself or send the case to the mediation judge. If the parties do not settle, then the case comes back to the original trial judge who can do the adjudication.

Audience: So if you are mediating a case that can win at trial, do you express your belief that the mediation has the merits on one side or the other?

[Vol. 15: 515, 2015]

The Emergence of Mediation in Korean Communities

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

J. Kwang Ho Lim: No. That's why I mentioned that neutrality and impartiality are good virtues in the Korean mediation setting. If a judge is conducting a mediation of a case on his docket, I think it is improper for the judge to open his mind about the issues that may be adjudicated afterwards.

Audience: So you don't want to hear one party admit they have a weak case?

J. Kwang Ho Lim: No, I don't want to hear that. Parties are cautious to not fully share confidential information to the judge acting as the mediator, because they know that judge will be the trial judge if there is no settlement. I want to add that I am not disagreeing with J. Youngjin Lee's thoughts, but I do want to point out that it is inevitable that judges must also conduct mediations, and that judges' and mediators' roles cannot be completely separated.

With the current situation in Korea, judges have to conduct mediations. The court pays private mediators \$70 per case. The mediators are doing mediation only to serve the nation, to serve the public. It is an honorable job in Korea to be a mediator. And mediators have their own professions—some are teachers, some are CEOs of companies, some are lawyers or doctors. They have their own job, and when they are called and asked, "Can you do a mediation in the Seoul Central District Court?" they say, "Yes," because they believe that it is honorable to serve as a mediator. And that's why they are willing to receive just \$70 per case.

Peter Robinson: If it's okay with you, I would like to end on that note. That being a mediator is an honorable thing. Now, please welcome Ryul Kim to describe to us his experience mediating in the Korean community, especially here in Southern California.

Ryul Kim: Thank you very much. Well, I'm glad that mediation is picking up in Korea. Thank you to Tom and Peter at Pepperdine. I really appreciate this wonderful opportunity.

First, I'd like to start off with the topic of this panel: Emergence of Mediation in Korean Communities. Is this a correct assumption? In other

[Vol. 15: 515, 2015]

The Emergence of Mediation in Korean Communities

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

words, is mediation in Korean communities really emerging and becoming prominent? The answer is positively and absolutely yes.

In 2006, a well-respected Korean-American judge, Judge Mark Kim of the Los Angeles County Superior Court, delivered a speech to Korean-American lawyers, and he made a really remarkable comment that 20% of civil filings in Los Angeles were related to Koreans. So this was in 2006; now we have the KORUS FTA, and also a visa waiver for Korean tourists, so the number certainly could be higher. But you have to pay attention to the fact that Korean-Americans only make up 4% of the Los Angeles County population. So after Judge Kim mentioned that 20% of civil filings are related to Koreans, I had to double-check and triple-check with him. And he confirmed, “Yes, 20%.”

So I was thinking, this seems to really contradict the common assumption that Koreans are not litigious with their Confucius culture and the emphasis on saving face, and that they wouldn’t file as many lawsuits as non-Koreans. Then why is there this disproportionate filing rate? Are Koreans really more litigious than other ethnic groups? I don’t think so. It seems to be that Koreans in the U.S. are more active—in the commercial arena and in businesses. That’s why they get more and more involved in lawsuits. For example, a Korean company from Korea is running a really small operation here in Orange County. They have only 7 or 8 employees, and they’ve been running their business for about 7 or 8 years. They have been named in a lawsuit about 12 times—mostly as a defendant, not as a plaintiff—in cases alleging sexual harassment, overtime, broker commission, executive compensation, workers compensation, discrimination, reverse discrimination, pregnancy discrimination, and so on. So the issue is more related to the business activities that the Koreans are engaged in, not because Koreans are more litigious.

