

# The Appropriate Remedies and Redress for Data Protection in Korea

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## I. Introduction

What kind of remedies and redress are available for the injured party in the following cases?<sup>1)</sup>

### *Case 1*

Abe found out that a considerable amount of additional fee had been charged by Bizcom, a mobile phone company for a value-added service which he had never subscribed to. Abe asserted that Bizcom had used Abe's personal information without Abe's prior written consent. Abe is going to demand the refund of unduly charged bill and compensation for his inconvenience.

Bizcom acknowledged that such value-added services were, in principle, provided to the clients upon their consent and that some agents allegedly made unsolicited subscriptions without clients' consent. Bizcom said "yes" to the refund, but "no" to the pecuniary compensation.

### *Case 2*

Cathy has a 10-year old boy who likes to play on-line games as a registered member of Game Site "Dudegame". Cathy discovered her boy had to pay a handsome amount of monthly charge. Cathy did not approve her boy's application for Dudegame membership which is not for free. Cathy pointed out Dudegame's admission of children under the age of 14 should be subject to parents' consent, and demanded the refund of admission fee and the secession of her boy from the Dudegame site.

Dudegame stressed that parents' consent is mandatory for the collection of

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1) These cases are real but modified for the purpose of this article.

personal information and the admission of children below 14, and that Cathy's son made believe that his parents had consented to his membership of Dudegame.

### *Case 3*

Elly bought a suit of clothes from Follyshop's Internet store in December 2001. However, Elly wrote down her complaint, that the fabric of the clothes delivered to her was different from that displayed on the catalog, on the bulletin board of Follyshop's homepage. Follyshop disclosed the order sheet containing Elly's name, address and bank account number on the open bulletin board. So Elly demanded immediate deletion of her order sheet and compensation for mental damage up to 300 thousand Won (equivalent to U\$250).

Elly was afraid that her personal information was open to public, and asserted that Follyshop's action jeopardized her security. Follyshop refused to provide redress to Elly because she had caused highly biased and adverse reputation to the visitors to the Internet shopping mall.

The above-mentioned cases show the negative aspects of the full-fledged information society in Korea. At first, e-consumers like Abe, Cathy and Elly could submit complaints to the Korea Consumer Protection Board (KCPB). If Bizcom, Dudegame and Follyshop refused to accept the mediation arranged by the KCPB, the injured parties had to file suit for damages with the court. But KCPB's decision has little legal authority, and the civil action is somewhat onerous and inconvenient in view of the small amount of damages. Also it is not easy to demand a specific performance of the violator including the secession from membership and deletion of relevant information.

In Korea, personal information concerning an identifiable data subject shall be protected by law. The Constitution provides for the protection of individual privacy and liberty. Article 17 states that all citizens shall enjoy inviolable right to privacy. Article 18 stipulates that all citizens' confidentiality of communication shall not be harmed. They purport to ensure every citizen the right to control and determine his/her own personal information in line with the right to pursue his/her own happiness.

Korea has two comprehensive data protection laws by sector: in the public sector, the Act on the Protection of Personal Information Maintained by Public

Agencies (effective from 1995), and in the private sector, the Act on Promotion of Information and Communications Network Utilization and Data Protection (hereinafter referred to as the "Data Protection Act". Data protection provisions came into force on July 1, 2001).

Under the Data Protection Act, the information and communications service provider (including ISPs) is required to notify a data subject of its purpose, and obtain subject's consent when it intends to collect and use personal data. Thus out-of-purpose use or conveying of personal data to the third party is strictly prohibited. Likewise, the information and communications service provider shall obtain the consent from a relevant legal representative, when the provider intends to gather personal data from children under the age of 14, or to utilize such information or convey it to a third party. So the data subject or minor's legal representative may, at any time, withdraw his/her consent to the collection, use and conveyance to a third party of personal information. He/she may request access to his/her personal data maintained by the information and communications service provider, and correction or deletion of any error or false information included therein. The information and communications service provider shall immediately take necessary measures to correct or delete such collected data or to suspend out-of-purpose use upon data subject's request.

If the information and communications service provider would not cease to violate the data protection provisions, their victims will increase. The above mentioned cases showed that service providers mishandled the personal information of customers. The alleged damages were not big enough to be adjudicated and could be settled by the concerned parties. As the cases were related to computer systems and networks, the relevant parties would agree to an arrangement suggested by the court-like authority with competent knowledge and technological expertise.

