NAGOYA UNIVERSITY

Graduate School of Law

EXAMINATION OF JUDICIAL ADMISSION IN CIVIL PROCEDURE:

TOWARDS A MECHANISM BEST FOR ALL

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DATE OF SUBMISSION : June 24, 2011

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ACKNOWLEDGMENT

Doing research in the field of civil procedure is an exciting adventure, which is hard to explain by words, but the excitement is often overwhelmed by the nervousness when having to think about the deadline. Regardless of many challenges I have come across during my research years, the endeavor to be a Cambodian of the first generation of the new Code of Civil Procedure to research and produce a dissertation in the field of civil procedure is always a primary inspiration to overcome all my anxiety and the obstacles. However, this dissertation may not have come into existence without the supports of particular institutions and many individuals. I owe a debt of gratitude to them.

My thanks are due to the Japanese government for the scholarship provided to me through Nagoya University. Together with these, I wish to acknowledge with gratitude the guidance of my main supervisor, Professor SAKAI Hajime, without whom I would have never started and completed this dissertation. Every single minute I had spent with him for his advices was full of nervousness in me, but his cheerfulness and friendliness did get rid of those intense feelings of mine, yet I always got the clear guidance for the go-ahead with my project. His permission for my membership in his seminars contributed significantly to my currently very limited Japanese ability that I needed for my research. I also wish to extend my gratitude to my sub-supervisors, Professor HONMA Yasunori and Professor WATANABE Miyuki, for their investment of time in reading and commenting on my dissertation. Together with this, I wish to convey my special thanks to Assistant Professor OKUDA Saori for her constant assistances on all personal problems and academic issues that I had encountered during my research years. Many things have changed within ten years since I first met her in Nagoya, but her hospitality and assistance remain the same.

I extend my heartfelt thanks to JICA and some of its experts whom I have known and worked with. JICA always provides me opportunities to engage in many trainings and projects which enable me to develop my practical knowledge in the field of civil procedure. Some experts have directly invested with me their time and efforts in boosting me up so that I could do the research in this field. Lawyer MANABE Kana made concerted effort in an attempt to send me back to Japan for further research, while lawyer KAMIKI Atsushi privately taught me Japanese language and deepened my civil procedure knowledge prior

to my departure to Nagoya University. They gained my personal respect and gratitude. I am also indebted to Mr. SALY Theara, Justice of the Supreme Court of Cambodia for his contribution on the copies of court documents that I used for my case reviews.

My most appreciation goes to my wife, KORK Boren, for her great assistance since the outset. Regardless of her own busy and hard time struggling with completing her dissertation and changes in physical conditions during her pregnancy, she was always there to assist me in anything I needed. I also take this opportunity to give praise to my gracious widow mother who has sacrificed everything in her life just to see me live up my dreams. Her unconditional love and care have saturated my strong spirit, while her undying supports have committed me to every success I made.

I dedicate this dissertation to my first-born son whose birth brought joy and inspiration to my wife and me for our academic lives. Above all, may glory be to God from whom my strength and wisdom come.

ABSTRACT

In civil disputes, it is generally up to the parties to initiate and instigate litigation, investigate facts, and present proof and legal arguments to the tribunal. As a result, the function of the court is limited to adjudicating the issues raised by the parties on the proof they have presented and with few exceptions, court will waive the issues, objections or points that parties have failed to raise, mention or make. However, it is not always the case that the parties who have asserted facts must prove the existence of the facts. There are exceptions in which courts employ some facts asserted by a party as the basis of judgment without requiring parties to prove them. The civil procedural laws of many countries stipulate these exceptions.

Article 179 of the Code of Civil Procedure of Japan, for example, stipulates that the "[f]act admitted by a party before a court shall not be required to be proven." Similarly, the Code of Civil Procedure of Cambodia prescribes in its Article 123 "[f]act admitted to by a party in court (…) need not be proven by evidence." In addition, Rule 36 (b) of the Federal Rules of Civil Procedure of the United States of America contain not the similar provisions that specifically mention about the fact, but prescribe more broadly that "[a] matter admitted under [Rule 36] is conclusively established unless the court (…) permits the admission to be withdrawn or amended."

Japanese scholars and court practices have long developed the theories of admissions, while the Federal Rules of Civil Procedure of America provide how an admission may be established. However, admission is merely a term in our civil procedure code, while its concept is absent and the court practices provide little or no basis for any conception. Leaving such situation remains status quo will harm the civil justice system of Cambodia because courts can arbitrarily presume that there is a judicial admission related to a particular fact that the court could base its judgment on to determine the claim of a party. Therefore, it is necessary that Cambodian scholars introduce a proper admission system to Cambodian civil procedure. This dissertation serves this purpose. It aims at giving a recommendation on a proper judicial admission system to Cambodia to solve the current problem, the lack of judicial admission system to realize the spirit of our current law and to serve as one among effective tools to apply civil justice system.

In order to achieve this purpose, this dissertation provides comparative studies and analyses on

judicial admission established under different civil procedure systems. This dissertation chooses to focus its studies and analyses on two major civil procedure systems, those of Japan and the United States of America. The rationales for choosing these two systems are because Japanese civil procedure is the parent law of Cambodian one, while American civil procedure has had influences on the post-war Japanese civil procedure. The comparative studies and analyses focus on legal provisions, scholarly theories and judicial precedents. The scope of these studies and analyses are limited to the general concepts of admissions and/or judicial admissions under each civil procedure system, facts or issues that can be subject matters for the judicial admissions, methods of establishment, the effects of the judicial admissions, the scope of their effects, the withdrawal and conditions for their withdrawal. As part of those studies and analyses, the dissertation introduces the premises on that have developed the law or system of judicial admissions in each civil procedure system. Finally, the dissertation provides the critical analyses on the advantages and disadvantages of each judicial admission system under the two civil procedure systems if Cambodia adopts any of them. In conclusion, the dissertation introduces a system to Cambodia that is more likely appropriate to the civil procedure system of the country.

For the conveniences for the readers to catch the flow of discussions and analyses, the author divides the dissertation into four main chapters. These four chapters are additional to the introductory chapter that includes the problem statement, research objectives and the methodologies and the last chapter that recommends a judicial admission system to Cambodia. These four chapters contain the titles and contents as follows.

Chapter one is titled as, “Judicial Admission under Japanese Civil Procedure.” This chapter focuses on the judicial admission under the Japanese civil procedure system. Its discussions and analyses are based on the theories developed by Japanese scholars and Japanese court practices according to the Japanese Supreme Court’s decisions. The theories that this dissertation studies are not limited to only commonly accepted theories, but also extended to minor theories. Meanwhile, the studies on judicial precedents focus on both the major and minor decisions and the judicial reasoning.

The discussions and analyses base on the literatures and the judicial precedents. Chapter one

commences with the presentation of the definitions of judicial admission that the Japanese courts have developed and that the Japanese scholars have provided. From these definitions, this chapter goes further to analyze the elements that constitute a judicial admission in a civil proceeding under the Japanese civil procedure system. Concerning the elements constituting a judicial admission, this chapter presents that the Japanese judicial precedents have held that there are three elements necessary for parties to constitute a judicial admission. First, the subject matter for admission must be facts, in principle. Second, one party must assert that fact and the other party states to adopt that fact, which means there must be consistency between the assertions and/or statements on that fact. Third, the fact asserted or stated by one party must be disadvantageous to that party. In other words, fact admitted is disadvantageous to the admitting party. Concerning the methods for establishment, this chapter discovers that the parties in civil suit can only make such assertions and statements of the fact to establish admission in the preparatory proceedings for oral argument or in oral argument stage. Thus, any assertions or statements made outside these two types of proceedings are not qualified to constitute a judicial admission. There are no conflicts of opinions among scholars concerning the methods of the establishment. However, what cause number of discussions are the facts that are subject matters of judicial admissions and their disadvantageousness.

A school of thoughts argues that not only ultimate facts should be subject to judicial admissions, but other facts, such as indirect ones should also become the subject matters for judicial admission and the effects of admissions of these facts should also bind the court and the admitting party. The other school of thoughts, however, disputes that facts other than ultimate ones must not become the subject matters for judicial admissions. Each school of thoughts provides different theories. This chapter provides detailed discussions on this issue.

Furthermore, this chapter moves on to discuss the arguments of some Japanese scholars who insist that the disadvantageousness of a fact to the admitting party should not be the major consideration for the establishment of a judicial admission. This chapter provides brief arguments provided by these scholars on the issue. This chapter continues to provide detailed discussions on the prerequisites for the withdrawal of the established admission because there are different scholarly opinions that challenge the precedents of the Supreme Court of Japan. Finally, this chapter concludes all the discussions related to the concepts of

judicial admission under the Japanese civil procedure system and presents the commonly accepted theories related to them and the basis from which the law or system of judicial admission of Japan has originated—the *benron shugi*.

Chapter two analyzes and discusses the notion of judicial admission under the federal practices, which means the Federal Rules of Civil Procedure of America (hereinafter "the Federal Rules") and the federal judicial precedents are the bases for the analysis and discussion. First, this chapter starts by the definitions of admissions provided by the Federal Rules of Evidence of America and those developed by American scholars before it continues to discuss what judicial admission is under the Federal Rules of Civil Procedure and the federal practices. The chapter goes on to provide detailed on the American theories on classifications of admissions, and later presents what judicial admission means under American federal practices. After these introductions, this chapter moves to discuss specifically on rules and methods through which parties in a civil suit may establish admissions and judicial admissions under the Federal Rules and practices.

Second, this chapter provides detailed discussions on admissions established through Rule 36 (request for admissions). It presents voluminous discussions on admissions established through Rule 36 because this rule stipulates precisely about the request for admissions by parties, and it also prescribes the forms for request and responses, scope of requests, the effects of admissions established under this rule and other restrictions. Section on discussions on admissions under Rule 36 finally presents that admissions established under Rule 36 are judicial admissions that have conclusive and binding effects.

Third, this chapter goes on to discuss admissions established under other devices that include other discovery devices, pleadings, pretrial conference, admissions at trial and admissions through stipulation. Parties through their lawyers can utilize one or more of these devices to establish admissions. However, not all admissions obtained through them are judicial ones. In other words, although admissions occur, not all of them have conclusive and binding effects. Therefore, this chapter provides discussions on devices through which parties can establish judicial admissions. The discussions on the establishment of admissions through these devices precede other discussions related to methods for withdrawal or amendment and the

effects of admissions. This chapter also tries to present that the American judicial admission system originates from the adversary system where parties through their lawyers play active role in civil suits, while courts are relatively passive.

In summary, the main theme of this chapter is to present the concept of judicial admission, the subject matters of admissions, the methods of establishment, the withdrawal, the effects and the scope of admissions that parties can establish through the devices provided by the Federal Rules. Furthermore, it finally concludes what devices parties can use to establish judicial admissions and how they are different from Japanese methods of establishing judicial admissions.

Chapter three of this dissertation introduces to its reader the issues of the scarcity of the Cambodian scholars specializing in the field of civil procedure and the academic publications that are the causes of the unavailability of theoretical developments of judicial admissions concept provided by the Cambodian Code of Civil Procedure. However, although this chapter presents such constraint, it shifts its attention to analyzing the court practices to see if any judicial admission concepts exist in the Cambodian courts' decisions. Such analyses base on the Cambodian case reviews.

This chapter finds that Cambodian courts have not yet applied Article 123 provided by the Code of Civil Procedure yet. This article mentions about the admission of fact by the parties and the effect that binds the court. However, this chapter finds that the Cambodian courts employ the term "acknowledgment" to recognize the state that one party agrees to the fact asserted by the other party and that fact is disadvantageous to the party who agrees to it. The Cambodian courts' decisions reveal that the courts recognize such acknowledgment when parties assert and adopt that fact in the oral argument proceeding which is similar to Japanese practice.

However, the case analyses come up with the conclusion that the "acknowledgment" serves no function the same as judicial admissions under American and Japanese practices and as admission provided by Article 123 of the Civil Procedure of Cambodia. Such conclusion bases on the fact that Cambodian courts recognize such acknowledgment that parties make, while at the same time the courts examine the evidences that the parties offer. In other words, such acknowledgment does not have any binding effect on

the courts. Similarly, through these case reviews, this chapter finds out that the acknowledgment that parties make at oral argument and that the courts recognize does not have any binding effect on parties. Therefore, this chapter recommends that Cambodia needs to adopt a judicial admission system from either American civil procedure system or from Japanese one as long as it best suits the current civil procedure system of Cambodia. To introduce in particular which system is the most suitable one, this dissertation creates chapter four to discuss the possibility and impropriety of adopting one among the two systems as well as to present advantages and disadvantages of each system.

Chapter four tries to pose a question whether Cambodia should move forwards Japanese judicial admission that bases on *benron shugi* or it should follow the American system that takes premise on adversary system. This chapter contains two sections. First section deals with the discussion on how appropriate the American judicial admission system is to Cambodian civil procedure system. This section bases its discussion on three aspects of problems that include technical, practical and theoretical issues. This section presents that the adoption of American judicial admission will require the substantial change to Cambodian legal system which then theoretically leads to the change in legal system of Cambodia. Furthermore, beside such disadvantages, the American system of judicial admission is costly which is not convenient for the Cambodian parties at all, and the current situation of Cambodia may not be ready to accommodate such a system as the number of Cambodian lawyers is relatively small.

Second section of this chapter deals with the analyses on the advantages of Japanese judicial admission system that Cambodia may take. Such analyses provide that Cambodia can adopt the Japanese system more easily because of Japanese advantages in the judicial admission system that include the technical, practical and legal culture advantages. One of the main arguments that this section provides is that the adoption of Japanese judicial admission system will not require any substantial change to Cambodian current legal system, as its current civil procedure has all the devices necessary to establish judicial admission required by Japanese system. After the analyses on American and Japanese judicial admission systems provided through the two sections, this chapter suggests that Japanese system is more appropriate for Cambodian civil procedure system.

Finally, the dissertation concludes that the Japanese judicial admission system is more appropriate for Cambodia. There are a number of arguments for this recommendation. First, the American disadvantages make it hard for Cambodia to adopt American judicial admission system. Any attempt to adopt such a system will harm Cambodian legal system, as the import of the American system will require the overhaul of current Cambodian law. Such adoption is not worthwhile, thus. Second, the Japanese advantages in civil procedure can make Cambodia enjoy the adoption of Japanese judicial admission system because there is no requirement for the overhaul of the current legal system. In other words, current Code of Civil Procedure of Cambodia has all the devices to adopt that Japanese judicial admission system. Thus, it is appropriate for this dissertation to recommend that Cambodia should adopt the Japanese judicial admission that bases on *benron shugi*.

EXAMINATION OF JUDICIAL ADMISSION IN CIVIL PROCEDURE:

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INTRODUCTION

Although litigation is not an amicable means for dispute resolution, the use of judicial mechanism is inevitable when other means of settlement cannot be employed to solve civil disputes. Two parties to a dispute may prosecute litigation seeking for a judgment that contains specific contents in his favor. However, prior to receiving a judgment with specific contents, the parties and judge involved in a case must abide by a series of certain rules stipulating the procedures. These procedures are called civil procedures.

Civil procedure deals with a civil justice system set up by the government of a society for the submission and official resolution of civil disputes.[1] It concerns the society's noncriminal process for submitting and resolving factual and legal disputes over the rights and duties recognized by substantive law.[2] Although there are different legal systems dominating legislation of each country, civil procedure are classified into two categories, one is inquisitorial system and the other is adversary system.

The main characteristic of the inquisitorial system is that the judge conducts active and independent inquiry into the merits of each case.[3] A Judge in the inquisitorial system may direct the investigation and production of evidence and the formulation of issues for decision.[4] On the contrary, adversary system, whose adversarial nature represents the characteristic of the Anglo-American procedural system, places enormous emphasis and responsibility on the lawyers because the court maintains a relatively passive role throughout the proceedings.[5] Therefore, in civil disputes, it is generally up to the parties to initiate and instigate litigation, investigate facts, and present proof and legal arguments to the tribunal.[6] As a result, the function of the court is limited to adjudicating the issues raised by the parties on the proof they have

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[1] Fleming James, Geoffrey C. Hazard Jr., and John Leubsdorf, *Civil Procedure*, 5th ed. (Foundation Press, 2001), 4.
[2] Kevin M. Clermont, *Black Letter Outline on Civil Procedure*, 8th ed. (West, 2009), 1.
[3] Jack H. Friedenthal, Mary Kay Kane, and Arthur R. Miller, *Civil Procedure*, 3rd ed. (West Group, 1999), 2.
[4] William W Schwarzer, "The Federal Rules, The Adversary Process, and Discovery Reform," *University of Pittsburgh Law Review* 50 (June 1989): 709.
[5] Friedenthal, Kane, and Miller, *Civil Procedure*, 2.
[6] Fleming James, Geoffrey C., Jr. Hazard, and John Leubsdorf, *Civil Procedure*, 5th ed. (Foundation Press, 2001), 4.

presented[7] and with few exceptions, court will waive the issues, objections or points that parties have failed to raise, mention or make.[8]

RESEARCH PROBLEM

Because civil disputes concerns only private interests, parties to a dispute comparatively act as customers who order for a particular type of food based on the ingredients they have, while judge will simply act as a chief who cooks based only on the ingredients provided by the customers. In such a comparative manner, it depends on what kind of food, curry or fried noodle, a person wants to eat; the requesting person has to bring the ingredients to the requested chief so that a plate of desired food can be cooked. Similarly, the plaintiff who seeks for the particular type of judgment must bring to the judge the facts and evidences necessary for judgment. These facts and evidences are called litigation materials.[9] Thus, in a loan for consumption case where a plaintiff, for example, asserts that he has monetary claim against a defendant and demands that court order the defendant to pay a specific amount of loan to him, it necessary that plaintiff assert, *inter alia*, the necessary facts to prove the claim. In order to prove the existence of a fact, in principle the asserting party must offer evidences.

However, it is not always the case that the parties who have asserted facts must prove the existence of the facts. There are exceptions in which some facts asserted by a party may be employed as the basis of judgment without having to be proven. These facts are stipulated in the procedural laws of many countries. The Code of Civil Procedure of Japan, for example stipulates that the "[f]act admitted by a party before a court shall not be required to be proven."[10] Similarly, the Code of Civil Procedure of Cambodia prescribes the "[f]act admitted to by a party in court (…) need not be proven by evidence."[11] In addition, the Federal Rules of Civil Procedure of the United States of America contain not the similar provisions that specifically mention about the fact, but prescribe more broadly that "[a] matter admitted under [Rule 36] is conclusively

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[7] Ibid.
[8] Friedenthal, Kane, and Miller, *Civil Procedure*, 2.
[9] Teiichiro Nakano, *Minji Saiban Nyūmon*, 2nd ed. (Yuhikaku, 2006), 24.
[10] Japanese Code of Civil Procedure, Act No.109 of June 26, 1996, at Article 179.
[11] Cambodian Code of Civil Procedure, at Article 123.

established unless the court (…) permits the admission to be withdrawn or amended."[12]

From such provisions, a court can render a judgment based on an admitted fact caring not what kind of evidence should be examined to prove the existence of a fact. As a result, admission in civil procedure has a great impact on a plaintiff's claim. Such an exclusive exemption of proof to the asserted fact, on the one hand, may be an incentive for parties to litigation since it may help economize the lengthy proceedings and the costs of search for proof. Nevertheless, due to the great impact on claim, admission, on the other hand, may jeopardize substantial justice. In order to argue that admission serves more advantages than disadvantages, it is inevitable that we examine the means and elements that are the bases for the construction of admission.

Rule 36 of the Federal Rules of Civil Procedure of America have provided detailed formalities on how an "admission" may be established. Nonetheless, although Japanese and Cambodian Codes of Civil Procedure employ the term "admission," both these codes provide no further description on how an establishment of admission may occur. Absence of such a prescription leaves room for the court's interpretation and academic development of the theories thereof. Japanese courts and scholars have well developed theories on admission since even before the post-war (World War II) reform of their civil procedure code. However, the concerns in Cambodia relate to the treatment on judicial admission by courts and the question on what are necessary elements contributing to the establishment of a judicial admission under current civil procedure system. The Code of Civil Procedure of Cambodia is quite new[13] and up to date; no Cambodian scholar has ever developed any theory on judicial admission. Thus, the status quo poses serious concerns on the civil justice system of Cambodia.

RESEARCH OBJECTIVE AND METHODOLOGIES

This dissertation aims at examining the notion of judicial admission under the civil procedure system in the two major jurisdictions, Japanese and American jurisdictions by analyzing the concept of admission and the elements necessary for establishing it under each system for the purpose of comparative studies.

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[12] *Federal Rules of Civil Procedure*, 2007, Rule 36 (b).
[13] Code of Civil Procedure of Cambodia was enacted and promulgated in July 6, 2006 and was enforced a year later.

The dissertation will, after critical analysis, present to Cambodia an approach on judicial admission from among the two civil procedure systems that is deemed most appropriate for the current legal system and culture of the country. In order to achieve this objective, the dissertation will do literature reviews and examination of courts' precedents from the two jurisdictions as means for critical analysis. Moreover, the dissertation will look into the current problems on judicial admission through ways of reviewing courts' decisions and analyze how admission is treated under current judicial practices. In addition, the dissertation will provide a detailed analysis on concept of judicial admission through literature reviews and precedents of Japanese and American courts by reviewing both the common theories and related counter arguments. By drawing a conclusion from analytical studies on the Japanese and American civil procedure systems, the dissertation, will finally propose an admission system deemed most appropriate for Cambodia.

The rationale for choosing Japanese civil procedure system and its theories as a model for this comparative study is because its civil procedure can be best described as the parent law of the contemporary civil procedure of Cambodia. The current Code of Civil Procedure of Cambodia is the result of legal assistance of Japanese government to Cambodia projected through Japan International Cooperation Agency (JICA) since 1999.[14] Therefore, one may hardly deny that the Japanese civil procedure will not, in a broad scope, affect the current civil procedure of Cambodia in many more aspects.

There are two main rationales for choosing American civil procedure system as one of the bases for the comparative studies of systems of admission in addition to its Japanese counterpart. First rationale is that the comparative studies on more jurisdictions will likely provide more options for comments that this dissertation can give to Cambodia. Second reason for such decision is the U.S. influence on the amendments of the Japanese Code of Civil Procedure.

The old Japanese Code of Civil Procedure of 1926 was much influenced by German procedure system due to the fact that this 1926 version was a basically streamlined version of the 1890 Code adopted on the basis of translation of the German Code of Civil Procedure of 1877.[15] This was, however, no longer true

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[14] Yoshiko Honma, "Hōritsu Kisōgo No Kadai," *Hōritsu Jihō* 82, no. 10 (January 2010): 30 and 32.
[15] Shozo Ota, "JAPANESE LAW SYMPOSIUM: Reform of Civil Procedure in Japan," *The American Journal of*

due to the fact that the post-war (World War II) amendments of the Japanese Code of Civil Procedure were introduced with elements of the Federal Rules of Civil Procedure of the United States of America.[16] For example, special procedures for summary courts and abolition of the ex-officio examination of evidence were among the change.[17] The greater U.S. influences on Japanese civil procedure system came through the adoption of the New Code of Civil Procedure of Japan of 1996 in which the small claim procedure was among the introductions of U.S laws to Japanese civil procedure.[18] Such substantial changes introduced to the post-war code prove the significant influence of the American civil procedure system on it Japanese counterpart. Hence, it is reasonable for this dissertation to introduce the judicial admission under the Federal Rules of Civil Procedure of the United States for the comparative analysis purpose.

Comparative Law 49 (Fall 2001): 563.

[16] Ibid.

[17] Ibid.

[18] Ibid., 564.

CHAPTER ONE: JUDICIAL ADMISSION UNDER JAPANESE CIVIL PROCEDURE SYSTEM

I. Concept of Admission

1. Definition of Admission

In Japan, the concept of "judicial admission" makes no significant difference between the definition developed by courts' precedents and that defined under theories.[19] Under Japanese civil procedure system, although the Code of Civil Procedure failed to define what judicial admission is, the Japanese courts had not left the situation remain as it was. The Supreme Court of Japan held that, "Judicial admission is a positive act of one party at litigation in accepting a fact disadvantageous to himself which has been asserted by the adverse party as a truth."[20]

Japanese scholars have reached the same approach with the better picture of formality for a judicial admission to be established. The scholars define judicial admission as a statement of fact by one party which is disadvantageous to the stating party and that statement is consistent with the assertion of the adverse party at oral argument proceeding or preparatory proceeding for oral argument.[21]

2. Conditions for Establishment of Admission

Drawing a conclusion from the definitions of admission above, it requires that some significant conditions be fulfilled prior to the establishment of a judicial admission to be made by parties to litigation. The furnishing of such conditions may depend on the explicit intentions of the parties or their behaviors in litigation acts and/or by the determination of judge. However, it is necessary that this dissertation conduct careful examinations on what those conditions are, and how parties may furnish those conditions so that court may rule that the parties have established admission.

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[19] Morio Takeshita, "Saibanjō No Jihaku," *Minshō Hō Zasshi* 44, no. 3 (1963): 443.

[20] *Shōkokin Henkan Youbi Riekikin Seikyū No Ken*, 21 Minroku 1520 (1915). The contents of the judgment read as," saiban jyou no jihaku toha sosyou nioite toujisya no ippou ga aitekata no syuccyou suru jujitsu ni site jikou ni furieki naru mono wo sinjitsu nari toshite kounin suru sekyokuteki koui wo iu mono to suru."

[21] Hajime Kaneko and Noboru Oyama, *Minji Soshō Hō Kōgi* (Seirin Syoin Shinsya, 1970), 235; Koji Shindo, Morio Takeshita, and Akira Ishikawa, *Kōza Minji Soshō Hō : Shinri*, vol. 4, 1st ed. (Kōbundō, 1985), 163; Ichirou Kasuga, *Minji Soshō Hō Ronshū* (Yuhikaku, 1995), 159.

2.1. Preparatory Proceeding for Oral Argument or Oral Argument

In order that a judicial admission be established, such admission must be made at the oral argument proceeding or at the preparatory proceeding for oral argument. One can think of quite a few legitimate grounds pursuant to such a prerequisite, among which is because judicial admission is an issue concerning the adjudication of litigation, the presence of judicial body constitutes the necessity for the establishment thereof.[22] A part from this, as judicial admission bears special judicial effects on litigation, the act of establishment of such admission must be carried out directly at court on the date specified through litigation procedure.[23] Therefore, judicial admission must be established at either oral argument or the preparatory proceeding for oral argument date.

An admission can be made outside of judicial proceedings.[24] However, such an admission will not be deemed judicial admission, but is regarded as extrajudicial admission and the admitted fact still has to be proven.[25] Extrajudicial admission does not have any effect as judicial admission does but rather will serve only as materials for the presumption of the existence or nonexistence of the fact that constitutes the contents of it (that extrajudicial admission), which means that the admitted fact serves only as the indirect fact.[26] Furthermore, an admission made at any oral argument proceeding related to other litigation is treated only as extrajudicial admission.[27]A part from these, facts set forth in the preparatory documents become only extrajudicial admission.[28]

A judicial admission can also be established even at the absence of the adverse party due to the nature that admission is a one-way act at court.[29] Moreover, a representative of litigant or partial guardian can also make judicial admission.[30]Above all, the scholarly interpretations provide that it is sufficient for a judicial admission to be construed in writing in the case where documentary adjudication is conducted at voluntary

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[22] Susumu Ito, *Benron Shugi* (Mitsuyuki Kōji, 1975), 127.
[23] Masanori Kawano, *Minji Soshō Hō* (Yuhikaku, 2009), 407.
[24] Ito, *Benron Shugi*, 127.
[25] Yasuo Ueno and Hiroyuki Matsumoto, *Minji Soshō Hō*, 5th ed. (Kōbundō, 2008), 280.
[26] Masao Sakahara, "Saibanjō No Jihaku Hōsoku No Tekiyō Hani," in *Kōza Minji Sosyō Hō : Shinri*, vol. 4, 1985, 163.
[27] Hiroyuki Matsumoto, *Minji Jihaku Hō* (Kōbundō, 1994), 18.
[28] Ibid.
[29] Ibid.
[30] Ibid.

oral argument.[31]

In order to avoid the unnecessary repetition of words, the term "admission" employed in this chapter will mean "judicial admission," and the word extrajudicial admission is not discussed as it not within the scope of this dissertation.

2.2. Consistency of Assertion and Statement

As another condition for the establishment of an admission, the "consistency" between the statement by one party and the assertion of the other party must occur. It is the common theory that the occurrence of the consistency of the assertion and statement is not the matter of order (before or after) of time.[32] An admission is established once a party to litigation asserts a fact advantageous to himself and the adverse party (known as "admitting party") states to acknowledge that fact; conversely, one party (the admitting party) freely states a fact disadvantageous to himself and the adverse party adopts that statement later.[33] To illustrate, in the case of the dispute over the loan for consumption, defendant Y may accept the fact of delivery of money as a plaintiff X asserts by stating, "it is as what you said," or "I admit that," or "I do not dispute this."[34]

Generally, in most cases, an admission is established by way that a party to litigation stated a fact that is in consistency with the fact which has already been asserted by the adverse party.[35] Furthermore, the adoption of the adverse party's assertion alone is sufficient for the construction of a consistency.[36]

2.3. Disadvantageousness of Assertion or Statement

The last element for the establishment of an admission is disadvantageousness of the assertion or the statement. A fact must be disadvantageous to the admitting party according to the afore-mentioned definition. The point in question here is what "disadvantageousness" refers to, and what should be the basis

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[31] Ibid.
[32] Hiroshi Takahasi, *Jyūten Kōgi: Minji Soshō Hō*, 1st ed. (Yuhikaku, 1997), 313.
[33] Ibid.
[34] Ito, *Benron Shugi*, 130.
[35] Kawano, *Minji Soshō Hō*, 407.
[36] Takahasi, *Jyūten Kōgi: Minji Soshō Hō*, 313.

for the determination of this term. This issue of disadvantageousness has long prompted two conflicting schools of thought over whether or not a fact asserted or stated must be a disadvantageous fact to the asserting or the stating party.

These schools of thought are a ground of opinions that support that admission should be established only to the fact disadvantageous to the stating or asserting party, while the other group of ideas raise that disadvantageousness should not be considered as an element for the establishment of an admission. Both school of opinions ground on their respective arguments below.

2.3.1. Supporting Theories

On one hand, "disadvantageousness" refers to the possibility that a party will partly or wholly lose in the case because of that disadvantageous fact and it is not necessary that such fact is limited only to the case where the adverse party bears the burden of proof.[37]On the other hand, "disadvantageousness" relates to judicial treatment, and it is not necessary to refer to the relationship that a party will possibly lose, either partly or wholly, in the case based on one`s own acknowledgement of the fact asserted by the adverse party.[38] The issue is the basis for such a relationship to be distinguished; it should be determined based on the whereabouts of the burden of proof, and it should be thought that an admission is established once there is a statement to affirm the fact that the other party bears the burden of proof.[39]

Derived from these contrasting concepts that claimed to be the premise of the notion of "disadvantageousness," there exist two prominent factional theories employed as the basis for the explanation pertaining what disadvantageousness means or what fact should be regarded as disadvantageous to the asserting or stating party. These theories were developed by Japanese scholars and may not apply internationally. One of the theories is "*shōmei sekinin setsu* [burden-of-proof theory]" and the other is "*haiso kanōsei setsu* [possibility-in-loss-of-case theory]."[40] Although the two theories may serve the same ultimate purpose—that is, to explain the basis for the determination of

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[37] Hajime Kaneko, *Minji Soshō Hō Taikei* (Syakai Syoten, 1964), 246.
[38] Ibid.
[39] Ito, *Benron Shugi*, 121.
[40] Teiichiro Nakano, Kaoru Matsuura, and Masahiro Suzuki, *Shinminji Soshō Hō Kōgi*, 2nd ed. (Yuhikaku, 2008), 286.

"disadvantageousness," the adoption for any of the theories will make affect the establishment of an admission since it may or may not established depending on which theory a judge applies.

The difference in the two theories may be simply understood by this example. In a suit demanding the return of loan, the plaintiff asserted the date of payment, while the defendant raised the matter of extinctive prescription based on the assertion of the plaintiff which made the plaintiff later modified his previous assertion about the date of payment.[41] What provokes the problem is the revision of the assertion by plaintiff because the question is whether such revision is the withdrawal of admission.

Each theory, "*shōmei sekinin setsu* [burden-of-proof theory]" (hereinafter, "burden-of-proof" theory) or "*haiso kanōsei setsu* [possibility-in-loss-of-case theory] " (hereinafter referred to as "possibility-in-loss-of-case" theory) provides different treatment. For example, in the civil suit where the date for payment becomes the issue, because the date for payment is the condition for late payment and the plaintiff bears the burden of proof, if the "burden-of-proof" theory is applied, the admission of the plaintiff is not established.[42] Hence, the modification of date for payment is simply treated as the modification of assertion.[43] On the other hand, if the "possibility-in-loss-of-case" theory is the alternative, the preceding admission has been already established; as a result, the modification of date for payment means the withdrawal of admission.[44]

Therefore, although a fact should be disadvantageous to the asserting party, the grounds for such determination vary depending on which theory applies. If the "burden-of-proof" theory prevails, a fact may not be regarded as disadvantageous to the asserting party, and an admission may not be established. On the contrary, if the "possibility-in-loss-of-case" applies, disadvantageousness may be broadly recognized and an admission may be widely established. The concepts and the further discussions on both theories in relation to the disadvantageousness of fact or statement in admission are discussed as follows.

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[41] Ibid.
[42] Ibid., 287.
[43] Ibid.
[44] Ibid.

2.3.1.1. "Burden-of-proof" Theory

Under the "burden-of-proof" theory, a disadvantageous fact to oneself explains that the establishment of an admission is accepted only when a party states or admits the fact that the adverse party bears burden of proof.[45] In the suit demanding the return of the loan, for example, if the defendant makes a statement that means the acknowledgment of the fact of the receipt of the money delivery, the plaintiff is relieved from the burden to prove that fact which is the presumptive fact concerning the occurrence of right to claim for the return of the loan.[46] As a result, because it means that the fact, which is a condition, employed as the premise for the occurrence of legal effect which is the occurrence of right to claim is furnished, such a statement (about the receipt of money) is evaluated as disadvantageous to the defendant.[47] The "burden-of-proof" theory accommodates the concept as following. In the event that the adverse party bears the burden of proof in relation to a concerned fact, if there is an assertion made by the admitting party consistent with the assertion of that fact by the adverse party, such burden of proof of the adverse party is lifted and the establishment of an admission based on disadvantageous statement must be acknowledged.[48]

The Japanese judicial precedents have long accepted this "burden-of-proof" theory. The *Daishin'in*[49] (the Great Court of Cassation established under the 1890 Court Organization Law)[50] court first held that, "it can be said as admission when one party who bears the burden of proof related to a fact asserts that fact and the adverse party (so-called party who bears not burden of proof) acknowledges that fact."[51]

2.3.1.2. "Possibility-in-loss-of-case" Theory—Complete or Partial Loss of Case

Under the "possibility-in-loss-of-case" theory, however, a fact disadvantageous to oneself is explained as one that when a party states to admit it that party will either wholly or partly lose the case once the

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[45] Ibid., 286.
[46] Makoto Ito, *Minji Soshō Hō*, 3rd ed. (Yuhikaku, 2006), 310.
[47] Ibid., 310-311.
[48] Ibid., 311.
[49] "*Daishin'in*" is the former Supreme Court of Japan that consisted of more than fifty judge and it did not hear the cases dealing with constitutional or administrative matters. It was the superior court that was established in 1875 and abolished in 1947. *See* Noda Yosiyuku, *Introduction to Japanese Law* (University of Tokyo Press, 1976), 53, 127. The original judgment read: aru jujitsu ni kanshi risshousekinin wo yusuru toujisya ha tougai jujitsu wo syuccyou shitaru ni taishi aiteikata (sunawachi rissyousekinin wo yusesaru toujisya) ni oite kono syuccyou wo mitomeru mono no wo jihaku to ie.
[50] John Owen Haley, *The Spirit of Japanese Law* (The University of Georgia Press, 2006), 3.
[51] Aritoshi Fukunaga, "Saibanjō Jihaku (1)," *Minshō Hō Zasshi* 91 (1985): 798.

judgment employs that fact as the basis.[52] This theory explains that it is not necessary that such fact is limited only to the fact that the adverse party bears the burden of proof.[53]Therefore, under the theory of "possibility-in-loss-of-case," in this example, an admission is established and the new assertion means the withdrawal of the established admission.

Although these two main theories are obviously distinct in their nature, it is still indecisive by the Japanese scholars and the judicial decisions on which one dominates the other for the reason that the presumption of "disadvantageousness" footing on "burden-of-proof" theory is common, while in practice, there is always a possibility that there is evaluation based on the "possibility-in-loss-of-case" theory.[54] In other words, the "burden-of-proof" theory gains momentum among the scholars, while courts may favor the "possibility-in-loss-of-case" one.

2.3.1.3. "Possibility-in-loss-of-case" Theory—Denial of Burden of Proof

Within the development of this theory, there exists a minority of opinions which claims that the establishment of an admission can be acknowledged; that is, when a party denies a fact that the party bears burden of proof.[55] The denial of a fact by the party on whom the burden of proof is imposed will also lead to the establishment of admission under this theory. The case study below can help ease the understanding about this theory.

Case study 1: In a suit demanding the confirmation of ownership, from the beginning the plaintiff asserted that the thing in dispute formerly belonged to A. The plaintiff inherited it from that predecessor A, while the defendant asserted that the defendant bought it from A while he was alive. Plaintiff, then, reversed his assertion and made a new assertion that plaintiff bought the thing in dispute from B, and that it did not formerly belong to A.[56]

In this case study, the former assertion that "the thing in dispute formerly belonged to A" and the latter

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[52] Koji Shindo, *Shinminji Soshō Hō*, 4th ed. (Kōbundō, 2008), 509.
[53] Ibid., 508.
[54] Hideyuki Kobayashi, *Shin Shōko Hō*, 2nd ed. (Tōkyō: Kōbundō, 2003), 245.
[55] Nakano, Matsuura, and Suzuki, *Shinminji Soshō Hō Kōgi*, 287.
[56] Hideyuki Kobayashi, *Shin Shōko Hō* (Tokyo: Kōbundō, 1998), 242.

that the "plaintiff bought the thing in dispute from B" means that plaintiff made the statement to deny the fact that he bore the burden of proof.[57] As a result, the later statement, under this theory, must be simply treated as the withdrawal of admission.[58]Hence, the adoption of this theory results in the strict prohibition on the denial of the burden of proof on the formerly asserted fact that determines the possibility in loss in the case once such assertion is consistent with the statement of the adverse party. Therefore, the revision of the former assertion simply means the withdrawal of the admission. Another rigid interpretation given to this theory is the explanation that, for instance, in the suit demanding for the return of loan, such statement as "I forgot about the fact concerning the delivery of money already" made by plaintiff can also constitute admission.[59]

To conclude, the "disadvantageous fact" refers to the point that once the court employs it as the basis for the judgment, the admitting party will possibly receive a disadvantageous judgment.[60] For instance, in the suit demanding the return of the loan, the statement by the defendant affirming the assertion by plaintiff about the fact of delivery of money is a disadvantageous fact to the defendant that constitutes admission. Furthermore, in the suit demanding the return of possession of a thing, the affirmation by plaintiff to the assertion of the defendant that the defendant has possession right based on lease agreement will also constitute an admission.

Other scholars, however, provided counter-arguments to the explanation of disadvantageousness based on burden-of-proof theory. Those arguments suggest that the conclusion of the establishment of admission under this theory causes the instability to the establishment of the admission, as it is shifted from one side to another depending on the decision of court to impose the burden of proof on a party to litigation.[61]

2.3.2. Opposing Theories

Although there is number of theories in support of disadvantageousness as an element for the

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[57] Ibid.
[58] Ibid.
[59] Ito, *Benron Shugi*, 122.
[60] Ueno and Matsumoto, *Minji Soshō Hō*, 281.
[61] Hiroshi Takahasi, *Jyūten Kōgi: Minji Soshō Hō*, Revised. (Yuhikaku, 2005), 427.

constitution of admission, there are also numbers of arguments opposing to this concept, as there is another school of thoughts conceptualizing that it is not necessary that "disadvantageousness" be an element for the establishment of admission. Professor Ikeda Tatsuo expressed that:

> [in] the first stage of the establishment of judicial admission, it can be thought that the only consistency of the assertions by parties is enough (the respect of legal peace between parties)….Different from admission in criminal case, disadvantageousness as a condition for establishment of admission in civil case is not important].[62]

Professor Matsumoto Hiroyuki, another prominent scholar on Japanese civil procedure, shares similar opinion that "disadvantageousness" should not be considered as an element for a judicial admission to be established; however, judicial admission should be widely accepted.[63] He bases his arguments on two main grounds. First, once an admission is established, there are no more disputes between parties; as a result court has to base its judgment on the admitted fact without having to carry out costly and time-consuming examination of evidence.[64] Second, the ambiguous nature of the "disadvantageousness" makes it not necessary to be considered as an important element for the establishment of an admission. Matsumoto explains this ambiguity based on cases studies as follows.

Case study 2: In a suit demanding the payment of a loan for consumption filed on 1 May 1973, the plaintiff asserted that the date for payment was due on 10 April 1963, while the defendant acknowledged to the assertion. The defendant, however, further stated that 10 years had lapsed since the date for payment was due, so the extinctive prescription on the extinguishment of claim had already completed.[65]

Case study 3: In a suit demanding the return of 1,000,000 Yen, the plaintiff himself acknowledged that he had received 100,000 Yen as a partial payment from defendant. The defendant agreed to the

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[62] Tatsuo Ikeda, "Saibanjō No Jihaku," in *Shinpan・Minji Soshō Hō Enshū 1: Hanketsu Tetsuzuki 1*, vol. 1, 1st ed. (Yuhikaku, 1983), 243. The original Japanese version reads: Saibanjyou no jihaku no seiritsu toiu dai ichi dankai dewa, toujisya de syucchou jujitsu ga ichi siteiru toiu koto dake de tariru to omowareru (toujisya kan no houteki heiwa no soncyou). (…) keiji jihaku to kotonari, minji jihaku no seiritsu niha furieki youken mo hitsuyou denai to kangaerareru.
[63] Hiroyuki Matsumoto, "Saibanjō No Jihaku Hōri No Saikentō," *Minji Sosyō Hō Zasshi* 20 (October 5, 1974): 67-100.
[64] Ibid., 85.
[65] Ibid., 76.

statement of the plaintiff. The plaintiff, thus, claimed that such payment interrupted the extinctive prescription earlier asserted by the defendant pertaining to the remaining 900,000 Yen.[66]

According to the arguments of Matsumoto, these cases prove that at one particular litigation, it is not always uniquely determined that a fact is advantageous or disadvantageous.[67] For instance, in case study 2 above, the fact concerning the date for payment, which is a fact constituting the condition for late performance and which is the basis for the occurrence of right to claim for the return of loan, is not a disadvantageous fact to the plaintiff.[68] The statement that "the payment date was 10 April 1963" could be evaluated as "disadvantageous" to the plaintiff only when the defendant raised the matter of extinctive prescription. The reason is because as a result of the application of law stipulating extinctive prescription which is the legal effect, the assertion about date of payment of plaintiff is "disadvantageous" to plaintiff himself, not to defendant.[69]However, it is not clear if the defendant will raise about the extinctive prescription as a defense because he can also give up such advantages; thus, in fact, extinctive prescription as an advancement of defense is a decisive matter which a party may or may not raise.[70]

Therefore, in case study 2, at time that the defendant offers a defense by stating the extinctive prescription, pursuant to the assertions of uncertain facts (payment date and lapse of extinctive prescription), provisions stipulating presumptive fact will apply.[71] Because of this application, the assertion of the same fact (assertion of payment date) by the adverse party (plaintiff) will be evaluated as "disadvantageous" fact to himself.[72] As a result, the admission will be established and that fact will be treated as determined fact.[73]

Similarly, in case study 3, to the extent that there is a statement of fact necessary to support the claim of the plaintiff, the assertion of partial payment by the defendant is not a disadvantageous assertion to himself at all.[74] However, in case where the adverse party adopts an assertion later and offer a defense or

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66 Ibid.
67 Matsumoto, *Minji Jihaku Hō*, 27.
68 Ibid., 26.
69 Matsumoto, "Saibanjō No Jihaku Hōri No Saikentō," 78.
70 Ibid.
71 Matsumoto, *Minji Jihaku Hō*, 27.
72 Ibid.
73 Matsumoto, "Saibanjō No Jihaku Hōri No Saikentō," 78.
74 Matsumoto, *Minji Jihaku Hō*, 27.

pleading upon that adoption (the defense in case study 2 is prescription and the pleading in case study 3 is the interruption of extinctive prescription), then the assertion which is originally supposed to be advantageous will bear the nature of disadvantageous statement.[75]

Professor Matsumoto Hiroyuki argued further that upon the determination of "advantageousness" or "disadvantageousness," the application of provisions on an uncertain fact is a precession.[76] Such application is provisional since its ultimate application rests with whether or not an admission can be withdrawn after its establishment.[77]

According to his argument, the explanation why such application is provisional is because the determination on "advantageousness" or "disadvantageousness" is also simply provisional, and as a result, the acceptance of the establishment of an admission is impossible.[78] Thus, according to this argument, whether an admission is established based on advantageous or disadvantageous fact cannot be generally and abstractly determined if the transition of the nature of "advantageousness" and "disadvantageousness" is taken into account. His view, however, translates that the determination of the advantageousness or disadvantageousness base concretely on the substantive law depending on cases.[79] Thus, if his arguments are taken into consideration when court deems whether or not an admission is established and considering that disadvantageousness is not an element for the establishment, admissions are established in both case studies above.