Today, I’d like to try to define what a Korean case is like. What are the frequent, common disputes that arise in the Korean communities? I came up with my own definition. There should be some Korean elements—like the parties, the legal issues, or business customs—which may affect the outcome

527

[Vol. 15: 515, 2015]

The Emergence of Mediation in Korean Communities

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

of a case. How, then, is the Korean community developing in Southern California? As you are aware, Korean immigration to the U.S. is relatively short compared to Chinese or Japanese immigration. A lot of Korean immigrants came to the U.S. in the mid to late 1970s and settled here in Southern California. Many are engaged in small family businesses, such as convenience stores, dry cleaners, small maintenance business, usually mom and pop stores. And in the last ten years, the Korean businesses here have been drastically growing. They are engaged in bigger businesses, like large textile companies, real estate, Korean spas, Korean BBQ chains and other restaurants. I have observed that the owners and employers of these businesses are sued often. As J. Youngjin Lee mentioned, 98% of civil cases don't go to trial here in the U.S., and are settled instead. So eventually, most of these Korean cases end up being settled by negotiation or mediation. So my conclusion is that Koreans are not really as litigious as we think or as is reported. It's really more of a correlation between the types of businesses and the lawsuits that arise.

I recently read a newspaper article that described a class action by about 200 employees of a hot tofu restaurant. They have multiple branches in Southern California and are doing really well, but their employees brought a class action against the restaurant for unpaid overtime, which ended up settling for \$3 million. I'm not involved in that case and am just relaying to you what I read. Just 10 years ago, it used to be only non-Koreans bringing lawsuits against Korean employers for various issues such as unpaid overtime, sexual harassment, or discrimination. This class action is a good example of more and more Koreans participating on the plaintiffs' side. This class action consists of about 50% non-Koreans and 50% Koreans. So more and more, Koreans are visible as plaintiffs in these cases. I have also noticed some instances where pastors of small Korean churches brought lawsuits for unpaid overtime.

Here is another example [referring to a slide]. I told you that many Korean immigrants run dry cleaning businesses. And it used to be that non-Korean employees would bring overtime claims against the Korean

528

[Vol. 15: 515, 2015]

The Emergence of Mediation in Korean Communities

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

employer. In this case where I was involved as a mediator, there was a Korean employer and Korean employee. The owner was in his 60s and the employee who brought the lawsuit was in his 30s. Their relationship was more like a father-son relationship than an employer-employee relationship. After the Korean owner settled a dispute with a non-Korean employee, this Korean employee wondered why he couldn't also seek unpaid overtime. So he brought a lawsuit against the employer and I was retained to mediate this is a case. There was an impasse. The employee was asking for \$150,000 and the employer did not want to pay more than \$5,000. How could I narrow down this huge gap? In this case, there was a really strong Korean element, including a SBA loan by a Korean community bank. Banks usually have UCC filing their priority lien on the business. So I told the employee's lawyers, "If you go to trial and win, I'm pretty sure that you can get the \$150,000 judgment, perhaps more with attorneys' fees, but how are you going to enforce it if there is another lien on the business already?" As a mediator, you don't make a decision or evaluation of the case unless you are asked, but you help them evaluate the situation for themselves. This case ended up settling eventually. So in this case, the controlling Korean element, at least one of them, was the Korean business practice of getting SBA loans through Korean community banks.

I also want to talk about another interesting concept of Korean "hweashik" or a "company dinner." It's a common business practice for Koreans to go to dinner together after business hours, where people get more relaxed and can talk to their supervisors and managers in a more low-profile setting and open up communication. My question is this, is this hwaeshik, company dinner a part of business or is it personal?

On one occasion, this is a really sad situation, after a company dinner, one of the employees drove home after drinking, and he got involved in an auto accident, and the other driver was killed. So the question raised in the U.S. court was whether drinking, eating together at this function is business or personal. Is it mandatory for employees to attend, or do you have an option? If it's optional, how much freedom do you have?