## **II. Alternative Dispute Resolution in Korea**

In Korea, most disputes arising out of private transactions have been resolved by the court. Recently, an increasing number of people resort to such alternative dispute resolution (ADR) as arbitration, mediation or conciliation. The merits of

ADR are speed, convenience, comparatively low cost and consensual resolution. If ADR mechanisms are proved to be successful, relevant parties would shun the court.

The court has already employed civil mediation procedures according to the Civil Mediation Act 1990. ADR is frequently used in cases of medical disputes, labor strifes, consumer claims and so on. Such ADR mechanism as well as the civil mediation might contribute to the public, administrative or specific nature of the disputes in the area of periodical registration, broadcasting, equal opportunity by sex, environment, construction, copyright, sub-contract, etc.

In this regard, it is noteworthy that the newly amended Framework Act on Electronic Transaction, effective from July 1, 2002, has established the Electronic Commerce Mediation Committee (ECMC). Originally the Act provided for only the process, not the body, of dispute resolution because other remedies were easily available in line with the "slim government" principle without any specific subject on its merits. However, as an increasing number of consumers were hurt in the course of e-trading and all-around efforts were called upon for the prevention of such occurrence, the ECMC set sail in the premise of the Korea Institute for Electronic Commerce on April 12, 2000. Accordingly, any kind of disputes arising from the electronic commerce has been resolved by such a mediation system.

With respect to the data protection, a dispute settlement body has been established under the newly amended Data Protection Act, which came into force on July 1, 2001. It was because any disputes related with data protection or privacy could not be settled like e-commerce or consumer protection issues. Under the Data Protection Act, anyone suffered for data protection issues may put in a claim that his/her case be treated in the Personal Data Protection Center<sup>2)</sup> in the Korea Information Security Agency (KISA).

If the suffering goes beyond endurance, the injured party may file a petition with the Personal Information Dispute Mediation Committee (PIDMC)<sup>3)</sup> under the Data Protection Act. The PIDMC was established in December 2001 to facilitate a prompt, convenient and appropriate settlement of disputes arising from personal data or privacy infringement. The Dispute Mediation Committee is composed of up

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2) <[http://www.cyberprivacy.or.kr/index5\\_a.htm](http://www.cyberprivacy.or.kr/index5_a.htm)>

3) <[http://www.cyberprivacy.or.kr/index1\\_a.htm](http://www.cyberprivacy.or.kr/index1_a.htm)>

to 15 members, appointed or commissioned by the Minister of Information and Communication from the well-qualified lawyers, IT engineers, professors, representatives from consumer organizations and IT businesses, whose term, integrity and professionalism are guaranteed by the Data Protection Act.

Actually, the dispute mediation proceedings shall be initiated by either an injured data subject or the on-line or off-line information service provider, and settled free of charge. When a petition for mediation is filed with the Dispute Mediation Committee, the Committee commences factual investigation in an informal way and advises a settlement voluntarily agreed upon by the parties prior to the formal mediation procedure.

If both parties fail to agree upon a settlement, the Dispute Mediation Committee starts the mediation proceedings. After fact finding efforts through hearings, discoveries and expert's examinations, the Dispute Mediation Committee suggests a mediation proposal for an agreement by the parties within 60 days from the filing of petition.

If and when both parties say "yes" to the draft mediation within 15 days from the proposal, and execute the mediation record, the mediation is effected. Otherwise, each party may file a civil suit with the competent court, and the Dispute Mediation Committee may support the data subject to conduct the court proceedings. Otherwise the parties may go directly to the court without filing a petition for mediation with the Dispute Mediation Committee.

The Dispute Mediation Committee is supported by the Secretariat of the PIDMC, which carries out receiving of the petition for dispute mediation and the factual investigation, preparation of agenda for the Dispute Mediation Committee conferences and keeping its minutes.

### **III. Data Protection Mediation Procedure**

#### **1. Data Protection Issues and Mediation Process**

How to resolve data protection disputes depends on the judiciary system and dispute settlement practices of the nation.

Originally any dispute arising out of e-commerce could be settled within the framework of consumer protection. During the course of electronic transactions,

however, a company functions not only as a supplier but also as a consumer. Therefore, the consumer protection regime, which stands for consumers and against fraudulent transactions, cannot apply to e-commerce in principle.