Although a school of thoughts claims that admission should be established based on the disadvantageous fact or statement, while the other one argues that admission should be established within wide scope regardless of the disadvantageous nature of the assertion or statement, both find their convincingly supportive arguments respectively. Regardless of the existence of some counter arguments opposing to the concept that "disadvantageousness" is an important element for the constitution of

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[75] Ibid.
[76] Ibid., 78.
[77] Matsumoto, "Saibanjō No Jihaku Hōri No Saikentō," 78.
[78] Ibid.
[79] Matsumoto, *Minji Jihaku Hō*, 27.

admission,[80] the argument that only disadvantageous fact can become the subject matter of admission has gained momentum and has become the common theory.[81]

In sum, under Japanese civil procedure system, it is a common theory that dominates the courts' precedents that a "judicial admission" must be constituted at either preparatory proceeding for oral argument or oral argument proceeding when both assertions and/or statements are consistent and disadvantageous to one of the parties. Thus, when referring to judicial admission under Japanese theories and practices, one must refer to few core elements. Those are preparatory proceeding for oral argument, oral argument, consistency of assertions and/or statements and the disadvantageous nature of such.

II. Effects of Admission

Article 179 of Japanese Code of Civil Procedure stipulates that, "[f]act admitted by a party before a court shall not be required to be proven." As a result of this stipulation, the effects of admission embrace the meaning that it is unnecessary that parties in proceedings offer evidence, but a court must recognize the admitted fact and base the judgment on that fact. This means that upon litigation proceeding, the admitted fact between parties is first of all excluded from the procedural important disputed points.[82]

Usually, parties to litigations make various assertions, and dispute the assertions made by the adverse parties which create various disputed points.[83] In order to dissolve those disputed points and for the legal decision on the important points, the determination of the existence or non-existence of a conditional facts which is the basis of the concerned legal issues and the facts which are employed to presume the conditional facts must be based on evidence.[84] Through this process, according to the provision of Article 179, the fact that a party has judicially admitted needs not be proven, and the act of offering evidence to prove the related fact is excluded.[85] As a result, such fact becomes undisputed fact and court is also bound

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[80] Ibid., 26-28.
[81] Ueno and Matsumoto, *Minji Soshō Hō*, 281.
[82] Kawano, *Minji Soshō Hō*, 412.
[83] Ibid.
[84] Ibid.
[85] Ibid.

by the contents of fact admitted by party.[86]Therefore, the establishment of an admission gives rise to the binding effects that can be divided into two main categories, such as effect on court and effect on parties.

1. Effect on Court

After the establishment of an admission, there is no necessity to prove the admitted fact, as the party to whom the burden of proof is originally imposed is now released from such a responsibility; the court, thus, must base its judgment on the admitted fact and must not judge differently from what is admitted.[87]In other words, the authority of a court to adjudicate the concerned fact independently and to make the judgment different from the contents of admission that party has made is removed.[88]The court, however, must determine the existence or non-existence of a fact in accordance with the admission of the party.[89] In such a case, even if through the result of the examination of evidence related to other disputed points court finds it convincing that the admitted fact contradicts the truth, court must also employ the admitted fact as the basis for its judgment.[90]This effect is called "trial elimination effect."[91]

Such effect that abolishes the authority to try on the matter of fact is based on the concept that civil litigation is a dispute concerning private interest and court does not have any direct relation with the contents of the judgment.[92]As a result, court does not have any interest concerning the matter of whether or not the fact undisputed between the party accords with the truth.[93] In other words, in order to prove the claim or affirmative defense, a party has to submit a certain fact and in the case where it is required that such fact be the basis for judgment and when the adverse party makes a statement on the same fact, there will be no dispute between the parties concerning that point.[94] As a result, it greatly eliminates the costly, labor-consuming and time-consuming examination of evidence, and even if court employs that undisputed

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[86] Ibid.
[87] Shindo, *Shinminji Soshō Hō*, 411.
[88] Kawano, *Minji Soshō Hō*, 413.
[89] Ibid.
[90] Ueno and Matsumoto, *Minji Soshō Hō*, 281.
[91] Hajime Sakai, "Jihaku <Haku Gojū Nana Jō>," *Hō Gaku Kyō Sitsu* 184 (January 1996): 36.
[92] Ueno and Matsumoto, *Minji Soshō Hō*, 280.
[93] Ibid., 281.
[94] Takeshita, "Saibanjō No Jihaku," 445.

fact as the basis for judgment, it does not cause any harm to the objectivity of the judicial decision.[95]

Moreover, this binding effect of admission extends also to the upper instance court.[96] For example, the admission established at first instance court will also bear the binding effect at the proceedings of the appellate court.[97] Beside the binding effect on court as mentioned above, admission also brings to parties in litigation another binding effect as follows.

2. Effect on Parties

Once an admission pertaining to a fact necessary for judgment is established validly, the admitted fact is excluded from the points that parties are disputing upon the proceedings and the party who makes such admission is bound by his own statement and he or she cannot freely withdraw that admission at the next level of court proceeding (admission made at first instance court will also bear binding effect at court of second instance).[98]A part from this, the admitting party cannot make any assertion which contradicts the contents of the admission.[99] However, there is a question on whether or not such binding effect extends to the adverse party of admission (the party to whom admission is established). There are two conflicting opinions.

A school of thought argues that once admission is established the assertion against this admission is restricted and the other party (not admitting party) is not allowed to prove the existence or non-existence of the admitted fact.[100]The other school of thought, however, argues that admission binds only on the admitting party while it does not bind the adverse party, and, as a result, the adverse party can make an assertion against the admitted fact.[101]Nonetheless, regardless of which school of thoughts prevails, both shares common viewpoint that once an admission is established the admitting party cannot freely withdraw the established admission.

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[95] Ibid.
[96] Nakano, Matsuura, and Suzuki, *Shinminji Soshō Hō Kōgi*, 288.
[97] Kawano, *Minji Soshō Hō*, 412.
[98] Ibid.
[99] Nakano, Matsuura, and Suzuki, *Shinminji Soshō Hō Kōgi*, 288.
[100] Matsumoto, *Minji Jihaku Hō*, 13.
[101] Sakai, "Jihaku <Haku Gojū Nana Jō>," 36.

In conclusion, once an admission is established, there arise two great effects—that is, the effect on court and the effect on parties. As a result of these effects, the admitting party cannot freely withdraw the admission and the admitted fact will become the basis for a judgment.

III. Withdrawal of Admission

There are many legal terminologies suitable for the conveyance of meaning of diminishing a legal or litigation act; nonetheless, there are reasons why author opted to employ the term "withdrawal" of admission in this dissertation as an alternative.

The term *dok kar sarapheap* in the Khmer language in the current Code of Civil Procedure of Cambodia which means "withdrawal of admission" is translated into English as "retraction of admission."[102] The same terminology also can be also found in the Code of Civil Procedure Rules of the Federal Republic of Germany, which is the parent law of Japan,[103] in English in Article 290 where the phrase "retraction of admission" has been employed as the titled of the article.[104] Although both translated versions are unofficial, they use the same terminology.

However, since the Japanese Code of Civil Procedure does not have provisions related to the issue, it is impossible to confirm the usage of a comparative English term in the Japanese law. Japanese scholars tend to utilize two legal terminologies, *tekkai* which means "revocation,"[105] and *torikeshi* which can be translated as "rescission,"[106] to mean the diminishing or removing the effect of a litigation act.[107] Under Japanese practices, the terms *tekkai* and *torikeshi* are used distictively. The former which has equal meaning with *torisage* which means "withdrawal"[108] can be used to diminish or remove an act of litigation regardless of whether or not there is defect pertaining to that act, and such a "revocation" does not give rise

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[102] *Cambodian Code of Civil Procedure*, 2006, Article 00.
[103] Honma, "Hōritsu Kisōgo No Kadai," 32.
[104] Simon L. Goren, *Code of Civil Procedure Rules of the Federal Republic of Germnay*, 1988, § 290.
[105] Hourei Gaikokugo Yaku・Jissi Suisin Kentou Kaigi, "Torikeshi," *Hourei Yougo Niei Hyoujyun Taiyaku Jiten*, March 2006, 181.
[106] Ibid., 191.
[107] Matsumoto, "Saibanjō No Jihaku Hōri No Saikentō," 89.
[108] Hourei Gaikokugo Yaku・Jissi Suisin Kentou Kaigi, "Torisage," *Hourei Yougo Niei Hyoujyun Taiyaku Jiten*, March 2006, 191.According to the Standard Legal Terms Dictionary prepared by the Relevant Ministries Responsible for Infrustructure Development for Promotion of Foreign Language Translations of Laws Liaison Council (established by the governmen tof Japan), the term *torisage* means "withdrawal."

to retroactive effect.[109] On the contrary, the later is used to refer to the diminishing or removing an act of litigation only when there is defect related to the that act.[110]

Although both terms, *tekkai* and *torikeshi* convey the same meaning under different conditions, the usage of the former has become a tradition when refering to the "revocation of admission."[111] The point why *tekkai* is preferable to *torikeshi* is because the act of litigation forms the basis of judgment and bears the characteristic related to the advancement of litigation proceedings.[112]

Concluding from these explanations, it is a common understanding among Japanese scholars that the revocation of an admission means the *tekkai* of admission, while the term *tekkai* itself equally means *torisage*.Thus, drawing a conclusion from these meanings and translations, the term *tekkai* equals to *torisage* which means "withdrawal."

In addition to rationales mentioned in the preceeding paragraphs, the reason for this dissertation to utilize the term "withdrawal" is because the Federal Rules of Civil Procedure of the United States of America that is the subject of the comparative studies in this dissertation also employs the term "withdrawal" of admission.

In conclusion, in order to comply with the concept of *tekkai* commonly used in Japanese textbooks and the official translation from Japanese term into English one, while taking into consideration the original English term utilized in American law which is alos a part of main discussions in this dissertation, and to accomodate the uniformity of the usage of terminology, the term "withdrawal" is hereinafter employed to refer to the *tekkai* or "revocation" of admission.

There are cases where the admitting party, after a valid admission is established, expresses an intention to withdraw the admission by claiming that the established fact contradicts the truth.[113] However, the Japanese Code of Civil Procedure fails to stipulate whether or not an admission may be withdrawn and

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[109] Morio Takeshita, "Soshō Kōi No Torikeshi Ha Mitomerareruka," *Hōgaku Kyōsitsu* 2, no. 1 (November 1961): 138.
[110] Ibid.
[111] Matsumoto, "Saibanjō No Jihaku Hōri No Saikentō," 90.
[112] Ibid.
[113] Kawano, *Minji Soshō Hō*, 415.

under what conditions. As a result, the problems in relation to the withdrawal of admission rest with the precedents of courts and scholarly opinions. The withdrawal of admission gives rise to the extinguishment of effect of its establishment due to the reason that such withdrawal is an act of removing the its establishment, or invalidating its effect or extinguishing the existence of the concerned admission.[114]

In so far as the issue of withdrawal of an admission is concerned, two diverse consequences must be taken into account prior to giving the green light or red light to the withdrawal. On the one hand, from the viewpoint of the adverse party, if a withdrawal of admission is broadly permitted and accepted, the party (the party to whom admission is established) who has enjoyed the privilege of exemption of evidence offering will be shocked and get into trouble with burden of proof. Moreover, for the court, the withdrawal of admission causes the disturbance to the trial which can be raised as public interest.[115] The reason for such argument is that the withdrawal of admission will result in the removal of the binding effects that previously bound the admitting party and court.[116]On the other hand, if there is no room for withdrawal after an admission is established regardless of what situation that is, then the admitting party may suffer from such rigid procedure when admitting party can prove that the admission is established by default or the admission contradicts the truth.

Therefore, the balance between the interests of parties and the smooth process of trial should be taken into consideration before court permits or rules out the withdrawal of admission. Under the precedents of the Japanese courts, the withdrawal of admission is strictly permitted and, thus, can be permitted only under some particular conditions. Those conditions are to be presented and discussed in the following.

1. Consent to Withdrawal by Adverse Party

Although judicial admission is a act of disposition in the procedure whose primary purpose is to reduce points in dispute, such procedural act has direct relationship with that of the adverse party. Therefore, in case where the adverse party consents to the withdrawal of the judicial admission act, admission is

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[114] Shindo, Takeshita, and Ishikawa, *Kōza Minji Soshō Hō : Shinri*, 4:185.
[115] Takeshita, "Saibanjō No Jihaku," 470.
[116] Matsumoto, "Saibanjō No Jihaku Hōri No Saikentō," 90.

withdrawn.[117] The reason is that there is no necessity that the effect of admission still binds the admitting party and both parties in fact will return to disputed point.[118]

The premise for such permission is based on the principle that it is parties' right to decide on the issue of whether a fact should be disputed or abolished from disputed point.[119] As a result, if the adverse party agrees, the withdrawal will be valid and there exists not any procedural conflict related thereto.[120]Furthermore, because the binding effect towards the admitting party functions as the protection of trust of the adverse party, the consent of the adverse party to the withdrawal of admission should be followed.[121]The Supreme Court of Japan has confirmed such allowance of withdrawal in its decision back to 1959.[122]

In addition to such explicit consent given by the party to whom an admission is established, the consent is presumed to have existed if the adverse party has not raised any objection against the withdrawal and the adverse party responds to the assertion after the withdrawal has taken place.[123] Thus, once the consent of the adverse party can be sought, the withdrawal of admission under this condition does not pose any scholarly arguments in so far as the private interests of the parties to litigation concern.

2. Admission as Result of Criminal Act of Another

In such a case where an admission is established as a result of criminal acts, such as fraud or intimidation, of others, the establishment of admission, thus, is not based on the autonomous intention of the admitting party.[124] Therefore, the admitting party should not be imposed with responsibility pertaining to the willful decision related to the elimination of disputed point (admission) and, therefore, he should not be bound by the effect of admission.[125]

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[117] Kawano, *Minji Soshō Hō*, 415.
[118] Ibid.
[119] Ibid.
[120] Ibid.
[121] Takahasi, *Jyūten Kōgi: Minji Soshō Hō*, 439.
[122] Nakano, Matsuura, and Suzuki, *Shinminji Soshō Hō Kōgi*, 288.
[123] Takahasi, *Jyūten Kōgi: Minji Soshō Hō*, 439.
[124] Kawano, *Minji Soshō Hō*, 415.
[125] Ibid.

A criminal act is not limited only to the act carried out by the third person; however, it also includes the acts committed by adverse party in litigation.[126] Thus, in either case, if admission is established due to the criminal act, then court will permit such withdrawal.[127]According to the precedent of the Supreme Court of Japan, it is not necessary that there should be a judgment declaring the guilt of the offender so that it is used as the condition for the withdrawal of admission in civil litigation.[128] In its decision to uphold the decision of the Higher Court and in dismissing an appeal complaint, the Supreme Court ruled that:

> However, prior to the biding of judgment, upon asserting the prescription of provision of item 5 of paragraph 1 of Article 420[129] that admission based on criminally punishable act of another person shall have no effect, because it is appropriate to interpret that it is not necessary that the conditions stipulated in paragraph 2[130] must be furnished, the opinion of the lower court is not against the law.[131]

3. Admission due to Falsity or Mistake

According to Professor Kawano Masanori, once an admission is established and when the fact constituting admission is in consistency with the truth that admitting party raises, it does not make any sense to refuse such admission. However, in the case where the admitting party asserts that the admitted fact contrary to the truth and the statement pertaining to that fact is made by mistake, court should permit the withdrawal of admission.[132] Nevertheless, the issue for the discussion is not about "falsity" or "mistake" or "falsity and mistake" as condition for the withdrawal of admission, yet it is about the

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[126] Takahasi, *Jyūten Kōgi: Minji Soshō Hō*, 440.
[127] Kawano, *Minji Soshō Hō*, 415.
[128] Takahasi, *Jyūten Kōgi: Minji Soshō Hō*, 440.
[129] After the revision of Japanese Code of Civil Procedure in June 26, 1996 by Act No.109, Article 420 became Article 338 with simplified wording and phrases while meaning remains relatively the same, and provision of Article 420, paragraph 1, item 5 is now Article 338(1)(v). *See*Hiroshi Sumiyoshi, *Shin Minji Soshō Hō No Gaiyō To Shinkyū Kyūshin Taisyō Jōbun*, 1st ed. (Hougaku Syoin, 1996), 296-297. New Article 338 (1)(v) reads: 1 Where any of the following grounds exist , an appeal m ay be entered b y filing an action for retrial against a final judgment that has become final and binding; provided, however, that this shall not apply where a party, when filing the appeal to the court of second instance or final appeal , alleged such grounds or did not allege them while being a ware of them:
v Another person's act that is criminally punishable caused t he party to admit any fact or prevented him/her from advancing g allegations or evidence that should have affected a judgment. *See Eiwa Taiyaku: Nihon No Minji Sosyō Hō・Dōkisoku*, 1st ed. (Hō Sō Kai, 1999), 262-264.
[130] Paragraph 2 of former Article 420, which is now Article 338 (2) read as: In case where any of the grounds referred to in items *iv* to *vii* inclusive of the preceding paragraph exists, a petition for retrial may be filed only if, with regard to the acts to be punished, the judgment for conviction or decision for a nonpenal fine has become final and binding, or it is impossible to obtain a judgment for conviction or a decision for a nonpenal fine for reasons other than lack of evidence. Ibid., 264.
[131] *Yakushoku Tekatakin Seikū Jiken*, 13(6) Saihan Minshū 2270 (Supreme Court 1961).
[132] Kawano, *Minji Soshō Hō*, 415.

necessity of proof pertaining to "falsity" and/or "mistake." The significance of proof has long prompted dividing groups of opinions which have resulted in various theories.

3.1. Proof on Mistake and Proof on Falsity

In case where there is proof that an admission is made based on mistake and that the admission is false (untruthful), such admission can be withdrawn.[133]Such a mainstream is influenced by the courts' decisions and scholarly opinions. Those various judicial precedents and scholarly arguments are as follows.

Because the Japanese Code of Civil Procedure lacked of provisions concerning the conditions under which an admission may be withdrawn, historically, many of the decisions of the *Daishin'in* court were influenced by the provisions of the German Code of Civil Procedure.[134] Article 290 of the German Code of Civil Procedure stipulates that, "(a) withdrawal affects the effectiveness of an admission in court only in a case where the withdrawing party proves that the admission was not truthful and was caused by a mistake. In such a case, the admission loses its effectiveness."[135]

The *Daishin'in* court followed this provision of the German Code of Civil Procedure by adopting the proofs on mistake in admission and falsity of admission as condition for approving the withdrawal of admission as a general principle.[136]The court, however, deregulated the proof on mistake as a condition by allowing that once there was proof on falsity, mistake could be acknowledged by way of presumption.[137] As a result, the Supreme Court which ruled on the conditions for approving the withdrawal of admission made it clear about its following this fundamental stand of the *Daishin'in* and its decision later became a crucial precedent.[138]Japanese Supreme Court, when upholding the decision of the lower courts, held that:

> If there is proof to confirm that the fact admitted by party did not conform to the truth, we can admit that the admission came to mistake…and it cannot be said illegal as we acknowledged that such

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[133] Takahasi, *Jyūten Kōgi: Minji Soshō Hō*, 440.
[134] Hiroyuki Matsumoto, "Saibanjō No Jihaku No Torikeshi," in *Hanrei Ensyū Kōza*, 1st ed. (Sekaishisosha, 1973), 301.
[135] Takeshita, "Saibanjō No Jihaku," 76.
[136] Matsumoto, "Saibanjō No Jihaku No Torikeshi," 301.
[137] Ibid.
[138] Ibid.

admission was based on mistake upon accepting that the admission of X, which was made at the lower courts based on X`s statement and other documents, did not conform to the truth.[139]

Although the "falsity" and "mistake" should have been both asserted and proved by admitting party as conditions for withdrawal of an admission, we can evaluate that the approach of the court's precedents have so far put more emphasis on the "falsity" condition than that of "mistake." The rationale for this comment is that the precedent of the Supreme Court has confirmed that once "falsity" is asserted and proven, the presumption on "mistake" of admission will exist. Such precedents have gained supports from some prominent scholars even though they share different views.

Professor Takeshita Morio expressed an opinion in accordance with the precedents that, "unless otherwise there is special circumstance, when it can be proved that an admission is false; it can be presumed that such admission is made by mistake."[140] Professor Kaneko Hajime posited the two-steps proof that, "I agree with the court's precedent that allowed the withdrawal of admission basing on the ground that the admission was false and made by mistake"[141]

Professor Mikatsuki Akira, although appraising the approach of the precedent of the Supreme Court as an effort to pursue the trial that meets the truth, however, expressed his view related to this approach in a more strict position. In his critique, Professor Akira perceived the attitude of courts through judgment which no longer requires the proof for mistake in establishment of admission as problematic.[142] He grounded his critique on two points; omission and loose treatment.

First, the omission (of proof on mistake) is an opening of the door that leads to the danger resulting from the statement on falsity alone.[143] His argument for such comment is that it does not matter if the later statement will contradict the former one, as long as he can prove that the later

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[139] Ibid., 299.
[140] Takeshita, "Saibanjō No Jihaku," 470.
[141] Kaneko, *Minji Soshō Hō Taikei*, 248-249.
[142] Mikazuki Akira, *Hanrei Minji Sosyō Hō* (Kōbundō, 1974), 245.
[143] Ibid.

statement is truthful and that the former one is false, the admission will lose its effect.[144] As a result of such, a party to litigation may play cunning trick by, from the beginning, stating the false fact.[145] From this viewpoint, the omission of proof on mistake from the conditions for the withdrawal of admission will cause disadvantages to the adverse party to whom admission has been established, as he or she may no longer possess or lose evidences necessary to support his original assertion.

The other argument for the critique against the such tendency of this precedent is that the loose treatment on the withdrawal of the admission by lifting the proof on mistake is the easy acceptance of the reversal of admission, and this not only cause the complication to the trial, but also damages the trust of the adverse party.[146]In support of this argument, Professor Akira raises that the acceptance of particular effect of admission is, on one aspect, what has derived from one of the principle of *Benron Shugi*, while from the other aspect it is undeniable that this acceptance grounds on the practical issues that admission system promotes the speed trial by simplifying and eliminating trouble of legislation.[147] Professor Akira goes further that the relaxation on proof of mistake makes no sense for the requirement on "falsity and mistake" as double conditions for withdrawal.[148]

The term "mistake" here refers to the misunderstanding[149] of fact, and it is not necessary that such mistake involves with negligence (even if such mistake occurred due to negligence of the admitting party, it constitutes the condition for withdrawal).[150]Although there are a number of arguments following the move of court's precedents and make this theory a common one, there are, however, theories arising out of and in opposing to this common theory. A school of opposing opinions views that only proof on falsity is enough, while the other school of opinions contends that it is the "mistake" that constitutes a valid condition for the withdrawal. The following sub-sections will present and discuss those tow conflicting theories.

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144 Ibid., 244.
145 Ibid.
146 Ibid., 245.
147 Ibid.
148 Ibid., 244.
149 Japanese employs the term "gokai" which means understands by mistake.
150 Takahasi, *Jyūten Kōgi: Minji Soshō Hō*, 440.

3.2. "Proof on Mistake" Theory

Under the theory of "proof on mistake", it is unnecessary whether or not admission conforms to the truth, if there is only proof of mistake, court should permit the withdrawal.[151] This theory employs the "self-proof" explanation as the basis for the critique of the "proof-on-mistake and proof-on-falsity" theory and "proof-on-falsity." The theory of "proof on mistake" explains that withdrawal should be admitted if the admitting party asserts and proves that the admission was established based on mistake.[152]

The term "mistake" means the admission was established due to a misconception[153], and if it had not been such a misconception, there would not have been such an admission.[154]

For example, when a party admitted to have received the money from the adverse party, all the party has to do is to assert and prove that he or she admitted it by mistake because the money he has received is different from the money he admitted.[155] In such a case, the disputed points are the money and the receipt thereof; however, there is no necessity that the admitting party must prove that he has never received the money in dispute.[156] In such a case, withdrawal of admission must be permitted while the receipt of money becomes disputed; in case where truth and falsehood are unclear, it must be acknowledged that there has never been any receipt (of the disputed money).[157] In an opposition to the common theory, Professor Ito Susumu explains as follows.

First, the reason why "mistake" as a condition cannot be taken out from the common theory is because such exclusion can be inferred as the exclusion of the responsibility of the admitting party.[158] To such an extent, if withdrawal is allowed even if the admitting party realizes that the admission has been made as false, the common theory cannot explain that it adheres to "mistake" as condition.[159]

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[151] Matsumoto, "Saibanjō No Jihaku No Torikeshi," 303.
[152] Ito, *Benron Shugi*, 144.
[153] Japanese uses the word "gonin" which means admit or accept by misunderstanding.
[154] Ito, *Benron Shugi*, 145.
[155] Ibid.
[156] Ibid.
[157] Ibid.
[158] Ibid., 140.
[159] Ibid.

In relation to this interpretation, Professor Ito Susumu argues that such an attitude is appropriate. The argument is that in principle the court should not grant the permission for the withdrawal.[160] Therefore, from the essence of the exclusion of the responsibility of the admitting party, even if such withdrawal does not result in the erosion of trust of the naïve adverse party, the admitting party must be held responsible for switching problem to this objective level which is, therefore, reasonable for making "mistake" a condition is justifiable.[161]

3.3. "Proof on Falsity" Theory

"Proof on falsity" theory proclaims that it is enough to admit the withdrawal of an admission when there is only proof to support that the admission is false (untruthful). This theory is established on the two main premises. First, "proof on falsity" theory explains that from the aspect that the nature of admission is expression of opinion (notification of fact), the admission, thus, should not been originally be allowed when it was against the truth.[162] Second, the theory is grounded on the reason that that the effect of admission is based on the *Benron Shugi* principle, which is a system to discover truth by requiring parties to litigation to assert advantageous facts and instrument of evidence.[163] Thus, some scholars argue that since a decision based on true factual relationship following change of contents of *Benron Shugi* which associates with introduction of obligation on truth is strongly required, effects of admission on parties vanish because of untruth.[164]

However, within this theory itself, there arise two different tendencies. The first tendency can be inferred as when an admission is established and becomes the basis for judgment, burdens on collection and preservation of evidence and fees are reduced and if the admission is allowed to be withdrawn freely, it will harm the act of proof of the adverse party (as some witnesses may have gone abroad already).[165] However, on the contrary, if the admitting party bears burden of proof and carries out primary act of proof, the

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[160] Ibid.
[161] Ibid., 140-141.
[162] Matsumoto, "Saibanjō No Jihaku No Torikeshi," 302.
[163] Ibid., 302-303.
[164] Ibid., 303.
[165] Takahasi, *Jyūten Kōgi: Minji Soshō Hō*, 440.

adverse party will neither gain nor lose.[166] In short, a withdrawal can be admitted only if there is proof on falsity as a system that proves estoppel and its violation.[167] The other tendency is not based on the explanation of estoppel; however, it takes the premise on the concept that the trial must be based on truth and only when untruth is admitted, the withdrawal of admission is fine because addition of mistake in the condition for withdrawal of admission will result in the trial not being based on truth.[168]

IV. Subject-Matter of Admission—Fact and Right

Article 179 of Japanese Code of Civil Procedure articulates that "fact" which is admitted by parties need not be proven. In other words, this provision puts emphasis on admission of fact. However, Japanese scholars have long argued on the issue of a party's act in acknowledging the existence of legal relationship or right disadvantageous to the party that forms the basis of legal relationship which is the subject matter of litigation, and that such acknowledgement is called "admission of right."[169]Therefore, this section aims at reviewing the discussions on these two issues, "admission of fact" and "admission of right," under the Japanese theories.

1. Admission of Fact

The definitions of admission as seen in previous discussion above employ the term "fact" as one of the elements for its constitution. However, facts under the civil procedure can be divided into a few types, among which are *ultimate fact*, *indirect fact*, and *secondary fact*. Thus, the question is whether or not these facts are subject to judicial admission.

This section will, therefore, provide a review on Japanese theories and precedents on the issue of judicial admission and the effects related to points indicated in the preceding paragraph, and to aid the comprehension to the following discussions, it is pivotal to first have a brief look at the concept of each type of fact.

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166 Ibid.
167 Ibid.
168 Ibid.
169 Kawano, *Minji Soshō Hō*, 410.

1.1. Ultimate Fact

The unified definition of the term ultimate fact is, up to date, still unavailable due to the fact that it is confused or cannot be clearly divided, in definition, with another one known as "presumptive fact."[170] However, a majority of opinions provide a distinction between the "ultimate fact" and the "presumptive fact" as (i) the latter means the fact which establishes the legal conditions that give rise to legal effects on the occurrence, hindrance or extinguishment of right (or obligations) stipulated in the law, while (ii) the former (*ultimate fact*) refers to a particular fact (that appears in proceedings) in each presumptive fact.[171]

Nonetheless, another explanation argues that the commonly accepted definition of ultimate fact is referred to the fact that give rise to the occurrence, extinguishment or alteration of legal effects (rights, obligations and legal relationships) which, in general, can be known by analyzing the expression of the articles of legal provisions.[172] For example, Article 709 of the Japanese Civil Code stipulates that, "a person who has intentionally or intentionally infringed any right or legally protected interest of others shall be liable for the compensation of the damages resulting in consequence."[173] Thus, according to this article, in relationship to right to claim for the compensation of damage as a result of tortuous act, facts on either intent, negligence, act of tortfeasor, occurrence of damage, cause-and-effect relationship or the illegality (alternatively to infringement of right or legally protected interest of others) is explained as ultimate fact.

Because ultimate fact serves as the one that gives rise to the extinguishment or alteration of legal effects as described earlier, another example can give a better understanding of it. For example, in cases concerning the right to claim for the payment due to sale and purchase contract, sale and purchase becomes the ultimate fact, while receipt of payment (which extinguishes the right to claim for payment) or confusion on contents included in the contract (which hinders the occurrence of right to claim) is also evaluated as ultimate fact.[174]

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[170] Nakano, *Minji Saiban Nyūmon*, 19.
[171] Ibid.
[172] Ito, *Benron Shugi*, 96.
[173] *Japanese Civil Code*, 1896.
[174] Ito, *Benron Shugi*, 97.

The detailed discussion on which definition is appropriate for ultimate fact is out of the scope of this dissertation. Therefore, it is better to just understand that the determination on the existence or non-existence of the ultimate fact will affect the existence or non-existence or right to claim of the plaintiff in a civil suit, as not every fact asserted at the oral argument will be employed as the basis for judgment by court, but only the ultimate fact. In short, ultimate fact can be regarded as the fact directly important for the evaluation of such legal effects as the occurrence, hindrance or extinguishment of right that becomes the subject matter of litigation in the suit.[175]

Indirect fact is useful for the presumption of the existence or non-existence of an ultimate fact.[176] Secondary fact, however, is neither the presumptive fact nor the one that presumes the presumptive fact.[177] This secondary fact serves only as a fact to challenge the reliability of the evidence[178] when such evidence is doubtful to court. For example, in a suit demanding the payment of loan for consumption, plaintiff X who claims to be lender demands that defendant Y, who is alleged to be borrower, return $ 1000 to X (to simplify, the matter of interests is out of the discussion herein). According to the Cambodian Civil Code, in order for party X to be entitled to right to claim for the payment, the plaintiff must assert and prove four important facts related to: (1) agreement (between parties) on the return of loan, (2) delivery of money, (3) agreement on date for payment, and (4) arrival of due date.[179]

Therefore, in a hypothetical case, for example, what X has to assert are: (1) X and Y agreed that X deliver the money on 24 December 2008 and Y must return, (2) "X delivered that 1000USD already," (3) date for payment was 24 December 2010, (4) due date has arrived already. These are points are called ultimate fact which are necessary to prove a claim. Meanwhile, the fact that "X withdrew the money from his ATM account on 24 December 2008" is an indirect fact to presume whether or not there was a delivery of money.

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[175] Nakano, *Minji Saiban Nyūmon*, 194.
[176] Ibid.
[177] Kawano, *Minji Soshō Hō*, 410.
[178] Nakano, *Minji Saiban Nyūmon*, 194.
[179] *Cambodian Civil Code*, 2007, 578. This article stipulates that, "A loan for consumption is a contract whereby one party, called the lender, assumes an obligation to entrust the free use of money, foodstuffs, paddy or other fungible objects for a specified term to another party, called the borrower, who assumes the obligation to return objects of the same type, quality and quantity as those received from the lender upon the expiry of the said term."

Under Japanese theories, the admission of ultimate fact and its effects on parties and court as discussed previously are undisputable. However, what sparks the issue is the establishment and the effects of admission of facts other than the ultimate one, such as indirect fact and secondary fact.

1.2. Indirect Fact

There two different schools of thoughts on whether or not an admission of indirect facts can be established and whether its effects should be recognized by court. In other words, if an admission related to an indirect fact is established, will its effects bind court and the admitting party? These two schools of thoughts towards admission of indirect fact can be categorized as the "negative approach" and the "affirmative approach" towards admission of indirect fact.

1.2.1. Negative Approaches

The Japanese court's precedents reached the view that admission of indirect fact must neither bind parties or the court. In a decision to dismiss the appeal (*Jyoukoku*) complaint related to the claim for the registration of the transfer of land ownership, the Supreme Court confirmed that admission of indirect fact did not bind the court, deeming that:

> However, with regard to the point that whether the appellant or its counterpart bought the land in dispute…which is the important disputed point, the fact which shall be the material for the recognition of this (disputed) fact is only the so-called indirect fact and even if there is party`s admission to this (indirect) fact, the court shall not necessarily be bound by that admission.[180]

In another prominent decision by the Supreme Court in confirming its stand to the denial the effects of the admission of indirect fact upon its decision to reverse and remand the judgment of the High Court who upheld the decision of the District Court, deeming that:

It is the so-called indirect fact and shall become only the material for the recognition of ultimate fact

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[180] *Tochi Shojūken Iten Tōki Seikyū Jiken*, 10 Saihan Minshū 577 (1956).

(…). Concerning this the admission of this indirect fact, of course, it shall not bind the court, and it is appropriate to comprehend that is does not bind the admitting party either.[181]

The case leading to such decision of the Supreme Court was concerned with the claim for payment of a loan whose background can be understood through the following summary.[182] X, who was plaintiff, High Court appellant and Supreme Court appellant, had a father who was A. A had monetary claim amounted for 300,000 Yen against Y_1 and Y_2, hereinafter Y. X inherited that right from A and later filed a complaint against Y demanding the payment of that monetary claim. In response to this claim, party Y asserted that: (1) person A bought the house from person B, who promised to buy back later, in the price of 700,000 Yen; A made the payment of 200,000 Yen after the conclusion of the sale and purchase contract, while promised that he would transfer his claim of 300,000 Yen that he had against Y (claim in this dispute) to B, and that he would pay the rest of 200,000 Yen later; (2) Y consented to that deal and later set off this obligation with the claim that they had against B.

In the defense against these assertions, party X stated that he admitted that there was a sale and purchase contract to buy the house at the price of 700,000 Yen and the first payment of 200,000 Yen that was made to B, but denied the fact about the transfer of claim in dispute to B, and later stated that the sale and purchase contract was cancelled by agreement. The court of first instance (District Court) determined that: (1) A bought the house from B at the price of 700,000 Yen, (2) that there was no dispute between parties to litigation concerning the delivery of 200,000 Yen (admitted face), and (3) based on the result of examination of evidence, the court recognized that thee was a transfer of disputed claim. Therefore, the first instance court dismissed the claim of party X.

In its appeal to the High Court, party X asserted that: (1) A bought the house from B at the price of 700,000 Yen was false and based on a mistake, so he withdrew this acknowledgment; (2) the truth was that A was requested to lend B 400,000, and upon the delivery of the deposit (partial payment) of 200,000 Yen; (3) there was a registration of transfer of ownership on the house as the security for sale; and (4) that the

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[181] *Kashikin Seikyū Jiken*, 20 Saihan Minshū 1392 (1966).
[182] The summary is based on Aritoshi Fukunaga, "Kansetsu Jijitsu No Jihaku," *Juristo: Minji Soshō Hō Hanrei Hyakusen*, December 2003, 128.

delivery of claim deed to B was the mandate to B for the collection of claim (which is in dispute in this case), but that collection mandate was later rescinded by agreement. Y, however, stated to object the withdrawal of admission. The High Court, based on the admitted fact and evidence, recognized the transfer of the claim (which is in dispute in this case) and as a result dismissed the appeal complaint of party X.

Concerning the withdrawal of the admission, the High Court reasoned that there was lack of sufficient evidence to acknowledge that admission was false and based on mistake which made the withdrawal of established admission impermissible. Party X filed a final appeal to the Supreme Court, which resulted in the reasoning of the Supreme Court as quoted above. In its decision regarding this case, the Supreme Court went further that only the ultimate fact that becomes the subject matter of admission, while an indirect fact must not constitute any admission.[183]

The Supreme Court provides no basis for the decisions to negate admission of indirect fact; however, Japanese scholars offer few concrete arguments in support of the court's decisions. Those affirmative theories which side with the decision of the Supreme Court provide two main explanations. First, the reason why admission of indirect fact must not have the same effects as those of admission of ultimate fact is because indirect fact only functions the same as evidence in that it is an instrument to prove the ultimate fact and when a judge is bound by the admission of such fact it will result in the contradiction with the principle of free determination which is vested with judge in determining the ultimate fact.[184] Second, placing emphasis on the first principle[185]of *Benron Shugi*, Professor Kaneko Hajime explained that this concept does not apply to indirect fact and secondary fact (it applies only to ultimate fact).[186] Thus, even if there are no assertions of these facts, the court can acknowledge these facts and employ as the basis for the judgment when court is convinced about the existence thereof upon the examination of evidence; while, the

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[183] *Kashikin Seikyū Jiken*,20:.
[184] Kasuga, *Minji Soshō Hō Ronshū*, 162.
[185] Under Japanese theory, *Benron Shugi* embraces three main principles. First principle denotes that court cannot employ any fact which is not asserted by the parites as material for trial (responsibility to assert). Second principle embraces the content that court must base its judgment on fact which is not disputed by parties (binding effect of admission). Third principle requires that court must recognize any fact disputed by parties only by evidence; however, such recognition must be through only evidence offered by parites (prohibition of examination of evidence by authority). *See* Nakano, *Minji Saiban Nyūmon*, 191.
[186] Hideyuki Kobayashi, "Minji Soshō Hō Ni Okeru Soshō Shiryō・Shōko Shiryō No Shūshū (1)," *Hōgaku Kyōkai Zasshi* 97, no. 5 (1979): 622-623.

ultimate fact, however, must be asserted by parties before court can base its judgment on it.[187] Professor Kaneko's opinion was later followed largely by many theories and soon later became the commonly accepted theory.[188] She went further in her famous argument to negate the establishment and effects of indirect fact that accreditation of effects of admission of indirect fact is an impossible order on court, saying:

> (…) any fact that imprints the ultimate fact when there is any dispute needs not be proven either when there is admission related thereto, but that does not necessarily bind the court. Certainly, other than entrusting the recognition of ultimate fact on free determination, it is an impossible order to demand that court form a determination based on indirect fact due to the existence of admission thereof although court, as a result of examination of evidence, doubts or learns that such admission is against the publicly known fact.[189]

In Professor Kaneko's view, the presumption of the existence or non-existence of evidence or indirect fact based on the application of empirical rules of judges is legal presumption and it is the problem of free determination.[190] The principle of free determination refers to the principle whereby a judge, when recognizing a fact that is a basis of a judgment, does not receive any legal restriction in determining the scope of instruments of evidence and the value of evidence, but is free to determine upon the conviction when evaluating the whole evidence and oral arguments.[191] In contrast, when the principle of statutory rules of evidence is applied, judge, upon recognizing any fact, is not permitted to recognize any fact freely, but is bound by those particular rules on scope of instruments of evidence and values of evidence stipulated by law.[192]

To sum up, under this negative approach, it can be interpreted that admission of indirect fact must not have any bending effect on court; however, free determination of judge will prevail any admission of indirect fact established by parties to litigation.

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[187] Ibid.
[188] Ibid., 624-625.
[189] Kaneko, *Minji Soshō Hō Taikei*, 248.
[190] Kaneko and Oyama, *Minji Soshō Hō Kōgi*, 234.
[191] Ibid.
[192] Ibid.

1.2.2. Affirmative Approach

In contrast, there are number of opinions which contrast to the common theory, but in support of the recognizing the establishment and effect of admission regarding indirect fact. Although serving the same purpose, recognition of establishment and effect of indirect-fact admission, the supporting opinions and arguments vary in a broad framework.

A school of concepts which affirms the establishment and effects of admission of indirect fact reaches a compromised solution positioning itself in between the principle of free determination and the absoluteness of the effect of admission of indirect fact. This concept suggests that although there is a dispute concerning the ultimate fact, if an admission pertaining to indirect fact which imprints that ultimate one, such admitted fact needs not be proven.[193] However, different from admission of main fact, such admission does not hinder court from acknowledging the existence or non-existence of the ultimate fact basing on its free determination of other indirect fact (s).[194]

Nonetheless, an admitting party is not allowed to asserted against the admission (estoppels function).[195] Based on this argument and targeting the common theory, Professor Shindo Koji claimed that, "[…] taking the admitted indirect fact as premise, to the extent that there are not enough other indirect facts to deny the admitted indirect fact, employing the admitted indirect fact to infer the ultimate fact cannot be called an impossible order. "[196] This theory reaches a moderate approach that is a compromise between the exclusive binding effects of admission and the free determination of a judge, and provides a better option.

Nevertheless, such an approach negatively provides a double standard on the treatment of effects of admission (with regard to indirect fact). The reason such comment is that once an admission with respect to an indirect fact is established, under this theory, the effect binds the admitting party, while also the court can opt whether or not to be bound depending on its discretion (free determination). Furthermore, the effect of admission of indirect fact under this theory will become useless when there is more than one indirect fact

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[193] Koji Shindo, *Shinminji Soshō Hō*, 3rd ed. (Kōbundō, 2004), 495.
[194] Ibid.
[195] Ibid.
[196] Shindo, *Shinminji Soshō Hō*, 512.

among which one is admitted while another is recognized by free determination and both of which potentially and conversely presume the existence and non-existence of an ultimate fact.