529

[Vol. 15: 515, 2015]

The Emergence of Mediation in Korean Communities

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

For example, there was a Korean female employee who was a manager, and at the same time a secretary at this company. She worked for this Korean male employer for many years. And over a period of 4 to 5 years, almost 3 to 4 times a week, she had to join this company dinner. Her claim was that she *had* to join—that it was a mandatory practice. The employer said, “No, it was not mandatory. I was trying to be generous to my employees and treat them to dinner as often as I can; I paid out of my pocket. Am I being sued for that because she’s claiming she should be paid overtime for the time that she spent with me for the meal?” So I talked to the employee and her lawyer, “If you go to trial, you have to hire an expert witness. Who are you going to hire? And how much are you going to pay?” For those who are familiar with litigation in the U.S., how much do you pay for expert witnesses? Arms and legs! That’s why we settle. And I know some plaintiffs’ lawyers, they don’t have money to finance. So they’re able to see the reality, and in this case, they settled the case. But one big credit should be given to the defense lawyer in this case. I made full disclosure to him that I knew the plaintiff, the female employee, personally, and her lawyer was an old acquaintance. But the defense lawyer said that it was okay, and that it might help him. And I guess he was right. If I, as the mediator, have a good relationship with the plaintiff, then it may be more helpful for the defense to reach a settlement.

Peter Robinson: Time is getting away from us. I would like to ask you a question and also open it up for audience questions. My question is about mediation techniques in with Korean participants. Especially when Judge Lee mentioned the knockout culture as opposed to the compromise/settlement culture, what is your approach when mediating in this culture?

Ryul Kim: This is a case between two Korean brothers. This is an example of a knockout culture case. They were really hard working Korean immigrants, who built a huge successful business from scratch. As their business got successful, their second generation got involved in management. And the older brother felt that he was being really left out,

530

[Vol. 15: 515, 2015]

The Emergence of Mediation in Korean Communities

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

and that the second generation wasn't giving him much respect. Then, his knockout instinct came into play: "I'm going to wipe out my younger brother, and my younger brother's son and daughter—my nephew and niece—by all means and all costs."

He brought the lawsuit and was ready to dissolve his relationship with his brother. But even though he had this killer instinct, after speaking with him, I realized that he was ready to forgive and reconcile with his younger brother. As soon as I recognized that, I went back to his younger brother during a private caucus and asked, is there anything your older brother has done for you, anything good in your whole life, anything you can think of? He said, "Yes, my parents died early and sometimes my older brother had to take care of me like a son." So then I went back to the older brother and said, "Your younger brother said he still remembers and appreciates everything that you have done for him."

After hearing that, his K.O. mentality softened. That mediation case started at 10am, and we reached so many impasses during mediation; it lasted until 2am—14 hours. But once the older brother's attitude was softened, he decided to sell his whole interest in the business to his younger brother. So even though there is this killer "knockout" instinct in the Koreans, at the same time, they are looking for the redeemable, forgivable element from the other party.

Peter Robinson: Thank you. I would like to give each of our panelists one chance to make a final comment after hearing from the other panelists.

J. Kwang Ho Lim: I would like to give a brief background regarding the K.O. mentality that has been discussed. Since the Korean culture has very strong Confucianism roots, there is a strong "saving face" culture. However, partially traced back to Korea's war history and culture, when there has clearly been a wrong and people's pride are affected, they feel justified in responding to the wrong, and that's when the K.O. mentality is usually triggered. It's difficult to generalize this though, and there certainly needs to be more studies done to determine whether this is a national characteristic, or whether it is something affected by the change in times and

[Vol. 15: 515, 2015]

The Emergence of Mediation in Korean Communities

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

circumstances. And with that, I would also like to thank you once again for inviting me to participate at this wonderful conference, and I hope that mediation continues to grow in Korea, and that we can see more peaceful resolutions to conflicts. Thank you.

J. Kwang Ho Lim: I want to deliver the deepest thanks to Peter Robinson, Jack Coe, and Tom Stipanowich for giving me a precious chance to come back here to this beautiful campus, and to remind me of some good days here. I learned a lot from this conference, and it reminded me of my first day here as a student. And I want to give you a little information regarding the Korean “hwaeshik” or company dinner. The Korean courts have many decisions holding company dinners to be a part of work. So this company dinner concept is that strong in Korea.

Ryul Kim: I really appreciate Straus Institute for doing this and reaching out to the Korean community in the U.S. and Korea, and extending your peace-making ministries at a global level. I really appreciate that.