On the international scene, electronic trading parties prefer more speedy and convenient remedies or ADRs to litigation before the court. Against these backdrops, the Organization for Economic Cooperation and Development (OECD) made public the Guidelines for Consumer Protection in the Context of Electronic Commerce on December 1999,<sup>4)</sup> in which OECD suggested that consumers should be provided meaningful access to fair and timely alternative dispute resolution and redress without undue cost or burden, and called for further study and cooperation at the international level.

The ADR mechanism arranged by specialists are regarded as a more adequate forum of dispute settlement in the electronic commerce than the traditional litigation before the court on the following grounds:

- e-commerce is not carried out on the paper nor in a face-to-face relationship;
- transactions are repeated and in bulk toward unspecified majority customers;
- announcement of one's intention are instantaneous and made through computer and communication systems; and
- more often than not transactions take place cross the border.

The frequent disputes arising from e-commerce might be curtailed when concerned parties are aware of preventive measures and redress, and low cost and speedy remedies are available. However, the above dispute resolution mechanisms apply directly to the disputes in the context of data protection. It is because the personal information is collected, processed and used through computer systems and networks, and unauthorized or illegal data flow would give rise to individually trivial but widely dispersed damages if it were not for timely and appropriate intervention.

## 2. The Effect of Mediation

Though data protection infringement could be settled more appropriately by ADRs rather than traditional litigation, it is arguable that the mediation process

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4) <<http://www1.oecd.org/publications/e-book/9300023E.PDF>>

would limit the citizen's right to trial<sup>5)</sup> and that the mediation effect is equivalent to the court decision.

As mentioned before, Article 36 of the Data Protection Act provides for that the Dispute Mediation Committee successfully advises its independent draft mediation to the relevant parties and close the case. If both parties agree upon the draft mediation, the Dispute Mediation Committee shall promptly prepare a written mediation. When the PIDMC chairman and the parties affix their names and seals thereon, an agreement identical to the written mediation between the parties shall be deemed reached like an out-of-court settlement.<sup>6)</sup> If both parties refuse to accept the draft mediation, i.e., a "mediation failed", the injured party could file suit with the court.

Thus, the Data Protection Act does not stipulate the mandatory mediation system, and allows both dispute mediation and litigation in view of the limited authority in the ADR mechanisms. It means that the current dispute mediation process supplements the traditional judiciary system, and would not infringe on the citizen's right to trial.

The Dispute Mediation Committee is required to investigate the particulars of disputes between the parties, and suggests a proper draft mediation to both parties so as to enhance its reliability. For efficient proceedings, the Committee may ask both parties or relevant witnesses to provide data and materials necessary to mediate the dispute.<sup>7)</sup> Accordingly the dispute mediation procedure functions as a quasi-judiciary system reinforcing citizen's right to trial.

Any dispute arising out of data protection may be resolved cumulatively by a mediation and a litigation, but the damages and the scope of injured parties will decide the course of procedures. If both parties come to the mediation procedure, the effect of the mediation shall be the settlement under the Civil Code, which is less effective than the court settlement. In principle, a court settlement may replace the court decision on condition that both parties approve the mediation and waive the right to trial. However, the data protection disputes concern the right to privacy, i.e., the human right under the Constitution, and have to be resolved

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5) Paragraph (1) Article 27 of the Constitution.

6) Article 731 of the Civil Code.

7) Paragraph (1) Article 37 of the Data Protection Act.

ultimately in the court.

In this regard, in 1995 the Constitutional Court of Korea ruled that Article 16 of the National Compensation Act which affords the effect of a court settlement to the compensation decision of the National Compensation Deliberation Committee subject to the applicant's consent is unconstitutional.<sup>8)</sup> The supreme court in the constitutional affairs reasoned that the decision which regarded one party's silence as its consent and acknowledged the formation of a mediation leading to a court settlement could bring about the limitation of the right to trial, an infringement upon the fundamental right. In the aftermath of the above-mentioned decision of the Constitutional Court, a mediation agreed upon by both parties is given the effect of a contractual settlement under the Civil Code rather than a court settlement so as to ensure the right to trial.

For a dispute mediation to have an identical effect with a court settlement, the following requirements should be satisfied:

- the mediation body shall be neutral and independent;
- the mediation procedures shall be fair to both parties;
- the assertion and evidences of both parties shall be disclosed in detail; and
- the mediation shall be reasonable and comply with the overall rule of law.