The other school of opinions, which affirms the effect of admission of indirect fact, argues that there should not be any special distinction between treatments on admission based on ultimate or indirect facts, as it, in principle, judicial admission related to indirect fact can also be established.[197] Hence, admission can be established regardless of so-called ultimate or indirect facts and must have binding effect on court.[198] As a result, court is not allowed to acknowledge other fact based on the result of evidence examination different from the admitted fact.[199] One of the arguments for the support to the binding effect of indirect fact admission is that it is impossible to make clear distinction between the ultimate fact and indirect fact.[200]

1.3. Secondary Fact

There are a numbers of Japanese court precedents in relation to admission pertaining to authenticity of documentary evidences and admission pertaining to signature and signet (*natusin)*.[201] From the beginning, the *Daishin'in* court negated the establishment of admission in relation to authenticity of the execution of documentary evidence, but later acknowledged it.[202]From that time the court required that the withdrawal of admission be made based on consent from that adverse party or upon proof of falsity and mistake; it confirmed that the admission pertaining to authenticity of bank account documents (such as passbook or slip) bound the court.[203]

After the Second World War, Japanese courts still followed the decisions of the *Daishin'in* court as among the court handling the cases related to admission confirmed that admission related to authenticity of execution of documentary evidence bound parties and admitting party could not withdraw it freely.[204] Regardless of number of scholarly critiques on such recognitions and appealed for the reexamination of the

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[197] Hideyuki Kobayashi, "Minji Soshō Hō Ni Okeru Soshō Shiryō・Shōko Shiryō No Shūshū (3)," *Hōgaku Kyōkai Zasshi* 97, no. 8 (1980): 1165.
[198] Ito, *Benron Shugi*, 146-148.
[199] Ibid.
[200] Ibid., 146-147.
[201] Fukunaga, "Saibanjō Jihaku (1)," 789.
[202] Ibid., 790.
[203] Ibid.
[204] Ibid.

judicial treatment on admission of secondary fact basing on similar arguments as what were discussed in earlier, the lower courts still admitted the effect on parties of admission of secondary fact.[205]

However, the turning point occurred when the Tokyo High Court (1976) ruled on the effect of admission on authenticity of execution of documentary evidence by allowing admitting party to freely withdraw such admission.[206] and the Supreme Court (1977) upheld that decision and negated the binding effect thereof on court by reasoning that the concerned admission did not bind court.[207]The Supreme Court deemed as follows.

> The argument (of the Supreme Court appellant) is construed on the assumption that admission related to the authenticity of the execution of each documentary evidence binds the (High) court and that plaintiff criticized the measure taken by (High) court in permitting the withdrawal of admission. However, because it is appropriate to deem that admission pertaining to the authenticity of the execution of documentary evidence does not bind court, such argument (of appellant) lack of premise and from the point that (admission) does not have any influence on judgment, it is improper to criticize the decision of the High Court. Reasoning in High Court decision is not illegal, thus (we) cannot approve the argument (of the appellant).[208]

Although the precedents of the Supreme Court reached such conclusion, there are number of scholarly opinions divided on the relation to the establishment and effects of admission of secondary fact. A school of opinions argues that admission in relation to the authenticity of the execution of documentary evidence binds neither court nor parties.[209] The other school of thoughts, however, raises that must have binding effects on both court and parties; however, the other school of views which takes the middle position deems that such admission binds only parties, but not court.[210]

The concept that effects of such admission must not be acknowledged grounds on the same arguments

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[205] Ibid.
[206] Ibid.
[207] Ibid., 791.
[208] *Tatemono Shūkyo Tochi Akewatashi Seikyū Jiken*, 31(3) Saihan Minshū 371 (n.d.).
[209] Kobayashi, "Minji Soshō Hō Ni Okeru Soshō Shiryō・Shōko Shiryō No Shūshū (1)," 792.
[210] Ibid., 792-793.

as those that negate the effects of admission of indirect fact—that is, the acknowledgement thereof conflicts with the principle of free determination.[211] Similarly, the opinions concerning the idea that only binding effect on parties should be acknowledged are construed on the same premises as what have been employed for the arguments on partial acknowledgement (acknowledgement of binding effect on parties) of effect of admission of in direct fact.[212]

Nonetheless, what sparks the problem is the tendency to acknowledge the effects of admission of the authenticity of the execution of documentary evidence, while negating the effects of admission of indirect fact for the reason that such practice contradicts the principle of *Benron Shugi*. The question relates to why only effects of this kind of admission should be acknowledged while effects of indirect-fact admission are refused.

Although there are no concrete arguments for such discriminating treatments, there are few assumptions that can be thought of as supports to such treatment on effect of the secondary fact admission. For example, even if in the case that the secondary fact does not become the independent subject matter for trial as in the case of suit for confirmation of truthfulness or falsity of documentary evidence, then the truthfulness or falsity of the execution of document become the ultimate subject matter of proof which is independent from the ultimate fact that determines whether or not there exists the relationship of the substantial right.[213] Another possibility is from the comparative perspective to indirect fact or other secondary fact, because authenticity of execution of documentary evidence is very important, it should be regarded as ultimate fact.[214] However, regardless of the number of different arguments, the theory that denies the effects of admission related to secondary fact has become the common theory.[215]

To conclude, although there are many arguments on the issue that facts rather than ultimate fact should also constitute a judicial admission and that the effects thereof should be acknowledged, the common theory has become that only admission of ultimate fact that bears the binding effect on court while such

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[211] Ibid., 793.
[212] Ibid.
[213] Ibid.
[214] Ibid.
[215] Ibid.

effect is not applied to admission of indirect fact.[216]

1.4. Publicly Known Fact

Publicly known facts refer to those points widely known to the general public, such as historically famous incidents, natural disasters and major accidents by simple knowledge and experience of individuals as members of society regardless of time and way of receiving those facts.[217] Therefore, if the public knows a fact, it is illogical for anyone who makes a presumption that the court does not know that fact. However, the issue here is not about whether or not admission related to a particular fact which is already known to the public can be established and its effects will be recognized. Such a fact can be regarded as fact the existence of which is, from the beginning, obvious to the court,[218] and according to Article 179 of Japanese Code of Civil Procedure, such obvious fact needs not be proven. Nevertheless, the issue is whether or not admission of a fact contradictory to publicly known fact can be recognized and the effects of it rise and court should admit.

Some Japanese scholars have provided quite a number of arguments related to such kind of admission and acceptance of its effects, as they view that the effects of admission of fact contradictory to publicly known fact should also be recognized due to the reason that the disputes of parties can be solved basing on such admission.[219] These opinions can be evaluated as being based on the foundation that admission system functions as mechanism to decrease or abolish points disputed by parties.

The other scholars, however, contest this argument. For one reason, a fact which is publicly known (to both ordinary citizens and courts) should not become the disputed point from the beginning; therefore, it is unnecessary that such fact be proven or be admitted.[220] The other reason why admission of such fact must be denied is because recognition of such admission means basing a judgment on the fact that is not

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[216] Ito, *Benron Shugi*, 146; Shindo, Takeshita, and Ishikawa, *Kōza Minji Soshō Hō : Shinri*, 4:166; Kasuga, *Minji Soshō Hō Ronshū*, 162.
[217] "Kōchi No Jijitsu," *Zukai Niyoru Houritsu Yougo Jiten* (Jiyu Kokumin Sha, 2003), 594-595.
[218] Kawano, *Minji Soshō Hō*, 410.
[219] Kaneko, *Minji Soshō Hō Taikei*, 248.
[220] Kawano, *Minji Soshō Hō*, 410.

convincing to whoever is the third party and this will ruin the trust towards court.[221]

From a negative viewpoint, the matter in question is the balance between the excessive role of parties in litigation and naiveté of court. The positive viewpoint is the trade-off between the speedy litigation and the flexibility of court. Although it is undeniable to conceptualize that once admission is established, the admitted fact will be excluded from the disputed points and that contribute to the speedy trial, it is also logical to consider from the essence of publicly known fact that such fact, even if disputed parties, can be *apriori* deleted from the disputed points.[222]

2. Admission of Right

Concerning the establishment and effects of admission of right, there are two different opinions which can be regarded as pro and cons. One group of opinions suggests that admission of right should be recognized as judicial admission (of fact) and its effects must be acknowledged.

For example, in a suit demanding the return of land, X based his claim on ownership, while Y disputed X's claim by asserting that he acquired ownership over that disputed land from X, or asserting that Y has concluded the lease contract with X and has long possessed that land.[223] In such a case, according to Professor Shindo Koji, the statement of the defendant acknowledging that plaintiff has ownership on the land constitutes admission,[224] and effects of admission (on ownership) can be recognized.[225]

Professor Shindo Koji views in general that, "a statement having content as acknowledging legal effect or right relationship that forms the premise of right relationship which is the subject matter of litigation is also admission."[226]According to Shindo's opinion, admission of right in relation to the claim itself is the acknowledgement or waiver of claim.[227] Moreover, the statements such as "acknowledgement of the negligence" and "there is justifiable cause" like that should be also admission of right because they

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[221] Takahasi, *Jyūten Kōgi: Minji Soshō Hō*, 439.
[222] Kazuhiko Yamamoto, *Minji Soshō Hō No Kihon Mondai*, 1st ed. (Hanrei Times Co.,Ltd, 2002), 165.
[223] Ueno and Matsumoto, *Minji Soshō Hō*, 282.
[224] Shindo, *Shinminji Soshō Hō*, 515.
[225] Ueno and Matsumoto, *Minji Soshō Hō*, 283.
[226] Shindo, *Shinminji Soshō Hō*, 515.
[227] Ibid.

are the statements on the conclusion of legal determination related to "negligence" and "justifiable cause" which are particular facts.[228]

Professor Shind's argument goes further that even in the case of acknowledgement or dismissal of claim that can also be called admission of subject matter of litigation itself, the comprehension of legal effect may become the problem.[229] He insists, however, in relation to the legal effect which is directly linked to the decision on winning or losing the suit which is subject matter of litigation, the statement not disputing such legal effect can be easily assumed as the intention not to dispute because of the awareness of such legal effect.[230] This argument, however, points out that in order to assume that there is such non-dispute intention, it bases on the proper understanding of the contents of the legal effect or right in dispute through the relationship between the fact and subject matter of litigation, and that such understanding requires strong legal capacity.[231]

As a result of this weakness, this argument emphasizes that such admission of right can be recognized only in the case where it is obvious that party understands the contents of the admitted legal relationship and does not dispute that right.[232]In support of this type of admission, Professor Matsumoto Hiroyuki provides an argument basing on the interlocutory confirmation suit:

> If the priority right or legal relationship in a suit becomes the subject matter of confirmation suit, it, thus, can become the subject matter of acknowledgment of claim already, but the acknowledgment of claim cannot occur because no such interlocutory confirmation suit is filed in practice; thus, binding effect on court should be admitted even if there are only consistent statement and legal assertion of the adverse party.[233]

In Professor Matsumoto's opinion, denial of such admission will cause parties economic loss.[234] His

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[228] Ibid.
[229] Ibid.
[230] Ibid., 515-516.
[231] Ibid., 516.
[232] Ibid.
[233] Ueno and Matsumoto, *Minji Soshō Hō*, 282.
[234] Ibid.

argument is that in order to decide on the existence or non-existence of a particular priority right or legal relationship, parties must assert a particular fact and if court cannot determine that fact, court is unable to decide and this makes judgment roundabout and litigation becomes even more costly.[235] However, in his opinion, prior to such recognition of the establishment and effects of such admission, it is crucial that many factors such as the situation appearing in the proceedings, intention of parties and legal knowledge and the experiences of so-called admitting party be taken into account.[236] It seems that under this school of opinions which supports the establishment and effects of admission of right, a party's legal capacity and court's ability (possibly the request for explanation) in confirming the so-called admitting party`s intention play significant role as prerequisites prior to the recognition of establishment and effects of admission of right.

However, another school of opinions concerning the establishment and effects of admission of right finds it differently. These opinions deny the establishment and the effects of such so-called admission of right. According to Professor Kaneko Hajime the statement admitting the existence or non-existence of right or legal relationship disadvantageous to oneself can be called admission of right, but it is not original admission. Admission of right related to a claim itself is the waiver or acknowledgment of claim.[237] However, when a right becomes the basis for a claim (for example, in the suit demanding for the compensation for the infringement of ownership, the basis is the statement of defendant acknowledging that plaintiff is the owner), it is not necessary that the adverse party give reason to his assertion of right.[238] Nonetheless, because finally it does not exclude court`s trial, court can make determination different from this assertion when that fact appears and can be recognized at the oral argument.[239] This theory can be called as relative denial theory.[240] The relative denial of effects of admission of right has become the commonly accepted among many Japanese scholars.[241]

Although the relative denial theory is commonly accepted, there exists another theory which can be

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[235] Ibid.
[236] Ibid.
[237] Kaneko, *Minji Soshō Hō Taikei*, 246.
[238] Ibid.
[239] Ibid.
[240] Shindo, Takeshita, and Ishikawa, *Kōza Minji Soshō Hō : Shinri*, 4:177.
[241] Ibid.

regarded as an absolute denial of admission of right and is one that absolutely negates the effect of such kind of admission, while this theory gains little support.[242] However, it is ambiguous to confirm that Japanese courts side with which theory due to the reasons that courts' precedents have so far reached non-unified approaches.[243]

V. Scope of Application

Admission, as has been discussed up to now, has such major effects on both parties and court which enormously influence the judgment on the merit of the case. Once admission is acknowledged to have been established and its effects have occurred, the courts will be debarred from questioning the truthfulness of that admitted fact unless disputed by parties upon request for withdrawal. Furthermore, a court must refrain from carrying out examination of evidence on its own authority to challenge the admission although court may have doubts. The reason for such prohibition against court is because civil litigation serves as state-supported mechanism to solve issues of private interests of civil parties to litigation, and of course, the judgment will affect only parties concerned to that litigation.

However, the question is concerning with the extent to which an admission applies. Judicial admission takes root on *Beron Shugi* which is one form of expression of private autonomy in civil litigation.[244] It bases on the inactive nature and passivity of justice.[245] It does not apply to other procedures where inquisitorial principle is more proper.[246] As a result, judicial admission does not occur in these procedures.[247] For example, Article 19 (1) of Law on Personal Status Litigation of Japan precisely stipulates list of the provisions related to admission of the Code of Civil Procedure which are not applicable to the proceedings of personal status litigation.[248]

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[242] Ibid.
[243] Ibid., 4:178-180.
[244] Sakai, "Jihaku <Haku Gojū Nana Jō>," 36.
[245] Ibid.
[246] Ueno and Matsumoto, *Minji Soshō Hō*, 285.
[247] Sakai, "Jihaku <Haku Gojū Nana Jō>," 36.
[248] Article19(1) of the Law on Personal Status Litigation of Japan stipulates that, "Articles 157, Article 157 (2), Article 159 (1), Article207 (2), Article 208, Article 224, Article 229 (4) and Article 244, and provisions of Article 179 related to fact admitted by parties shall not apply to litigation procedure in personal status suit." *See* Select Roppou, *Jinji Soshō Hō*, 2002, 905.

As discussed so far, civil proceedings are carried out with regard to the commencement and conclusion of actions together with respect to submission of facts and evidence by parties and for the interests of the parties. On the contrary, other proceedings, such as personal status proceedings, stemming from the notion that familial relationship serves the foundation of social which affects public interest, places more emphasis on intervention of court because the effect of the judgment in civil status issues will also extend to the third party. Hence, allowing admission which is the result of dispositive act of the parties to also have binding effects on the third party is not appropriate.[249] A part from this, the denial of application of judicial admission in other proceedings than that of normal civil litigation can be thought as appropriate is because court can consider the whole substance of oral arguments to determine the truth on its own discretion.[250]

To sum up, the scope of judicial admission applies only to the normal civil proceedings where only interests of the parties to litigations concern. The other procedures, such as personal status procedure which applies to personal status suit, however, judicial admission does not apply. The ground for such a denial is that such procedures employ the inquisitorial principle.

In conclusion, under the Japanese civil procedure system, it has become a common theory that a judicial admission must consist of three elements, one of which is fact, the second is disadvantageousness of statement, and the third is the consistency between the assertion and the statement adopting such assertion regardless of the order of the former and the later. From scholars' viewpoints and judicial precedents, admission of ultimate fact is disputable, while there are still numbers of scholarly arguments on establishment and effects of admissions of other facts, such as indirect fact, secondary fact and admission against the publicly known fact and the admission in relation to right and legal relationship (admission of right).

VI. Basis of Admission System—*Benron Shugi* and Its Brief Historical Background

For a better understanding of the discussions and arguments in the next chapters, it is of importance to

[249] Ueno and Matsumoto, *Minji Soshō Hō*, 285.
[250] Ibid.

get deep into the root from which the system of admission has been developed. This section will examine, therefore, the ground on which the concept of judicial admission has been developed.

It has traditionally been explained by Japanese scholars that the system of admission under Japanese civil procedure system, as described in this chapter, is based on the *Benron Shugi* or the "oral argument principle" as its foundation.[251] Although the *Benron Shugi* alone may not adequately explain the relative grounds on which the establishment, effects or withdrawal of a particular judicial admission are denied or acknowledged, the sole purpose of this section is to provide the better understanding of the fundamental basis from which the system of admission originated.

There may exist number of appropriate English terminologies to conceive the meaning of *Benron Shugi*. However, this section and other sections of the whole dissertation will utilize the original Japanese terminology to maintain its originality and to avoid the confusion that may happen during the discussion on the system of civil procedure of other countries beside Japan. Therefore, the term *Benron Shugi* will always used from now without any equivalent English translation.

1. Concept of *Benron Shugi*

From the viewpoint of parties in a civil suit, litigation can be comparatively regarded as a sport competition where the party who receives the judgment in his favor is the winner, while the party against whom the judgment is rendered is a loser. Meanwhile, the court is a platform for the free and fair competition having judge as a referee for this fair-played competition. Every game has its rule. It is a common sense to conceive that the challengers in the game must abide by the rules; but more importantly it is the grounds on which the decision is made. For example, a boxer may become the winner because he gets more points than his opponent, yet the issue here in is how points are calculated and based on what criteria.

In civil litigation, for example, if the claim by a plaintiff is the demand for payment of loaned money,

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[251] Kawano, *Minji Soshō Hō*, 404.

it is not just the issue that court rules that plaintiff has right to claim is important, but the most important thing is what are the resources leading court to make such determination on the right to claim of the plaintiff. In short, particular materials for a court to rule on the subject matter of adjudication are indispensable. Such "materials for adjudication," which, in broad meaning, are called "litigation materials" must be acquired, and that court must consider to which extent are these materials necessary and where those materials can be acquired.[252] The premise on which the answer to the extent of necessity and the acquisition of those "adjudication materials" takes by referring to that court must form its judgment (adjudicate) by taking and utilizing only parties who are private persons as adjudication materials for court is called "*Benron Shugi*."[253]

To simplify, a court must refrain from searching for and collecting all the materials necessary for forming a judgment on its own, but it is the parties to litigation who are supposed to present facts and evidences which are important adjudication materials by asserting and submitting those concerned facts and evidences.[254] In short, *Benron Shugi* is the principle that puts emphasis on the parties' powers and responsibilities in collecting litigation materials (facts and evidences).

What makes this *Benron Shugi* party-oriented is a result of the adoption of this principle there follows the principle of reasoning which parties who carry out litigation activities have to provide rationale for all the assertions they make.[255] The reasoning is carried out based on fact and evidences, which, under *Benron Shugi*, are in the control of parties.[256]

2. Principles of *Benron Shugi*

As a result of the aforementioned concept, there arises three principles forming the contents of *Benron Shugi* all of which are classified as principle one, principle two and principle three. Such classification is commonly understood by Japanese law students and scholars.

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[252] Ito, *Benron Shugi*, 30.
[253] Ibid.
[254] Ibid.
[255] Ibid., 46.
[256] Ibid.

2.1. Principle 1 (Burden of Assertion)

Under the principle one or the principle of burden to assert, the court is not allowed to base its judgment on any fact (material for judgment) that has not been asserted by either party.[257] Such restriction on court means that parties to litigation have freedom as to whether or not they assert a particular fact as well as the right or authority to determine the scope of the fact to be taken into consideration by court upon rendering a judgment. On the contrary, even if there is a fact advantageous or advantageous to a party existing objectively, such a fact must not taken into consideration by the court when it renders a judgment, if such fact is not asserted by a party. Hence, a party will lose advantage or suffer from the disadvantage of a legal effect (such as the creation or extinction of rights) which is not recognized by court due to his or her failure to assert.

For example, if *Beron Shugi* applies and under this principle, in the suit demanding for the payment of loan where plaintiff asserts and proves the existence of loan contract and delivery money, the court cannot dismiss plaintiff's claim because court learns about the extinctive prescription which is not asserted by defendant. It means that upon forming a judgment court must not take into consideration the issue of the extinctive prescription, as it has not been asserted by the defendant.

To sum up, a court cannot take into consideration any fact not asserted by either party. Thus, each party assumes a responsibility to assert the advantageous facts in order to receive a favorable judgment. Such responsibility is called " burden of assertion."[258]

However, the Japanese Code of Civil Procedure does not contain any explicit provision which make it clear about the restriction on court concerning the consideration of fact which is not asserted by either party although it is practical under the current civil procedure system of Japan.

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[257] Ibid., 39.
[258] Nakano, *Minji Saiban Nyūmon*, 191.

2.2. Principle 2 (Binding Effect of Admission)

According to the concept of *Benron Shugi*, the essence that fact which is not disputed by parties to litigation must be recognized by court as it is (if its existence is not contested by parties, court must recognize that it exists, or conversely, if its non-existence is not disputed, a court must not make any contradictory recognition).[259]In other words, a court must bases the judgment on this undisputed fact, and that is called "the binding effect of admission."[260]

As an example, the fact concerning the loan contract must be the basis for the judgment without any exception if plaintiff asserted that he lent defendant, while defendant asserts that defendant has, as promised, already paid to the plaintiff. The issue to be further proved in such a case is whether or not the fact concerning payment has ever existed while there is no doubt pertaining to the existence of fact related to the loan contract. Under this principle, even if a court finds out that there has never been any loan contract between the plaintiff and defendant, then the court is not permitted to rule out the existence of fact relevant to loan contract which is not contested by parties. This principle constitutes the core for the judicial admission which has been abundantly discussed in this chapter; thus, any further discussion herein is of no necessity.

2.3. Principle 3 (Prohibition on *Ex Officio* Examination of Evidence)

The third principle of *Benron Shugi* concerns the proof level in the civil procedure. Under this principle, once *Benron Shugi* applies, the parties must offer evidence to prove the contested facts that they have asserted before it can be determined whether or not those facts have ever existed.[261] Within this essence, court must refrain from examining any evidences not offered by parties. This principle is called the "prohibition of examination of evidence by court`s own authority."[262]

For example, in the case where there is the disputed on the issue of the receipt of money, the plaintiff

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[259] Ito, *Benron Shugi*, 39.
[260] Nakano, *Minji Saiban Nyūmon*, 191.
[261] Ito, *Benron Shugi*, 157.
[262] Nakano, *Minji Saiban Nyūmon*, 191.

indicates and requests that court examine a witness A to prove the disputed fact. However, the court, on his own authority, caries an examination of another witness which is not requested by plaintiff so as to confirm the existence or non-existence of the disputed fact. Such practice is not permitted under this principle of *Benron Shugi*.

In short, this principle dictates that in order to determine an existence of a fact disputed by parties, the court can examine only evidence offered by that asserting party, while court must refrain from examination of evidence *ex officio* (without request from either party).

3. Basis of *Benron Shugi*

Up to now, there have been two prominently dominant theories for answering to the questions where there is *Benron Shugi* and for what should this principle be adopted by Japanese civil procedure. These theories are known in Japanese as *Honsitsu Setsu* or "parties' autonomy theory" and *Shūdan Setsu* or "method-of-justice theory".[263] The following sub-sections will use the English terminologies to explain the concepts of the *Honsitsu Setsu* and the *Shūdan Setsu* in details.

3.1. "Parties' Autonomy" Theory

Generally, the ordinary civil procedure deals with the disputes that concern the property relationships to which the principle of parties' autonomy is recognized and through which the autonomy of a party is respected by law.[264] Resulting from this perspective, parties must participate in solving their disputes in an active manner when parties deem judicial resolution is the only effective and ultimate mechanism when parties resort to lodging a complaint at court after, in some cases, they have sought all means of extrajudicial resolutions.[265] In such context, in order to maintain activeness of parties while the involvement of government agency (court) is relatively inevitable, it is favorable that the method of judicial decision which is comparatively close to autonomous resolution that parties totally control should be

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[263] Nakano, Matsuura, and Suzuki, *Shinminji Soshō Hō Kōgi*, 191.
[264] Ibid.
[265] Ito, *Benron Shugi*, 56.

established.[266]

To attain the purpose of getting the parties involved actively in the court proceedings, the intervention by the State must be, within the limit that such practice does not endanger public interests, removed, resulting in the recognition of the necessity of the authority of parties in controlling and collecting the litigation materials.[267] Such explanation deems that because parties to litigation always oppose each other in order to win a case, theoretically, they must try hard in collecting and offering litigation materials sufficient to confirm the truth to the court.[268] Furthermore, in some cases State receives neither benefit nor harm if parties admit and offer to the trial any fact contradictory to the truth (admission) since such act can be viewed as the disposition of parties' right.[269]

To sum up, the relinquishment of authority to control the litigation materials is the principle of *Benron Shugi* and within the essence that this principle is responsive to the nature of the case in question.[270] This *Benron Shugi*, thus, is every essential for the general civil procedure which can be referred to as the procedural manifestation of principle of partys' autonomy. For such a reason, this explanation has so far been called "parties' autonomy" theory.[271]

3.2. "Method-of-Justice" Theory

However, parties' autonomy is not a single theory that can explain the basis for *Benron Shugi*. There has been so far another challenging theory that dominates the way of conceptualization of groups of scholars who favor this theory. It is the *Shūdan Setsu* or "method-of-justice" theory. We can understand from its explanation that this theory contrasts to the partys' autonomy theory.

The method-of-justice theory explains that the suit concerning property-related disputes is the last resort for parties to opting for the judicial decision which is a system established by the State after the

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[266] Ibid.
[267] Ibid.
[268] Ibid.
[269] Ibid.
[270] Ibid.
[271] Ibid., 56-57.

parties have all sought for private dispute resolutions.[272] Therefore, there is not a single reason why there should be any method close to autonomous dispute resolution set up in the trial system established by State.[273] Nonetheless, to carry the trial, which is a State-run system, truth that happened outside of court must be revealed and such revelation is based on litigation materials.[274]

The collection of litigation materials by court's own authority is troublesome which puts constraint to accomplishing its purpose.[275] Thus, as an alternative to imposing workload on court, it is better off to entrust such task to parties who benefit in litigation so that they can bring all necessary litigation materials to trial.[276] The further argument is that even if there may be cases where parties may jeopardize the truth, then there are some limits where the court can exercise discretion to mend such flaw, or even if impossible, it is always rational to assume that parties have exercised their rights to dispose their interests.[277]

From such explanation, *Benron Shugi* appears as one of the methods taken to prove or discover the truth where the application of such is effective and best for the general civil procedure due to the active involvement of parties to litigation with some limits of discretion resting with the court. The judicial system can handle some possible circumstances arising out of what may be called the abuse of rights or duties of parties to litigation.

Besides the two main theories explaining the basis for *Benron Shugi* as having been discussed so far, there exist quite a number of theories. However, this dissertation refrains from discussing further on those theories. The rationales are because of the time constraints and they are not commonly accepted theories.

VII. Conclusion

The system of judicial admission admitted under the Japanese Code of Civil Procedure has traditionally been based on the concept of *Benron Shugi*, the principle that parties in the civil suits must be

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[272] Ibid., 57.
[273] Ibid.
[274] Ibid.
[275] Ibid.
[276] Ibid.
[277] Ibid.

responsible for collecting litigations materials and present them to the court. Although this principle puts emphasis on the private parties in litigation, the Japanese judges still get involved closely in the proceedings through which parties in the civil suits establish judicial admission. Since parties can only establish judicial admissions at the preparatory proceedings for oral argument or at the oral argument proceeding and the judges administer these proceedings, the parties in the suits establish these admissions in the court. Under the Japanese practice, any admission established outside of the court or not through these two types of proceedings will be regarded merely as extrajudicial admission without the effects that bind the court and parties.

Although the Code of Civil Procedure of Japan does not stipulate the subject matters for the admission, judicial precedents and majority of scholars confirm that only the admissions of ultimate facts that bind the courts and the parties. However, it is still unclear whether the majority of court decisions acknowledge the effects of admission of right, as no research can confirm the tendencies of judicial precedents concerning the issue of admission of right, while Japanese scholars have different views on the issue. In other words, the judicial precedents randomly recognize the binding effects on the courts and the parties the admission of right.

Because the judge will only use admission of fact in a particular suit as the basis for the judgment to dispose that particular case, parties cannot use these admissions in other cases although with the same parties. In other words, the binding effects of a judicial admission obtained in a particular case are valid only for that case. These effects do not bind the admitting party who are disputing with same party or others in a different case. Once the parties establish a judicial admission and its effects arise, the admitting party cannot freely withdraw that admission. Unless the admitting party can prove that the admission has been established due to falsity and mistake, or that it has been established because of criminal act of another, the admitting party must get the consent to withdrawal by the adversary party. If the admitting party fails satisfy these conditions, the effects of the admission bind the admitting party.

Although judicial admission system is recognized because it helps the parties and the judges to dispose of the case speedily and more economically, such system does not apply in other special procedures.

The judicial admission system is not recognized in the suits where the public interests concern. For example, the Law on Personal Status Litigation Procedure of Japan states precisely to exempt the application of judicial admission. The judgments in the personal status suits do not only affect the parties in the suits, their effects also extend to the third parties who may not get involved in the suits. In other words, the scope of application of judicial admission system is limited to only property-related civil suits.

CHAPTER TWO: JUDICIAL ADMISSION UNDER AMERICAN CIVIL PROCEDURE SYSTEM

I. Objective and Framework of Review

The aim of this chapter is to examine how civil admission, particularly judicial admission, under American civil procedure system is established. The examination will include the reviews on definitions of admission, scope and procedure for establishment of admission, and its effects. What makes the examination on American judicial admission important is that American civil litigation may share some common characteristics with the Japanese *Benron Shugi*; that is the significant roles of parties in civil litigation and that judicial admissions in both systems put weight on the parties' autonomy.

The American civil litigation is based on the adversary system;[278] the system that puts the emphasis on the parties in civil litigation for the search of truth.[279] Under this adversary system, the combatants in civil litigation, with the help of the respective advocates, clash each other to hone the issues and fight as hard to compete in the litigation,[280] while the role of American judges is relatively passive.[281] Their role is confined to only deciding between competing presentations of evidence and law that are tendered by the advocates.[282] Although there is no standard or uniformly accepted definition of the adversary process, the classic analysis shows that it rests on much more sophisticated premises that include the presence of a neutral tribunal, the preparation and presentation of the case by the parties (through their attorneys)[283], and a structured procedural system designed to find the truth.[284]However, the differences in cultural definitions of the roles of judges and lawyers in the Japanese *Benron Shugi* system and the American adversary one may make them greatly different. The examination of the judicial admission under American adversary system may enable us to see those disparities.

Due to the fact that the United States of America is the federal State and each state has its own judicial

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[278] Robert Gilbert Johnston and Sara Lufranco, "The Adversary System as a Means of Seeking Truth and Justice," *The John Marshall Law Review* 35 (Winter 2002): 145.
[279] Ibid., 147.
[280] Ibid.
[281] Schwarzer, "The Federal Rules, The Adversary Process, and Discovery Reform," 709.
[282] Geoffrey C. Hazard Jr., "Discovery and the Role of the Judge in Civil Law Jurisdictions," *Notre Dame Law Review* 73 (May 1998): 1019.
[283] Schwarzer, "The Federal Rules, The Adversary Process, and Discovery Reform," 709.
[284] Ibid., 706.

system and court system separate from the federal ones,[285]the review and discussions on the issues relevant to the notion of admission in civil cases of this chapter and the following ones are restrictively based on the federal practices. Thus, Federal Rules of Civil Procedures of the United States and other federal rules will become the basis for the discussions. However, this dissertation does not at all rule out any possibility of reviewing state practices which may significantly contribute to the analyses.

II. General Concepts of Admission

The Federal Rules of Civil Procedure of the United States of America (hereinafter referred to as the U.S. Federal Rules) which were adopted in 1938[286] and underwent subsequent amendments contain provisions which employ the phrase "request for admission" rather than the sole "admission."

Rule 36 of the U.S. Federal Rules scrupulously prescribes about the scope of the request for admission containing matters subject to be requested for admissions.[287] The rules stipulate the methods through which a request for admissions may be carried out, time for response, answer and objection to the request and the legal effects of the both the request and response, the withdrawal and the amendment of admission.[288] The rules further stipulate the sanctions for a failure of the responding party in reacting in a timely manner to the request.[289]

Prior to further discussions that may focus on each items incorporated in the Rule 36, this section introduces the general definitions of "admission" under the American civil procedure system. Such an introduction contributes to critical discussions in the following sections of this whole chapter.

1. General Definitions of Admission

Although the U.S. Federal Rules do not define what admission is, Section 801 8(d) 2 of the Federal Rules of Evidence, however, define an admission as a statement offered against a party:

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[285] Friedenthal, Kane, and Miller, *Civil Procedure*, 4.
[286] Richard L. Marcus and Edward F. Sherman, *Complex Litigation: Cases And Materials On Advanced Civil Procedure*, 4th ed. (West Group Publishing, 2004), 2.
[287] West, *Federal Civil Judicial Procedure and Rules*, Revised. (Thomson West, 2009), 206.
[288] Ibid.
[289] Ibid.

(A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.[290]

The term "statement" may be broad depending on the context. It can be made verbally or in writing. However, Rule 801 defines what "statement" means. The term "statement" utilized in this general definition, as prescribed by Rule 801 (a) means: (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.[291]

Based on these definitions, some American scholars provide a more simplified version of definition of admission. Those scholars move on to define "admission," as word or act of a party or a party's representative that is offered as evidence by the opposing party.[292] Such a definition may, to some extent, narrow down the scope of understanding that American civil procedure system treats admission as evidence. However, such quick conclusion is premature. Thus, further discussions on civil admission are pivotal.

Resulting from this general definition which embraces both the "words" either in oral or written form and the "acts," American scholars go on to divide admission, under this general explanation, into two categories—that is, "*express* admission" and "admission by *conduct*."[293] The former refers to the statement of the opposing party or an agent whose words may be used against the party.[294] Meanwhile, the latter may vary according from case to case which requires further reviews. We can conclude from the definitions provided above that either principal party or party's agent can establish admission either in the explicit form or by conduct.

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290 "LII: Federal Rules of Evidence", September 22, 2004, 801(d)(2), http://www.law.cornell.edu/rules/fre/.
291 Ibid., 801(a).
292 John William Strong, *McCormick on Evidence*, 4th ed. (West Group, 1992), 393.
293 Ibid.
294 Ibid.

Although the Federal Rules of Evidence prescribes detailed and comprehensive definitions, these rules, whose purpose is to regulate the evidence that the jury may use in order to reach a verdict, provide no distinction on application within the scopes of civil actions and criminal actions. As a result, the rules of evidence, which are the rules and standards regulating the admission of proof at trial of a lawsuit, are applied in both civil and criminal actions.[295] Due to this complex nature and to avoid confusion as well as to limit the scope of discussions with the sole focus on judicial admission in civil cases, this chapter will not review all types of admissions stipulated in the definition in the Federal Rules of Evidence.

2. Classification of Admissions

Prior to its 1970 amendment through which the substantial changes were made, the Rule 36 of the U.S. Federal Rules caused a splitting of opinions on the interpretation of judges concerning the extent to which a party was bound by his own admission. For example, some courts view an admission established under the Rule 36 as an equivalent of the sworn testimony.[296] Because courts in some jurisdictions allowed the parties to rebut their testimonies, courts that treated an admission as a sworn testimony ruled that admission was rebuttable.[297]

Specifically, District Court judge Modarelli held in his decision in the *Ark-Tenn Distributing Corp. v. Breidt* which was affirmed by the Appellate Court that:

> Simple justice demands that a person who has no knowledge of a request for admission should not be held liable for his failure to deny. In any event, admissions or denials in response to a request for admission stand in the same relation to the case that sworn testimony bears.[298]

Testimony is evidence that competent witness under oath or affirmation gives at trial or in an affidavit or deposition.[299] Thus, the ambiguity of the effects of admission provided by Rule 36 prior to its 1970 amendment gave rise to a school of thoughts that admission was equivalent to evidence. Deriving from

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[295] Ibid., 2.
[296] *United States v. Lemons*, 125 F.Supp 686 (W.D.Ark 1954).
[297] West, *Federal Civil Judicial Procedure and Rules*, 208-209.
[298] *Ark-Tenn Distributing Corp. v. Breidt*, 209 F.2d 359 (3d Cir. 1954).
[299] *Black's Law Dictionary*, 1999, "testimony, n."

these thoughts, the term "evidentiary admission" have been developed in comparison to the term "judicial admission." The following sections introduce more ideas on both types of admission through comparative analysis.

2.1. Evidential Admission

"Evidentiary admission" is defined as words in oral or written form or conduct of a party or a agent (representative) offered as evidence against him (the party).[300] Historically, this type of admission has also been characterized as "ordinary admission" or "quasi admission,"[301] while some scholars called it "informal evidence," but most predominantly, it is also labeled as "extrajudicial admission[302]."As to the effect, evidential admission is not conclusive but subject to contradiction or explanation.[303]

2.2. Judicial Admission

Judicial admission, under the American concept, is a formal concession made in the pleadings in the concerned civil case or stipulations by a party or counsel which gives rise to the effect of withdrawing a fact from issue and of dispensing wholly with the need for proof of the fact.[304] Drawing a conclusion from this definition, a judicial admission under the American civil procedure system can be established by either a party or representative at the pleading stage in civil procedure. The effect of such admission is conclusive.

Although such a definition for judicial admission under the American civil procedure system puts emphasis on the admissions established through the pleadings, civil admissions under the federal practice may not be limited to admissions established through the said pleadings. Originating from dexterity or incompetence, design or inadvertence, concessions may be effected at any stage of litigation: in response to request for admissions, in pleadings, stipulations, through agreements at pre-trial conference, or in

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[300] Charles Tilford McCormick, *Handbook of the law of evidence* (West Pub. Co, 1954), 504; Strong, *McCormick on Evidence*, 394.
[301] *Aguirre v. Vasquez*, 225 S.W.3d 744 (Tex. App. Houston 14th Dist. 2007).
[302] *United States v. United Shoe Mach. Corp.*, 89 F. Supp 349 (D. Mass. 1950).
[303] Strong, *McCormick on Evidence*, 394.
[304] Ibid.

statements in open court.[305]

Thus, referring judicial admissions by limiting only to the admissions established in the pleadings alone may be problematic. Furthermore, the Federal Rules of Civil Procedure of the United States stipulates a specific rule which embraces provisions concerning the "request for admissions." These provisions are stipulated in Rule 36 that provides a mechanic for the parties to establish civil admissions[306]

Therefore, there is a necessary that this dissertation carry out profound examinations the admissions established under different devices as prescribed above. The examinations will focus on the methods of establishment of these admissions, the effects of such, the scope of their application, and so on. Given that Rule 36 provides more specific provisions concerning admissions, the discussions related to it may be more voluminous than those in relation to admissions established under other devices. Such large-scale coverage will prioritize admissions established under Rule 36 to be discussed first in the order of the following sections.

III. Admission under Rule 36: Establishment of Admissions through Requests and Responses

Under the Federal Rules of Civil Procedure of the United States, an admission may or may not be established and the effects thereof may or may not take place depending on the act and the response of the request for admission. Moreover, depending on the nature of the reaction of the responding party, an admission may be explicitly established or deemed as having been established by the responding party. Prior to the situation that court can determine that an admission is established, parties have to go through many complicated procedures and formalities in accordance with the U.S. Federal Rules. Among these are procedures and formalities provided by Rule 36 that specifically governs the request for admissions.

Since the adoption of the Federal Rules of Civil Procedure in 1938, Rule 36 has undergone subsequent revisions made through its 1946, 1970, 1987, 1993 and 2007 amendments. The revised versions came into

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[305] "Judicial Admission," *Columbia Law Review* 64, no. 6 (June 1964): 1126.
[306] *Fed. R. Civ. P.*, Rule 36.

effect some time after their respective revisions.[307]

Substantial revisions were made to the 1970 amendment. Those substantial changes were the result of the critical comments from various scholars and the split decisions reached by judges. Such the controversies were related to the application of the rule concerning the issues of admission related to fact, application of law to fact or opinions about either of them, and the sanctions against the responding party for the failure to comply with the time provided and timeframe for the answer to request for admission.[308] Above all, the most significant changes brought to Rule 36 through the 1970 amendment were related to the issue of the effect of admission, which, as a result, may have put an end to the related discussions.[309] Hence, the changes made in 1970 were designed to make the rule serve its purpose more effectively, and disagreements among courts concerning the proper scope, including whether a request was objectionable.[310] The controversies among court before were the objection of a request if it went to a matter of opinion, disputable matters and the extent that the party on whom a request was served must take an effort to inform itself on a matter about which it lacked knowledge, of the rule were solved.[311]

Although the rule was revised again in 2007, the objective of the amendment was merely to be stylistic, while no substantial changes in meaning were intended; the language used in Rule 36, along with the language of all the other Civil Rules, was amended as part of the general restyling of the Civil Rules to make them more easily understood.[312] Due to the fact that the 1970 revision brought substantial changes to the rule, while its 2007 counterpart brought nothing remarkable concerning its substance, the year 1970 may often appear in the following discussions as a benchmark for comparisons of the analysis of theories and judicial precedents.

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[307] West, *Federal Civil Judicial Procedure and Rules*, 206-207.
[308] Ibid., 207.
[309] Ibid.
[310] "Federal Rules of Civil Procedure: Title V. Disclosure and Discovery" (Mathew Bender & Company, Inc., 2010), sec. Rule 36.
[311] Ibid.
[312] Charles Alan Wright, Arthur R. Miller, and Richard L. Marcus, "Federal Rules of Civil Procedure," *Federal Practice & Procedure* 8B, no. 3 (2010): 2251.

1. Request for Admissions

1.1. Scope of Request

The U.S. Federal Rules provide in Rule 36 both subject matter related to which a party to litigation may request for admission. However, from its provisions, one may find out that there are restrictions on some particular issues that a party must refrain from request for admission. Thus, the rule stipulates both the permissible scope for the request and its impermissibility.

1.1.1. Permissible Scope

Prior to 1970, the former Rule 36 (a) authorized the request for admissions "of the truth of any relevant matters of act."[313] Because of such ambiguity of the rule, a majority of decisions held that only matters "of fact" were properly the subject of requests for admission.[314] These judicial decisions sustained objections to requests that were regarded as involving opinions or conclusions or a mixture of law and fact.[315] Nonetheless, after its 1970 amendment, the subject matter of requests for admission became clearer, as the revised Rule 36 stipulated that a party may serve on any other party a written request to admit, for purpose of the pending action only, the truth of any matters within the scope of Rule 26 (b) (1) relating to facts, the application of law to fact, or opinions about either, and the genuineness of any described documents.[316]

The note prepared by the Advisory Committee on 1970 Amendments revealed that the new provision eliminates the requirement that the matters be "of fact," and that this change resolved conflicts in the court decisions as to whether a request to admit matters of "opinion" and matters involving "mixed law and fact" was proper under this rule.[317] The note of the Committee indicated further that a request may be made to admit any matters within the scope of Rule 26 (b) that related to statements of fact or opinions of act, or of

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[313] Ibid., 2255.
[314] Ibid.
[315] Ibid.
[316] *Fed. R. Civ. P.*, Rule 36 (a) (1).
[317] "USCS Fed Rules Civ Proc R 36."

the application of law to fact.[318] In short, Rule 36 provides that requests for admissions can call for any of the following matters:

- Facts
- Statement of fact;
- Opinion on a matter of fact;
- The application of law to fact; and
- The genuineness of a document.

The rationale lied behind the approach of the Advisory Committee was as what indicated and extracted from their note as follow:

> Not only is it difficult as a practical matter to separate "fact" from "opinion"…but an admission on a matter of opinion may facilitate proof or narrow the issues or both. An admission of a matter involving the application of law to fact may, in a given case, even more clearly narrow the issues. For example, an admission that an employee acted in the scope of his employment may remove a major issue from the trial. In *McSparran v Hanigan,* 225 F. Supp. 628 (E.D.Pa.1963), plaintiff admitted that "the premises on which said accident occurred, were occupied or under the control" of one of the defendants, 225 F Supp at 636. This admission, involving law as well as fact, removed one of the issues from the lawsuit and thereby reduced the proof required at trial. The amended provision does not authorize requests for admissions of law unrelated to the facts of the case.[319]

However, even if the subject matters for the request for admissions have now become non-doubtful, then the rule still fails to provide a better understanding on what kind of fact that constitutes the basis for the subject matter for request for admissions. For instance, the questions may arise with regard to whether a request for admission can call for admission of a statement of indirect fact or supplementary fact, or opinion or application of law.

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[318] Wright, Miller, and Marcus, "Federal Rules of Civil Procedure," 2255.
[319] "USCS Fed Rules Civ Proc R 36.doc", n.d.

Given that of Rule 36 (5) which indicates that the party who considers a matter requested for an admission presents a genuine issue for trial must not object to the request on that ground alone,[320] one may be able to conclude that the requests for admissions under the Federal Rules of Civil Procedure may relate to "ultimate facts."[321]This ambiguity may be a loophole that gives rise to necessity of examining case laws.

Case laws made after the 1970 amendment, which applied Rule 36, enabled the comprehension that the term "facts" encompassed in this rule might refer to "ultimate facts."[322] Under these case laws, parties requested for admissions of ultimate fact that proved the dispositive of the entire case[323] and courts granted summary judgments based on those admitted ultimate facts. The courts held, "[a]s a preliminary matter, a request for admission under Rule 36 and a resultant admission, are not improper merely because they, as here, relate to an "ultimate fact," or prove dispositive of the entire case."[324]From this opinion, it seems that "ultimate facts" are not the "must" on which a request for admission may be based. In contrast, the ultimate facts are the only ones among the facts, of any kind, that can be the subject matters for request for admissions.

With respect to the application of law to fact, the request from one party to the other party may call for the admission of party's contractual obligations as a matter of law.[325]As stipulated in Rule 36, a request for admissions may seek to establish the genuineness of documents. With the application of such a provision, a request for admission pertaining to genuineness of documents can be particularly useful in helping parties determine which documents that are to be introduced at trial will present fundamental problems and.[326]The application of this provision has been well confirmed in the decisions of American courts against the parties who refused to respond to such requests for admissions.

In the case of *Berry v. Federated Mut. Ins. Co.*, 110 F.R.D 441, 441 (N.D. Ind. 1986). the court denied the insurer's motion for protective order where an insurer sought a protective order to absolve it from

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320 *Fed. R. Civ. P.*, Rule 36(5).
321 John R. Kennel, "Deposition and Discovery," *American Jurisprudence* 23, no. 2 (2010): 184.
322 "Moore's Answer Guide: Federal Discovery Practice," *Mathew Bender & Company, Inc.* 1 (2010): 13.03 [2].
323 *Marchand v. Mercy Med. Ctr.*, 22 F.3d 933, 936-939 (n.d.); *Cereghino v. Boeing Co.*, 873 F. Supp. 398, 403 (D. Org. 1994).
324 *Cereghino v. Boeing Co.*, 873:403.
325 "Moore's Answer Guide: Federal Discovery Practice," 13.03 [3].
326 Ibid., 13.03 [4].

having to answer plaintiff insured's requests for admissions. In addition, the court ordered the insurer to file an appropriate response to the insured's requests for admissions. The court also dismissed the case with prejudice as to all parties and all claims and assessed jury costs against the parties.[327]

The insured *Berry* sought compensatory damages under the terms of the insurance policy and punitive damages based upon the insurer's alleged bad faith in denying the claim. The insured brought a bad faith action against the insurer for denying a claim and a negligence action against the adjusters for allegedly mishandling the claim. The plaintiff served requests for admissions against both and requested them to admit that copies of the insurance policy, letters, office memoranda, checks, and other documents were true and correct copies of the originals. The insurer objected and argued that the requests were overwhelming, vexatious, oppressive, and unduly burdensome and that requests directed to foundation and admissibility issues were improper. However, the insurer failed to cite any authority to support its contentions. The court found that a large number of documents must be introduced at trial and the genuineness and authenticity of the majority of these documents should not be in dispute. As a result, the court held that Rule 36 of was an appropriate procedure to determine which documents would and would not have foundational problems and which the court, accordingly, denied the insurer's motion, ordered it to file an appropriate response, and dismissed the case.[328]Additionally, because the text of a document is a matter of fact,[329] under American practices, it is also proper for a request to require the responding party to admit or deny the accuracy of quoted text from a particular document.[330]

1.1.2. Impermissibility of Request

Although parties may enjoy the extensive scope which embraces the variety of subject matter to which an admission is requested, a party must avoid requesting for admissions of some issues that may not be permissible. First, the requested matters must be relevant and not privileged. As Rule 36 stipulates in reference to Rule 26, which concerns duty to disclose, that a party can serve on any other party a written

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[327] *Berry v. Federated Mut. Ins. Co.*, 110 F.R.D 441, 441 (N.D. Ind. 1986).
[328] Ibid.
[329] "Moore's Answer Guide: Federal Discovery Practice," 36.03 [4].
[330] *Miller v. Holzmann*, 240 F.R.D 1, 4 (D.D.C 2006).

request to admit the truth of any matters within the scope of Rule 26(b)(1), it is necessary to examine the provision of that concerned rule.

With respect to the scope and limits of discovery, Rule 26(b)(1) stipulates that unless otherwise limited by court order parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense . Such matters include the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).[331] Hence, the request for admissions must refrain from any matters that are regarded as privileged; that is to say, a request for admissions may concern any matter which discovery may be had, that is, any non-privileged matter relevant to the claims and defenses in the pending case.[332]

Second, neither pure request for opinions of law, which are not contemplated by the rule, nor are requests seeking legal conclusions appropriate when proceeding under Rule 36.[333] The committee note of 1970 indicated that request seeking legal conclusions,[334] or legal theories unrelated to the facts of the cases were not authorized.[335]The American court decisions confirmed the guideline provided by the committee note of 1970. For instance, the District Court, in the case where American government filed an action against an individual defendant who was debtor to the government by loan provided to the defendant through Health Education Assistance Loan, rendered a summary judgment in favor of the government. The Appellate Court affirmed that judgment and confirmed that the defendant's requests for admissions improperly targeted the "ultimate legal issue in the case." The Appellate Court viewed that:

Yet, for example, [defendant] sought to have the [plaintiff] admit such statements as "Plaintiff has

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[331] *Fed. R. Civ. P.*, Rule 26(b)(1).
[332] "Moore's Answer Guide: Federal Discovery Practice," 13.03 [5].
[333] Claudia Wilken, "Moore's Federal Practice-Civil," *Mathew Bender & Company, Inc.* 7 (2010): 36.10 [8].
[334] "USCS Fed Rules Civ Proc R 36.doc."
[335] "Moore's Answer Guide: Federal Discovery Practice," 13.03 [3].

failed to state a claim upon which relief can be granted," "[p]laintiff's claims are barred by the applicable statute of limitations and/or laches" and "[d]efendant does not owe money to [p]laintiff." Plainly the first of those requests does not fit the prescribed mold, and the second is at least problematic in the same respect. Even the third, though it might perhaps be stretched into an effort to elicit a factual response, targets the ultimate legal issue in the case.[336]

Thus, while a request for admissions of law is improper, under Rule 36 (a) of the U.S. Federal Rules, a request for admissions regarding the application of law to the facts is not.[337] A party to a civil suit can request his or her adverse party to admit the application of law to the facts which are related to the suit. However, the pure request for admissions of law alone is inappropriate.

Third, while factual matters generally are appropriate subjects for a request for admissions, a trial strategy is not.[338] For example, it is improper to use a request for admission under Rule 36 to determine what evidence the adverse party plans to present at trial. Specifically, in the case of *Howell v. Maytag,* 168 F.R.D. 502 (M.D. Pa. 1996), the court denied a defendant's motion for summary judgment because plaintiff were not required to respond to requests for admissions, as the request exceeded the scope of what court called permissible discovery and that the dismissal of plaintiff's claim was not an appropriate sanction for plaintiffs' spoliation of evidence. The court ruled that the defendant's requests seeking to uncover a plaintiff's plans for trial exceeded the scope of Rule 36 of the Federal Rules of Civil Procedure.[339]

To summarize, the requests for admissions under Rule 36 can call for the admissions of any matters which are related to a pending case as long as they are related to facts, a statement of fact, an opinion on a matter of fact, the application of law to fact and the genuineness of a document to fact as long as the matter is not privileged and not a pure legal conclusion unrelated to facts of the case. The request for an admission can be initiated by a plaintiff and defendant who are parties to the action.[340] The term "party" here does not necessarily refer to only the litigant acting pro se. It also to the appointed representative (attorney) and also

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[336] *United State v. Petroff-Kline*, 557 F.3d 285, 293 (6th Cir. 2009).
[337] Kennel, "Deposition and Discovery," 183.
[338] Wilken, "Moore's Federal Practice-Civil," 36.10 [8].
[339] *Howell v. Maytag*, 168 F.R.D. 502, 504 (M.D. Pa. 1996).
[340] *Federal Practice and Procedure: Civil Rules* (Thomson/West, 2006), 665.

extends to the United States or state officials, and the guardian *ad litem* (a guardian, usually, a lawyer, appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party)[341] of a minor party on whom the adverse party can serve the request for admissions.[342]

1.2. Form of Request

From the dictation of Rule 36 as provided herein, it is a must that the requesting party makes a request in written form which is a compulsorily explicit way of commencing the establishment of an admission. With regards to the form stipulated in this Rule 36 (a) (1), it can be understood by a form set out as sample for request made by plaintiff having contents as follows:[343]

> **Request for Admission under Rule 36**
>
> Plaintiff X requests defendant Y within 00 days after the service of this request to make the following admissions for the purpose of this action only and subject to all pertinent objects to the admissibility which may be interposed at trial:
>
> **1.** That each of the following documents, exhibited with request, is genuine (relevant documents must then be listed and description on each must be associated herein).
> **2.** That each of the following statements is true (each statement must be listed).
>
> Signed:
>
> Attorney for Plaintiff
>
> Address:

Rule 36 prescribes explicitly that each matter requested for admission must be stated in separately numbered paragraphs and that other necessary documents be attached with the written request.[344] The separate statement on matters requested for admissions prescribed in this rule simply means that the requesting party each request listed down in the written form deals with a particular issue, which can be understood as one-paragraph-one-issue basis.

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[341] "guardian ad litem, n."
[342] Kennel, "Deposition and Discovery," 181.
[343] Herbert E. Greenstone, "Request for Admission by Plaintiff," *American Jurisprudence Trials* 4 (August 1966): 8.
[344] *Fed. R. Civ. P.*, Rule 36(a)(2).

From this point of view, the matter of exactness of a request on each matter is important for the comprehension of the party to whom the request is made (hereinafter referred to as the "responding party"), and in practice courts require that the request must not be in narrative form, yet it should be very simplified allowing for a "yes" or "no."[345] In other words, the requesting party bears the burden of making the requests simple and direct by avoiding vague or ambiguous ones that make it hard for the responding party to answer properly. Judge Randolph F. Treece of the Northern District Court of New York, in his decision in a civil action instigated by the employee of Champlain Enterprises, Inc., viewed:

> In order for this to be an orderly procedure, the requesting party bears the burden of setting forth its requests simply, directly, not vaguely or ambiguously, and in such a manner that they can be answered with a simple admit or deny without an explanation, and in certain instances, permit a qualification or explanation for purposes of clarification.[346]

Since the Rule 36 does not stipulate the limitation on number of requests for admission to be served to the other party, this, in some cases, result in hundreds of requests for admission being propounded. For example, in some cases the plaintiff made as many as 1,267 requests for admission to defendants,[347] while in some cases a party made as many as 241 of requests.[348]

Beside the obligations to specify and clarify in the request imposed on the requesting party by Rule 36 as mentioned earlier, the requesting party is also required to attach a copy of the document with his or her request if a request concerns with the genuineness of a document.[349] However, such attachment will be exempted if the document is, or has been, otherwise furnished or made available for inspection and copying.[350] In addition to these requirements, the U.S. Federal Rules demand that the request for admission be signed and that the person signing the request must state his address, e-mail address, and phone

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[345] Greenstone, "Request for Admission by Plaintiff," 8.
[346] *Henry v. Champlain Enterprises, Inc.*, 212 F.R.D (N.D. N.Y. 2003).
[347] *A. Farber & Partners, Inc. v. Garber*, , 237 F.R.D. 250, 257 (C.D. Cal. 2006).
[348] *Modern, Inc. v. State of Fla., Dept. of Transp.*, 2005 WL 1676809, at *2 (M.D. Fla. 2005).
[349] *Fed. R. Civ. P.*, Rule 36 (a) (2).
[350] Ibid.

number.[351]

1.3. Service of Request

After the completion of the formalities as discussed in the preceding sections, the signed request for admissions must be served on the party from whom the admission is requested and copies of the request must be sent to all other parties.[352] However, without a leave of court or written stipulation, a request for admissions may not be served before the time specified in the provision of the Federal Rules of Civil Procedure which governs the timing and sequence of discovery.[353]

Rule 26 (d) dealing with time and sequence of discovery provides that, a party many not seek discovery from any source before the parties have conferred as required by Rule 26(f), relating to conference of the parties and the planning for discovery, except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), relevant to proceedings exempt from initial disclosure, or when authorized by the rules or by court order.[354]In real practice, courts have ruled out the service of requests for admissions with the service of complaints for the reason that courts held as "simply too early for defendant" to perceive what facts should be contested or admitted.[355]In general, a request for admission must not be filed until they are used in the case or the court orders the filing.[356]As for the mode of serving, Rule 5 of the Federal Rules of Civil Procedure stipulates sufficient provisions that a requesting party may enjoy.[357] However, the service of the request for admission is complete upon the mailing of request.[358]

In conclusion, under the Federal Rules of Civil Procedure of the United States, a party in civil dispute may serve the adverse party(s) with a written request for admissions of the truth of any matters, as permitted by rules governing discovery scope and limits, which are related to facts, or statements or opinions about the facts, application of law to fact, or statements or opinions about this application, and the

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[351] Ibid., Rule 26 (g) (1).
[352] Wilken, "Moore's Federal Practice-Civil," 36.10 [4].
[353] Kennel, "Deposition and Discovery," 182.
[354] *Fed. R. Civ. P.*, Rule 26 (d).
[355] *Perez v. Miami-Dade County*, 297 F.3d 1255, 1268 (11th Cir. 2002).
[356] "Moore's Answer Guide: Federal Discovery Practice," 13.06 [3].
[357] *Fed. R. Civ. P.*, Rule 5.
[358] *Freed v. Plastic Packaging Materials*, 66 F.R.D 550 (E.D. Pa. 1975).

genuineness of any described documents. The requesting party is obligated to comply with the rules governing the formalities and procedure for request for admission together with the enjoyment of the right to exercise the request for admissions as provided by the rules, or the defective request will result in the advantages provided to the adverse party. For instance, a party is not obligated to respond to the unsigned request for admissions.[359]

2. Responses to Request for Admissions

Although the responses may vary depending on case and the contents entered in the written request, the party on whom the request for admissions is served has obligation to respond to the request. The silence or failure to respond in a timely manner will give advantages to the requesting party for the reason that the deemed admissions in relation to the matters requested will occur.[360]However, even if the responding party provides a valid response, it does not mean that he or she may avoid the establishment of admissions either, as admissions pertaining to matters requested may or may not be established depending on the type and/or the contents of the responses.

2.1. Types of Response

Rule 36 provides two basic forms of responses that can be chosen by the responding party, an answer and objection. Rule 36 provides that if a matter is not admitted, then the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it.[361] According to the rule, a denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest.[362]The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can

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[359] Wilken, "Moore's Federal Practice-Civil," 36.10 [3].
[360] *Fed. R. Civ. P.*, Rule 36 (a) (3).
[361] Ibid., Rule 36 (a) (4).
[362] Ibid.

readily obtain is insufficient to enable it to admit or deny a point.[363]

Rule 36 provides another option for the responding party beside the responses having the contents as introduced in the preceding paragraph. That option is "objection to the request." However, the rule requires that the responding party must state the grounds on which he or she makes such an objection to the request.[364] A party must not object solely on the ground that the request presents a genuine issue for trial.[365]

To summarize, the responses to a request for admission initiated based on Rule 36 of the Federal Rules of Civil Procedure of the United States of America take two fundamental forms, answer and objection. However, from the contents of those answers and objections as provided in the rule, responses to the request for admissions can be subdivided into categories, such as admission, denial and objection.

2.1.1. Admission

An admission may be established under this Rule 36 when the responding party simply chooses to admit the matter requested by the requesting party, a simple admission is all that is required by this Rule 36; and a simple, explicit admission requires, as not seen nowhere in this rule, no further explanation, while at the same time it is not necessary to establish any evidence or authority for an admission.[366]However, there may be case where admission may require qualification when the request is ostensibly true, but the responding party cannot in good faith admit it without some necessary contextual explanation to remedy any improper inferences.[367]

Falling under the answering category provided in the Rule 36 (a) (4), the answering party must qualify an answer or deny only part of a matter (requested for admission), as the answer must specify the part admitted and qualify or deny the rest.[368] Rule 36 (a) (4) imposes an obligation on the answering party that when good faith requires that a party qualify an answer or deny only part of the matter of which an

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[363] Ibid.
[364] Ibid., Rule 36 (a) (5).
[365] Ibid.
[366] Wilken, "Moore's Federal Practice-Civil," 36.11 [5] [a].
[367] Ibid.
[368] Ibid.

admission is requested, the answering party must specify so much of the matter contained in the request as is true and must qualify or deny the remainder. In other words, the answering party may not deny the requested mater in its entirety but must break the matter down by specifying that the part (of the requested matter) which is true, while denying (or stating an inability to admit or deny) the rest of points.[369]Both the complete or partial admissions as such are explicit as the matter requested for admission is conceded by the admitting party which is different from the matter deemed admitted by a party.

Although Rule 36 does not precisely use the term "service" to require the responding party to serve on the requesting party, the rule stipulates the time frame within which the responding party must comply with, or the failure of such compliance will result in the deemed admission instead.[370]

2.1.2. Denial

According to Rule 36 (a) (3) the responding party can completely deny or partly deny the matter requested for admission which thus can be labeled as complete denial or partial denial. Within the scope of this provision, a responding party can choose to completely deny a request for admission, or alternatively it may move to partly deny the request. The, according to this provision of Rule 36 (a) (3), the responding party may, in good faith, qualify his or her answer or deny part of a matter. In such a case, the responding party is required to state specifically the admitted part and deny (or qualify) the remainder.[371] The American courts confirm the spirit of this provision in their decisions, as the magistrate judge in *Henry v. Champlain Enters*., case noted:

> There will be times, however, when the answer cannot be a succinct yes or no, and a qualification of the response is indeed necessary. Under these circumstances, the answering party is obligated to specify so much of its answer as true and qualify or deny the remainder of the request.[372]

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[369] Steven S Gensler, "Federal Rules of Civil Procedure, Rules and Commentary: Rule 36. Requests for Admission," *FRCP-RC RULE 36* (Westlaw International, 2011).
[370] Ibid., Rule 36 (1) (3).
[371] Wilken, "Moore's Federal Practice-Civil," 36.11 [5] [b].
[372] *Henry v. Champlain Enterprises, Inc.*,212:.

Nevertheless, in the situation where the request embraces interdependent, compound issues, the responding party may deny the entire statement when it is premised on a denied fact.[373]The same standards and requirements of Rule 36 apply regardless whether the responding party intends to opt for a partial or a complete denial.[374] This provision of Rule 36 (a) (3) requires, without different treatment on partial or complete denial, that the denial must fairly meet the substance of the requested matter. Such requirements are rigidly construed and the failure to comply with these standards may warrant sanctions.[375] The spirit of this provision is realized in the decisions of American courts which rule based on that provision that a denial must be forthright and specific and the requirement that such a response fairly meet the substance of the request is strictly enforced.[376]

2.1.3. Objection

Another type of response to the request for admission provided by Rule 36 is the concept of objection. Applying this method of response of objection, the responding party may serve a written objection to a request for admission or any portion thereof that the responding party feels improper by stating specifically the reason or reasons for such objection; the responding party can object to the form or the substance of the request.[377]

An objection to the request, either complete or partial one, must be signed by the principal party or by the attorney, while it must also include the address of the signature, email address and telephone number.[378]The responding party must serve the written objection to the requesting party within the requirement of the rule, or within any other time stipulated by the parties or as ordered by the court.[379]Rule 36 (a) (5) specifically stipulates that a party may not object solely on the ground that the matter requested for admission presents a genuine issue for trial,[380] but the responding party must deny the requested matter

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[373] Wilken, "Moore's Federal Practice-Civil," 36.11 [5] [b].
[374] Ibid.
[375] Ibid.
[376] Kennel, "Deposition and Discovery," 189.
[377] Ibid., 181.
[378] Wilken, "Moore's Federal Practice-Civil," 36.11 [5] [c].
[379] Ibid.
[380] Gensler, "Federal Rules of Civil Procedure, Rules and Commentary: Rule 36. Requests for Admission," Rule 36 (a) (5).

or specify the reason or reasons why he or she cannot admit or deny it.[381]

Although Rule 36 does not explicitly provide specific grounds on which an objection to a request for admission can base, but the responding party can object to a request based on the ground that the requested matter goes beyond the scope of discovery stipulated in Rule 26(b)(1) which governs the discovery scope and limits.[382] Moreover, the responding party may object to a request for admissions based on some other potential grounds, such as the improper format of request, untimely request, excessive number of requests, undue burden, improper scope of request, and irrelevancy.[383]

With regard to the improper format of request, an objection may be based on the request's noncompliance with format requirements, such as the requirement that each matter on which an admission is requested be set forth separately.[384] Therefore, a request which is set forth as a compound or complex statement may be objectionable.[385] Beside this format defect, the responding party may base his objection on the propounding party's service of the request in violation of the applicable time constraints as required by Rule 36 (a) (3) and Rule 26 (d) (1).[386]

Furthermore, in addition to an objection that may be made to requests that exceed any applicable limit on the number of requests for admission, provided in Rule 26 (b)(2)(A) ,[387]undue burden may constitute the ground for objection to a request for admissions, too. The advisory committee note of 1970 indicated that some court decisions sustaining objections on disputability grounds could have been justified by the burdensome character of the requests.[388] The note further pointed out that request containing such burdensome character are requests that were so voluminous and so framed that the responding party found the task of identifying what was in dispute and what was not unduly burdensome.[389] Requests having

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[381] Kennel, "Deposition and Discovery," 192.
[382] Wilken, "Moore's Federal Practice-Civil," 36.11 [5] [c].
[383] "Moore's Answer Guide: Federal Discovery Practice," 13.09.
[384] *Fed. R. Civ. P.*, Rule 36 (a) (2).
[385] "Moore's Answer Guide: Federal Discovery Practice," 10.09 [1].
[386] Ibid., 13.09 [2].
[387] This provision stipulates that: by order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36 (request for admission).
[388] West, *Federal Civil Judicial Procedure and Rules*, 208.
[389] Ibid.

burdensome characters are also understood as requests that are repetitive, convoluted, vague, or ambiguous, or that otherwise require extensive analysis or explanation.[390]

A part from aforementioned grounds and in addition to the reasons that the request for admissions exceed the permissible scope for request, such as those seeking for pure legal conclusion, or that a matter requested is irrelevant to the claims and defense asserted in the case which are not in the scope of discovery (as referred to Rule 26 (b)(1) by Rule 36 (a)), an objection may also be based on the defect in procedure on the requesting party's side. That defect is the failure of the propounding party to serve a document whose genuineness is the subject of the request if the document is not otherwise available to the responding party.[391] Thus, Rule 36 (a)(1)(B) provides such an advantage to the responding party.

Moreover, the responding party can also base an objection to a request on the claim that the information sought in the request for admission is confidential or it involves privileged matters, such as matters which are within the attorney-client privilege, the government privilege, or the privilege against self-incrimination.[392] For example, in the suit that involved the United States as plaintiff, the government objected to request for admission claiming that such information sought by the defendant was privileged and protected by Rule 6 of Federal Rules of Criminal Procedure.[393] The defendant filed for motion to compel plaintiff's response, while District Court denied that motion of the defendant, and the Appellate Court affirmed that decision.[394] Although the rule does not make it clear in its provision; however, in practice, any objection based on such privileges must be particularized.[395]

Not all objections are admissible, but rather sanctionable under some particular rules of Federal Rules of Civil Procedure. For instance, under Rule 36 (a) (6), motion regarding the sufficiency of an answer or objection, is stipulated in the favor of the requesting party to act against the so-called unjustified objection as this provision allows the requesting party to determine whether or not it is sufficient. If a court deems

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390 "Moore's Answer Guide: Federal Discovery Practice," 13.09 [4].
391 Ibid., 13.09 [5], [6], [8].
392 Wilken, "Moore's Federal Practice-Civil," 36.11 [5] [c].
393 *United States v. 266 Tonawanda Trail*, 95 F.3d 422 428 n.10, 428 (6th Circuit 1996).
394 *United States v. 266 Tonawanda Trail*,95:.
395 Wilken, "Moore's Federal Practice-Civil," 36.11 [5] [c].

that the objection unjustified, the court must order that the responding party serve the requesting party an answer, which is, thus, admission or denial with reasons.[396]

Except for what is stipulated precisely in Rule 36 (a) (5), it does not provide any other necessary guidelines related to the grounds on which a court can base to overrule the objection of a requesting party. American court's decisions, however, have established that objections to requests for admissions are not allowable if responding parties base their objections on the contentions.

First, the objection to a request for admission is not permissible solely on the ground that the requesting party has the burden of proof on the matter requested. By reviewing only substantial provision of Rule 36 it is obscure to determine whether or not a party to litigation who has the burden of proof on an issue, especially on a fact, can request his adverse party to admit that issue or fact due to the reason that Rule 36 does not mention explicitly. However, by examining courts' decisions that ruled out the objection of a responding party because of his contention that the requesting party bore burden of proof on the requested matter, we can understand that regardless of whom the burden of proof is rested, a party can always request the adverse party to admit any issue. As a result, the responding party cannot make an objection to the request by reasoning the requesting party bears the burden of proof pertaining to the requested matter. This practice is confirmed through courts decisions both before and after the amendment of Rule 36 in 1970.

In a suit through which plaintiffs sought for compensation to damages caused by traffic accident that claimed a life of a 10-year-old boy in case in 1948, the Supreme Court ruled in its decision that, "[i]t is not proper to refuse to respond to a requested admission on the ground that the requesting party has the burden of proving the matters asserted therein."[397]

The tendency of courts regarding the treatment on the refusal to permit the objection to a request for admission on the basis that the requesting party bears the burden of proof remains unchanged decades after the adoption of the Federal Rules of Civil Procedure, and although remarkable revisions have been made to

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[396] Gensler, "Federal Rules of Civil Procedure, Rules and Commentary: Rule 36. Requests for Admission," Rule 36 (a) (6).
[397] *Dulansky v. Iowa-Illinois Gas & Elec. Co.*, 92 F. Supp. 118 (S.D. Iowa 1950).

the Rule 36. In a recent decision, an American court awarded plaintiff with a particular sum against the defendants for failing to admit the truth of admission as a result of the improper objection against the request.[398] Therefore, the request for admission under Rule 36 can be made in relations to any issues or facts regardless of whom the burden of proof rests.

Second, an objection will be held inappropriate if the responding party contents that the requested matter consists of facts within the knowledge of the requesting party. In *Diederich v. Dept. of Army* 132 F.R.D. 614 (S.D.N.Y. 1990), plaintiff's attorney served to the defendants a request for admissions and defendant filed objections against the request basing on few grounds. However, the defendant's objections filed in response to plaintiff attorney's request for admissions and its application to strike the requests was denied. Among the opinions expressed as grounds for such denials of the court was that the objection based on the ground that the requesting party had the knowledge of the requested fact was inappropriate. Such impropriety, as the court ruled, was because if a party already had personal knowledge or belief regarding the relevant facts, he or she may have compelled the opposing party to admit or deny such allegations, or to offer a valid reason why he or she could not admit or deny the fact. The reason, as the court said, was that the purpose of Rule 36 pertaining to requests for admissions was to expedite trial by removing essentially undisputed issues, thereby avoiding time, trouble and expense which otherwise would be required to prove issues. In supporting its decision, the court went further to explain that:

> Objections that plaintiff should obtain the information by independent discovery and investigation, or that the matter is already within plaintiff's knowledge, are similarly misplaced. Again, [the court] reiterate that the purpose of requests for admissions are [sic] to seek defendant's agreements as to alleged fact. Whether plaintiff could obtain the information independently or whether certain facts are within plaintiff's knowledge are irrelevant considerations.[399]

Third, the responding party cannot object to a request for admissions merely on the grounds that the requests cover many of the issues in the case. Due to the reason that Rule 36 does not restrict number of the

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[398] *House v. Giant of Maryland LLC*, 232 F.R.D. 257 (E.D. Va. 2005).
[399] *Diederich v. Department of Army*, 132 F.R.D. 614, 616-617 (S.D.N.Y. 1990).

issues related to which a request for admissions may call as long as they are within the scope provided by the rule and case laws have undoubtedly established that requests for admissions could go to all the fact issues in an action.[400]Therefore, the responding party cannot object to the request basing on this ground.

For the reason that the ultimate purpose of Rule 36, as recorded in the advisory committee note of 1970, is to reduce trial time,[401] case laws have confirmed that admission may serve as proof that is dispositive of an entire case.[402] To elaborate, a request for admission related to facts dispositive of case is permissible.[403] The responding party, therefore, cannot object to such type of request.

Fourth, as prescribed in Rule 36, an objection is not permissible on the bases that the requested matter constitutes a genuine issue for trial or that the request goes to a disputed matter presenting a genuine issue for trial. The impermissibility of the objection taking the argument that the requested matter constitutes a genuine issue for trial as the premise is precisely stipulated in Rule 36. The courts have long confirmed the strict application of this provision in their decisions. For example, in the case of *In re M & L Bus. Mach. Co.,* 184 B.R. 366 (D. Colo. 1995), the court held that "no objection available on grounds that requests go to a disputed matter presenting genuine issue for trial."[404]

Fifth, since Rule 36 allows the request for admissions which relates to opinions of a fact or the application of law to the fact, any contentions based on these reasons will result in objection held improper. Any objection to a request for admission based on such grounds is not appropriate, thus, overruled because Rule 36 has prescribed unambiguously that a request for admissions may relate to the application of law to fact. Such requests for admissions, therefore, are within the permissible scope that should not be confused with the pure requests for opinions of law or requests seeking legal conclusion which are not appropriate under the rule.

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400 *Pleasant Hill Bank v. United States*, 60 F.R.D. 1, 4 (W.D. Mo. 1973).
401 West, *Federal Civil Judicial Procedure and Rules*, 207.
402 *Branch Banking & Trust Co. v. Deutz-Allis Corp.*, 120 F.R.D. 655, 658 (E.D.N.C. 1988).
403 *In re Niswonger*, 116 B.R. 562, 566 (Bankr. S.D. Ohio 1990).
404 *In re M & L Bus. Mach. Co.*, 184 B.R. 366, 368 (D. Colo. 1995).

Sixth, the responding party cannot claims that a lack of personal knowledge allows for an object to a request for admission if the information is obtainable on reasonable inquiry. The case of *Herrera v. Scully,* 143 F.R.D. 545 (S.D.N.Y. 1992) revealed the court decision in refusing the objection based on such ground, that "a party may not refuse to admit or deny pretrial discovery request for admission based on lack of personal knowledge if information relevant to request is readily available to him."[405] Such a decision proves that the responding party has an obligation to inquire into the available information to respond to the request for admission in a manner of either admit or deny the requested matters rather than making an objection solely on the excuse of lack of personal knowledge.

2.1.4. Statement of Lack of Information or Knowledge

In the situation where the responding party cannot truthfully admit or deny the request for admissions, the responding party must, as required by Rule 36 (a) (4), through the written response served to the requesting party state specifically why he cannot admit or deny it. Because the statement concerning reasonable inquiry is significant, the responding party must also allege and specify at the same time that the responding party has made a reasonable inquiry in his attempt to respond to the request.[406]

As a result of the court which ruled that the response inadequate because the response failed to show that the reasonable inquiry was made, judge William A. King, in expression of his opinions pertaining to the decision viewed that, "[a]n answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny."[407] Judge William went further that:

> The purpose of requests for admissions is not necessarily to obtain information, but to narrow the issues for trial. Therefore, we find, on the basis of the record presented, that the matters sought to be admitted by the debtor were well within the scope of *Rule 36*, and that […] general denial of such

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[405] *Herrera v. Scully*, 143 F.R.D 545, 548 (S.D.N.Y 1992).
[406] Wilken, "Moore's Federal Practice-Civil," 36.11 [5] [c].
[407] *In re Sweeten*, 56 B.R. 675 (Bankr. E.D. Pa. 1986).

matters, without reasonable inquiry, justifies an award of sanctions to the debtor in the amount requested.[408]

Such a decision and opinion of court conforms with the Rule 36 (a) (4) which stipulates that the answering party may assert a lack of knowledge or information as a reason for failing to admit or deny only when the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable him to admit or deny. However, the mere statement from the party to whom the request for admissions is directed that the responding party has made a reasonable inquiry is not adequate. Such a mere statement will result in the failure for response; the evidence proving that the responding party has made reasonable inquiry, thus, is necessary.[409] In the decision against the responding party whose response was dismissed by the Eastern District Court of Pennsylvania, the judge stated that:

> Although DeSimone complied with the literal language of the Rule by averring that, "after reasonable investigation", it was "without knowledge or information sufficient to form a belief as to the truth of the Request for Admissions", the evidence presented shows that DeSimone *did not,* in fact, make a reasonable inquiry into the matters sought to be admitted and was unwilling to do so.[410]

Thus, any excuse for the failure or for any inability to answer by merely stating that the requesting party lacks of knowledge or information is not acceptable for court when the information is obtainable through reasonable inquiry. The responding party has the obligation to prove that although reasonable inquiry has been made, the knowledge or information for the response is still yet inadequate.

With regard to the "reasonable inquiry" requirement, generally a party is not required to make inquiry of a complete stranger in order to obtain information. However, the "reasonable inquiry" requirement goes beyond parties to the suit, and parties have been required to make inquiry of a person not a party to the action in order to respond to Rule 36 admission.[411] In this regard, one court has found that a party must inquire a third party in the situation that there is identity of interest manifested, such as both being parties to

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[408] Ibid.
[409] Wilken, "Moore's Federal Practice-Civil," 36.11 [5] [d].
[410] *In re Sweeten*,56:.
[411] Wilken, "Moore's Federal Practice-Civil," 36.11 [5] [d].

litigation, a present or prior relationship of mutual concerns, or active cooperation in litigation, and when there is no manifest or potential conflict between the party and the person on who will be subject to inquiry.[412]

Furthermore, the responding party cannot object to a request by way of asserting that answering it will be greatly burdensome due to the reason that the responding party will have to contact third person to prepare responses.[413] In contrast, the proper recourse is to make efforts to obtain the requested information and to respond that the inquiry was made and the information was insufficient to enable the responding party to either admit or deny.[414]

Beside the types of response introduced in the previous subsections, a responding party may seek for intervention from court when the circumstance arises. Such a mechanism is provided by the U.S. Federal Rules although it is not precisely stipulated in Rule 36. This mechanism is the filing of motion for protective order to be discussed in the following subsection.

2.1.5. Motion for Protective Order

A protective order can be simply understood as a court directive that prohibits or restricts a party from engaging in a legal procedure (especially discovery) that unduly annoys or burdens the opposing party or a third-party witness.[415] Rule 36 does not specifically provide such a protective order as a means to be utilized by responding party. However, such mechanism is set forth in Rule 26 (c) of the Federal Rules of Civil Procedure which applies to all discovery under the federal rules, and in this respect, requests for admissions are treated as normal discovery.[416]

Rule 26 (c) stipulates that a party or any person from whom discovery is sought may move for a protective order in the court where the action is pending, or as an alternative on matters relating to a

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412 Ibid.
413 Ibid.
414 Ibid.
415 "Protective Order."
416 Wilken, "Moore's Federal Practice-Civil," 36.11 [5] [e].

deposition, in the court for the district where the deposition will take place.[417] The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action.[418] The court may issue an order to protect a party or person from annoyance, for good cause embarrassment, oppression, or undue burden or expense, including one or more orders.[419]

The orders enlisted in the rule includes forbidding the disclosure or discovery; specifying terms, including time and place, for the disclosure or discovery; prescribing a discovery method other than the one selected by the party seeking discovery; forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters.[420] Other orders also include the designating the persons who may be present while the discovery is conducted; the requiring that a deposition be sealed and opened only on court order; the order which requires that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way.[421] The other order is one that requires the parties to file simultaneously specified documents or information in sealed envelopes, to be opened as the court directs.[422]

Therefore, in the event that a party obligated to respond to the request for admission finds the request to be oppressive, if the said party feels that the response may cause undue embarrassment or expense, the responding party can file with the court a motion for a protective order.[423] For instance, the responding party may file a motion for a protective order when the requests are voluminous or so poorly framed which makes it burdensome to ascertain what is in dispute.[424] The court, then, has to balance the legitimate needs of the requesting party with the claim of oppression made by the responding party, and can make any protective order that justice requires for good cause.[425] As a result, court will grant a protective order relieving a party on whom a request for admissions was served of the duty to respond to the request for

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[417] *Fed. R. Civ. P.*, Rule 26 (c) (1).
[418] Ibid.
[419] Ibid.
[420] Ibid.
[421] Ibid.
[422] Ibid.
[423] Wilken, "Moore's Federal Practice-Civil," 36.11 [5] [e].
[424] Ibid.
[425] Ibid.

admissions.[426]

2.2. Form of Responses

The response to a request for admission must be made in writing and signed by either the party, if acting *pro se*, or by the party's attorney, in the case the principal party is represented by attorney.[427]A copy of response has to be served on the party making the request, while a copy of the response must also be served on all other parties to the action except when the court has ordered differently.[428] The response should be a single document, in which the various requests are listed in order and an admission, a denial, and objection, or a statement of inability to admit or deny made to each of the requests as is appropriate.[429]

2.3. Time for Responses

In order to effectively respond to request for admission so as to avoid the requested matters deemed admitted, the responding party must conform to the time limits provided by the rules. Those time limits can be said as time in principle as expressly stipulated and time extended upon permission by the court. The discussions of these time issues are detailed in the following subsections.

2.3.1. Time in Principle

Rule 36 (a) (3) requires that in principle the responding party serve to the requesting party in a written form any type of response discussed above within 30 days, and that such written response be signed by the principal party or an attorney.[430] The person who signs the response must include the signer's address, email address and telephone number.[431]

However, the same rule provides an exception to the 30-day time limit, as requesting party may provide a different time frame in his stipulation, the right to do so as provided by Rule 29 (stipulations

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[426] Kennel, "Deposition and Discovery," 192.
[427] *Fed. R. Civ. P.*, Rule 36 (a) (3).
[428] Wright, Miller, and Marcus, "Federal Rules of Civil Procedure," 2259.
[429] Ibid.
[430] *Fed. R. Civ. P.*, Rule 36(a) (3).
[431] Wilken, "Moore's Federal Practice-Civil," 36.03 [1].

about discovery procedure), for a response to be made by the responding party, or the party on whom the request was served can serve on the requesting party the response within the time set forth by court.[432] Therefore, according to Rule 36 (a) (3), a 30-day time period for answering a request for admissions is mandatory when alternatives cannot be seen in the stipulations of the requesting party or in the order of court. The failure to comply with this provision to respond to a request for admission will result in the deemed admission as dictated in the rule.[433] However, there is an exception to this mandatory rule, as a responding party may seek for the assistance from court in allowing him to file the belated response. To acquire such exceptional advantage, the responding party must request to court for the extension of time which is to be discussed in details in the following subsection.

2.3.2. Request for Extension of Time

The principle that the response must be served within 30 days as prescribed the Rule 36 (a) (3) is not that harsh as it simultaneously provides room for court's discretion to grant extensions of time to respond to a request for admissions after the expiration of 30 days. For example, if the party upon whom the request for admission was served has failed to timely respond within 30 days or within any other periods stipulated under Rule 29 by the parties as mentioned above, court can allow the additional time for the filing of a response upon motion.[434] The rationales provided in court cases, express or implied, were commonly that the failure to file a timely response was due to *inadvertence* or *excusable neglect* and that the permission for additional time for a proper response would not *prejudice* the requesting party.[435]

Prior to the amendment of Rule 36 in 1970 where the time for response to a request for admission was 10 days, the rationale for extensions of time to serve a response expressed in courts' precedents are as following. In 1955, the Supreme Court decision in *Des Marais v. Thomas* 147 N.Y.S.2d 223 (N.Y. Misc. 1955) the plaintiff brought an action in New York to recover under an insurance policy for the loss of an

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[432] *Fed. R. Civ. P.*, Rule 36(a) (3).
[433] Ibid.
[434] H. H. Henry, "Time for Filing Responses to Requests for Admissions; Allowance of Additional Time," *American Law Report* 93 (1964): 7.
[435] Ibid.

airplane and defendant served upon plaintiff a request for admissions of facts.[436] Several months later when no answer had been filed in response to this request, defendant moved for a summary judgment.[437] The plaintiff, however, filed a cross motion for an extension of time to serve an answer to the request for admissions, serving a proposed answer with the motion papers the court, then, granted the extension of time and directed the defendant to accept the proposed answer.[438]Justice of Supreme Court handling the case viewed as follows:

> It is, of course, the proper practice to move for extension of time before the designated period has expired, unless written stipulation be obtained, or, at the least, within a reasonable time thereafter. However, plaintiff's delay may be regarded as excusable in view of the difficulty of communication and his attorney's reliance upon some understanding concerning an extension.[439]

The court grounded its decision on the reason the plaintiff's attorney who asserted that when defendant's attorney were informed of the plaintiff's residence and of his being out of the country while working as pilot, they orally agreed to extend the time to answer.[440] Such agreement was made by the attorneys with the understanding that the trial would be adjourned until a reasonable time after the service of answer.[441] The plaintiffs' attorney asserted further that the defendant's attorney stated that the oral extension of time had been for 2 weeks only.[442]The court in this case found that the delay of the plaintiff in filing a timely response was excusable.