If the applicant is notified of the "mediation failed" and the case closed, he/she could decide whether he/she file suit with the court. At present, the mediation procedure is for free. But a reasonable charge is necessary because the beneficiary should pay the cost and mediation influx should be prevented.

#### **IV. Prospects for the Data Protection Mediation System**

The Personal Information Dispute Mediation Committee (PIDMC) of KISA ruled the first-mentioned cases as follows:<sup>9)</sup>

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8) Constitutional Court's 91Hun-Ka7 case on May 25, 1995. Until then Article 16 of the National Compensation Act provided for that "the compensation decision of the National Compensation Deliberation Committee, when the applicant consents thereto, shall be deemed as if a court settlement has been formed."

9) These are excerpts from the case book compiled by the Secretariat of the Personal Information Dispute Mediation Committee.



*Case 1. Unsolicited value-added service charge*

PIDMC ruled that Bizcom's use of Abe's personal information, which was voluntarily presented by Abe at the time of subscription to Bizcom's mobile phone service was in violation of Article 24(1) of the Data Protection Act.<sup>10)</sup>

PIDMC decided that defendant should refund improperly charged rate to Abe and pay the damages up to 500 thousand Won for Abe's psychological sufferings. Bizcom did not approve the decision, and the mediation failed with the case closed.

*Case 2. Children's admission to the online game site membership without parents' consent*

PIDMC ruled that Dudgegame, which admitted a child below 14 with no consent of Cathy, boy's mother, violated Article 31(1) of the Data Protection Act.<sup>11)</sup> PIDMC mediated that Dudgegame should refund the fee and have the minor member withdraw from the game site. Both parties agreed to that decision and the case closed.

*Case 3. Internet shopping mall owner's intentional leakage of client's information*

PIDMC ruled that Follyshop's disclosure of Elly's information on the Follyshop's bulletin board infringed Article 24(4) of the Data Protection Act.<sup>12)</sup> PIDMC decided that Follyshop should immediately delete the personal information on the bulletin board and compensate damages up to 200 thousand Won for Elly's suffering. Both parties agreed to that decision and the case closed.

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10) Article 24 (Utilization and Provision of Personal Information, etc.) (1) No provider of information and communications services, with the exception of the consent of the relevant user or the case falling under each of the following subparagraphs, shall utilize the personal information or provide it to any third person beyond the scope of the notification as prescribed in Article 22 (2) or the limit specified in a standardized contract for the utilization of the information and communications services: *<omitted>*

11) Article 31 (Right of Legal Representative) (1) Any provider of the information and communications services shall, when he intends to gather the personal information from any child whose age is below 14 under Article 22 or to utilize the personal information or provide such personal information to any third person under Article 24 (1), obtain a consent thereof from his legal representative. In this case, the provider of the information and communications services may ask the relevant child for the necessary minimum information, including the name, etc. of the legal representative, to get an agreement of the legal representative.

12) Article 24 (Utilization and Provision of Personal Information, etc.) (4) Any person who handles or handled the personal information of users shall not damage, infringe on or leak any personal information of users that he has learned while performing his duties.

The above three are among hundreds of mediation cases. PIDMC attentively hear both plaintiff's claims and defendant's assertion on a fair and equal footing. PIDMC is believed to play as an unbiased learned umpire regardless of the amount of damages. If the information and communications service providers continue to do such businesses unregulated and undisciplined even without awareness of their illegality, the damage would spread with data protection or privacy at a perilous status in this information society. So, from the viewpoint of data subjects, the injured party has to use all possible means of remedies and redress, including the correction or deletion of incorrect information as well as appropriate damages.

What if one party would not accept the mediation? In most cases, the injured party could not go to the court because the damages are not so big and even trivial, and the court proceedings are expensive and onerous. Therefore, in view of the limited authority and effect of ADR mechanisms, it is advisable that the defendant has nothing but to approve the mediation agreement in the following manner:

- to provide the title of enforcement (i.e., *chaemoomyongyi* in the Korean terminology) to the mediation;<sup>13)</sup>
- to support the victims so as to file lawsuit: and
- to let the violator of the data protection provisions confront penalty or even criminal charges.

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13) If Defendant fights against such title of enforcement provided to Plaintiff by filing "objection" with the court, the attempted mediation or Plaintiff's demand will have a chance to be adjudicated by the court.