Discretion of court concerning the extension of time for response against the statutory time limit again can be seen in a remarkable decision of the Supreme Court in the *Schuett v. Hargens* 173 Neb. 663 (1962) case. In this case, the plaintiff served a request to the defendants to seek for certain admissions, and the defendants did not comply with the request within the time set forth by the plaintiff. Plaintiff filed a motion for summary judgment after the time had expired. The defendants then filed a motion for additional time to

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436 Ibid.
437 Ibid.
438 Ibid.
439 *Des Marais v. Thomas*, 147 N.Y.S.2d 223 (N.Y. Misc. 1955).
440 Ibid.
441 Ibid.
442 Ibid.

comply with the request for admissions reasoning that the time provided by the plaintiff was insufficient. The trial court overruled the motion for summary judgment and gave the defendants 10 days to answer the request, which was answered within that time. The court ruled that:

> The court, upon proper showing, saw fit to extend the time. This was clearly within the court's discretion. [The Rule] provides that the period designated shall be not less than 10 days after service or within such shorter or longer time as the court may allow. There was no abuse of discretion in granting the additional time.[443]

Another prominent case where the higher instance court ruled against the decision of the lower court in denying the motion for extension of time to serve the response was in the case of *John Clark v. Prudential Insurance Company* in 1963. The lower court denied the plaintiff`s motion for an extension of time to serve a response to the defendant's request for admissions; however, the New York Supreme Court reversed the decision and allowed plaintiff 30 days to comply with the request. The court held that:

> Although the request for admissions was served almost 2 years prior to the date of the motion for extension, the defendant had not been substantially prejudiced by the delay, and that the failure to respond was due to the oversight of the plaintiffs' attorneys which, in the court's opinion, was excusable under the circumstances.[444]

Later decisions of American courts concerning the allowance of extension of time for filling belated response after the amendment of Rule 36 in 1970, for response was changed from 10 days to 30 days,[445] reach no different approaches to those decisions made before the 1970 amendment. The courts continue to exercise their discretions to allow the filing of belated response to request for admissions based on similar rationales as raised in the analysis of decisions below.

In 1983, the Court of Appeal of Florida reversed a summary judgment in *Melody Tours Inc. v. Granville Market Letter, Inc.* case and remanded it to the trial court. The appeals court grounded its

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[443] *Schuett v. Hargens*, 173 Neb. 663 (1962).
[444] *Clark v. Prudential Ins. Co.*, 293 NYS2d 553 (1963).
[445] West, *Federal Civil Judicial Procedure and Rules*, 208.

decision on the inadvertent negligence of the responding party to request for admissions and the absence of prejudice against the requesting party as basis. In that case the appellants' counsel inadvertently neglected to timely file answers to requests for admissions, which admissions covered all of the factual allegations of appellee's complaint. The appellants responded to the requests 77 days late. The trial court denied the appellants an opportunity to avoid the effect of the admissions and relied on the admissions to enter a summary judgment. The court which reversed the summary judgment and remanded the case with directions to allow appellants to file their sworn answers to the requests.[446] Judge Cowart of Court of Appeal held as follows:

> (….) in determining whether a belated response to requests for admissions should be permitted the standard should be the same as in setting aside a default judgment and that, mere inadvertence being insufficient for the latter, it was insufficient for the former.[447]

In another prominent 1991 decision where the prejudice against the requesting party was absence, the court granted permission for the belated filing of response to request for admission. On November 2, 1990, the Higher Education Assistance Foundation sought certain admissions as defendants from bankruptcy debtors pursuant to Rule 36 of the Federal Rules of Civil Procedure. Upon the failure of the plaintiffs to respond within the time required by the rule, the defendant filed a motion on January 3, 1991 for a summary judgment based upon the deemed admissions. The plaintiffs filed a motion in opposition to defendant's motion for summary judgment, or in the alternative, to amend the admissions. The defendant contended that since the plaintiffs failed to respond to the request for admissions, the matters contained in the request were deemed admitted and there remained no genuine issue as to any material fact and that defendant was entitled to judgment as a matter of law. The plaintiffs, however, argued that the Court should permit them to amend the admissions as no prejudice would result to defendant in accepting the untimely responses.[448] Judge Randolph Baxter expressed his opinion as follows:

One of the primary purposes of bankruptcy is to relieve an honest debtor from the weight of

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[446] *Melody Tours, Inc. v. Granville Market Letter, Inc.*, 413 So. 2d 450 (Fla. Dist. Ct. App. 5th Dist. 1982).
[447] Ibid.
[448] *In re Lucas*, 124 B.R. 57 (Bankr. N.D. Ohio 1991).

> oppressive indebtedness and permit him to start afresh. To grant a summary judgment against the Debtors would thwart that legislative purpose. Additionally, it does not further the interest of justice to automatically determine the issue of a lawsuit and enter summary judgment against a party because of a missed deadline.
>
> The Debtors, though untimely, have admitted all the requests except for two, Nos. 13 and 14, which they have denied. These two requests go to the heart of the matter, and, as such, should be decided by the Court upon a complete trial…. [T]he party who obtained the admissions, bears the proof that withdrawal or amendment will prejudice [defendant] in maintaining its defense on the merits.[449]

According to this opinion of the judge, the grant for belated response was based on the absence of prejudice against the requesting party and such determination was based on the failure of proof of the requesting party on the issue of prejudice. Such similar approach was taken by another court decision in allowing the defendant to file a two-week belated response to the request for admission of plaintiff due to the rationale that the plaintiff failed to show that his ability to prosecute claim would be prejudice by withdrawing deemed admission and filing late response. Judge Helen J. Frye expressed opinion for such permissions as follows:

> A party who fails to file a timely response to a request for admissions is deemed to have admitted the matters addressed in the request. However, the party may seek relief from the court upon motion by demonstrating that withdrawal or amendment will serve the presentation of the merits of the case. The party who obtained the admissions must then show prejudice in maintaining the action or defense on the merits. If the party who obtained the admissions cannot show prejudice, the court should permit withdrawal or amendment.[450]

In short, excusable neglect, prejudice and inadvertence put weight on a decision of the courts. Court must consider their existence to determine whether to grant an order to allow the belated response to be filled within a new period. The new period permitted by court enables a party to file a response even after

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[449] Ibid.
[450] *Upchurch v. USTNET, Inc.*, 160 F.R.D. 131 (D.Or. 1995).

the expiration of the original time limit stipulated in the law or that in the stipulation of the requesting party.

"Excusable neglect" that can be found in courts' precedents is, for example, when the responding party offered the excuse that the party failed to respond to the request for admission for the reason that he was seriously ill and incapacitated as the result of an automobile accident.[451] Meanwhile, in some cases, the court deemed that the lack of familiarity with the Federal Rules of party's attorney constituted the "excusable neglect" when a party failed to timely respond to a request for admission.[452]Thus, the use of "excusable neglect" is flexible and varies from case to case.

Similarly, the term "prejudice" varies from case to case. However, case laws have provided a common concept that may best explain the term. The prejudice that bears on permitting belated filling of answers to request for admissions is a difficulty that the adverse party may face in proving its case due to a sudden need to obtain evidence. [453]Usually, American courts find that the prejudice contemplated by Rule 36 (b) relates to special difficulties a party may face caused by a sudden need to obtain evidence upon withdrawal or amendment of an admission.[454] Such difficulty can occur when a party finds it impossible to prove a case due to the unavailability of a key witness and so on.[455]

According to the reviews of courts' decisions above, although time for filing response to request for admission has already expired as provided in the Rule 36 or as in the stipulation of the requesting party, the responding party is still entitled to right to file motion for extension of time. Such extension, if granted, will enable a party to file a belated response. However, court may grant the extension accordingly based the rationales that court deems appropriate according to each case.

A more recent decision by the Court of Appeal of Illinois provided that a "good cause" shown by the party could be the rationale on which a court may base to grant the order for allowing the filing of the

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[451] Henry, "Time for Filing Responses to Requests for Admissions; Allowance of Additional Time," 7.
[452] Ibid.
[453] Wright, Miller, and Marcus, "Federal Rules of Civil Procedure," 2264.
[454] Ibid.
[455] Ibid.

belated response. However, the court deemed that “good cause” is not simply mistake, inadvertence, or neglect or an absence of prejudice against an adverse party. The following reviews on cases and court decisions provide a more profound understanding on the “good cause.”

In *Robbins v. Allstate Ins. Co.* 298 Ill. Dec. 879 (App. Ct. 2d Dist. 2005) case, the plaintiff appealed a decision of the trial court that refused a motion for belated response and that ordered requested matters deemed to be admitted. In this case, the plaintiff asserted that he mistakenly admitted that, as "a man of limited education and no understanding of the process or its consequences," should be excused for the failure to comply with.[456] He goes on to argue that the trial court "ought to have given consideration to the fact that the request to admit and compliance with the rule is highly technical and that plaintiff's answer was prepared at a point in time when he was *pro se*."[457] The Appellate Court, however, ruled that:

> [M]istake, inadvertence, and neglect are not valid bases for a finding of good cause, plaintiff's claim that he mistakenly admitted, in handwriting, requests six and seven provided no basis for the trial court to exercise its discretion and allow an untimely but conforming response….While we sympathize with plaintiff's position, the fact that plaintiff was proceeding *pro se* at the time also provided no basis for the trial court to exercise its discretion and allow an additional response, nor does it provide a basis for us to reverse the trial court's decision.[458]

This decision conforms to the previous decision of the same Appellate Court rendered in 2004 that ruled on the “good cause” doctrine. The language of good cause still exists in other court decisions. However, the standard for its determination may not be common.

In *Glasco v. Marony*, 283 Ill. Dec. 819 (Ill. App. 2004). case where the defendants filed their request for admissions, along with their certificate of service, the defendants indicated that they had mailed the request to the plaintiff's attorney on a specific date. The plaintiff did not deny or object to the requests within the time provided by law. Therefore, the defendants moved to file a motion for summary judgment.

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[456] *Robbins v. Allstate Ins. Co.,*, 298 Ill. Dec. 879, 544 (App. Ct. 2d Dist. 2005).
[457] *Robbins v. Allstate Ins. Co.,*,298:.
[458] Ibid.

The plaintiff, however, requested a leave to file her late answers to the defendants' request for admissions. The plaintiff asserted that her attorney was unable to locate the request for admissions and had been unaware of the document until the defendants filed their motion for a summary judgment on. In the plaintiff's motion to reconsider, the plaintiff's attorney asserted that he had been out of town and without a secretary at the time of service.[459] The trial court granted a summary judgment in favor of defendants, but the plaintiff appealed the decision. The Appellate Court in affirming the trial court's decision viewed that:

> (….) the circuit court did not abuse its discretion by denying the plaintiff's request for an extension of time to respond to the defendants' request for admissions. Mistake, inadvertence, or simple attorney neglect cannot constitute the sole basis for a good cause determination.[460]

In this decision, the court further reasoned that the burden of proof and the initial burden of production for a motion for a summary judgment lie with the person who moved for such judgment. A defendant who moves for a summary judgment may meet the initial burden of production either (1) by affirmatively showing that some element of the cause of action must be resolved in the defendant's favor, or (2) by demonstrating that the plaintiff cannot produce evidence necessary to support the cause of action.[461]

The language of "good cause" as seen in these decisions is obscure. It may vary from case to case depending on the nature of the assertions made by the party who failed to timely respond to request for admission. The court has the discretion in deciding whether or not to grant permission for belated filing of response based on reasons that court deems "good cause."

In conclusion, under the Federal Rules of Civil Procedure a party is entitled to filing a belated response to request for admissions when court permits once there exists mistake, inadvertence, excusable neglect or an absence of prejudice to the opposing party, or in some cases when "good cause" is shown. To elaborate, courts look into the motive of the responding party to see if there is any indication of a lack of good faith on the part of the responding party, while the court has to evaluate if the belated response will

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[459] *Glasco v. Marony*, 283 Ill. Dec. 819 (Ill. App. 2004).
[460] Ibid.
[461] Ibid.

not provide prejudice to the requesting party.[462] For the determination of the good faith of the responding party, courts look into the excuse of that party and the reasonableness of the tendered excuse.[463] In some cases, however, court have not looked expressly at the good faith or excusable neglect of the responding party, but their decisions on whether or not to allow the belated response to be made were based on whether or not the requesting party would be prejudiced as a result of the allowance of the late response.[464] Although the response to a request of admission may take a varied form ranging from admissions, denials, objections, other qualifications or a mix of any possible response as raised earlier, the response is treated and prepared as one document.[465] The local rules in many district courts require a particular form for the responses to the requests for admission.[466]

3. Deemed Admission

In addition to explicit admission made by the party on whom the request for admission was served by means of written response as discussed earlier, the other particular type of admission may be established as a result of the act of the responding party due to the express provision of as Rule 36. As stipulated precisely by this rule a matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney.[467] A shorter or longer time for responding may be stipulated to under Rule 29 or court may order such time change for the response.[468]

According to this provision, deemed admission takes place as a result of the failure of a party to respond to the request for admission within statutory time limit (30 days), the time designated by the requesting party, or time permitted by court's order. Thus, if the party on whom the request for admissions is served wishes to avoid having the requested matters deemed admitted, the party can do so by simply serving on the requesting party the written answer or objection. Such answer or objection must be made

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462 Kennel, "Deposition and Discovery," 188.
463 Ibid.
464 Ibid.
465 Wilken, "Moore's Federal Practice-Civil," 36.11 [4].
466 Ibid.
467 *Fed. R. Civ. P.*, Rule 36 (a) (3).
468 Ibid., Rule 36(a) (3).

within 30 days after the service of the request, or within the timeframe provided by the requesting party, or time limit ordered by the court. Failure to comply with this provision, unless as permitted for extension of time for belated filing of response as discussed earlier, will cause the matters requested deemed admitted.

At least one attorney of record must sign the response to the request for the responding party. If the party is proceeding *pro se*, then the party must sign the response. The signed response must be associated with the mailing address, email address and telephone number of the signer.[469] Although Rule 36 (a) (3) prescribes precisely the deeming of an admission as a result of response, courts have reached split decisions in applying this provision.

In contrast to the expressed admission made by the responding party, a deemed admission may require that the requesting party establish that the request was properly served and the other party failed to respond.[470]A few years after the amendment of the Rule 36 in 1970, the American court which ruled in the favor of the plaintiff entered into summary judgment against the defendant. The court connected the failure for timely response with the proper service of the request to come up with the conclusion on the establishment of the deemed admission.

The summary of the case may provide a better understanding for the court's approach. In the *Freed* v. *Plastic Packaging Materials* (1975) the parties entered into an agreement under which the broker was to find a manufacturing and distributing outlet for the corporation's products in Great Britain in exchange for a finder's fee. The broker found a distributor and submitted a bill for the fee, which was never paid. The broker instituted a suit. After litigation had commenced, the corporation's attorney was permitted to withdraw for non-payment of fees. The broker mailed requests for admission to the corporation's last known address and to the address of its parent company. The requests were returned to the broker unopened. The broker filed a motion for summary judgment, and argued that the corporation's failure to answer resulted in deemed admissions. The court held that a party's failure to answer requests for admissions could form the basis for a summary judgment. A judgment granted on a claim about which

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[469] Wilken, "Moore's Federal Practice-Civil," 36.03 [1].
[470] Ibid.

there is no genuine issue of material fact and upon which the movant is entitled to prevail as a matter of law. This procedure device allows the speedy disposition of a controversy without the need for trial.[471]. The court held that the corporation's failure to receive the requests for admissions did not affect the admissions being deemed because the requests were sent to the corporation's last known address. The court granted a summary judgment in favor of the broker.[472] The rationale to support the decision was stated as follows:

> It is well settled that failure to respond to a request for admissions will permit entry of a summary judgment if the facts admitted are dispositive of the case.... Such is the situation here. Failure to receive a request for admissions will not prevent a summary judgment based thereon; however, the record must show the request was mailed to the last known street address of the party concerned in compliance with *F.R.Civ.P.5(b)*[473].[474]

According to this decision of this court, deemed admission is established not only due to the failure of the responding party in replying timely to the request, but the proper service is also required. Hence, where a request for admissions is properly served and there is no timely response, all matters therein are admitted and may well form the basis for summary judgment.

In addition to the connection of proper service made by requesting party to the failure of timely response of the responding party, some courts moved further to dictating that under Rule 36 a request for admission was not deemed admitted before the court decided on the motion to stay application of the rule.[475] The case of *Graham* v. *Three or More Members of Mary Reserve General Officer Selection Board* (1983) may well describe this stand through its following summary. The plaintiff, a United States Army Reserve colonel, brought an action against the Secretary of the Army, and officer selection board members, alleging that he had been arbitrarily and capriciously denied a promotion and was thereby deprived of a property or liberty interest without due process, in violation of *U.S. Const. amend. V*. The parties filed

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[471] See "summary judgment."
[472] *Freed v. Plastic Packaging Materials*,66:.
[473] This Rule is related to the methods of service and filing of pleading and other papers. See *Fed. R. Civ. P.*, Rule 5 (b).
[474] *Freed v. Plastic Packaging Materials*,66:.
[475] Wilken, "Moore's Federal Practice-Civil," 36.03 [1].

motions for summary judgment.[476]

As a result, in the plaintiff's action against the Secretary of the Army and officer selection board members alleging that defendants' denial of the plaintiff's promotion violated the plaintiff's due process rights, the court denied the colonel's motion for summary judgment.[477] However, the court granted the defendants' motion for a summary judgment and dismissed the colonel's action on the merits.[478] Among other reasons, judge Sterling maintained that:

> As a second preliminary matter the Court finds that Plaintiff's requests for admission filed on November 24, 1980 (…) are not deemed admitted by operation of *Rule 36, Fed.R.Civ.P.* Defendants timely filed on November 26, 1980, a motion to stay the application of *Rule 36*. It would be extremely inequitable and disruptive of judicial proceedings to permit the Rule to operate during the pendency of a motion to stay that very operation. The Court holds that the requests could not be deemed admitted before the motion to stay was decided by the Court's Order of January 12, 1981. After that date the case was dismissed and the Rule could not apply in a cause which was no longer before the District Court. If Plaintiff disagreed with the disposition of the motion and case at that time he should have promptly appealed.[479]

Thus, the ultimate occurrence of the deemed admission rested with the intervention by the court. However, recent court decisions have proved that Rule 36 has self-executing effects which require no court's intervention to finally determine that deemed admission take place, yet deemed admission occur to the matters unanswered in request.

In the case of *American Tech. Corp.* v. *Mah* (1997), the plaintiff filed a complaint against the defendants alleging patent infringement; trade dress infringement and unfair competition in violation of *15 U.S.C.S. Section 1125(a)*; common law tort of false marketing; inducing infringement; common law unfair competition; and unjust enrichment. The defendants did not respond to a letter or outstanding requests for

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[476] *Graham v. Three or More Members of Amry Reserve Gen., Officer Selection Bd.,*, 556 F. Supp 669 (S.D. Tex. 1983).
[477] Ibid.
[478] Ibid.
[479] Ibid., 556:671.

admissions.[480]

The plaintiff, American Technology Corp.'s Renewed, filed motion for the order which would confirm the deemed admission in relation to the that matters set forth in the plaintiff's request for admissions. However, the court denied that motion.[481]In denying the motion, the magistrate found that while defendants had flagrantly disregarded their obligation to answer the requests for admission, *Rule 36(a) of the Federal Rules of Civil Procedure* did not mandate judicial intervention. *Rule 36(a)* provided an enforcement mechanism, by automatically deeming the matters contained in the requests for admission.[482]

The defendants' failure to respond to plaintiff's requests for admission automatically gave rise to the deemed admissions pertaining to requested matters. Since court intervention was not required to invoke *Rule 36(a)*, an order restating *Rule 36* would have been surplusage.[483] Judge Robert J. Johnston stated as follows:

> A party who has been served with requests for admission has the option of not responding. However, a party's "failure to respond, either to an entire request or to a particular request, is deemed to be a [judicial] admission of the matter set forth in that request or requests….Since unanswered requests for admission are automatically deemed judicially admitted under *Rule 36(a)*, no court intervention is required. The rule is explicit that a matter is admitted if a party fails to respond within thirty days or within a time period set by the court.[484]

From this standpoint, parties and court should waste no more time and resources in with trying to establish what have already been established under Rule 36 by the deeming. The self-executing effect of Rule 36 excludes the necessity of court's motion to confirm deemed admission. Such admission must automatically become the basis for summary judgments have become more apparent in recent courts' decisions.

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[480] *American Tech. Corp. v. Mah*, 174 F.R.D 687 (n.d.).
[481] Ibid.
[482] Ibid.
[483] Ibid.
[484] Ibid.

For instance, in *Smith* v. *Pacific Bell Tel. Co., Inc.,* (2009) case, the court moved to make a concrete confirmation on the application and the effect of Rule 36(a)(3). The court made it clear that no court order was necessary to establish conclusively matters in unanswered requests for admission because they were automatically deemed judicially admitted under that provision.[485] Thus, no court intervention is required.[486] The court ruled as follows:

> *Fed. R. Civ. P. 36(a)* provides that a matter is deemed admitted unless, within 30 days after service of the request the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party. Failure to respond to requests for admission results in automatic admission of the matters requested. No motion to establish the admissions is needed because *Rule 36(a)* is self-executing.[487]

In the *Federal Trade Comm'n* v. *Medicor* case (2002), upon filing a motion for summary judgment, the plaintiff argued that that it served requests for admissions upon defendants, and that the defendants' failure to respond resulted in admission of the requested matters. The defendants, however, argued that the plaintiff filed no motion to request that court's directive to determine deemed admission on the matters in the requests. In rendering the summary judgment based on the deemed admission, the court ruled that failure to timely respond to requests for admissions resulted in automatic admission of the matters requested. No motion to establish the admissions was needed because *Federal Rule of Civil Procedure 36(a)* was self executing.[488]

The premise for the court decision to render the summary judgment was the "automatic deemed admission." Such automatic deemed admission, as can be seen in the previous analysis, existed as a result of the failure to serve a timely respond to the requesting party. Such practice in law, thus, confirmed that Rule 36 (a)(3) is self-executing and any order to confirm the deemed admission is neither necessary nor appropriate.

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[485] Wilken, "Moore's Federal Practice-Civil," 36.03 [1].
[486] Ibid., 36.03 [1].
[487] *Smith v. Pacific Bell Tel. Co., Inc.,*, F. Supp. 662 2d 1199 (C.D Cal. 2009).
[488] *Federal Trade Comm`n v. Medicor, LLC,*, 217 F. Supp. 2d 1048 (C.D. Cal 2002).

In conclusion, unless an order for extension of time for belated response is issued in the favor of the responding party, deemed admission is established pertaining to the matter requested for admission once the requesting party fails to timely respond. The response must be made within the time provided by Rule 36, time specified by requesting party, or time ordered by the court. The failure to respond within these time limits will result in the deemed admission and there is no necessity of the motion from the party and court's order to confirm the establishment of such admission. In addition, the court can base on this deemed admission to render summary judgment.

4. Effects of Admission Established in Accordance with Rule 36

Until the 1970 amendment, Rule 36 was silent about the extent to which a party was bound by admissions that the party had made which as a result a great many cases said, in various contexts, that admission were the equivalent of sworn testimony.[489] However, the amendment of Rule 36 in 1970 put an end to the issue that had long been discussed concerning the scope of effect of the admission obtained through this rule. The revised Rule 36 (b) now precisely prescribes that a matter admitted under this rule is established conclusively unless the court, on motion, permits the admission to be withdrawn or amended. Subject to Rule 16(e), the court may permit withdrawal or amendment when it promotes the presentation of the merits of the action and when the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits. The admission under this rule is not the admission for any other purpose and cannot be used against the party in any other proceeding.[490]

Hence, any matter admitted in accordance with Rule 36 is conclusively established regardless of whether it is the explicit admission or admission by default (as a result of failure to respond to request for admissions).[491] That admission is for the purpose of the pending action, unless the court, on motion, permits the withdrawal or amendment of the admission.[492]The notes of the Advisory Committee on 1970 Amendments revealed that these provisions give an admission a conclusively binding effect, for purpose

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[489] Wright, Miller, and Marcus, "Federal Rules of Civil Procedure," 2264.
[490] *Fed. R. Civ. P.*, Rule 36(b).
[491] Wilken, "Moore's Federal Practice-Civil," 36.03 [2].
[492] Ibid.

only of the pending action, unless its withdrawal or amendment take place.[493]

However, the scope of the binding effects or the extent to which the effects apply, as for example to whom, of admissions established in compliance with Rule 36 remains crucial for more profound discussions. The following subsections focus on these issues. In order to achieve this purpose, they provide the examinations on court decisions. The following sections that focus on the reviews of court decisions that applied the Rule 36 after its amendment will elaborate the understanding on the effects admissions.

4.1. Binding Effects on Court and Parties

Any matter admitted in compliance with Rule 36, whether expressly admitted or admitted by failure to respond, are conclusively established and for the purpose of the pending action.[494] In the case of *American Auto. Ass'n* v. *AAA Legal Clinic* 930 F.2d 1117, 1120 (5th Cir. 1991), there came an appeal complaint before the United States Court of Appeals against the judgment of United States District Court for Western District of Texas. The district court ignored one admission of the appellee legal clinic and which withdrew another admission *sua sponte*, in appellant corporation's service mark infringement action under Lanham Act, *15 U.S.C.S. Sections 1051-1127 (1988)* and unfair competition action under state law.

During the pre-trial proceedings the appellee refused to cooperate with appellant's requests for admissions. Therefore, the appellant included the admissions in its pretrial order and relied on them to support the case. The district court *sua sponte* withdrew one of appellee's admissions, and ignored another. On appeal, the United States Court of Appeals for the Fifth Circuit reversed and remanded the decision of the district court reasoning that:

> A plaintiff alleging service-mark infringement appeals the district court's decision upon completion of trial to ignore one admission of the opposing party and deem another withdrawn, absent any motion to do so. Because we find that the plaintiff relied on the admissions, and the court's decision therefore prejudiced the plaintiff in contravention of *Federal Rule of Civil Procedure 36(b)*….We review the district court's decision to permit the withdrawal or amendment of an admission for abuse of discretion.

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[493] West, *Federal Civil Judicial Procedure and Rules*, 209.
[494] Wilken, "Moore's Federal Practice-Civil," 36.03 [2].

> *Federal Rule of Civil Procedure 36* governs requests for admission. Each matter on which an admission has been requested is admitted unless the party to whom the request is directed responds with a written answer or objection. According to *F.R.C.P. 36(b)*, as amended in 1970, [a]ny matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission…..
>
> In form and substance a *Rule 36* admission is comparable to an admission in pleadings or a stipulation drafted by counsel for use at trial, rather than to an evidentiary admission of a party. An admission that is not withdrawn or amended cannot be rebutted by contrary testimony or ignored by the district court simply because it finds the evidence presented by the party against whom the admission operates more credible. This conclusive effect applies equally to those admissions made affirmatively and those established by default….[495]

Other case laws from American courts have strengthened the application of Rule 36 with regard to the effect of admission established in accordance with this rule. To elaborate, once admission is established in compliance with Rule 36, a requesting party is placed out of duty to prove the admitted matters. For instance, in the case of *Weva Oil Corp* v. *Belco Petroleum Corp.,*68 F.R.D. 663 (N.D.W.Va. 1975), the court rendered upon motion a summary judgment based on the deemed admissions in the favor of defendant. The reason for that deemed admissions was the result of the denial of the plaintiff's motion for leave to file untimely responses to defendant's requests for admission. Because of the failure to make timely response to defendant's request, the truths of the matters contained in the request were deemed admitted. The court moved to proclaim the exemption of the proof on the admitted fact by stating as follows:

> [I]t was determined that a party's failure to respond admits the truth of all matters therein stated; that where there is no response to a request for admission, the party making the request is entitled to rely thereon and no further proof is required to be made of facts thus admitted, and that the party to whom

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[495] *American Auto. Ass'n v. AAA Legal Clinic*, 930 F.2d 1117 (5th Cir. 1991).

requests for admission are directed has the burden of taking some affirmative action relative thereto.[496]

The effect of admission established in accordance with Rule 36 arises not only abolishes the necessity to prove the disputed issues, but also gives rise to effect that prevents the party against whom the explicit admission or one by default has been established to present any evidence to contradict the admitted matters. This effect is not stipulated explicitly in the provision of Rule 36. Nonetheless, case laws have confirmed that reality.

In the case of *Tillamook Country Smoker, Inc.,* v. *Tillamook County Creamery Ass'n,* 465 F.3d 1102 (9th Cir. 2006), the United States Court of Appeals affirmed the judgment of the District Court of Oregon who rendered a summary judgment in favor of plaintiff. The district court based on the admission established against the defendant. In the decision affirming the one of the district court, judge Barry G. Silverman reasoned that, "(a)s the district court noted, the court and parties are bound by such admissions, which cannot be "ignored by the district court simply because it finds the evidence presented by the party against whom the admission operates more credible."[497]

In conclusion, from the contents of the decisions reviewed above, the admission established under Rule 36 has binding effect on court and party against whom admission is established. On the one hand, once admission is established, its effect arises which as a result court is not allowed to deny the admitted matter even if upon the examination of evidence court finds it more credibly that the admitted matter contravenes the truth. On the other hand, the court cannot ignore these admissions but has to base its judgment on the admitted facts. Such an effect of admission diminishes the trial authority of court. Concurrently, the effect of the admission under Rule 36 extends to a party against whom the admission has been established. Only if the court permits the established admission to be withdrawn or amended by motion of party, the party cannot rebut the admission by contrary testimony.

The Advisory Committee on the 1970 amendment notes and makes it clear that in form and substance a Rule 36 admission is comparable to an admission in pleading or stipulation drafted by counsel for use at

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[496] *Weva Oil Corp. v. Belco Petroleum Corp.*, 68 F.R.D 663 (N.D.W.Va. 1975).
[497] *Tillamook Country Smoker, Inc., v. Tiallmook County Creamery Ass'n*, 465 F.3d 1102 (9th Cir. 2006).

trial, rather than evidentiary admission of a party, and thus is treated as a judicial admission.[498] The approach made by the 1970 amendment on the effects of admissions established under Rule 36 reflects the successful argument of a prominent American scholar. Prior to 1970, that scholar argued that unless the party securing an admission could depend on its binding effect, the party could not safely avoid the expense of preparing to prove the matters on which the party had secured the admission, and as a result the purpose of the rule was not realized.[499]

Prior to the 1970 amendment, there was strong support for the proposition that an admission obtained under Rule 36 should be binding on the party who made it. One court held that:

> An answer to a request under *Rule 36* is unlike a statement of fact by a witness made in the course of oral evidence at a trial, or in oral pre-trial depositions, or even in written answers to interrogatories. It is on the contrary a studied response, made under sanctions against easy denials, to a request to assert the truth or falsity of a relevant fact pointed out by the request for admission. The purpose of the Rule is not the discovery of information but the elimination at trial of the need to prove factual matters which the adversary cannot fairly contest. … [R]equest for admission the means for obtaining a conclusive admission of any relevant fact and did not limit the remedy to so-called 'ultimate' facts. Were this otherwise then the much-vaunted improved Federal Rules would be without a well-known and useful mode of limiting the factual disputes, and this under a system which has reduced the significance of pleadings as the means of limiting issues of fact.[500]

Since 1970, Rule 36 (b) has so stipulated that the binding effect of admission is conclusive on party against whom the admission is established and on court. The decisions of court analyzed in preceding paragraphs have confirmed the realization of the spirit of Rule 36 (b). Therefore, an admission established under this rule is conclusive and binding on both court and parties.

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[498] West, *Federal Civil Judicial Procedure and Rules*, 209.
[499] Ted Finman, "The Request for Admission in Federal Civil Procedure," *Yale Law Journal* 71 (January 1962): 418-426.
[500] *McSparran v. Hanigan*, 225 F. Supp 628, 637 (E.E. Pa. 1963).

4.2. Summary Judgment

As introduced in the discussions on the decisions of courts pertaining to conclusiveness of admissions established explicitly or by default, they may become the basis for motions for summary judgment. However, a summary judgment is not always granted automatically based on those admissions because the motion for summary judgment based on an admission established by default may receive special scrutiny from the court.[501] Although the requesting party may rely on the conclusiveness of an admission as a basis for a motion for a summary judgment , the court may grant such motion based on an explicit admission or on the basis of one resulting from a party's failure to respond timely to the request for admission.[502] However, the requesting party, in the latter situation, must prove that the request for admission was served properly in accordance with Rule 5 (b), and that the responding party failed to respond.[503]

Upon considering a motion for summary judgment based on an admission, the court may consider such factors as whether they are certain or uncertain, whether they are vague, ambiguous, or clear, and whether the request was properly served.[504] If a court is satisfied that there are no genuine issues of material fact in the case, it may grant a motion for summary judgment based on that admission.[505]

Although admissions, explicit or ones by default, established under Rule 36 constitute such effects as presented in preceding sections, there are however a number of exceptions where such effects may not apply or partly apply. For instance, Rule 36 itself as well as case laws provide that admissions established under Rule 36 are established for the purpose of the pending action, which cannot be employed in other actions. Their effects do not necessarily bind other parties rather than the party on whom the request for admission is directed. The following discussions and court decisions reviews will provide better understanding on the scope of the effects of an admission.

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[501] Wilken, "Moore's Federal Practice-Civil," 36.03 [4].
[502] Ibid.
[503] Ibid.
[504] Ibid.
[505] Ibid.

4.3. Non-binding Effect on Requesting Party

The requesting party can rely on the conclusiveness of an admission as matters explicitly admitted or deemed admitted do not require further proof, and any evidence contradictory to it is not permissible. Furthermore, an admission which has not been amended or withdrawn cannot be rebutted by contrary testimony, nor can that be ignored by the court although the party against whom it is established offers evidence which may appear to be more credible.

However, such binding effect applies only to the admitting party, while the requesting party is not necessarily bound by it, which then the requesting party can offer evidence to counter the admission.[506] Although Rule 36 mentions that "a matter admitted under this rule is conclusively established…," for the purpose of the pending action,[507] it, however, fails to mention if such conclusive effect binds the requesting party in the same way as it is for the admitting party. The notes of the Advisory Committee on 1970 amendments also did not make the matter clear, but rather it focused on giving the emphasis of the effect of admission made under Rule 36 that conclusively binds the admitting party.[508] The effect secures the requesting party who can rely on this binding effect and safely avoid the expense of preparing to prove the matters which that party has secured the admission.[509]

As a result of this absence of explicit provision of the rule and guideline of the Advisory Committee concerning the binding effect on the requesting party, case laws may serve significant role in interpreting the rule and in providing guidance on how the requesting party should be treated in relation to the conclusive effect of admission established under Rule 36. The case laws have established that the requesting party may rely on the conclusiveness of an admission, but is not necessarily bound by admission, and even if the requesting party offers admitted facts into evidence, the requesting party is free to offer more favorable evidence.[510]

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[506] Ibid., 36.03 [5].
[507] *Fed. R. Civ. P.*, Rule 36 (b).
[508] West, *Federal Civil Judicial Procedure and Rules*, 209.
[509] Ibid.
[510] Wilken, "Moore's Federal Practice-Civil," 36.03 [5].

Prior to the 1970 amendment of Rule 36 where the effect of admission was ambiguous and controversial among courts' decisions, some courts interpreted that the admissions established under Rule 36 did not necessarily bind the requesting party.[511] A judge noted in his decision that, "[t]he submission of requests for admissions by a litigant does not, in and of itself, bind the litigant to the truth or existence of the facts contained in the answers to the requests."[512] Case laws concerning the issue remained unchanged but were more affirmed after the substantial amendment of Rule 36 in 1970. The American courts maintained their stand concerning the binding effects of admissions established under this rule as they had long stood for. A judge handling the *Brook Village North Assocs.*v. *General Elec. Co.,* 686 F.2d 66 (1st Cir. 1982) referred to the 1970 Advisory Committee note concerning the effect of admission as follows:

> Requiring a party thus to elect between relying on admissions by default and introducing no evidence, and introducing evidence but foregoing the binding force of the admissions, unfairly forces a party who chooses to make use of admissions by default to limit his proof at trial to the scope of his request for admissions. We therefore hold that a party who obtains an admission by default does not waive his right to rely thereon by presenting evidence at trial that overlaps the matters controlled by the admission.[513]

To sum up, under Rule 36, the party propounding the request for admission can enjoy the conclusive effect of admission. Such effect binds the admitting party. However, the requesting party is not necessarily bound by it. Thus, the propounding party may offer other favorable evidence to challenge those admitted matters.

4.4. Effects' Boundary

The conclusive and non-conclusive effects presented in the sections above are brought by admissions established in conformity to Rule 36 extend within a limited boundary. These effects apply only to the pending action. Therefore, they cannot be used in other cases. Moreover, the effects arise only against some

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511 *Champlin v. Oklahoma Furniture Mfg. Co.*, 324 F.2d 74 (10th Cir. 1963).
512 Ibid., 324:76.
513 *Brook Village North Assocs. v. General Elec. Co.*, 686 F.2d 66, 72 (1st Cir. 1982).

specific parties in the concerned suit.

4.4.1. Admission Limited to Pending Action

In conformity with the provision providing that request for admissions is for the purpose of the pending action,[514] Rule 36 provides expressly an admission under this rule is not the one for any other purpose and cannot be used against the party in any other proceeding.[515] Consequently, admissions made under Rule 36 bear no collateral estoppel effect, the affirmative defense barring a party from re-litigating an issue determined against that party in an earlier action, even if the second action differs significantly from the first one.[516]

4.4.2. Admission Binds only to a Specific Party

Although Rule 36 has not stipulated precisely about who are to be bound by the effects of an admission, American courts have confirmed in their decisions that an admission established under this rule binds only the particular party, the party who is served with the request.[517] In addition, other decisions of American courts have clearly ruled on the issue of binding effects of admissions on party that admissions by default bind only the non-responding party, but not the co-parties.[518]

5. Conclusion

Admissions in compliance with Rule 36 can be established only by way of a party serving the formal request in the written form to ask the adverse party to respond to the request. A requesting party is obligated to comply with the rules governing the request and the service, and the failure to adhere to the rules will result in the formal defects of the request which gives right to the relinquishment of the duty of the adverse party from responding to the request. However, if no defects from the requesting party side occur, the party on whom the request for admissions was served must respond to the request in the written form through the

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514 *Fed. R. Civ. P.*, Rule 36 (a)(1).
515 Ibid., Rule 36 (b).
516 Wilken, "Moore's Federal Practice-Civil," 36.03 [3].
517 *Alipour v. State Auto. Mut. Inds. Co.*, 131 F.R.D 213, 214-215 (N.D. Ga. 1990); *Riberglass, Inc. v. Techni-Glass Indus., Inc.*, 811 F.2d 565 (n.d.).
518 *Becerra v. Asher*, 921 F. Supp 1538 (S.D. Tex. 1996).

service in accordance with the governing rules provided in the U.S. Federal Rules. The response may contain admissions to the matters requested to admit by the requesting party. Such admissions are explicit admissions constituted based on the express intention of the responding party.

On the contrary, implicit admissions may also be established as a result of the default of the responding party upon his failure to provide a timely response to the request. In such a failure case, Rule 36, precisely dictates that matters in the request are deemed as admitted to the requesting party. Such a deemed admission is established automatically as a result of the self-executing effect of Rule 36 upon the failure to respond of the party on who is served with the request for admissions. Case law has provided no motion for confirmation of the establishment of these deemed admission is required, nor is it necessary for the confirmation order.

Both explicit and deemed admissions under this rule are regarded as judicial admissions, not evidentiary ones. To this effect of the judicial admissions, both court and parties are bound. Neither evidence nor any assertions can be made against these admissions as they are conclusively binding. Hence, a court must base its judgment on these admissions. However, case law has established that a requesting party is not necessarily bound by such effects although that party can enjoy the advantages provided through such admissions. The requesting party may present more favorable evidence to this exemption at trial in order to diminish the admissions when such a challenge would result in the judgment that favors that party.

However, admissions established in compliance with Rule 36 are not the only admissions that can be sought in American civil procedure system within the framework of federal practice. There exist several more devices established by the Federal Rules of Civil Procedure of the United States of America can serve as means for the establishment of admissions. Those devices include the “discovery” and the “pleadings.” The profound understandings on those devices are indispensable for the knowledge of admissions established through them. Such explorations may give rise to a better understanding of the admissions in comparison to those established under Rule 36. Additionally, such comparative analysis may contribute to the better pictures of judicial admissions under American federal civil procedure system. However, due to

the limit of this research, this section will highlight some fundamental features within limited scopes.

IV. Discovery and Admissions

In the American civil procedure system, there is a system called "discovery" which enables a formal process by which parties can obtain information from their adversaries and other witnesses relating to the litigation.[519] A discovery system may be the most fundamental feature that symbolizes the unique characteristic of American adversary system through which parties are required as well as entitled to broadly and actively exercise their rights in civil litigation. Modern pretrial discovery practice dates from the reforms included in the Federal Rules of Civil Procedure in 1938 through which the main role of narrowing legal and factual issues for trial previously performed by pleading was transferred to the functions of the discovery phase of litigation.[520]

Although discovery is not the only means though which a party to litigation may obtain information on civil cases, the discovery under federal rules' model proved so attractive that it has been adopted in large part in a majority of the United States of America.[521] This device serves, either negatively or positively, several purposes.[522] It is utilized to reveal information necessary for trial preparation, to narrow issues for trial by eliminating from the litigation uncontested issues, to freeze the evidence belonging to the opponent and the basis for her case, and to obtain and present evidence to be used at trial.[523] In addition to the main advantage that discovery device provided by the Federal Rules of Civil Procedure enables such fullest exploration of the issues and facts,[524] the proponents of the discovery claims that the opportunity to interrogate parties and witnesses before trial and to obtain documents and objects of evidentiary value brings several other benefits.

First, discovery may help remove before trial issues which are not likely to be seriously issues as it

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[519] John B. Oakley and Rex R. Perschbacher, *Civil Procedure* (Casenotes Publishing Co., Inc., 1999), 7.
[520] Ibid.
[521] Ibid., chap. 7.I.
[522] Ibid.
[523] Ibid.
[524] William A. Glaser, *Pretrial Discovery and the Adversary System* (New York: RUSSELL SAGE FOUNDATION, 1968), 30.

can show that the evidence on an issue is overwhelming, in which case the issue will usually be uncontested, or that the issue is nonexistent, in which case it will be abandoned or yield to summary judgment.[525] If the issue is a critical one, its elimination through the discovery can lead to pretrial settlement of the litigation.[526]

Second, as discovery usually reveals the critical aspects of a witness's story, it can simplify presentation of evidence at trial by eliminating time-consuming objections to innocuous testimony.[527] As claimed by American scholars, permitting the parties to use discovery tends to ensure that all evidence will be unearthed and that there will be a minimization of concealment of relevant information and materials.[528] Furthermore, the full disclosure will tend both to prevent unfair surprise at trial and to reduce the number of judgments which do not accurately reflect the actual state of the facts.[529]Last, the pre-trial deposition of a witness can secure their testimony when it is fresher, especially when the action is filed relatively soon after the transaction which is subject of suit.[530]

Some observers who hail the wide scope of discovery and its fundamental effect on the American adversary have gone further to even name discovery as one of the most important contributions of the Federal Rules to all of civil procedure.[531]In short, it may be appropriate to comment that the purpose of discovery, in general, is to remove surprise from trial preparation and enable the parties to obtain evidence necessary to evaluate and resolve their dispute.[532]

Based on the rationale that they are all governed by rules for the scope of discovery in the Federal Rules of Civil Procedure, the discovery mechanics embrace five main devices among which is "request for admission."[533] However, since the request for admission had been thoroughly discussed, this subsection aims to introduce only the rest of the devices of discovery which include deposition, interrogatories, request

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525 James, Hazard, and Leubsdorf, *Civil Procedure*, 287.
526 Ibid.
527 Ibid.
528 "Developments in the Law--Discovery," *Harvard Law Review* 74 (March 1961): 945.
529 Ibid.
530 James, Hazard, and Leubsdorf, *Civil Procedure*, 288.
531 *Miner v. Atlas*, 363 U.S. 641, 649 (1960).
532 Kennel, "Deposition and Discovery," 1.
533 James, Hazard, and Leubsdorf, *Civil Procedure*, 290.

for production and the examination of persons.

1. Deposition

Depositions are provided by Rules 27-32 and Rule 45 of the Federal Rules of Civil Procedure which consist of two forms—oral deposition and deposition on written questions (written deposition). The oral deposition is a self-executing device of discovery that usually requires no court order, and it becomes compulsory for a party simply upon sending a notice that the deposition has been scheduled.[534] In other words, the party or an attorney may schedule a deposition only by notifying the adverse party (or opposing attorney) of the time and the place where the deposition will be taken place.[535]

Variants of the oral deposition include a deposition on written questions and other special rules for use of it before filing a formal action or after completion of an action but pending appeal.[536] A deposition on written questions operates much as does an oral deposition with one exception; the attorney usually is absent.[537] However, the lawyer may instead send their questions in advance to the officer (a person appointed by court or designated by the parties)[538] who then proceeds to read them aloud to the witness who answers orally and whose response are duly recorded. The opposing party is provided with sufficient time to prepare because each party has a certain number of days in which to send their written questions to the officer designated to take the deposition.[539]

Depositions are used not only to depose the parties to litigation, but they can also be taken on the nonparties, such as witness to evaluate the credibility, presence, and demeanor of the witness, as witness's voice characteristics, predominant body language traits, and idiosyncratic tendencies all factor into an analysis of the credibility of the witness.[540] Additionally, depositions are also critical to preserve necessary

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534 *Fed. R. Civ. P.*, Rule 30.
535 Friedenthal, Kane, and Miller, *Civil Procedure*, 409.
536 Oakley and Perschbacher, *Civil Procedure*, 7.II.A.
537 Friedenthal, Kane, and Miller, *Civil Procedure*, 412.
538 *Fed. R. Civ. P.*, Rule 28(a)(2).
539 Friedenthal, Kane, and Miller, *Civil Procedure*, 412.
540 "Moore's Answer Guide: Federal Discovery Practice," 1.21.

testimony of witnesses who may not be available for trial due to death, illness, or other causes.[541]

Therefore, this device is remarkably useful for the parties who wish to obtain information from those who are not parties to litigation, especially witnesses. Rule 26 (b) which governs the scope of discovery applies to oral deposition.

2. Interrogatories to Parties

Written interrogatories are another major device provided by the discovery system provided in the Federal Rules of Civil Procedure. The rules provide that a party may serve upon other party written interrogatories to be answered under oath by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who must furnish such information as is available to the party.[542] Such interrogatories may be served without leave of court or written stipulation if the written ones do not exceed 25, including discrete subparts.[543] Interrogatories may relate to any matter within the scope of discovery stipulated in Rule 26 (b) (2),[544] but they may be directed to only parties.[545]

To simplify, interrogatories are a series of written questions directed to parties to be answered under oath with some minimal requirement of investigation prior to the answering, and such device is not available for witness and are self-executing as depositions as well. A number of case laws have proved the usefulness and broad purposes of interrogatories in a very broad scope. The purposes served by interrogatories include ascertaining facts and procuring evidence or securing information as to where pertinent evidence exists and can be obtained.[546] The interrogatories are used to narrow the issues,[547] to reduce the possibilities of surprise at trial,[548] to facilitate disposition of a case prior to trial, through

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[541] Ibid.
[542] *Fed. R. Civ. P.*, Rule 33.
[543] Ibid., Rule 33 (a).
[544] Ibid., Rule 33 (a) (2).
[545] *Ohio Realty Inv. Co. v. Lawyers Title Ins. Corp. of Richmond, Va.*, 244 So. 2d 176 (Fla. Dist. Ct. App. 4th Dist. 1971).
[546] *U. S. v. Purdome*, 30 F.R.D. 338 (W.D. Mo. 1962).
[547] *Federal Cartridge Corp. v. Olin Mathieson Chemical Corp.*, 41 F.R.D. 531 (D. Minn. 1967); *Truck Drivers and Helpers Local Union No. 696 v. Grosshans & Petersen, Inc.*, 209 F. Supp. 161 (D. Kan. 1962).
[548] *U. S. v. Article of Drug Consisting of 30 Individually Cartoned Jars, More or Less, Labeled in Part: "Ahead Hair Restorer for New Hair Growth",*, 43 F.R.D. 181 (D. Del. 1967); *Federal Cartridge Corp. v. Olin Mathieson Chemical*

settlement.[549] Sometimes, interrogatories are used to expedite the trial through summary judgment,[550] to facilitate the trial preparation,[551] or to ascertain the contentions of an adverse party.[552]

Moreover, the interrogatories may also serve another remarkable purpose which can be found in other discovery devices; that is, to obtain admissions.[553] However, admissions made in interrogatories are not conclusively binding, as the answering party can introduce other evidence on the subject at trial.[554] Overall, as to the matter of effect, answers to interrogatories do not limit the proof that may later be offered which means answers made to the interrogatories do not have binding effects, but are considered as evidence when offered at trial.[555]

3. Request for Production (or Inspection)

The third discovery device is a request for production or inspection of documents, things and land governed particularly by Rule 34. As provided by the Federal Rules of Civil Procedure a party may serve on any other party a request to produce and permit the inspection and copying of any designated documents, including writings, drawings, graphs, charts, photographs, sound recordings, and other data compilations from which information can be obtained.[556] If necessary, those documents should be translated by the respondent through detection devices into reasonably usable form.[557] A party may also inspect and copy, test, or sample any tangible thing that constitutes or contains discoverable matter and which is in the possession, custody, or control of the party who is served with the request.[558]

A party may request permission to enter upon designated land or other property in the possession or

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Corp.,41:.

[549] *U. S. for Use of Weston & Brooker Co. v. Continental Cas. Co.*, 303 F.2d 91 (4th Cir. 1962); *Pressley v. Boehlke*, 33 F.R.D. 316 (W.D. N.C. 1963).

[550] *U. S. for Use of Weston & Brooker Co. v. Continental Cas. Co.*,303:; *Jackson v. Kotzebue Oil Sales*, 17 F.R.D. 204 (Terr. Alaska 1955).

[551] *U. S. v. Article of Drug Consisting of 30 Individually Cartoned Jars, More or Less, Labeled in Part: "Ahead Hair Restorer for New Hair Growth"*,,43:.

[552] Kennel, "Deposition and Discovery," 121.

[553] *Stonybrook Tenants Ass'n, Inc. v. Alpert*, 29 F.R.D. 165 (D. Conn. 1961); *U. S. v. Purdome*,30:.

[554] *Freed v. Plastic Packaging Materials, Inc.*, 66 F.R.D 550 (E.D. Pa. 1975).

[555] Kennel, "Deposition and Discovery," 118.

[556] *Fed. R. Civ. P.*, Rule 34 (a).

[557] Ibid.

[558] Ibid., Rule 34 (a) (1).

control of the party upon whom the request is served for the purpose of inspecting and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation, so long as the matters sought are within the ordinary scope of discovery.[559] At present, parties sometimes go further to seek for the inspection of computer hard drives in order to retrieve the erased message.[560]

The rule requires that the request must describe with reasonable particularity each item or category of items to be inspected.[561] It also demands the request specify a reasonable time, place and manner for the inspection and for performing the related.[562] Furthermore, it also suggests that the request may specify the form (s) for the inspection on the electronically stored information.[563]

In order to conform to such specification requirement, the request, may have to state, for example, in the case of request for inspection of documents, that, "reports and memoranda concerning injury claims regarding product X."[564] As a result of such rigid requirement, any party lacking of information sufficient to make specification, the concerned party must first obtain such information that may be available through the use of other discovery devices such as deposition or interrogatories.[565] In principle, a request for production under Rule 34 of the Federal Rules of Civil Procedure may only be directed to parties to the action.[566] However, persons who are not parties to an action may be compelled to produce documents or things or to submit to an inspection, as provided by Rule 45 which governs the issuance of subpoenas.[567]

A request for production may not be served, without leave of court.[568] A party cannot serve the request before the time specified by the provision of the Federal Rules of Civil Procedure governing the timing and sequence of discovery.[569] The provision governing the time for discovery specifies that a party may not seek discovery from any source until the parties have conferred concerning discovery, as required by the

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559 Ibid., Rule 34 (a) (2).
560 James, Hazard, and Leubsdorf, *Civil Procedure*, 297.
561 *Fed. R. Civ. P.*, Rule 34 (b) (1).
562 Ibid.
563 Ibid.
564 James, Hazard, and Leubsdorf, *Civil Procedure*, 297.
565 Ibid., 298.
566 Kennel, "Deposition and Discovery," 147.
567 *Fed. R. Civ. P.*, Rule 45.
568 Kennel, "Deposition and Discovery," 164.
569 Ibid.

rule.[570]

With respect to responses and objections, the party on whom a request for production of documents and things is served ordinarily must file a written response within 30 days after service of the request, meanwhile a shorter or longer time may be directed by the court or, in the absence of such an order, agreed to by the parties in the stipulations governed under Rule 29.[571] Moreover, the response must state, with respect to each item or category, that an inspection and related activities will be permitted as requested unless there is some objection.[572]

4. Examination of Persons

The fourth mechanism provided under the discovery system is the examination of persons which can either be physical and mental examinations governed mainly by Rule 35. The Federal Rules of Civil Procedure stipulate that when the mental or physical condition, including the blood group, of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner.[573] The court also may order a party to produce for examination a person in that party's custody or legal control.[574] Such an order, as required by the rule, may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties, while at the same time the rule requires that the order must specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is made.[575] Such requirements imposed by Rule 35 beyond the scope requirements set forth in Rule 26 (b) make this device differ significantly from all the others, and the requirement for court order as a prerequisite for examination right conveys an understanding that such device is not self-executing.[576]

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[570] Ibid.
[571] *Fed. R. Civ. P.*, Rule 34 (b) (2).
[572] Ibid.
[573] Ibid., Rule 35 (a) (1).
[574] Ibid.
[575] Ibid., Rule 35 (a) (2).
[576] Oakley and Perschbacher, *Civil Procedure*, 7.II.D.

It is well understood that such examinations seriously concern with the privacy and the dignity of every individual subject to examination which is, therefore, no party may be entitled to the examination right without court order and without good cause, which, thus, requires serious consideration from the court. Many court decisions have revealed that the application of Rule 35 is extremely rigid as an examination will be permitted only when a person's physical or mental condition is a key issue in the case, that is "in controversy."[577] The well known Supreme Court case of *Schlagenhauf v. Holder,* 379 U.S. 104 (1964) have established a guidance for the determinations of a condition regarded as in controversy and a showing that will amount to good cause.

More specifically, the most common situation in which a medical condition is in controversy is when, for example, the plaintiff sues for personal injuries caused by the accident.[578] However, it may also be appropriate to obtain examination of a defendant in the situation alleged by the plaintiff that the defendant's driving skills were insufficient to operate a vehicle causing the injuries to the plaintiff.[579] In general, the purpose of this device is to inform the court and the parties of the facts as to the physical condition of the examined party, and thus to secure the just, speedy, and inexpensive determination of an action.[580]

In summary, "discovery" refers to a set of methods enabling one side to get information from the other between the dates the case is filed and tried.[581] The discovery embraces devices that include the deposition, which can be taken through oral questioning or by written questions and can be taken of either party or a nonparty witness; interrogatories to a party, which pose written questions to a party; production of things (particularly documents) and entry on property to inspect, make copies of photographs, or conduct tests; physical or mental examinations of parties or persons "under the legal control of a party"; and request for admissions, as well as, in addition, the pretrial disclosure which requires the parties to transmit certain information and documents to other parties even without request.[582]

The functions and the uses of those devices have provided a concise understanding that the discovery

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[577] Friedenthal, Kane, and Miller, *Civil Procedure*, 424.
[578] *Schlagenhauf v. Holder*, 379 U.S. 104 (1964).
[579] Ibid.
[580] *Hardy v. Riser*, 309 F. Supp. 1234 (N.D. Miss. 1970).
[581] Glaser, *Pretrial Discovery and the Adversary System*, 9.
[582] James, Hazard, and Leubsdorf, *Civil Procedure*, 290.

serves three distinct purposes. First, to obtain evidence to use at the trial; second, to secure information as to the existence of evidence that may be used at the trial and to be ascertained how and from whom it may be procured, as for instance, the existence, custody and location of the pertinent documents or the names and addresses of person having knowledge of the relevant facts; and third, to narrow the issues, in order that at the trial it may be necessary to reduce evidences only to a residue of matters which are found to be actually in disputed.[583] Admissions can be also established through some devices of the discovery as presented earlier. However, such admissions are not judicial, but evidentiary that may be challenged at trial. Thus, such admissions do not possess any conclusive effects as admissions established under Rule 36 do.

V. Identifying Request for Admissions

Although the request for admission provided under Rule 36 is categorized as one among the rest of the discovery devices established by the U.S. Federal Rules, American scholars and judges have so far labeled the characteristics of the request from different perspectives, especially when its effect interferes the interpretation.

Some American judges, for example, have viewed request for admissions provided by Rule 36 as a discovery device solely for the limited purpose; that is, for the purpose of discovery deadline established in scheduling an order.[584] In particular, a plaintiff in the case of *Jarvis v. Wal-Mart Stores, Inc.,* 161 F.R.D. 337 (N.D. Miss. 1995) was not ordered, as motioned by defendant, to comply with request for admissions filed two days before the discovery deadline. The court treated request for admissions as discovery device for purposes of establishing deadline for service on the other, despite defendant's contention that request for admission was not discovery device.

As provided in the case management plan and scheduling order (Rule 16 (b) should be consulted for the reference of scheduling order, time to issue and contents of the order), the deadline for completion of

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[583] Alexander Holtzoff, "Instruments of Discovery Under Federal Rules of Civil Procedure," *Michigan Law Review* 41, no. 2 (October 1942): 205-206.
[584] *Joseph L. v. Connecticut Dep't of Children & Families*, 225 F.R.D. 400, 403 (D. Conn. 2005).

discovery[585] was February 15, 1995, and the court conducted the pretrial conference on March 28, 1995. The court found that there were no motions filed concerning discovery at any time prior to expiration of the discovery deadline. The defendant's motion to direct the plaintiff to respond to requests for admission was on February 13, 1995. As a result, the court the denied defendant's request for the court to direct plaintiff to comply with its requests for admission, as mentioned in the preceding paragraph.[586]

Due to the fact that request for admission served on a party calls the responding party to admit the truth of matters specified or the genuineness of documents described in the request, some scholars have commented that the "request for admission" device is treated sometimes as a form of pretrial practice rather than pure discovery.[587] These scholars reason further that such "request for admission" is a device which is not aimed purely at discovering or obtaining new information but also at clarifying the parties' positions and narrowing either the scope of issues for trial or the scope of potential contests with regard to documentary evidence.[588] More concretely, while some scholars had long (prior to 1970 amendment) made it clear that the "request for admission" under Rule 36 is a supplement to the pleadings,[589] some scholars have viewed that the request for admission under Rule 36 as a pleading device that narrows the issues to be tried rather than a discovery device to obtain evidence.[590]

Taking all these various perspectives into consideration, the "request for admission" provided in Rule 36 on the one hand can be well evaluated as under the discovery family's household from its formal feature. However, once its substantial effects (as analyzed in previous sections) play a role in such evaluation, the "request for admission" may be uncontestedly concluded as one different from its brotherhood in the discovery family. Such characteristic makes it a unique mechanism in the discovery. The Advisory Committee Note on the 1970 amendment has undoubtedly confirmed that admissions obtained through the request(s) in compliance with Rule 36 are not evidentiary, but judicial which are comparable to admissions

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[585] See Rule 26 (d) to refer to timing and sequence of discovery.
[586] *Jarvis v. Wal-Mart Stores, Inc.*, 161 F.R.D. 337, 339 (N.D. Miss. 1995).
[587] Oakley and Perschbacher, *Civil Procedure*, 7.II.E.
[588] Ibid.
[589] Harold Kauffman, "Pleading: Rule 36 of the Federal Rules of Civil Procedure," *California Law Review* 29, no. 6 (September 1941): 783-784.
[590] James, Hazard, and Leubsdorf, *Civil Procedure*, 302.

in the pleadings.[591]

To sum up, the request for admissions is one among the discovery devices governed by the discovery rules. However, admissions established under this rule are judicial which are totally different from those established under other discovery devices and which merely serve as evidences. The admissions established in compliance with Rule 36 have the same conclusive effects as those made in the pleading do.

VI. Pleadings and Admissions

Since pleading device is so sophisticated that it requires enormous time to go deep into discussing for the understating of its every detail, this section alone cannot handle such thorough discussions. The following exploration aims only at providing some fundamental knowledge on the pleading system in the hope that such comprehension may contribute to the better knowledge of the nature of admissions in American civil procedure system, especially those established in compliance with Rule 36. Within such limited framework, the following discussions focus on "modern pleadings," which will basically introduce the pleadings practiced in the federal court under the Federal Rules of Civil Procedure.

In a very concise forms, pleadings may serve two functions. First, pleadings permit the elimination from consideration of contentions that have no legal significant.[592] Therefore, if a plaintiff sets forth an allegation of claim for which the law provides no redress, that matter may be disposed of immediately due to the reason that such matter constitutes no necessity for the trial to determine whether or not the facts alleged in support of the claim are true.[593]Second, the pleadings guide the parties and the court in the conduct of the cases. A party cannot prepare for the trial if he has not been informed adequately of his adversary's contentions.[594] Moreover, the court cannot control litigation if the court does not have the knowledge of the nature of the litigants' allegations.[595]

In a more detailed description, pleadings serve several fundamental functions. First, they demonstrate

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[591] West, *Federal Civil Judicial Procedure and Rules*, 209.
[592] Friedenthal, Kane, and Miller, *Civil Procedure*, 246.
[593] Ibid.
[594] Ibid.
[595] Ibid.

that the court has jurisdiction of the subject matter of the action (as required by Rule 8(a)(1) of the Federal Rules of Civil Procedure).[596] Second, pleadings are utilized to give notice of the nature of the party's claim to adversaries.[597] Third, they identify and separate the legal or the factual issues in the action. Fourth, they present evidence and to narrow the issues for trial.[598] Fifth, pleadings are employed to provide a guide for discovery and trials and to expose insubstantial claims.[599] Sixth, pleadings provide a record for the scope of judgment for use in the application of preclusion doctrines.[600]

The concept of "pleading" in a civil suit can be simply known as a formal document in which a party to a legal proceeding sets forth or responds to allegations, claims, denials, or defense.[601] The notion of "modern pleadings" was introduced to the United States and England in the second half of the nineteenth century.[602] Modern pleadings are different from their common-law counterparts, as the common-law ones consisted of the detailed statements of the parties which may have constituted, in large parts, constituted both their contentions and the evidence which are the bases for the decision on the case.[603] Modern pleadings, however, were to set forth the parties' contentions of fact so as to guide the court together with the parties throughout the pendency of the case.[604]

Unlike the pleadings formerly found in the common law where a coherent set of rules did not exist for the case in the common law courts, the vital aspect of pleading reform was the application of a uniform set of rules to all cases, regardless of the nature of the substantive cause.[605] The developments in the pleading system reform in the United States, however, were processed at the different pace and time. Some jurisdictions, such as New York and California, the reforms took place in 1848 and 1850, while other States made the relative reforms in late 1930s following New York's "code pleading" system.[606]

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596 Oakley and Perschbacher, *Civil Procedure*, chap. 5.I.B.
597 Ibid., chap. 5.I.B.
598 Ibid.
599 Ibid.
600 Ibid.
601 "pleading."
602 Friedenthal, Kane, and Miller, *Civil Procedure*, 242.
603 Benjamin J. Shipman, *Handbook of Common-Law Pleading*, 3rd ed. (ST. PAUL: WEST PUBLISHING CO., 1923), 11.
604 Friedenthal, Kane, and Miller, *Civil Procedure*, 244.
605 Ibid.
606 Ibid., 245.

Typically, a litigant under the code pleading is required to allege "a plain and concise statement of the facts constituting each of action (defense or counterclaim) without unnecessary repetition." Although this formulation is apparently simple, because in practice, American courts have had substantial problems in defining the terms "cause of action" and "facts," such a formulation has been proven by courts to be deceptive.[607] Some other states, however, retained the substantial vestiges of common-law practice until as late as 1947.[608]

The uniform system of pleading established for all suits in the federal courts was introduced through the promulgation of the Federal Rules of Civil Procedure in 1938.[609] The federal reform that brought a new approach to the pleading which avoided the uses of terms "facts" and "cause of action" proved to be remarkably significant as it stressed the simplicity beyond that achieved by state court reform but later required only a fair notice of a claim or defense.[610] Such a pleading adopted by the Federal Rules of Civil Procedure is called a federal "notice pleading" which majority of states has followed.[611] Rule 8(a)(2) which requires that a party set forth "a short and plaint statement of the claim showing that the pleader is entitled to relief" is a key provision which makes the pleading technicalities under the Federal Rules be stripped away and the concept of "notice pleading" is firmly established.[612]Thus, the Federal Rules of Civil Procedure eliminate the controversies among courts concerning the matters of "cause of action" and "fact" as mentioned above.

Nonetheless, although many other aspects of various states' civil procedural systems have been revised to comply with the federal rules, some other states sill follow the "fact pleading" developed as an integral part of the reform that began with the adoption of 1848 New York code of civil procedure.[613] Those states still adhere to the original code pleading formulations, thus.[614] Based on this fact, it can be logically concluded that, in the United Sates nowadays, there exists two fundamental types of pleading,

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[607] Ibid., 258.
[608] Ibid., 245.
[609] Ibid.
[610] Ibid.
[611] Ibid.
[612] Ibid., 258-259.
[613] Ibid., 245.
[614] Ibid.

known generally as "fact pleading" and "notice pleading."

The former practice at the common law pleading revealed that it took parties to a litigation to file back and forth number of pleadings prior to the conclusion or closure of a final pleading. For example, if the answer of the defendant solely denies the plaintiff's allegations, then further pleadings serve no purpose. In contrast, if the answer contains affirmative allegations setting forth defenses, then it would be reasonable to demand that plaintiff reply to those allegations. As a matter of fact, if the reply again contained any affirmative allegations, it would be logical for us to think that defendant must rebut those allegations. As a result, such back-and-forth practices would continue until the final pleading would contain only the denials. Such formalistic and time-consuming practices moved the drafters of modern pleading provisions to determine the limit on number of pleadings and leave to other devices the elimination and delineation of the issues. As a result of such attempt, the original pleading rules were adopted by many states with the requirements that the plaintiff must file a reply to the affirmative allegations set forth by the defendants after which no more subsequent pleadings should exist.[615]

However, the current approach in the modern method pleading is that many jurisdictions cut off the pleadings after the answer.[616] For example, the federal rules expressly provide that any further pleadings attempted after the answer of the defendants are subject to court's discretion through specific order which may require the plaintiff to file a reply to an answer. Rule 7 (a) stipulates that, "pleadings allowed in the federal court (as stipulated in the Federal Rules of Civil Procedure) are complaints, answers (to complaints), answers to counterclaims, answers to cross-claims, third-party complaints, and a reply to an answer (if so ordered by the court)."[617]

Therefore, under the Federal Rules of Civil Procedure, the initial pleading is the complaint or petition in which plaintiffs sets forth allegations and prayer[618] for relief.[619] The complaint is followed by the answer in which defendant may deny allegations made in the complaint and, in addition, may set forth affirmative

[615] Ibid., 248.
[616] Ibid.
[617] *Fed. R. Civ. P.*, Rule 7 (a).
[618] A request addressed to the court and appearing at the end of pleadings; especially, a request for specific relief or damages. *See* "prayer for relief."
[619] Friedenthal, Kane, and Miller, *Civil Procedure*, 247.

allegations regarding defenses and counteractions.[620]The following discussions on the "pleading" mainly focus on the "complaint" and the "answer" to the complaint as the bases within the framework of the Federal Rules of Civil Procedure, which means federal "notice pleading".

"Complaint," from American civil procedure concept, is the initial pleading filed in any civil action and contains the basic allegations that describe the plaintiff's reason to complain of the defendant and the relief or response the plaintiff seeks.[621] In other words, it is the pleading by which a party who initiates a civil action seeks affirmative relief.[622]

Beside the requirement by law that pleading must contain the short and plain statement of the grounds for the court's jurisdiction, the general rules of pleading stipulated in the Federal Rules of Civil Procedure requires that a pleading stating a claim for relief must contain a short and plain statement of the claim.[623] That statement must show that the pleader is entitled to relief.[624] The demand for relief sought may include relief in the alternative or different types of relief.[625]The pleading, thus, put the defendant of the case on notice of the claim of plaintiff which will enable the defendant to answer and prepare for trial.

The term "answer," contains the defending part's responses to the material in the pleadings and can add additional material constituting defenses of various sorts.[626] Since filing a complaint with the court is the commencement of the action,[627] the Federal Rules require in principle that the defendant serve an answer within 21 days after being served with the complaint after a plaintiff commences an action by the filing of a complaint.[628] The failure to comply with such requirement will likely cause the defendant disadvantages in judgment, as court may enter into default judgment in the favor of the plaintiff.[629]

In answering the complaint, the defendant is required to state in short and plain terms the defendant's

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620 Ibid., 247-248.
621 Oakley and Perschbacher, *Civil Procedure*, 5.I.D.
622 "Moore's Answer Guide: Federal Pretrial Civil Litigation," *Mathew Bender & Company, Inc.* 1 (2009): 4.01.
623 *Fed. R. Civ. P.*, Rule 8 (a).
624 Ibid.
625 Ibid.
626 Oakley and Perschbacher, *Civil Procedure*, 5.I.D.
627 *Fed. R. Civ. P.*, Rule 3.
628 Ibid., Rule 12 (a) (1) (A) (i).
629 Ibid., Rule 55 (a).

defenses to each claim asserted against the defendant.[630] The rules of pleading provide two fundamental choices for the defendant in answering to the complaint; it can be either admissions or the denials of the allegations set forth in the complaint of the plaintiff[631] and any available defenses to the suit of the plaintiff.[632] In short, the answer must admit or deny each of the material allegations raised in the complaint.[633]

As provided by the federal rules, except in the case that some specific allegations are considered denied or avoided at the absence of responsive pleading.[634] In general, however, the answering party must specifically deny an allegation in the pleading.[635] The failure to specifically deny any allegation will, thus, result in the allegation deemed admitted.[636]

Beside the complete admission or denials of the allegations in a complaint, the federal rules provide parties another option which is the partial denial of an allegation. Therefore, a defendant in good faith may deny part of an allegation. In order to deny partially, the defendant must admit the part that is true and deny the rest.[637] However, if the defendant lacks of knowledge or information sufficient to be convinced of the truth of an allegation, then the defendant must so state, and the statement as required by the rules, and the statement has the effect of a denial.[638]

Even if the rules provide such a freedom to the party who responds so a pleading, the denial based on the ground of lacking of knowledge or information may be made only after some reasonable inquiry has been carried out,[639] as the responding party may face sanctions imposed by court according to the rules governing sanctions stipulated in the Federal Rules of Civil Procedure. Case law has proved that some courts penalized the parties by treating the facts alleged in the complaint as having admitted when a court

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630 Ibid., Rule 8 (b) (1) (B).
631 Ibid., Rule 8 (b).
632 Ibid., Rule 8 (c).
633 "Moore's Answer Guide: Federal Pretrial Civil Litigation," 4.31[1].
634 *Fed. R. Civ. P.*, Rule 8 (b) (6).
635 Ibid.
636 Ibid., Rule 8 (b) (6).
637 Ibid., Rule 8 (b) (2).
638 Ibid., Rule 8 (b) (5).
639 Ibid., Rule 11 (b) (4).

found that the assertions of the party that a party had insufficient knowledge or information were untrue.[640]

The remarkable feature of pleadings in relation to admissions here is as what have been introduced in the preceding paragraphs. From the plaintiff's pleadings perspective, admissions may be established either by the defendant admits the allegations in the complaint by stating in the answer to the complaint that they are true or by failing to properly deny those allegations according to the rules governing the answer. If the answer is not amended, these admissions will bind the defendant at trial and obviate any necessity by the plaintiff to offer proof on the matters admitted to the court.[641] After the closure of the pleadings, any party may move for judgment on the pleadings.[642] Motion for judgment on the pleadings is a party's request that the court rule in its favor based on the pleadings on file, without accepting evidence, as when the outcome of the case rests on the court's interpretation of the law.[643]

In a motion for summary judgment, the moving party asserts that no genuine issue of material fact exists based on the existing record, and that the party is entitled to judgment on the merits as a matter of law.[644] On the contrary, a motion for judgment on the pleadings contends that the moving party is entitled to judgment based on them alone which means the court that considers the motion on the pleadings is limited to examining only the sufficiency of the pleadings.[645] In deciding the motion for judgment on the pleadings, court must not look beyond the pleadings themselves to decide whether certain facts exist on which a substantive laws will operate to exclude proof of other facts.[646]

Nonetheless, the federal rules indicated that if any matters outside of pleadings are presented to and not excluded (by the court), then the court must treat the motion for judgment based on the pleadings as a motion for summary judgment under Rule 56. This means that the court must give the nonmoving party an opportunity to respond to the motion.[647]

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[640] *Harvey Aluminum, Inc. v. NLRB*, 335 F.2d 749, 758 (9th Cir. 1964).
[641] Friedenthal, Kane, and Miller, *Civil Procedure*, 292.
[642] *Fed. R. Civ. P.*, Rule 12 (c).
[643] "motion of judgment on pleadings."
[644] *Fed. R. Civ. P.*, Rule 56 (c).
[645] "Moore's Answer Guide: Federal Pretrial Civil Litigation," 4.34[1].
[646] Marcus and Sherman, *Complex Litigation*, 499.
[647] *Fed. R. Civ. P.*, Rule 12 (b) (6) and Rule (c).

With regards to the standard for grating motion, the court will grant the motion for judgment on the pleadings if, accepting as true all the material allegations contained in the nonmoving party's pleadings, the moving party is entitled to judgment as a matter of law.[648] More specifically, a party will be granted judgment upon motion for judgment on the pleadings only if there are no disputed facts, which, if proven against the moving party, would defeat the moving party's recovery (claim).[649] If the state of record clearly shows that there are material facts in dispute, the motion for judgment on the pleadings will be denied by the court.[650]

In summary, the process of pleading functions as means of production of issues regarding the case between the parties and those issues are noticeable to court so as to enable court to have good knowledge of the issues in the case which, as a result of that knowledge, enable court to render a valid judgment according to the Federal Rules of Civil Procedure. Pleadings, according to most courts and commentators, constituted an important device for effectuating judicial admissions.[651] Any material allegation in the complaint or any failure to deny such an allegation in the answer may be absolutely conclusive upon a party throughout the proceeding, thus precluding the introduction of further evidence; the abandoned, withdrawn or amended pleadings will no longer constitute judicial admissions, however.[652]

However, pleadings alone may not be enough for the court to render a judgment on merits if admissions are not made in them, but the disputed issues continue to exist that require proofs on the allegations made by parties and their adversaries. Pleadings under the federal rules now are relatively free of detailed factual allegations, while obtaining facts to narrow issues for trial is now largely the work of the discovery process,[653] as presented above. In addition to the discovery devices and the pleadings that are utilized to establish admissions, other mechanisms provided by the Federal Rules can be used to establish civil admissions as well. However, whether they give rise to the conclusive effects or not remained to be discussed; the following section under take these discussions.

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[648] "Moore's Answer Guide: Federal Pretrial Civil Litigation," 4.34[2].
[649] Delmar Karlen et al., *Civil Procedure: Cases and Materials* (WEST PUBLISHING CO., 1975), 499.
[650] Ibid.
[651] "Judicial Admission," 1127.
[652] Ibid.
[653] Oakley and Perschbacher, *Civil Procedure*, 8.IV.A.

VII. Admissions under other Devices

1. Admissions at Pretrial Conference

In addition to admissions established in the pleadings and through the discovery devices, especially the "request for admissions" mechanic, admissions may also be established under other devices provided by the Federal Rules of Civil Procedure of the United States. The process of defining a controversy, although not an endless one, it is generally continuous until the judgment is rendered. Therefore, litigants' investigative efforts may continue so as more offensive and defensive measures may be better offered to support their claims. However, at the beginning of the suit, as parties are usually relatively uninformed, they will not be prepared to make any concessions.[654] Nevertheless, because the disclosure of even just a few uncontested points will limit the subsequent of discovery efforts which could possibly save their time and expense, later in the case, after the depositions and other discovery devices have been used and the parties are better informed, further definition and limitation may be called for.[655] The litigants' newly-gained knowledge will make further admissions appropriate; these admissions can be obtained either through the submission of new request for admissions or in the course of the pretrial conference.[656]

"Pretrial conference," stipulated in Rule 16, is a meeting of counsel for the parties (or sometimes the parties themselves) and the judge held before trial and usually after the pleading and discovery stage. This procedural mechanism was introduced to the Federal Rules of Civil Procedure of the United States through its adoption in 1938.[657] One among the main rationales lied behind the introduction of such procedural device to the U.S. Federal Rules was that judges should be encouraged (not required) judges to participate in sharpening and simplifying the issues of law and fact to be litigated at the trial.[658] The shortcoming of the most procedural systems was that too much reliance was place on the pleadings to achieve this objective and not enough either on the exchange of information or on informal processes of discussion and

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654 Finman, "The Request for Admission in Federal Civil Procedure," 382.
655 Ibid.
656 Ibid.
657 Kauffman, "Pleading: Rule 36 of the Federal Rules of Civil Procedure."
658 David L. Sharpiro, "Federal Rules 16: A Look at the Theory and Practice of Rule-making," *University of Pennsylvania Law Review* 137 (June 1989): 1978.

negotiation.[659] Thus, this device may serve this purpose.

The new Rule 16, after its substantially extensive amendments in 1983 and 1993, specifies that its purpose is to expedite litigation, establish control of the case, discourage wasteful pretrial activities, encourage preparation for trial, and encourage settlement.[660] To attain these purposes, the rule lists possible subjects that may be discussed at the pretrial conference, among which is obtaining admissions of facts and of documents to avoid proof at trial.[661] Although the rule provides that pretrial conferences can be carried out by the presence of parties without their attorneys, other pretrial conferences must be attended by at least one attorney from each side that is authorized to enter into stipulations and make admission.[662] The pretrial conference is closed with the final pretrial conference the purpose of which is to formulate a trial plan, including plan to facilitate the admission of evidence.[663] After any pretrial conference under Rule 16, including a final pretrial conference, is completed, the court should issue an order reciting all actions taken.[664] This order controls the course of the action.[665]

Since Rule 16 does not specify who prepares the order, counsel usually consult the local rules, as well as the individual judge's standing orders, to determine whether a final pretrial conference order is required, and if so, the requirements of the order, and whether it is counsel's responsibility to draft the proposed order.[666] For the illustrative purpose, the final pretrial order usually indicates a number of topics. They include facts that establish jurisdiction and venue and a statement of the case.[667] Beside these, the order may also include the date and time that the trial will commence, an estimated length of trial, all rulings made at the final pretrial conference.[668] Topics to be entered into a final pretrial conference order also extend to a summary of all factual and legal issues to be tried, and any issues to be severed and tried

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659 Ibid.
660 *Fed. R. Civ. P.*, Rule 16 (a).
661 Ibid., Rule 16 (c) (2).
662 Oakley and Perschbacher, *Civil Procedure*, 8.II.2.
663 *Fed. R. Civ. P.*, Rule 16 (e).
664 Ibid., Rule 16 (d).
665 Ibid.
666 "Moore's Answer Guide: Federal Discovery Practice," 4.18 [5].
667 Ibid., 4.18 [5].
668 Ibid.

separately.[669] The topics in the order may also include a final list of witnesses to be called to by identifying the subject of their testimony and any deposition excerpts to be read, expert witnesses to be called, and a summary of their qualifications.[670] Moreover, the order generally includes the exhibits and visual aids to be presented at trial, identification of exhibits to be admitted without objection, and summary of any objections and discovery excerpts from stenographic and video depositions, responses to interrogatories, and requests for admission, and the undisputed facts.[671]

Pretrial conferences can be used for many purposes as presented above. However, it may be known better as the supplement to the pleadings and discovery because it is a forum for trial preparation so as to avoid complications at trial. For example, the judge should insure that the pleadings will accommodate all the claims and defenses reveal at the pretrial conference which thus obviate the need for amendment at the trial and possible continuance.[672]A part from this, rather than employing this procedural device for the sole purpose of obtaining admissions, such device enables the possibility for the admissions as mentioned from at the outset of this section. For instance, in practice, before the trial date and after the completion of discovery, counsels are frequently ready to admit many things they were not prepared to admit in the pleading stage.[673] Thus, if any admission is obtained at this pretrial stage, the procedure of such is operated judicially in comparison to the admissions obtained through the pleadings and discovery whose procedures operate extrajudicially, but whose effects are conclusively binding. On the contrary, admissions at pre-trial conference will generally not be conclusive as the rules regulating pre-trial conference do not deter improper denials.[674]

A part from this, questions remain as to how far the scope of the effects of admissions established through pretrial conference reach. Much attention should be paid to this procedural device. The reason is because the success of the pretrial conference may depend on the attendance of the counsel, as the rule requires that the final pretrial conference must be attended by at least one attorney who will conduct the

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669 Ibid.
670 Ibid.
671 Ibid.
672 James, Hazard, and Leubsdorf, *Civil Procedure*, 354.
673 Ibid., 353.
674 Finman, "The Request for Admission in Federal Civil Procedure," 381.

trial.[675]

2. Admissions at Trial

In exception to the admissions obtained through pretrial conference having been discussed in the preceding paragraphs, under the federal practices, judicial admissions may be also obtained at trial. In the course of trial, judicial admissions by parties occur most often in direct testimony when the party acknowledges some particular fact that is fatal or at least adverse to his claim or defense.[676] There are, however, conflicting opinions of judges concerning the effects of such admissions. Historically, some judges have prevented parties from introducing evidence to rebut the admitted issues as they recognized that the testimony of a party constituted a judicial admission and as such is binding and conclusive upon the party.[677] While some courts, in supporting this type of admission as judicial one with binding effect, viewed that a party is not entitled to have a jury consider more favorable facts than what he has claimed himself in his testimony.[678]

In contrast, some other courts, however, have considered the testimony made by the parties to be merely evidential which is not conclusive; the admitting party may even bring in the other witnesses to contradict his own testimony.[679]The treatment of party testimony as a judicial admission had been strongly criticized.[680]The arguments for such criticism rest with the assumptions that testimony as to a party's fallible impressions of events, or to his own opinions, in contradistinction to matters of certain and personal knowledge may appear too unreliable to be considered as conclusive; furthermore, the timid party may be badgered into misstatements under the stress of examination by president counsel.[681]

The criticism of treating testimony by parties judicial admission does not put emphasis on the inflexibility of its application, as some court ruled that flexibility may be achieved by permitting

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675 *Fed. R. Civ. P.*, Rule 16 (e).
676 "Judicial Admission," 1130.
677 *Bell v. Harmon*, 284 S.W.2d 812, 814 (Ky. 1955).
678 *Samish v. United States*, 223 F.2d 358, 362-363 (U.S. App. 1955).
679 *Ritchie v. Reo Sales Corp.*, 272 Mich. 684 (Mich. Supp. 1935).
680 "Judicial Admission," 1131.
681 Ibid.

contradiction of testimony if circumstance is consistent with honesty and good faith.[682] The moderate approach reached by American scholars is that courts should treat testimony as judicial admission only when reasonable jury could disbelieve the testimony.[683]Therefore, although such kind of admissions may be called judicial admissions they are established judicially at the trial with the present of the trial judge. Such admissions may not have binding effects for the reason that the treatment on its effects may vary from case to case, or they may be regarded as judicial admissions as last resort when no contradictory evidences could be presented against the testimony made by parties.

Beside this kind of non-conclusive judicial admissions made by the parties, judicial admission under American civil procedure may also be established by counsel in the open court depending on evaluation of the mode of expression and intention of the particular attorney—factor not susceptible of precise definition or easy application.[684] Although there is no uniformed theory to determine when a judicial admission by counsel is established at trial, a number of case laws have set some precedents that give rise to the understanding of what and when such admissions are constituted. For example, a casual response to a query from court,[685] hypothetical or ambiguous statement may be too vague too be considered as conclusive;[686] while on the contrary, a measured reply to the judge or withdrawn contention may be sufficient to be deemed as admissions.[687]

It is undeniable that attorneys are more skillful and knowledgeable of the procedure and rules governing judicial admissions than the ordinary parties, which as a result the statement or litigation acts carried out by the attorneys should be treated more kindly in relation to the judicial admissions. The old court decisions provided the understanding that to grant a relief for judicial admission courts must take into consideration whether the counsel's attempt to withdraw such admission was motivated by inconsistent, new evidence.[688] The court needed to also consider if the recognition of such withdrawal would place heavy burden on the opposing party who has so far relied on prior admission and has withheld evidence

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682 *Harlow v. Leclair*, 82 N.H. 506 (1927).
683 "Judicial Admission," 1132.
684 Ibid.
685 *Howard Indus., Inc. v. Rae Motor Corp.*, 186 F. Supp. 469 (E.D. Wis. 1960).
686 *Sefton v. Valley Dairy Co.*, 345 Pa. 324 (Pa. Supp. 1942).
687 "Judicial Admission," 1132.
688 *Cole v. State Compensation Comm`r*, 114 W. Va. 633 (1936).

that is now difficult to produce.[689]To elaborate, such decisions emphasize that the basis for determining the conclusiveness of admissions by the counsel at trial is the balance between the motives by the counsel with regard to the withdrawal of the established admissions and the burdensome that may cause on the opposing party to produce evidence to prove the once-established but withdrawn admissions. Remarkably, in most instances judicial admissions result from the express statements, and with the absence of such explicit concessions courts are reluctant to find implied admissions and generally insist that parties furnish proof on the contested issues.[690]

3. Admissions through Stipulation

Judicial admissions related to some particular issues in litigation may be obtained through stipulations. Stipulation is a voluntary agreement between made by parties or their attorneys concerning some relevant point related to the pending judicial proceeding.[691] The parties or their attorney may draft stipulations as formal, written agreements, or read into a deposition transcript, or included as part of a pretrial agreement, or reserved for the trial record.[692] The attorneys are free to reach any reasonable agreement regarding the effect the stipulation has on evidentiary, trial, and other litigation elements.[693]

Under American civil procedure system, stipulation is a judicial admission binding on the parties making it absent special considerations.[694] If the attorney of the plaintiff stipulates the statement of fact disadvantageous to his client, the admission occurs and the plaintiff is bound by it.[695] The same effect occurs to the defendant. For example, in the case of *Diapulse Corp. of America v. Birtcher Corp.* C.A 2d 1966, the attorney of the defendant enters into a pretrial stipulation that plaintiff would not have to produce certain evidence in a libel action. However, defendant later argued that the jury had no basis upon which to reach its decision about damages because plaintiff had not offered any proof as to the loss. The court

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689 Ibid.
690 "Judicial Admission," 1132-1133.
691 "stipulation."
692 Roger S. Haydock, David F. Herr, and Jeffrey W. Stempel, *Fundamentals of Pretrial Litigation*, Second. (ST. PAUL, MINN.,: WEST PUBLISHING CO., 1992), sec. 5.11.3.
693 Ibid.
694 *John McShain, Inc. v.U.S.*, 375 F.2d 829, 831 (Ct.Cl 1967).
695 *Mull v. Ford Motor Co.*, 368 F.2d 713 (C.A.2d 1966).

precluded the defendant from such argument as he was bound by the stipulation.[696]

Therefore, when a party or his or her attorney entered into an agreement on an existence of a particular fact in the stipulation, an admission to such existence occurs and becomes judicial which gives rise to binding effects on court and the parties. Such device enables parties and their attorneys to establish a judicial admission. It, thus, bears the same effects as those established in the pleadings and ones made through the request for admissions under Rule 36.

VIII. Conclusion

Under American federal civil procedure system, judicial admissions may be established at various stages of litigation through various mechanisms. These stages of litigation range from the pleadings to the trial, while mechanisms utilized to establish such admissions may also include discovery devices and pretrial conference. Such judicial admissions can either be known as "express judicial admissions" or "implied or deemed judicial admissions."

For the "express admissions" made through the explicit forms are those made through the express intentions of parties by their written answer to the complaint (for the pleading) or written answer to the request for admissions. To elaborate, such admissions are established by way that the parties stipulate in their answer to the complaint to admit the allegations as true, or in the form that the responding parties to a request for admissions enter in their written response to admit the matters pointed out in the written request for admissions.

On the contrary, the admissions by default are the admissions by the conduct of the parties in litigation or their attorneys. Such admissions, as discussed in the preceding sections in this chapter, may be established by way that the parties failed to answer to the complaint (for the case of admissions made by defendant in the pleading stage), or as a result of the failure to comply with the governing rules to respond to the request for admissions carried in accordance to Rule 36.

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[696] *Diapulse Corp. of America v. Birtcher Corp.*, 362 F.2d 736, 744 (U.S. App. 1966).

A part from these, the judicial admission, either express or deemed ones may also be established at the trial depending the nature of situation, while the conclusive effects of such admissions remain questionable as a matter of court decisions. These kinds of admissions by default are the deemed admissions that can be assumed as one among the statutory sanctions imposed on the parties who have violated the rules, either rules governing pleadings or discovery, by their conducts in litigation.

The outstanding points to be taken into consideration here is the use of term "judicial admissions" under the federal practice of American civil procedure system. Two unique or peculiar aspects should be taken into account. On the one hand, as seen in the analytical reviews in previous sections, admissions established in the pleadings or through request for admission in compliance with Rule 36 are the admissions with particular formalities and procedure rules that operate extrajudicially as they are dominated by the parties and without the necessary involvement of courts. However, admissions established under those devices are regarded as judicial admissions whose effects are conclusively bindings on parties, particularly the admitting parties, and courts and no evidences can be introduced to contradict those admitted matters. Regardless of their forms, *express or deemed* admissions, the same conclusive effects take place in association with those admissions. The conclusive effects simply mean that the ones that bind the parties (especially the admitting party, but not the party for whom the admission is established) and the court, and so long as such admissions stand unretracted, for the purpose of the case, the jury and the court regard the allegation as true, and the admitting party cannot offer any testimony to contests its untruthfulness.[697]

On the other hand, admissions made either at pretrial conference or trial by the parties or their counsels are also termed as "judicial admissions." Nonetheless, such terminology may be based on the rationale that those admissions and their procedures operate with the requirement that courts get involved—that is, the presence of trial judges is required. The effects of such admissions established under these stages of litigation procedure, especially at trial, are unstable depending on the determination of court since there are no specific rules governing such effects. Instead, courts are rested with the decision to set

[697] Edmund M. Morgan, "Admissions as an Exception to the Hearsay Rule," *The Yale Law Journal* 30, no. 4 (February 1921): 355.

forth the standard for determining their conclusiveness. Hence, it may be appropriate to comment that the admissions under the American civil procedure system whose procedures operate judicially are regarded as judicial admissions because of its formal nature that require the judicial involvements. However, they do not necessarily have the same conclusive effects as those possessed by admissions made in the pleadings and through request for admissions in compliance with Rule 36 of the Federal Rules of Civil Procedure. In other words, these kinds of admission serve only as evidence, but not as judicial admissions that bear the conclusively binding effects.[698]

In conclusion, within the framework of the federal practice, "judicial admission" under the American civil procedure system, can be categorized as those without binding effects and those with binding effects. The former can be established expressly or implicitly when any of the discovery devices, except the request for admission, is utilized, at pretrial conference stage or at trial. The later, however, can be established only in the pleadings or through the request for admissions, a kind of discovery devices, provided by Rule 36 of the U.S. Federal Rules and in the stipulations. Parties, especially admitting ones, and the court will be conclusively bound by the effects of such admissions. The subject matters of these conclusive-effects-borne admissions can be found in the respective sections presented above.

[698] Ibid., 356.

CHAPTER THREE: UNDERSTANDING JUDICIAL ADMISSION UNDER CAMBODIAN CIVIL PROCEDURE SYSTEM

This dissertation has examined so far the systems of judicial admission under two major civil procedure systems that have different legal traditions. However, the concepts of judicial admission under the Cambodian civil procedure require analysis in order to characterize them between the two major judicial admission systems. This chapter, therefore, serves the purpose of examining the background of the Cambodian Code of Civil Procedure. Following a discussion of the code, the chapter will uncover the existence of judicial admission concepts from the scholarly aspect and the court practices.

I. Brief Background of Cambodian Code of Civil Procedure

After the collapse of the Khmer Rouge in 1979, Cambodia became a nation starting from zero. [699] Because the Khmer Rouge took control of the country with a bloody civil war, the regime ruled the country with only a constitution and orders set forth by a central government called Ang Kar. All the laws implemented prior to 1975 were no longer in use. The regime collapsed in 1979. The post-war government started to govern the country with some laws drafted and adopted by the Council of State and the instructions from the central government. This pro-socialism government continued until 1993 where the first general election was held and that enabled the formation of a new government through the votes of the Cambodian citizens. Although new laws had been enacted after the formation of the new government, in the field of civil justice, there was neither civil code nor code of civil procedure. However, there were some laws and regulations related to the civil procedure. They included the Law on Organization and Activities of the Adjudicate Courts of the State of Cambodia (1993), Law on Court's Fees (1993) and Law on Methods for Enforcement of Civil Judgment (1992). Beside these, there were only instructions issued by the Ministry of Justice to deal with the actual practical problems that the courts faced. Such a situation continued until the application of the new Code of Civil Procedure of Cambodia in 2007.

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[699] The regime is also known as Khmer Rouge which ruled the country in between April 1975 and January 1979.

In an effort to establish a credible and stable legal and judicial framework for upholding the rule of law and fostering private led economic growth, in 2001, the Royal Government of Cambodia initiated a program called Legal and Judicial Reform Strategy to carry out massive reform on the justice system.[700] This program has received technical supports from various donor countries that include Japan. The Japanese government has provided legal assistance to Cambodia in drafting the Civil Code and Code of Civil Procedure through a project known as Legal and Judicial Cooperation Project. Japan International Cooperation Agency, JICA, and the Ministry of Justice of Cambodia represent the two countries to implement this project. The project has continued until the present. The Japanese assistance focuses on providing technical cooperation for Cambodia concerning the drafting of a Civil Code and Code of Civil procedure and other ancillary laws. As a result, the new Code of Civil Procedure of Cambodia was adopted in 2006 and went into effect in 2007. Thus, there has been just four years since its enforcement. The Code of Civil Procedure of Cambodia is a fledgling, while Cambodian practitioners are trying hard to implement it effectively.

II. Concepts of Judicial Admission under the Cambodian Civil procedure System

1. Scholarly Opinions

As mentioned in section I in this chapter, the Code of Civil Procedure of Cambodia is a new law available in Cambodian civil justice system. There is a lot more that needs to be done, especially in the development of legal theories. Such development may take so much time because there are quite a few Cambodian scholars or almost none who specialize in the field of civil procedural law at the present. A number of Cambodian universities have departments of law and politics studies available for undergraduate and graduate programs. However, not all of these universities, at least to my experience as adjunct professor at a few universities, have regular course in civil procedure in their curriculum. The lack of professors specializing in the field can be the major obstacle for these universities to have regular civil procedure studies program in their curriculum.

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[700] "CDC - Legal and Judicial Reform Strategy", n.d., http://www.cdc-crdb.gov.kh/cdc/legal_judicial_reform.htm(accessed June 2, 2011).

Because of the scarcity of the academics specializing in the field of civil procedure, textbooks and other academic publications by Cambodians concerning Cambodian civil procedure laws are not available. Therefore, the theory developments and scholarly opinions regarding the concept of judicial admission cannot be found although the Code of Civil Procedure of Cambodia utilizes the term "admission." Although this dissertation wished to present the discussions on the concepts of judicial admission developed by Cambodian scholars, such attempt was impossible due to the unavailability of the academic publications. However, the constraint on the access to academic publications does not put the attempt to study the concepts of judicial admission under the current civil procedure system of Cambodia to an end. This chapter will shift its attention to studying on the concepts of judicial admission under the Cambodian court practices.

2. Court Practices

In general, this sub-section will focus on whether or not the term "admissions" has existed in the court decisions. If they ever existed, how judges treated those admissions in relation to their effects, the withdrawal and the scope of application. Given that the access to court documents are limited and that the pages and time for the production of this dissertation is strictly scheduled, this sub-section undertakes the reviews of several selected civil cases that disposed at the Supreme Court. Among these are the full reviews on cases of judgments available from the court first instance. The cases subject to review are those tried by the application of the Code of Civil Procedure that went into force in 2007. Each case will be identified by numerical order, for example Case 1 or Case 2, following the parties' names and official record number. The contents of the judgments and the reasoning may be a bit incomprehensible in some aspects because Cambodia is under the process of legal and judicial reform ranging from the drafting of the fundamental codes and laws to building and strengthening judicial capacity.

Since the understanding of the judiciary system of Cambodia may contribute to the conveniences in understanding the case reviews, this section presents the readers the brief aspects of Cambodian judiciary system as following. The Cambodian judiciary system comprises of provincial, municipal, and military courts as the courts of first instance, while the Appellate Court is the second instance court, and the

Supreme Court is the highest court whose decision is not appealable in principle. The military court is the only special court located in the capital, Phnom Penh, whose jurisdiction is to try cases concerning offenses committed by members of the armed forces and which concern the discipline or effected properties of such service people.[701] Beside this special court, there are 20 Provincial Courts situated in each province of the country and one municipal court known as the Phnom Penh Municipal Court which is located in the capital city. These provincial-municipal courts act as the court of first instance dealing with all the criminal and civil disputes. There is only one appeal of court in Cambodia located in the capital city and is known as the Phnom Penh Appellate Court. This court handles all the appeals and complaints from all the courts of first instance.[702] Both the first instance and the appeal courts try both the factual and legal issues, while the Supreme Court, located in the capital, is the court that deals only with the legal issues. Thus, the Supreme Court examines only the application of laws to facts in the appeal complaints against the judgments rendered by the first and second instance courts. There are three types of appeals under the current civil procedure of Cambodia through which a decision that has not yet become final and binding can be appealed to a higher court. The first type is known as *Uttor* appeal, which is an appeal against the judgment of a court of first instance (provincial or municipal court).[703] The second type is *Satuk* appeal, which is one against a judgment issued by the *Uttor* appellate court.[704] The Third type is an appeal against a ruling which is known as "*Chomtoah* appeal."[705] The following case reviews will employ these specific terms concerning the name of the particular first instance courts and the type of appeal against the decisions of the courts.

Case 1: *Srey Vat v. Ros Chea*, Supreme Court's judgment number 251 dated 13 July 2009 concerning the demand to return immovable based on ownership. The Supreme Court upheld the decision of the Appellate Court who maintained the decision of the Phnom Penh Municipal Court (court of first instance) by reasoning that the defendant acknowledged the fact that a plaintiff purchased land and paid for the construction of the house which that was in dispute. The Supreme Court was silent about the admission of

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[701] *Law on Organization and Activities of the Adjudicative Courts of the State of Cambodia*, 1992, Article 9.
[702] Ibid., Article 3.
[703] *Cambodian Code of Civil Procedure*, Article 259 (1) (a).
[704] Ibid., Article 259 (1) (b).
[705] Ibid., Article 259 (1) (c).

the act, but mentioned about the acknowledgment of fact by one party as asserted and gave rise to right to claim by the other. The following detailed review of the case may help to understand the Supreme Court's decision better.

According to the Phnom Penh Municipal Court case file number 444 dated 25 May 2006, Srey Vat, who was plaintiff, *Uttor* appellee and *Satuk* appellee, sued Ros Chea, who was defendant, *Uttor* appellant and *Satuk* appellant, demanding that the court order the defendant to surrender the land and the house to the plaintiff. The plaintiff through the lawyers asserted in oral argument in the court of first instance that he had purchased the land from a person in 2001 and built a house on the land. The plaintiff later permitted the defendant to reside in the house temporarily because the defendant promised to return the properties later if the plaintiff so requested. In support of the assertion, the plaintiff offered the title of possession[706] and witness as evidence for the court to examine. The defendant stated that he acknowledged that the plaintiff purchased the land and that the plaintiff transferred to him a particular amount of money to build the house on the land in dispute. However, he went further to assert that the money was not enough, so he added another 11, 000 U.S. dollars from his own pocket to complete the construction, yet the defendant offered no evidence of proof. The defendant went on to assert that the plaintiff had promised to let him and his family live on the properties permanently. In this connection and instead of denying the claim, the defendant requested that court order the plaintiff to compensate him 35,000 U.S. dollars in exchange for the surrender of the land and the house.

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[706] Title of possession is not a title of ownership. It is a certificate issued to the possessor or quasi-owner of a land who applies for the registration through the sporadic registration system provided by the State. Currently, Cambodia is implementing the systematic land registration to issue the first-generation title of ownership to the quasi-owners. Such registration is carried commonly for lands in a particular areas after thorough administrative procedures. Since the nationwide registration is not speedy as it needs to be carried out from one area after another, some quasi-owners apply for the registration of their lands. Such registration is known as sporadic registration through which the applicants' qualifications are investigated according to the Land Law. After those lands are registered through this sporadic registration, the applicants will be issued the certificates called "title of possession." They need this kind of title to transact their lands. They can later change for the title of ownership after the systematic registration is completed. While waiting for the reconstitution of the cadastral plan and land register, the competent authorities shall continue to issue titles of possession to the immovable property. The title is evidence of possession but is not in itself a title of ownership and is not indisputable. The titles of possession shall only constitute definitive and indisputable title of ownership of the property in the absence of any dispute as to the ownership of the property at the time the land register is created. In case of a disputed claim, the determination of the lawful possessor of the immovable property shall be based on the additional investigation of all relevant evidence. A title of possession to an immovable property is one kind of evidence but is not in itself determinative. See *Land Law*, 2001, Article 40.

The Phnom Penh Municipal Court ruled in favor of the plaintiff. While ordering the defendant to surrender the land and the house to the plaintiff, it dismissed the counter-claim of the defendant. In its decision stating:

> The defendant confirmed that the plaintiff purchased the land in dispute…and allowed him to reside and that the [plaintiff] later transferred the money to him to build the house on the disputed land in the promise to allow him to reside on the disputed land and house permanently, which proved that the properties did not belong to the defendant, while the defendant had only right of residence and right to use.[707]

From this brief reasoning, the court based its decision on the facts asserted by the plaintiff which were later acknowledged by the defendant to determine the ownership right of the plaintiff and the obligation to surrender the properties based on this right. The assertion of the facts made in the oral argument stage was consistent with the statement of the defendant. If such statement by the defendant resulted in him losing this case, it was a disadvantageous statement. Under Japanese theories and practices, such consistency of the assertion and the statement and the disadvantageousness of the statement of the fact as in this case would constitute an admission. However, the Phnom Penh Municipal Court did not use the term admission in its judgment.

Above all, even if it might have been admission in this case, then it was not judicial admission which serves binding effects the same as one under Japanese or American practices. The reason for such a presumption in this case was that the court carried the examination of witnesses offered by both sides. The testimonies of these witnesses confirmed the existence of the facts asserted by the plaintiff, which the defendant adopted later. In this regard, one could infer that the court based its decision concerning the existence of the facts asserted by plaintiff and adopted by the defendant on the evidence. Therefore, the consistency of the assertion and the adoption of the existence of facts made in the oral argument did not constitute a judicial admission that had a binding effect on the court. Thus, this practice was different from the concept of judicial admission under the Japanese and American jurisdictions.

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[707] *Srey Vat v. Ros Chea* 04-05 (Phnom Penh Municipal Court 2007).

The defendant made an *Uttor* appeal to the Appellate Court. The following summary of the case and the decision was based on *Srey Vat v. Ros Chea* App. Ct (App. Ct. 2007). Through this *Uttor* appeal, the assertions and statements made by parties at the oral argument at the Appellate Court made the disputed facts more apparent. The plaintiff asserted that he came to visit the defendant in Cambodia in 2001. The appellant suggested to him to buy a plot of land. Once the plaintiff returned to the United States, he decided to transfer the amount of 8,000 U.S. dollars to the defendant to purchase the land. Later, the plaintiff decided to build a house on that land. The plaintiff then decided to transfer the total amount of 18,000 U.S. dollars to the defendant and to another person separately to pay for construction fees. This time when the plaintiff visited Cambodia, the defendant refused to allow him to stay in his house. The plaintiff, therefore, lodged a complaint at the Phnom Penh Municipal Court to request the court to order the defendant to surrender the land and the house to him. The plaintiff asked the Appellate Court to examine the land registration documents issued by the Land Cadastral Office that he offered at the court of first instance.

The defendant at the court of first instance stated through his lawyer that the appellee asked him to buy the land with the plaintiff's money while the plaintiff promised to allow him to stay permanently on the land. The defendant also contributed 500 U.S. dollars for the total purchase price of 8,500 U.S. dollars. The defendant later asked for some money from the plaintiff to build the house on the land. The defendant also stated that he added another 4, 000 U.S. dollars in addition to the 18, 000 U.S. dollars transferred to him by the plaintiff for the complete costs of construction. The defendant stated that the total amount for land purchase was 8, 500 U.S. dollars, while the total amount that the defendant spent on both purchase of the land and house construction amounted to 11, 000 U.S. dollars. The defendant requested the court to reverse the judgment.

The Appellate Court did not conduct oral argument to listen and understand the new claims and defenses of the parties, but rather the oral argument concerning the same issues that were asserted at the first instance court. The Appellate Court upheld the decision of the Phnom Penh Municipal court. The court reasoned that the defendant's lawyer acknowledged the facts at the oral argument at the appeal proceeding. The court went further to hail the decision of the court of first instance that the former decision was made without errors based on the examination of evidence and that the Appellate Court agreed to the reasoning

provided by the said court. The defendant made a *Satuk* appeal to the Supreme Court. The Supreme Court reached the same decision to uphold the judgments and reasoning of the Phnom Penh Municipal Court and the Appellate Court.

The issues centered on the decisions of these courts which were concerned with the facts that the "plaintiff transferred the money to the defendant to buy the land and the house" and the "plaintiff allowed the defendant to live on the disputed properties."[708] Although these facts might not be the grounds for the decision to presume the ownership right of the plaintiff that led to the courts' orders to demand the defendant to surrender the properties to the plaintiff, the discussions here are limited only to whether the concept of judicial admission ever existed in these decisions. In this case, the concept of judicial admission did not exist, not because the courts did not use the term "admission" or phrase "defendant admitted the facts asserted by plaintiff," but because of the way these courts treated the assertions of each party. If the concept of judicial admission had ever existed, then the courts should have reasoned that the defendant had admitted the facts (plaintiff purchased the land" and "plaintiff built the house) as asserted by the plaintiff. However, though the plaintiff asserted these facts, and the defendant adopted them in his statement in the oral arguments at the Phnom Penh Municipal Court and the Appellate Court, the courts determined their existence based on the evidences offered by the parties. Thus, the ground for the presumption of the existence of these facts was evidence not admission. If the court had ever construed that judicial admission existed through the consistency of the statements of the plaintiff and defendant, then Article 123 (2)[709] of the Code of Civil Procedure of Cambodia might have been applied which meant courts had to base their decisions on the facts based on admission not evidences. Another case may confirm the court practice in handling the facts acknowledged by the adverse party, but not regarded as admission.

Case 2: *Sokha v. Chin Kimheang* Supreme Court's judgment number 29 dated 27 January 2009 concerning monetary claim. The Supreme Court upheld the decision of the Appellate Court that sustained the decision of the Phnom Penh Municipal Court. The court reached such a decision based on the same

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[708] *Srey Vat v. Ros Chea* PP. App., 3 (Phnom Penh Appellate Court 2007).
[709] *Cambodian Code of Civil Procedure*, Article 123 (2).

conclusion of fact that "the defendant acknowledged that she borrowed the money from the plaintiff." This fact was the basis of the judgments rendered by the first instance court and the Appellate Court.

The following summary of the case and discussions are based on the *Sokha v. Chin Kimheang* Phnom Penh Municipal Court's judgment number 84 dated 20 June 2006. Mr. Sokha, plaintiff, *Uttor* appellee and *Satuk* appellee, filed a complaint to the court requesting that it order Ms. Chin Kimheang, defendant, *Uttor* appellant, *Satuk* appellant, to repay him 8,720 U.S. dollars, the amount that he alleged the defendant had borrowed from him. Together with this request, the plaintiff also demanded that the court order the defendant to pay interest and late payment damages amounting to 3,000 U.S. dollars, or permit the compulsory sale against the defendant's house to satisfy the claim. In the oral argument, the plaintiff asserted that he lent the defendant the amount of 8,720 U.S. dollars and that the defendant had set up her house as a security. The loan and security contracts they made was on 30 March 2006. The plaintiff offered two witnesses for the examination by the court. In the oral argument, the defendant stated that she acknowledged the facts of the loan and security contracts as asserted by the plaintiff. However, she beseeched the court to allow her to pay the plaintiff 150 U.S. dollars per month.

The Phnom Penh Municipal Court approved the claim of the plaintiff by ordering the defendant to repay the amount of 8,720 U.S. dollars and 4,000,000 riels as the principal and interests to the plaintiff. The decision went further by dictating that in the event that the defendant failed to pay after the judgment became final and binding, then the house would be surrendered as payment for the loan. Without giving any reasoning in details, the court ruled that the defendant owed the plaintiff because she acknowledged the loan contract and the security contract. The court was convinced by the testimonies of the witnesses examined at the oral hearing. The defendant made an *Uttor* appeal. However, the Appellate Court upheld the former judgment. This court reached the same conclusion after conducting the oral argument proceeding the court deemed that the defendant did owe the plaintiff, as the defendant herself stated to recognize the loan while at the same time the defendant asked this court to approve her suggestion about the periodical payment of 150 U.S. dollars per month.[710] The Supreme Court in maintaining the decisions

[710] *Sokha v. Chin Kimheang* 4 (PP. App. Ct. 2007).

rendered by the lower courts reasoned similarly that the defendant had acknowledged that she borrowed the money from the plaintiff as stated in the 30 March 2006 contract.[711] Through these courts' reasoning, the court seemed to base their decision on the facts that the plaintiff asserted which the defendant adopted at the oral argument proceeding.

However, the decisions of the courts based on this fact did not produce any concept about judicial admission. Instead of saying that "the defendant admitted the fact alleged by the plaintiff," the courts expressed that "the defendant acknowledged the fact alleged by the plaintiff." Because of the treatment of the courts concerning the acknowledged facts, the courts seemed to have not presumed the existence of fact concerning loan based on what could have been an admission by the defendant, but the courts grounded the presumption on the evidence. If the concept of judicial admission ever existed and had been established in this case, the courts would not have examined the evidence but rather would consider it as admission that could have bound both the courts and the parties as stipulated by the Article 123 of the Code of Civil Procedure of Cambodia. Thus, the acknowledgment by the defendant of the fact alleged by the plaintiff was not an admission. If this acknowledgment was not a judicial admission, then the parties could easily revise the assertion or statement. However, if the courts refuse such a revision, then it might possibly to construe that the court would have treated this acknowledgment as judicial admission.

Case 3: *Dy E v. Touch Yang* Supreme Court's judgment number 341 dated 14 September 2010 concerning a monetary claim. The following summary is based on this case. In correcting the error made by the lower courts, the Supreme Court adjudicated based on the acknowledgement by the defendant on two important facts asserted by the plaintiff. The Supreme Court still maintained the usage of the term "acknowledgment" of facts although its effect should have made it judicial admission because the court refused to permit the defendant to withdraw its statement to adopt the assertion by the plaintiff. According to the extract briefed in the Supreme Court's judgment, Mr. Dy E, plaintiff (who was *Uttor* appellee and *Satuk* appellee) lodged a complaint with Banteay Meanchey Provincial Court against Mr. Touh Yang, defendant (who was*Uttor* appellant and *Satuk* appellant). The plaintiff requested that the court order the

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[711] *Sokha v. Chin Kimheang* 4 (Supp. Ct. 2009).

defendant to pay him the principal money and interests based on a loan contract. The plaintiff alleged that he lent the defendant 45,000 bahts[712] with 5 % (2,500 baht) monthly interest rate. According to the plaintiff, the loan period was ten months starting from 18 March 2001 to 18 January 2010. As claimed by the plaintiff, the written contract was concluded on 24 March 2001 with the agreement that the defendant offered a house as security. In the court, of first instance the plaintiff asserted that defendant had never paid in compliance to the contract.

The defendant agreed to some of the allegations made by the plaintiff. He acknowledged that he borrowed and received the amount of 45,000 bahts from the plaintiff and agreed to pay 2,500- baht monthly interest rate. Although the defendant claimed that he regularly paid the interest and made the final payment of the 45,000-baht principal on 18 January 2001, he could not recall the total amount he had paid to the plaintiff. He went on to tell the court that he did not receive any receipts of payment from the plaintiff.

The Beanteay Meanchey Provincial Court ruled in the favor of the plaintiff ordering the defendant to pay the 45,000-baht principal. However, since the contractual interest rate (5 % per month) was against the statutory rate (5 % per year),[713] the court ordered the defendant to pay 5% interest calculated based on the 45, 000 principal for the term starting from the delivery of money up to the date of actual payment based on the effect of this judgment. The defendant appealed the decision. In the oral argument in the Appellate Court, the plaintiff made the statement that he had received the total amount of 6, 500 baht as the payment of the interest made by the defendant. Therefore, the Appellate Court revised the judgment of the provincial court. The decision took the amount acknowledged by the plaintiff as the basis for calculation the amount to be paid to the plaintiff by the defendant. The defendant made the *Satuk* appeal to the Supreme Court. Although the Supreme Court found that the Appellate Court erred in calculating the amount to be paid by the defendant to the plaintiff, the court shared the same reasoning. The judgment read:

> This court deemed that the defendant acknowledged the authenticity of the loan contract concluded on 24 March 2001 and the delivery of money by the plaintiff on 18 March 2001 as asserted by the

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[712] Bath is the Thai currency. Usually Cambodians living in the provinces or cities close to borders trade with their neighbors in the *Riel,* or with the foreign currencies, such as Thai *Baths* or U.S. dollars.
[713] *Contract and Other Liabilities*, 1988, Article 51.

plaintiff. Thus, the defendant had established the rights and obligations with the plaintiff according the contents of the contract that it concluded.

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… as for the assertions of the defendant that it had paid both the 45, 000 baht principal and the total amount of 25, 000 baht for the 10-month interest to the plaintiff which were denied by the plaintiff, the defendant should have proved those facts. However, because of the failure of proof, such assertions could not be held as truth, yet it could be implied that the defendant acknowledge that it borrowed 45, 000 baht from the plaintiff.[714]

The court went further to provide in its reasoning in the judgment that:

[Because] the plaintiff had acknowledged that it received the amount of 6,500 bahts as the payment made the defendant, that acknowledge amount should be [considered when the calculation of the payment to be made to the plaintiff was made]….

… therefore, the decision of the Appellate Court was appropriate although it erred in the calculation which was not related to the grounds of its decision.[715]

There are two main issues for the discussions concerning this case. First, with regard to the issue related to the statement of the plaintiff who voluntarily acknowledged the existence of the 6,500-baht payment. The judgment of the Supreme Court was not clear if the defendant stated that fact (about the payment) and the plaintiff adopted it later. Nonetheless, it could be that the plaintiff made the statement because the defendant still maintained his statements that he had paid the entire principal (45, 000 bahts) and the interest (2,500 bahts) to the plaintiff as required by the contract already.[716] If this were true, then the judicial admission should not have been established from the viewpoint of Japanese theory because only plaintiff stated that fact, while the defendant did not adopt that statement, as he still maintained that he had completely paid the principal and the interests. Therefore, if no judicial admission concerning this 6,500-baht payment fact was ever established, then the judge should not have considered the fact either.

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[714] *Dy E v. Touch Yang* Supp. Ct. 1, 4-5 (Supp. Ct. 2010).
[715] Ibid., 5-6.
[716] Ibid., 4.

Nevertheless, according to the Supreme Court's judgment the fact about the 6,500-baht payment bound the court because the courts considered that statement and made it the basis of the judgments.

The second issue concerns with the facts about the contract and the delivery of the money. If the court complied with the Japanese theory, the admissions related to these facts would have taken place even if the courts did not rule, "the defendant admitted that he concluded the loan contract with the plaintiff and that he received the amount of 45, 000 baht from the plaintiff." There is quite a few reasons for this connotation. First, the allegations and the acknowledgment were made at oral argument. Second, the acknowledgment made by defendant was disadvantageous to him as the court deemed based on the acknowledgment that he concluded the loan contract with the plaintiff and had received the amount of 45, 000 baht. Third, the courts did not require any examination of evidences to prove the allegations of the plaintiff. On the contrary, courts determined the existence of the loan and the delivery of 45,000-baht principal based on the acknowledgement of the defendant. Nevertheless, only the term "acknowledgment" appeared in the courts' judgments, while the courts seemed to be bound by the effects of judicial admission. The basis for this binding should be the Article 123 of the Code of Civil Procedure, but the courts did not indicate that provision in its decision to determine the existences of these facts based on the acknowledge of the defendant.

In conclusion, although the term "judicial admission" was not used in the courts' decisions in this case, the court recognized the binding effect of the acknowledgment of the parties. This acknowledgment can be the consistency of the allegations and the statement of the parties (related to the loan contract and money delivery), and the only statement made by one party which was not adopted by the adverse party (the case of the statement admitting the receipt of 6,500 baht as payment made by the defendant). The former could have been the judicial admission under Japanese theory, while the latter was merely a simple assertion that the courts should not have bound the courts.

Case 4: *Huy Huot v. Ran Vanna* Supreme Court's judgment number 112 dated 23 March 2010 concerning a monetary claim. The plaintiff lodged a complaint at the Kampong Cham Provincial Court requesting the court to order the defendant to pay him 11,880 U.S. dollar and 2,000 U.S. dollar as

compensation for the breach of contract. According the allegations in the complaint, the plaintiff asserted that he concluded a work contract with the defendant on 1 May 2006. The contract stipulated that the defendant bore the obligation to grow rubber plants for the plaintiff on a farmland, and the defendant ensured that those these plants grew well otherwise the defendant would remedy the damages three times as much as the plantation costs. The Kampong Cham Provincial Court ruled in the favor of the plaintiff and ordered the defendant to pay the costs of the plantation and the damages to the plaintiff. The defendant appealed the decision. However, the Appellate Court affirmed the judgment of the court of first instance. The defendant made a *Satuk* appeal against the decision of the Appellate Court. The details of the defenses made by the defendant in both the first and second instance courts cannot be analyzed as they were not highlighted in the judgment of the Supreme Court.

Nonetheless, the Supreme Court withheld the decision of the Appellate Court and conducted s separate oral argument. According to the summary provided in the written judgment of the Supreme Court, the parties made allegations and defenses as follows. The defendant argued that the lower courts did not take into account the facts that he provided as defense against the claim of the plaintiff. The defendant asserted that he abided by the contract, while the plaintiff disagreed with the claim. The defendant went on to assert that according to the contract, the plaintiff assumed the obligation to plow the land so that he could do the plantation work for the plaintiff on the plowed land. Nevertheless, the plaintiff failed to do the plowing and this resulted in the planted rubber plants to die one after another. The defendant asserted further that after he told the plaintiff that he would do the replanting, the plaintiff neglected his offer and instead worked plantation on his own. The defendant recognized that he concluded two work contracts with the plaintiff: one was made on 28 September 2005, and the other was on 1 May 2006. The defendant requested that the court reverse the Appellate Court's decision and remand it to be retried as he agreed to redo the plantation but not the pay damages. The plaintiff insisted that the Supreme Court maintain the decision of the Appellate Court because the contract made it clear that whoever failed to assume an obligation that resulted in the loss of interests of the other must remedy the situation three times the damages caused by such failure.

The Supreme Court reversed the judgment of the Appellate Court and remanded the case. In ruling that the decision of the lower court was inappropriate, the Supreme Court's judgment noted that the lower courts failed to take into account the allegation of the defense. The Supreme Court expressed that the plaintiff did not dispute the statement by the defendants that "he agreed to redo the plantation to the extent that necessary, but the plaintiff bought the new rubber plants and did the plantation by itself."[717] Therefore, the Supreme Court regarded this statement as true, which meant that the negligence of the plaintiff caused the inconvenience for the defendant to perform his obligation.[718]

The reasoning of the Supreme Court concerning the silence of the plaintiff in relation to the statement made by the defendant construed that the statement should have bound the courts because the plaintiff implicitly admitted it by not disputing it. If the Japanese concept of judicial admission were applied to this case, the statement by the defendant concerning the facts that "the defendant offered to remedy the situation constituted a judicial admission. Moreover, the effect of judicial admission pertaining to these facts could have taken place because the Supreme Court ruled that the court took this statement as true as the plaintiff did not dispute it, and the court decided to reverse the Appellate Court's judgment and remanded the case. In other words, the Supreme Court's reasoning translated the understanding that the lower courts' decisions should have regarded the statement of the defendant. To elaborate, the facts admitted by the plaintiff should have bound the courts.

Although the Supreme Court did not use the term "admission," it could be inferred that the court deemed that the judicial admission concerning the facts asserted by the defendant were established as the result of the failure to dispute of the plaintiff, and they should have bound the courts. Therefore, the lower courts should have taken the admission as the basis for their judgments. From the review of this case, a vague conception of judicial admission emerged in the Supreme Court's practices although the court did not clearly define what judicial admission was. Furthermore, in order to assume whether or not the concept of judicial admission has existed in the court practices, one must look into the uniform treatment of the Cambodian courts on the acknowledged facts to see if these facts bound the parties and the courts.

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[717] *Huy Huot v. Ran Vanna* Supp. Ct. 1, 4 (Supp. Ct. 2010).
[718] Ibid.

Case 5: *Chhoeut Chhany v. Srey Pan* Supreme Court's judgment number 151 dated 28 April 2009 concerning a monetary claim. The plaintiff lodged a complaint at the Battambang Provincial Court on 1 November 2006 requesting the court to order the defendant to repay a loan. The plaintiff alleged that the defendant concluded two loan contracts with her. The first contract was made on 16 February 2006 in which the sum of the principal was 4, 000, 000 *Riels* at a 7 % of monthly interest rate. The due date for the payment was 16 February 2008. The second contract was made on 30 April 2006 in which the sum of the principal was 4,380,000 riels with the same 7% of monthly interest rate. The due date for the payment stipulated in the second contract was 30 September 2006. The defendant offered a piece of land as title to secure the claims of the plaintiff.[719] In the complaint the plaintiff requested the court to order the defendant to pay her the total amount principal of 8,380,000 riels and interests according to the law (statutory interest rate was 5 % per year) and 50,000 riels compensation.

The court of first instance approved all the claims of the plaintiff, but the defendant appealed the decision. In turn, the Appellate Court affirmed the decision of the first instance court. The defendant filed a *Satuk* appeal to the Supreme Court. The summary of the Supreme Court's judgment failed to indicate the assertions or statements made by the defendant, the attempt to track back to the defenses offered by the defendant was impossible. However, from the indication in the judgment of this court, the defendant offered the defense against the claim of the plaintiff in the answer provided to the Supreme Court. The defendant acknowledged the contract concluded on 18 February 2006 and raised that the plaintiff was entitled to only 4,000,000 riels as claim among which 2,000,000 riels was the principal money in the loan for consumption contract. The defendant denied the allegation that she concluded the contract dated 30 April 2006 concerning the 8,380,000 riels (sic). In the decision to uphold the judgment of the Appellate Court, the Supreme Court noted that, "the defense offered by the defendant was not appropriate."[720] The court made such a conclusion based on two grounds. First, the court indicated that the defendant stated in the compromise proceeding carried out on 21 November 2006 to acknowledge the authenticity of the

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[719] This kind of practice to provide security of a debt is called "gage" provided by Land Law 2001 of Cambodia. Gage is *Gage* is a contract concluded in order to guarantee the payment of a debt, pursuant to which the debtor remits to his or her creditor not the property itself but the ownership title of the property that was recorded in the Cadastral Register. *See Land Law*, Article 219.

[720] *Chhoeut Chhany v. Srey Pan* Supp. Ct. 1, 3 (Supp. Ct. 2009).

contracts concluded on 18 February 2006 and 30 April 2006.[721] In other words, the defendant admitted the existence of the two contracts. Second, the defendant failed to prove her denial (that she borrowed only 2,000,000 riels from the plaintiff).[722]

The indication of the Supreme Court seemed to convey a message that the courts based their decisions on the judicial admission established to the facts related to the contracts. Nevertheless, it was extremely vague if the court regarded the previous statement of the defendant as judicial admission and that such admission bore the conclusive effects on the court and the parties. Any precise assumption about the court's conception on the judicial admission in this case is premature. On the one hand, through the indication that "the defendant failed to prove her denial (that she borrowed only 2,000,000 riels from the plaintiff)," the court seemed to require that the defendant must prove her revised statement (that she borrowed only 2,000,000 riels from the plaintiff). Therefore, if the defendant could do so, she would have been able to withdraw her acknowledgment previously made pertaining to the existence of the contract concluded on 30 April 2006 (concerning the 4,380,000 riels). In other words, the defendant needed to prove that the acknowledgement was false by proving that the latter statement was true. However, the defendant failed to do so which mean she was bound by her previous acknowledgment that she concluded the second loan for consumption contract (dated 30 April 2006) with the plaintiff. This means a judicial admission was established which gave rise to the effect that bound the admitting party and the court.

On the other hand, it the failure of the defendant did not translate that the defendant established a judicial admission for the plaintiff, but the court rather treated the statement to acknowledge the authenticity and the existence of the second contract as evidence. The ground for this assumption is that the plaintiff asserted the existence of a second contract, while presenting it to the court as evidence, while the defendant denied that its authenticity. Although the defendant later agreed or admitted that she concluded the second contract with the plaintiff which meant that she acknowledged its authenticity, such acknowledgment was made in the stage where the court attempted to effect the compromise settlement. Under the Code of Civil Procedure of Cambodia, the court can attempt to affect a compromise settlement at

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[721] Ibid., 4.
[722] Ibid., 3.

any stage of the litigation, including the date for the preparatory proceedings for oral argument.[723] However, this dissertation could not confirm from the judgment of the court which resulted in the lack of understanding if the attempt for the compromise was made in the preparatory proceedings for oral argument or in the oral argument proceeding. A part from this, under the Japanese theory, only the assertions and the statement made at the preparatory proceedings or at oral argument that can constitute a judicial admission. Thus, the statement made at any stage of proceedings out of these two stages will be valued as evidence. If it is evidence, the court can choose to believe in it or to presume it is not a fact. Similarly, in this case, even if the courts based on the acknowledgement of the defendant related to the second contract, such acknowledgement should have been treated only as evidence. Even if the courts chose to presume the existence of the second contract based on this evidence, the court could not rely on any other evidences rather than the statement of the defendant at that compromise date.

Therefore, if Japanese theory applied to this case, the acknowledgment pertaining to the second contract should have been a judicial admission if it were made at either preparatory proceeding or at oral argument. As a result, the revised statement to challenge the former statement made by the defendant was an attempt to withdraw the established admission. The indication of the Supreme Court could roughly provide the conclusion that the withdrawal would have been permitted if the defendant were able to prove that the admission was false by the defendant's ability to prove that the revised statement was correct. However, since the defendant failed to prove the later statement, the court regarded the former statement as true. Nonetheless, even if the court construed that the former statement of the defendant was true, it did not mean that the parties established a judicial admission related to the fact about the second contract because the court's construction of the existence of fact was based on the statement of the defendant made at the compromise date. Such a statement made out of the preparatory proceeding or oral argument should be treated only as evidence. Above all, the courts must utilize the same term, admission, as employed in the law in order to apply the provisions of the law.

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[723] *Cambodian Code of Civil Procedure*, Articles 97 and 104.

III. Conclusion

In conclusion, no Cambodian scholar has ever developed the concept of judicial admission. Similarly, the judicial decisions have not given rise to the development of the notion of judicial admission. From the case reviews, this dissertation can conclude that the term "admission[724]" does not exist in court practices. However, Cambodian courts use the term "acknowledgment[725]" to mean that a party accepts the facts or issues that the other party alleges. According to the case reviews above, an acknowledgment was the act of a party that accepts the fact alleged by the adverse party as truth. Such acknowledgment usually caused disadvantages to the parties who made the acknowledgment when courts employed it as the basis for the judgment. From the reviews of the cases, parties usually made an acknowledgment in the oral argument stage of the proceedings. Therefore, if the Japanese theory applied to the acknowledgment of the parties that Cambodian courts recognized, Cambodian parties could establish such an acknowledgement in the same manner that Japanese parties made a judicial admission under the Japanese civil procedure system.

However, it is uncertain if such "acknowledgment" serves the same function and provides the same binding effects as "judicial admission" under Japanese and American civil procedure systems does. The conclusion about the uncertainty of the binding effects of the "acknowledgment" that the parties make bases on two aspects.

First aspect concerns the binding effect on court. The binding effect of "acknowledgment" on the courts was uncertain. The binding effect on the courts of the acknowledgment in all the cases that this dissertation reviewed was clear because the court confirmed that the defendants acknowledged the facts alleged by the plaintiffs (for example, in case 1, case 2 and case 3), but at the same time the courts admitted the evidences offered by the plaintiffs. Although the courts stated in their reasoning to recognize the acknowledgments of the defendants, such recognition by the courts did not translate the understanding that the acknowledgments of those defendant bound the courts because the courts did not base their decisions about the facts only on the acknowledgments, but the courts did examine the evidences. What would

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[724] It is translated into Cambodian Code of Civil Procedure as, "*kārsārbhāb*." *See* Ibid., Article 123.
[725] In the article concerning the abandonment and acknowledgment of claim, this term "acknowledgment" is translated into Khmer language as, "*kāddualskāl'*. " *See* Ibid., Article 221.

happen if the courts did not use the acknowledgment of the defendants? Could the courts have reached different decisions based on the result of the examination of evidences? If the court could have reached different decision about the facts based on the result of examination of the evidences, it could be then appropriate to conclude that the court were bound by the effects of the acknowledgment. In contrast, if the courts would reach the same decisions on facts based on the result of the examination of the evidences, there would be no way to conclude that the effects of the acknowledgments of the defendants bound the courts. If the effects of the acknowledgments of the defendants had bound the courts, the courts should have ruled out the examination of evidences offered by the plaintiffs because the acknowledgements of the defendants alone were enough for the courts to recognize the truth.

The other issue that makes this dissertation find it hard to conclude that an acknowledgment has binding effect on courts is the issue concerns with the submission of evidence to prove the existence of a fact after parties make an acknowledgment. In the case reviews above, all of the plaintiffs offered evidences before their statements at the preparatory proceedings for oral argument or oral argument date where defendants made acknowledgments. The issue is what would happen if the parties offer evidences to prove a fact that they had already acknowledged? If the courts refused to examine, but rather based their decisions about fact only on these acknowledgments, it would be appropriate for this dissertation to conclude that the acknowledgment had the binding effect on courts. However, if the court admitted to examine such kind of evidences, it meant that the acknowledgment served no function and no binding effect on court as the judicial admission did. Nonetheless, this was merely a hypothesis, as this dissertation could not confirm the courts' stand from the case reviews above.

Second aspect relates to the binding effect on parties. The acknowledgment seemed to have binding effect on parties, especially the acknowledging party because in one among the cases above that this dissertation reviewed, the Supreme Court refused to permit the withdrawal requested by the defendant (case 5). However, the Supreme Court ruled that in order to withdraw the acknowledgment of the fact that the defendant made, the defendant needed to prove that the acknowledgment was false, and the defendant needed to prove such falsity by proving that the fact that the defendant later asserted was true. From the reasoning of the Supreme Court, it seemed that the acknowledgment had binding effect on the

acknowledging party. However, this conclusion is still premature. The courts, Battambang Provincial Court, the Appellate Court and the Supreme Court, did not purely recognize the acknowledgment based on the assertion of the plaintiff and the statement of the defendant. However, the court still examined the evidences offered by the plaintiff as well. A part from this, the assertion of the plaintiff concerning the existence of the loan contract and the statement to adopt it by the defendant were made at the compromise settlement proceeding. Therefore, if the Japanese theories applied, the acknowledgment in this case did not serve the same function as judicial admission under Japanese civil procedure; thus, from the beginning the acknowledgment that served the same binding effect on parties as judicial admission did not exist. As a result, this dissertation could conclude that the courts recognized the existence of fact on loan contract asserted by the plaintiff based on the evidence offered by the plaintiff. Thus, the later assertion of the new fact by the defendant to challenge the former fact asserted by the plaintiff was merely a simple assertion of fact not the withdrawal of acknowledgment. In other words, both plaintiff and defendant alleged two different facts to support their claim and defense while trying to prove each fact respectively, while plaintiff could successfully did and the defendant failed. Thus, the failure to prove the falsity of the acknowledged fact was not the failure to comply with the prerequisite needed to withdraw an acknowledgment that had the binding effect on the defendant. It simply meant only that the defendant failed to prove the fact he asserted as a defense against the plaintiff.

In summary, the “acknowledgment” under Cambodian court practices does not serve the same function as the judicial admission in compliance with the spirit of Article 123 of the Code of Civil Procedure of Cambodia. The difference of the terminology usage and the handling of the “acknowledgment” by Cambodian courts can explain that the concept of judicial admission has not existed yet in the current practices in Cambodia. This conclusion not only bases on the reason that the Cambodian courts have not utilized the term “admission” in their judgments, but because of treatment by the courts on the methods of establishment and the effects of what the courts call “acknowledgment” of fact by parties.

For the conveniences of the readers, the author provides in this dissertation the comparison chart in the annex. The chart enlists the commonalities of American and Japanese judicial admissions system, while it also provides very brief presentation about similarities that the acknowledgment under Cambodian court

practices may have in comparison to the two systems. Together with these comparisons, the chart also provides the differences in relation to the judicial admissions and the acknowledgment in the three jurisdictions that this dissertation has analyzed so far (see annex).

CHAPTER FOUR: CAMBODIA AND THE NEED FOR JUDICIAL ADMISSION SYSTEM: TOWARDS AMERICAN ADVERSARY OR JAPANESE *BENRON SHUGI*

Given that theories of judicial admission in Cambodian civil procedure system have not been developed, and that leaving the problem unsolved will undermine the civil justice system, Cambodia needs a system of judicial admission in place. As discussed so far, judicial admission system serves important roles in civil procedure system. The vagueness of the judicial admission concepts can cause harm to civil justice system. Therefore, the development of the system and the theories are necessary to cure the current problem of Cambodian civil procedure. Such a development will give rise to the existence of a benchmark for court to determine the establishment of a judicial admission in the civil suits. Moreover, the benchmark for the determination will probably put a constraint on the court to avoid the arbitrary decision on the issues of judicial admission. In short, Cambodia is in need of a judicial admission system in our civil procedure system. However, the method to develop such a system of admission is the primary concern for civil justice because the establishment, the withdrawal, and the effects of an admission may vary depending on the system that Cambodia adopts to incorporate into her civil procedure system.

This dissertation has provided detailed discussions on the systems of judicial admission in civil procedure. The two systems take roots in the civil procedure of Japan and that of the United Sate of America. Although the American practices have some influences on the Japanese civil procedure historically, its judicial admission system is apparently different, both theoretically and practically, from that adopted in Japan. Cambodian policy makers should analyze the advantages and disadvantages of each system before deciding to adopt either one.

This chapter aims at analyzing these advantages and disadvantages. This chapter will come up with a recommendation to Cambodian policy makers on which system is appropriate. To attain this purpose, this chapter mainly focuses on the possibility and the challenges for the adoption of each admission system. The section will commence with a discussion on the possibilities and the challenges for the adoption of the American judicial admission by our Cambodian civil procedure from the above-mentioned three aspects. Those aspects include the technical, practical and theoretical aspects. Taking these aspects as bases, the

following discussions will be divided into two main sections. First section will focus on the adoption of American judicial admission system into Cambodian civil procedure system and the impropriety and challenges of the American system for Cambodia. Second section will provide analyses on the Japanese advantages in judicial admission system for Cambodian civil procedure system.

I. The Adoption of American Judicial Admission: Impropriety and Challenges

A detailed discussion on the American judicial admission system in the previous chapter shows that the adoption of American judicial admission to Cambodian civil procedure system is likely difficult or even impossible. There are quite a few reasons for the assumption about the difficulty or the impossibility of such adoption. First the adoption of the American system will greatly bring about the technical issues in the Cambodian civil procedure system. Second, it grounds on the logic that any attempt to adopt American system will face practical issues that require long-term treatment, which makes the adoption of the American judicial admission system, is not worthwhile Third, the differences in legal cultures between the America and Cambodia which will make the attempt to adopt the American ways of judicial admission difficult. The following discussions will present the arguments to support these points.

1. Technical Issues: Substantial Revisions of Cambodian Law

Any attempt to adopt the American ways of judicial admission into Cambodian civil procedure would inevitably require substantial revisions of the current civil procedure. These revisions would inevitably suggest the abolishment of some key provisions related to the establishment of judicial admission, and the revisions to introduce the American pretrial devices to accommodate the judicial admission system. The following subsections underline those possible revisions.

1.1. Revision or Abolishment of Article 123

The Code of Civil Procedure of Cambodia stipulates, "[f]acts admitted to by a party in court, and facts

the existence of which is obvious to the court, need not be proven by evidence."[726] In Cambodian civil procedure system, the judge must preside over the preparatory proceedings for oral argument (where the compromise attempt initiated by court may take place) and oral argument are all carried-out in the courtroom.[727] This provision in the civil procedure system acknowledges the admission to any fact made in the courtroom within the presence of a judge. Therefore, such admission is judicial, not only because of its effect that diminishes the necessity of proof on the admitted fact, but also because the way the admission must be established according to this provision.

On the contrary, none of the judicial admissions which have conclusive effects established under the American system is made in the courtroom with the presence of the judge. The establishment of those admissions is entrusted to the parties and their attorneys by way of exchanging pleadings and answer, agreements in the stipulations, and the service of written requests and responses. Hence, admissions constructed in compliance with one of these devices are extrajudicial, but serve the conclusive effects that bind court and the parties. Therefore, if the American ways of judicial admission were introduced to Cambodia, the country needed to revise this provision and neglected the necessity of having an admission established judicially.

1.2. Revision to Adopt Pleading System

As mentioned before, under the federal practice, pleadings is a device through which a judicial admission is established by parties in the civil suit. Such establishment of judicial admission is either the result of the answer to admit the allegations in the complaint or the failure by the other party to deny the allegations. However, Cambodia's current law does not have any provisions similar to these concerning the pleadings and answers as American law. In other words, Cambodian legal system has a fact-pleading requirement that plaintiff must plead sufficient facts at the outset of the case in order to win. Nonetheless, Cambodia Code of Civil Procedure fails to provide any means for the plaintiff to compel the production of the facts before the initiation of the case.

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[726] Ibid., Article 123.
[727] Ibid., Article 89.

In Cambodia, the current practice requires that the action commence simply by a plaintiff filing a written complaint with the court. The complaint must enter some matters that our law requires as a compulsion. These matters include the names and addresses of the parties, the names and addresses of their legal representatives, the contents of the main text of the judgment sought, and the facts necessary to specify the claim.[728] When the court deems that the written complaint furnishes these requirements, the court will serve the complaint against the defendant.[729] In principle, the court will set the court date, any time within 30 days from which the date the complaint is filed, for the first preparatory proceeding, for oral argument and for the summoning the parties to appear before the court for that purpose.[730]

The preparatory proceedings for oral argument are the tools for the preparation of the oral arguments, and are used to improve and facilitate the adjudication.[731] In order to attain these purposes, the Code of Civil Procedure of Cambodia authorizes the court to arrange and organize the allegations and arguments of the parties, clarify the points at issue in the case, and organize the evidence pertaining to points at issue, in order to make sure that a concentrated hearing should take place at oral argument.[732] As a result, the court can require parties to submit preparatory documents in connection with preparatory proceedings for oral argument or oral argument.[733] The documents must set forth offensive or defensive measures as well as statements in opposition to the other party.[734] The practices in this preparatory stage makes Cambodian procedure system resemble the civil law system where one of its fundamental is on the concept that the judiciary properly controls the quest for evidence in civil litigation.[735] Therefore, these practices are very different from the American ones that entrust all the production of facts and evidences to the parties and their lawyers through the pretrial devices, including the discovery.

There is a practice under Cambodian civil procedure system which may be similar to American

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[728] Ibid., Article 75.
[729] Ibid., Article 79.
[730] Ibid., Article 80.
[731] Japanese Working Group in charge of Drafting Code of Civil Procedure of Cambodia, *Seskti bnylá qaṃbi kram nĩ tividhi rṭṭhppveṇi bhāg 1: nĩ tividhi pṇtýṅ [Textbook on the Code of Civil Procedure of Cambodia-Part I: Litigation Procedure]* (Ministry of Justice of Cambodia, 2008), 73.
[732] *Cambodian Code of Civil Procedure*, Article 103.
[733] Ibid., Rule 101.
[734] Ibid.
[735] Hazard, "Discovery and the Role of the Judge in Civil Law Jurisdictions," 1024.

pleading. The Code of Civil Procedure of Cambodia requires that the defendant must enter into his or her preparatory documents the responses to the claims contained in plaintiff's complaint, as well as the admissions or the denials of the facts alleged in the complaint, facts that constitute affirmative defense and other statements.[736] However, the preparatory proceedings under Cambodian civil procedure are far different from the pleading.

First, the preparatory proceedings for oral argument are carried out in the courtroom and are chaired by a single judge or the panel consisting of three judges.[737] Thus, these proceedings are judicial. Second, Cambodian law does not provide a specific timeframe for the defendant to answer the complaint, but the court has the authority to set the time limit for the defendant to submit the initial preparatory document or a preparatory document containing allegations regarding a particular matter, or offering for examination of evidence regarding a particular matter.[738]

Although Cambodian law stipulates provisions governing the answer to the allegations, which are similar to those governing the pleading in American system, the effects resulting from the failure to answer have great difference from those arising as a result of the failure to answer the pleadings properly. Cambodian law stipulates, "[w]here a party does not make clear that such party contests a fact asserted by the adversary party at oral argument or at preparatory proceedings for oral argument, the party shall be deemed to have admitted such fact."[739] However, this provision also provides exemptions, as it further provides that the "court can determine, based on all of the circumstances surrounding the progress of and what has been presented at the trial, that the party contested the fact."[740] Furthermore, although a fact is deemed admitted as the result of the application of this provision, a party can still avoid such admission if the party states that he or she is ignorant of a fact alleged by the adversary party, such party must be presumed to have contested the alleged fact.[741] Thus, a deemed admission established under this provision serves different effects from one arising in the pleading process.

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[736] *Cambodian Code of Civil Procedure*, Rule 101.
[737] Ibid., Article 23.should have page numbers.
[738] Ibid., Article 102.
[739] Ibid., Article 96 (1).
[740] Ibid.??
[741] Ibid., Article 96 (2). (poor form to have so many ibid in this manner.

In general, at this preparatory stage, the court can issue an order regarding the offering of evidence or any other order that may be issued on a date for oral argument. The court can examine documentary evidence to the extent necessary to arrange or simplify disputed issues and evidence.[742] In short, at these proceedings, the judge(s) can hear the views of the parties or their lawyers, suggest the production of documents or the responses to the allegations, narrow the issues for the trial, and arrange witnesses for examination at the trial and documents necessary for the trial. The order for such preparations is a guideline for the trial without any conclusive effect, as in the American pre-trial order, as parties can still offer new facts and evidences at the oral argument stage.[743] However, in principle, parties are not allowed to do so after the conclusion of the preparatory proceedings for oral argument.[744]

A series of preparatory proceedings for oral argument may take place depending on the discretion of the court when it deems necessary for the preparation of the adjudication. At the conclusion of the final oral argument where the arrangement of the disputed issues and evidence is completed, the court will confirm the facts with the parties to be proven in subsequent examination of the evidence (at oral argument).[745] This pretrial procedure is more similar to the American pretrial conference than the pleadings.

Therefore, in order to accommodate the judicial admission system that applies under the American pleadings, Cambodia needs to revise all the concerned provisions that will surely change the structure of the law to pave it to be more like the pleading system. A part from these substantial revisions, Cambodia must provide more provisions on the formalities and time for serving and answering the complaints to enable the judicial admission to take place at the default of the answering party. The question is whether or not such substantial revisions are necessary and worth being considered by Cambodia.

1.3. Revision to Adopt the Stipulation System

As discussed previously, parties can establish judicial admission through the stipulation of their lawyers. Therefore, in order to accommodate the American way of judicial admission, Cambodia needs to

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[742] Ibid., Article 106.
[743] Ibid., Article 116 (3).
[744] Ibid., Article 108.
[745] Ibid., Article 107.

introduce the stipulation system to its civil procedure system as well. The necessity for such an introduction is because of the absence of the stipulation system in the current civil procedure system of Cambodia.

The current legal system provides two types of representation system in civil litigation, the legal representative and the appointed representative. A legal representative has the authority to represent a party in court and is granted this position not on the basis of the party's will, but by law or upon the decision of the court.[746] A legal representative conducts litigation mainly for and in lieu of the party who does not have the capacity to litigate.[747] For example, a parental figure may act on behalf of a minor child, while the general guardian (not necessary a lawyer) may act on behalf of the person under general guardianship.[748] The legal representative acts with the limited scope as specified by the substantial laws for the principal party. The appointed representative, however, acts in a broader limit on behalf of the principal parties.

The appointed representatives are selected by the will of the parties. These appointed representatives must be lawyers,[749] and parties cannot limit the scope of their representation unless in some exceptional cases.[750] The scope of the authority enjoyed by the appointed representative includes the filling of complaint, answering, intervention, cross-action, participation in a litigation [pending between third parties], appeal, settlement, or abandonment or acknowledgment of claims.[751] In addition to this broad scope of authority, the lawyers can make admission in the oral argument on behalf of the parties, unless the principal parties repudiate or revise such admission.[752] Hence, the lawyers under Cambodian civil procedure system can also establish a judicial admission, but that must be made at the oral argument stage which is different from the admission made by American lawyers through the stipulation system.

Under American practice, parties through their lawyers can stipulate about the modes of general discovery. As provided by Rule 29 of the Federal Rules of Civil Procedure, the parties can stipulate that a deposition may be taken before any person, at any time or place, in any notice, and in the manner specified,

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[746] Japanese Working Group in charge of Drafting Code of Civil Procedure of Cambodia, *Seskti bnylá qaṃbi kram nĭ tividhi rṭṭhppveṇi bhāg 1: nĭ tividhi pṇtỳṅ [Textbook on the Code of Civil Procedure of Cambodia-Part I: Litigation Procedure]*, 28.
[747] Ibid.
[748] *Cambodian Code of Civil Procedure*, Article 32 (3).
[749] Ibid., Article 53.
[750] Ibid., Article 54 (3).
[751] Ibid., Article 54.
[752] Ibid., Article 52.

and that such deposition may be used in the same way as any other deposition.[753] The parties may also stipulate to modify any procedures other than depositions that govern or limit discovery. However, a stipulation extending the time for any form of discovery must have court approval when it would interfere with the time set for completing discovery, for hearing a motion, or for trial.[754] Though a court has the ultimate power to order that discovery be accomplished in a manner other than stipulated, the parties may ordinarily control discovery by such stipulations.[755] The parties can make one or more of the types of enforceable stipulations listed below:[756]

1. A stipulation to commence early discovery, that is, prior to the discovery planning conference required by Rule 26(f), or to alter the deadlines for discovery;

2. A stipulation to the entry of a protective order to protect a party or other person against annoyance, embarrassment, oppression, or undue burden or expense;

3. A stipulation permitting service of more than 25 interrogatories;

4. A stipulation to have service of a request for production and inspection take place before the discovery planning conference required by Rule 26(f). Additionally, parties may stipulate that a written response to a request for production be served within a longer or shorter period than the 30 days normally required, provided that any extension does not interfere with a court-specified discovery cut-off date or scheduled hearing or trial; and

5. Stipulations relating to requests for admissions, including a stipulation that a written answer or objection to a request for admission must be served within a time other than the usual 30 days. Cite (needs proper blocking all sentences must line up with indent—there should be gaps as well.

Although stipulation may serve as a tool to control the modes of discovery to obtain which is not directly related to the fact on the merit of a particular case, the full effect to unambiguous terms expressed

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753 *Fed. R. Civ. P.*, Rule 29 (a).
754 Ibid., Rule 29 (b).
755 "Moore's Manual--Federal Practice and Procedure," *Mathew Bender & Company, Inc.* 2 (2010): § 15.09 [1] [b].
756 Ibid., § 15.09 [2].

in a stipulation that the court gives will affect the merit of the case.[757] For example, when American parties stipulate in writing how discovery will be conducted, they waive their rights under otherwise applicable federal rules.[758] Specifically, once a party enters into the pre-trial stipulation that the adversary party does not need to prove a certain fact in the case, the stipulation will bind the party who makes it, and the court will determine the existence of a particular fact without being based on evidence but on the stipulation.[759]

Hence, in order to adopt a judicial admission system through the American stipulation, Cambodia needs to revise some substantial provisions of its law to introduce the stipulation system that allows Cambodian lawyers to make admissions through the written agreement. Such revision will possibly cause the overhaul to Cambodian civil procedure, as not only provisions related to the authority of appointed representative alone must be revised, but Cambodia needs to also consider the preparation of some other substantial provisions relevant to the formalities of the agreement, the scope of its effect and the treatment by court concerning that agreement.

1.4. Revision to Adopt Request for Admissions

Among the devices provided by the American civil procedure system for judicial admission, the request for admissions may be the most appropriate one for Cambodia to adopt. The adoption of request for admission system as a mechanic for parties to establish judicial admission might not cause major changes to other current provisions of Cambodian law. Without the concern related to the reshuffle of the whole structure of the current law of Cambodia, request for admission might require only the construction of additional provisions as those provided in Rule 36. These additional provisions might include provisions related to scope of request, formalities for request and response, time for response, effect of not responding, type of and conditions for withdrawal. Such additions would be followed by the incorporation of the summary judgment and sanction system as discussed in previous sub-sections (of this dissertation). If judicial admission could be established through this form-oriented mechanism, such an admission could be used to solve the problem concerning the definition and the establishment of judicial admission under

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[757] Ibid., § 15.09 [3].
[758] Ibid.
[759] *Diapulse Corp. of America v. Birtcher Corp.*,362:.

current civil procedure system of Cambodia. However, the adoption of such judicial admission through this mechanism would still cause Cambodia a hard work in addition to what we are currently facing in practice.

This "American Rule" is more costly to American parties in civil suit because it requires a party that refuses to admit a fact without reasonable grounds to pay the proponent's attorney fees.[760] However, under this device, if, for example, a party does not admit a fact and the proponent must prove it at trial, the proponent may be awarded "the reasonable expenses of making that proof, including reasonable attorney's fees."[761] Moreover, empirical studies have shown that frequent use of this device has been relatively modest in comparison to use of other discovery ones.[762]

1.5. Revision to Adopt Summary Judgment

To accommodate American system of judicial admission, Cambodia needs to revise the current law and set up the summary judgment system. Rule 56 of the Federal Rules of Civil Procedure requires that the summary judgment be rendered at the request of a party when the pleading, the discovery and disclosure materials on file, and any affidavit show that there is no genuine issue as to any material fact and that the moving party is entitled to such judgment as a matter of law.[763] The languages of the rule translate that court decides the motion for a summary judgment of a party base on the submitted papers.[764] The court does not hear testimony.[765] Therefore, in order to support or oppose the motion, the parties must offer the fruits of the discovery process plus affidavit (statements of witnesses and interested parties made under oath) that the court is to read in order to determine whether there is a factual dispute requiring resolution by a trial of fact.[766] In other words, judicial admissions of facts as shown in the pleadings, stipulations by counsel, or through the answer to the request for admissions will be used as documents to submit to the court when a party files a motion for a summary judgment. The Court will base judicial admissions on those files to determine the non-existence of material facts and render the summary judgment without the

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[760] James, Hazard, and Leubsdorf, *Civil Procedure*, 303.
[761] Ibid. pg??
[762] Glaser, *Pretrial Discovery and the Adversary System*, 53.
[763] *Fed. R. Civ. P.*, Rule 56 (c) (2).
[764] Oakley and Perschbacher, *Civil Procedure*, chap. 8.IV.A.
[765] Ibid.
[766] Ibid.

trial of facts.

The concept of summary judgment is not familiar in Cambodian civil procedure. Under the current Code of Civil Procedure, there is only one type of judgment related to court's decision on the merit of a case. and is the final judgment. However, Cambodian law makes it clear about the necessity of oral argument. Cambodian law provides that "the court must hold oral argument proceedings before rendering a judgment on the claims."[767] The oral argument proceeding under our civil procedure may be the trial stage under American law. On the oral argument date, parties present the results of the preparatory proceedings for oral argument, which focuses on the clarification of facts or disputed points to be proven by evidence.[768] At this stage of the preceding, a court may allow parties to further allege facts and offer evidence as necessary. Such a chance for advancing the offensive or defensive measures will enable the parties to establish admissions in the open court with the presence of judges.[769] In the event that the court deems that no further trial is necessary, the court can conclude oral argument and issue a final judgment based on the result of the oral argument and evidentiary investigation.[770] Therefore, even if tall facts are admitted and there is no genuine issues related to the facts, then the court still needs to carry out the oral argument in order to render the judgment to conclude the case.

However, the current practices in Cambodia may share some formal similarities with the American counterpart's ones, but are substantially different. These practices can be found in the provisions exceptional to the practice concerning the necessity of oral argument for rendering the judgment. These exceptions include the judgment rendered without oral argument and the discontinuance of an action without ordinary judgment.

Under current Cambodian law, court may render a judgment without having to conduct the oral argument when the civil suit is legally defective and the plaintiff cannot cure that defect.[771] Such a measure is to dismiss the suit without consideration of the merit. It is, thus, similar to the American practice that a

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[767] *Cambodian Code of Civil Procedure*, Article 114.
[768] Ibid., Article 116.
[769] Ibid.
[770] Ibid., Article 180.
[771] Ibid., Article 81.

summary judgment is issued without trial of fact. However, the judgment dismissing the complaint under the Cambodian practice is chiefly different from the American practice because this mechanism does not aim at determining the merit of the case as the summary judgment.

The other exception is that Cambodian law permits the discontinuance of action without trial and without basing on judgment. This exception to the necessity for oral argument occurs when a party states to abandon the claim or to acknowledge the claim of the other. In such a case, the waiver of claim or the acknowledgment is entered into the protocol of the case which the court clerk produces.[772] The entry in the protocol has the same effect as a final and binding judgment and becomes the title of execution.[773] However, the party must carry out such an act of waiver or acknowledgment at the preparatory proceeding for oral argument date (may be pleading stage under American law) or at the oral argument date.[774] While this exception similarly negates the judgment as in the American practice, it still necessitates the oral argument that summary judgment excludes in the United States.

In summary, the current law of Cambodia does not have the summary judgment system to accommodate the American ways of judicial admission. In order to adopt such a judgment system, Cambodia needs to consider the major changes in the judgment system of her law. Such changes may require further reforms in the methods of producing judgments and appeal procedures against those judgments. Such changes are extensive and unlikely worthwhile.

One may argue that such substantial revisions are worthwhile in order that Cambodia can adopt American judicial admission system into her civil procedure system to hail the parties' roles in litigation and reduce the burden of judges getting involved in civil litigation. However, one also needs to consider the practicality of the system itself. Even if Cambodia may successfully reshuffle her law in such a great unnecessary extent, Cambodia will still face other major issues that may halt the application of the judicial admission system that Cambodia tries to adopt. The following subsections present these practical issues.

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[772] Ibid., Article 222.
[773] Ibid., Article 350.
[774] Ibid., Article 221.

2. Practical Issues: Costs and Lawyer Shortage

From the practical perspective, the adoption of the American ways of judicial admission proves to be difficult, and might result in an unworkable for Cambodian legal system. Such a conclusion is established on few grounds. First, the American way of judicial admission system is costly. Second, the adoption of such a system requires a number of lawyers which may be beyond what Cambodia can handle within the short run. Third, the adoption of such a system will require major substantial revisions of the current law. In addition to these three major constraints, other ancillary matters may also significantly contribute to such practical issues.

2.1. Cost Issues

The main characteristic of Cambodian legal system is the predictability of the litigation expenses and its modesty. Such predictability arises from the fact that parties can generally estimate the court costs and lawyer fees. According to the Code of Civil Procedure of Cambodia, the basic court costs are calculated by taking the amount of claim as the basis, the filing fees.[775] In addition to these basic costs, litigants can also predict other litigation expenses, such as court costs other than the filing fees and the party's costs.[776] The extra court costs are those necessary for court to conduct the juridical proceedings which include the costs for evidence investigation, documents delivery, travel expenses and lodging of judges and court clerks upon the investigation of facts or evidences and other procedural act during the litigation and actions to be carried out outside the courtroom.[777]

A party's costs, however, may include the expense incurred in producing documents such as complaints or other types of motions, preparatory documents for oral argument, and fees incurred in submitting such documents to the court.[778] A party's costs also extend to travel expenditures, per diem allowances, and the lodging costs incurred in connection with the appearance of the party and his or her

[775] Ibid., Article 61.
[776] Ibid., Articles 62, 63.
[777] Ibid., Article 62.
[778] Ibid., Article 63.

representative at court.[779] The Cambodian legal system applies the so-called "loser pays" rule[780] which suggests that the losing party be ordered by court to bear the litigation costs.[781] However, the adoption of the American judicial admission system into the Cambodian civil procedure one will make Cambodia's litigation system the unduly expensive.

The American judicial admission system is costly because the adversarial tactics in discovery and pretrial deposition cause additional expenses and delay.[782] The party seeking the establishment of the request for admissions will have to shoulder the great expense for such attempt, while the party on whom judicial admissions are sought to be established will have to bear tremendous costs to avoid such establishment. For example, the Federal Rules of Civil Procedure is expensive so the way of establishing the judicial admissions under the discovery devices becomes costly .[783] At least one empirical study has revealed that the externalities will result in inefficiently high discovery expenditures when a litigant must absorb the costs of responding to the discovery requests of his opponent.[784](your note only indicates one study) An externality refers to a cost or benefit resulting from an activity of a party who is a decision maker that does not accrue to that party and is thus "external" to his or her decision making process.[785] Glaser??also reported that the majority of litigants, especially the defendants believe that discovery makes litigant more expensive.[786]

Cambodia cannot avoid such high cost if it adopts the ways that judicial admissions may be established, especially ones through the request for admission as provided by the American civil procedure system. There are quite a few reasons for the presumption on such cost issues. These reasons are the payment of attorney fees and costs on proof to avoid admission in every case, the possible change of the current attorney fees payment culture, and the necessity for setting up sanction system to implement the

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779 Ibid.
780 Benjamin Kaplan, Arthur T. von Mehren, and Rudolf Schaefer, "Phases of German Civil Procedure II," *Harvard Law Review* 71, no. 8 (June 1958): 1462.
781 *Cambodian Code of Civil Procedure*, 64.
782 Schwarzer, "The Federal Rules, The Adversary Process, and Discovery Reform," 716.
783 James, Hazard, and Leubsdorf, *Civil Procedure*, 287.
784 "Discovery Abuse under the Federal Rules: Causes and Cures," *The Yale Law Journal* 92, no. 2 (December 1982): 352.
785 Jack Hirshleifer and Amihai Glazer, *Price Theory and Applications*, Fifth. (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1992), 452.
786 Glaser, *Pretrial Discovery and the Adversary System*, 177.

judicial admission system effectively.

2.1.1. Costs as a Result of the Need for Lawyers

In order to adopt the judicial admission system like the complicated one provided in the Federal Rules of Civil Procedure of America, Cambodian parties in civil suits always need lawyers to represent them in every case so that a judicial admission may or may not be established. In the request for admissions, for example, if one party in a civil suit attempts to serve the request for admissions of the other party, he or she may probably not be able to draft such a precise request in compliance with the requirements of the law. Parties to a suit in Cambodia cannot seek for the establishment of judicial admission in the formality-oriented judicial admission system and through such sophisticated procedures as provided for in the Federal Rules of Civil Procedure. Thus, to avoid defects concerning the form and the procedure for requesting and responding to the request, parties need to hire an attorney who is a legal professional with practicing skill regardless of the scale of the case and the amount of the claim. The need for assistance from such a legal professional requires the handsome payment depending on the case.

Beside the cost incurred upon the party who requests for admission, the American admission system also invokes the costs on the party who responds to the request. The responding party must also need to hire an attorney to help in dealing with the complex formalities for response so as to avoid the deemed admission. In addition to this attorney cost, the responding party must bear the burden of expenses incurred from the inquiry. As pointed out in a previous chapter, a responding party cannot merely state that he or she lacks of information or knowledge to truthfully admit or deny the request for admission. Such response is effective only when the responding party states that he or she has made reasonable inquiry.[787] The mere statement on the reasonable inquiry attempt is not enough, but the responding party must offer evidence to support his or her statement.[788] The failure to give any actual showing of reasonable inquiry will make the response inadequate,[789] which then results in the occurrence of deemed admission. Such inquiry required by the American judicial admission system causes unreasonable economic disadvantages to the responding

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[787] *Fed. R. Civ. P.*, Reule 36 (a) (4).
[788] Wilken, "Moore's Federal Practice-Civil," 36.11[5][d].
[789] *In re Sweeten*, 56:678.

party.

Cambodia could choose to adopt the judicial admission system through the pleadings, stipulations or request for admissions like the federal civil procedure without requiring that involvement of the attorneys to reduce litigation costs. However, the American experiences revealed that such system will never work effectively without the active involvement of the lawyers. Such ineffectiveness is caused by a few factors being ensconced in the American civil procedure system which include the passive role of judges, the limited ability of lawyers in the complex court procedures, and the excessive needs for lawyers.

Unlike that of the civil law judge who directs the investigation and production of documents and the formulation of issues for decision, the role of American judges has been traditionally passive.[790] Therefore, parties in the adversary process must prepare and present the cases through the complex procedures[791] However, American lawyers traditionally play an important role in preparing and presenting the cases on behalf of the parties in civil suits because of the limited ability of the parties[792] and because of the complexity of the American court proceedings.[793] Although parties can freely represent themselves, they can rarely do so successfully.[794] Because of such an important role given to lawyers in the American adversary system, the propriety and the effectiveness of the whole system depends on the attitude of the lawyers. From the American experience, if Cambodia were to adopt American ways of establishing judicial admissions, Cambodia would not be able to reduce the litigation expenses because of the necessity of lawyers to operate the system effectively.

The adoption of the American judicial admission system into the civil procedure system of Cambodia will give Cambodian lawyers a better role in the civil litigation. However, such adoption will give rise to the unwritten requirement for the parties to hire lawyers in any case. Such practice will simply increase the cost burdens on the parties and may likely discourage *bona fide* persons from filing civil suits that consist of moderate amount of claim. As a result, the system will not be widely used because of such undue burden,

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[790] Schwarzer, "The Federal Rules, The Adversary Process, and Discovery Reform," 709.
[791] Ibid., 706.
[792] Ibid., 709.
[793] James, Hazard, and Leubsdorf, *Civil Procedure*, 8.
[794] Ibid., 9.

or the parties in civil suits cannot utilize it effectively when they act attempt to act *pro se*.

2.1.2. Costs Accrued due to the Possible Change in Attorney Fees

In order to adopt the American system where admissions may be established in the pleading, through the discovery or through other means as discussed in the previous chapter, the system of payment to lawyers may also have to be changed to a more unfavorably costly one. Unlike in the United Sates where the attorneys work on an hourly or contingent fees basis,[795] Cambodian litigants pay a lump sum to the lawyers who represent them in a civil suit depending on the scale of the case. The payment will vary according to which level of litigation the lawyers represent the parties. For example, in a case in which a lawyer represents a party from the court of first instance to the Supreme Court will be charged more than in a similar case to Appellate Court.

Such a payment culture may have to be changed when adopting the American ways of judicial admission system. Lawyers may not be willing to charge their Cambodian clients based on a lump sum payment anymore because they can no longer predict the workload of the case they handle. The Cambodian lawyers may not be able to predict the burdens of exchanging the documents between the requesting party and the responding party. Therefore, such a workload may encourage the transition from the current fees payment system to the hourly basis one. Those lawyers will likely have to charge their clients on the hourly basis as their American counterparts. Such transition could lead to the economic burden for both the plaintiff and the defendant.

2.1.3. Costs as a Result of the Necessity of Establishing a Sanction System

In addition to the major costs to be incurred on litigants, the parties would likely suffer from high costs of litigation if Cambodia were to adopt the American judicial admission system. To adopt American judicial admission system means Cambodia also needs to adopt the sanction measures imposed against the party who obligated by law to respond to the request for admission. The loose treatment on such party will make

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[795] Jon C. Reitz, "Why We Probably Cannot Adopt the German Advantage in Civil Procedure," *Iowa Law Review* 75 (May 1990): 1003.

the American system of judicial admission less or not effective. These sanctions are stipulated in the Federal Rules of Civil Procedure to be imposed by a court on the party who fails to make disclosure or who refuses to cooperate in discovery.[796] In particular, according to these federal rules, any party who fails to admit the points requested and if proven true by the requesting party, the court could sanction the responding party by order him or her to pay the expenses that include the attorney's fees incurred in making that proof.[797]

The complex system of judicial admission is not economical. The adoption of such a system will make civil litigation excessively costly. As a result, judicial admission does not serve the economic purpose of civil litigation. Historically, the recognition of the judicial admission system was to avoid the unnecessary controversy, to obviate the imposition of a continuance, or to limit the introduction of evidence at trial.[798] The strong impetus for attorneys to concede issues in litigations is the time consuming, expenses and the unpleasantness of the judicial process.[799] However, the current practice under the American civil procedure system may hardly prove the realization of the purpose of such a judicial admission system.

Some American scholars have hailed that American admissions promote economy in resolving disputes because when a point is conceded, the litigants need not expend effort in investigations concerning it nor incurring expense in presenting the evidence.[800] Such views are convincing only from the point of litigation in America. The cost reduction of litigation is an advantage provided by the effects of judicial admission in civil procedure. The litigants can enjoy the effects of the admission by not having to search for evidence through the costly discovery mechanism. However, such an advantage is still not acceptable for Cambodian system for the reason that the adoption of such will turn the country's litigation system into the unduly costly one.

To adopt any system into the civil procedure law, Cambodia must consider the effective use of that system. Although one system may provide enormous advantageous to the civil justice, when the users have

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796 *Fed. R. Civ. P.*, Rule 37.
797 Ibid., Rule 37(c)(2).
798 "Judicial Admission," 1121.
799 Ibid. pg?
800 Finman, "The Request for Admission in Federal Civil Procedure," 376.

limit access to using such a system because of the high cost, the system will be in vain because it will be unusable. The economic situation of parties must not act as a determinant for those seeking access to a justice system. In other words, the low economic situation of an individual should not lessen his or her opportunity to access to justice system. Policy makers must avoid such a system that may be actively used by a particular group of people in a society.

Economic barriers for the parties to litigation may diminish the equal use of expensive judicial admission system. The reason for such assumption is that the ability of utilizing such formality-based system will tremendously depend on the size of the wallets or purses of the litigants rather than on the scale of the needs. As a result, such unequal access to the utility of the judicial admission system will endanger the achievement of justice.

Even if everyone in a society can afford to use such a system because they have less options, then it would be better off that such a system is economical so that justice could be achieved at low cost. The parties should not be unduly affected by time and money.[801] The judicial forum should become convenient to the citizens. Policy makers should consider a welfare-based approach when attempting to adopt a justice system. Hence, the adoption of American way of judicial admission is impractical from such economic perspectives.

2.2. Issues of Lawyer Shortages

The attempt to introduce American judicial admission system to Cambodian civil procedure will face another major challenge. That challenge is a shortage of lawyers. Although the current civil procedure of Cambodia does not mandate that lawyers represent litigants, the adoption of the American way of judicial admission will inevitably pressure the parties to litigation to resort to choosing lawyers.

The procedural complexities in the pretrial stage through which a judicial admission may be established will jeopardize the access to civil justice by litigants who are ordinary citizen with limited legal

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[801] James, Hazard, and Leubsdorf, *Civil Procedure*, 3.

knowledge. For example, the litigant who attempts to seek for an admission may not effectively take advantages from the judicial admission system when he or she who fails to comply with the procedures for pleading or discovery. Another litigant, however, may suffer from the effect of the implicit admission established because that party fails to respond promptly to the request for admission sought by his or her opponent. The reasons for such failure can be due to the limited knowledge on the procedure. The discussions on the America judicial admissions in the previous chapter established the complexities of the American civil procedure. Because of these procedural complexities, in the United States of America parties must seek lawyers to represent them in a case. The American experiences reveal that every individual in the United States, except corporation, is free to represent themselves in the courts.[802] However, American litigants rarely litigate successfully except in small claims courts and other relatively informal tribunals.[803] The reasons for such a failure and for the necessity for hiring lawyers to represent them are the complicated nature of the court procedures.[804] Therefore, the American adversary system, lawyers play a crucial role in operating the procedures.

Adoption of the American judicial admission system into Cambodian civil procedure one requires sufficient number of lawyers to be the key players in the operation of the procedures. The question for Cambodia is whether this Country has adequate number of lawyers. In 1982, The United States of America had three times as many lawyers per capita as Germany and twenty times as many as Japan.[805] With this number, one American lawyer was for every four hundred people.[806] As of 2010, the statistic provided by the Standing Committee on Personal Discipline of the American Bar Association showed that there were as many as 1,421,619 lawyers with active license.[807] With the population of 308,745,538,[808] each lawyer represents approximately as few as 217 people.

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[802] Ibid.
[803] Ibid.
[804] Ibid.
[805] Arthur R. Miller, "The Adversary System: Dinosaur or Phoenix," *Minnesota Law Review* 69 (October 1984): 3.
[806] Ibid.
[807] Standing Committee on Personal Discipline, *2009 Survey on Lawyer Discipline System* (American Bar Association, November 2010), http://www.americanbar.org/content/dam/aba/migrated/cpr/discipline/2009sold.authcheckdam.pdf(accesssed May 25, 2011).
[808] "Census Bureau Home Page", n.d., http://www.census.gov/ (accessed June 2, 2011).

On the contrary, the most number of practicing lawyers in Cambodia as of 2011 was 594.[809] With a population of 14.5 million,[810] this becomes one lawyer per 23,500 Cambodians. Hence, Cambodian lawyers would have to shoulder harder load if Cambodia were to adopt the American ways of judicial admission that their American counterparts have long been familiar with. The main issue, therefore, is the question how one judicial admission system can apply to two different legal systems that have great difference in number of lawyers who are supposed to operate that one system.

If Cambodia were to adopt the American system, it would be possible to increase the number of Cambodian lawyers so that they could effectively function the system that the country were to adopt. However, any attempt to increase the number of lawyers must face the challenge of a shortage of human resources. The statistic of the literacy rate of Cambodia is as moderate as 73 per cent.[811] However, according to the Ministry of Education, Youth and Sport of Cambodia, the number of the Cambodian students enrolling in the higher education institutions (for example, colleges) in 2009 was as low as 168,003.[812] Therefore, according to the data of the Ministry of Education, Youth and Sport, only about one per cent of Cambodians enter universities each year. The colleges of law may benefit moderately from this small percentage, which makes the prospect for the increasing lawyers low.

With such a low prospect of number of students enrolling in law colleges, not all would be qualified to pass the bar examination. Moreover, the number of acceptances would depend on government policy, not to mention the budgetary constraints of the Cambodian government. Even if the government might wish to turn more law students into lawyers, the government might wish to consider the qualification of those college students so that they could become well-efficient lawyers to be key players in the system Cambodia were to adopt. However, the situations of law education in Cambodian colleges pose major constraints on developing human resources specializing in the field of civil procedure ready for use after they are accredited to become lawyers. The attempt to solve such constraints may not succeed in the short term.

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809 "The Bar Association of the Kingdom of Cambodia", n.d., http://www.bakc.org.kh/(accessed May 24, 2011).
810 "CIA - The World Factbook", n.d., https://www.cia.gov/library/publications/the-world-factbook/geos/cb.html(accessed May 25, 2011).
811 Sopheap Chan et al., *Scoping Study: Research Capacities of Cambodia's Universities* (Cambodia: The Development Research Forum in Cambodia, August 2010), 28.
812 Ibid.

Hence, it would be a time-consuming process before Cambodia could effectively apply the imported American system. As a result, any desire to adopt such a system of judicial admission to our civil procedure will likely become a large-scale investment of the country. Such investment is not only costly, but predictably risky. The investment will not be beneficial for our civil justice system due to the shortage of the key players in the system. As a result, the adoption of American way of judicial admission system is likely an impossible mission from the point of the shortage of lawyers.

In conclusion, any plan to import such similar devices for the establishment of judicial admission provided by American civil procedure to Cambodian civil procedure for the sole purpose of resolving the "admission" issues would be equal to the attempt to change the whole structure of Cambodian legal system. This plan would merely bring double the problems to the current civil procedure system of Cambodia. A part from this legal reshuffle jeopardy, from the practical viewpoint, any attempt to adopt The American way of judicial admission would require tremendous revisions of provisions of the current law of Cambodia. Such revisions would possibly cause a major change to the whole structure of the law. Moreover, regardless of the type of the American devices through which judicial admission can be established, this system will probably make our litigation system costly as the undue burden will occur on the parties regardless of their status as plaintiffs or defendants.

3. Theoretical Issues and Differences in Legal Culture

In addition to the technical and practical issues mentioned above, there are a number of theoretical issues which will pose a substantial barrier to the import of the American form of judicial admission to Cambodia. Such issues are a result to the differences in legal culture between those of America and Cambodia The following subsection undertakes to explore the issues of those legal culture differences.

The civil law tradition has long been ensconced in Cambodian legal system, whereas America has long followed the common law system that always begins with the concept of the adversary system.[813] This difference in legal cultures makes great disparity for Cambodian civil procedure system and the American

[813] Hazard, "Discovery and the Role of the Judge in Civil Law Jurisdictions," 1018-1019.

one concerning cultural definitions of roles of judges and attorneys. The disparity presents great challenges and constraints for Cambodia to adopt the judicial admission system from the American legal system.

Judges in Cambodian legal system play more active roles than those in American ones. Although the Code of Civil Procedure of Cambodia puts emphasis on the importance of parties' role in civil litigation, Cambodia still maintains the civil law tradition where judges play central role in civil justice system. Not only that judges in Cambodian system play active role at the hearing, they also play significant role in fact findings and defining factual disputes to prepare for trials as these are assigned by our civil procedure.[814] To simplify, Cambodian judges have statutory responsibility to clarify the issues that get the court involved deeply in the development of the case concerned. A apart from these, as applied under other jurisdiction of the same civil law tradition,[815] the out-of-court fact discovery is not permitted in Cambodian civil procedure system.

Another aspect of the cultural definition of active roles of our judges is the *de novo* review system in Cambodian civil procedure. Such review proves better the wide scope of chief responsibility of judge in production of act in Cambodian legal culture. The *de novo* review provides Cambodian Appellate Court the opportunity to review the disputed factual issues. Such a review is not only to examine and correct the errors of the court of first instance in making factual judgment based on the evidence adduced, but also to ask the parties and witnesses the questions that this court thinks that the lower court failed to examine.[816] The Appellate Court may base documents used by the first instance court for such review, and it can examine litigation materials provided at this appeal stage to complete adjudication.[817] In order to enable this Appellate Court to carry out adjudication, Cambodian law stipulates, with few exceptions, the *mutatis mutandis* application of provisions regarding procedures at first instance.[818]

In short, the civil procedure system of Cambodia acknowledges the necessity of judicial intervention

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[814] *Cambodian Code of Civil Procedure*, Articles 112, 116, 124.
[815] Oscar G. Chase, "American 'Exceptionalism' and Comparative Procedure," *The American Journal of Comparative Law* 50 (Spring 2002): 293.
[816] Japanese Working Group in Charge of Drafting Code of Civil Procedure of Cambodia, *Commentary on Each Article of Code of Civil Procedure of Cambodia* (Ministry of Justice of Cambodia, 2007), 256.
[817] Ibid.
[818] *Cambodian Code of Civil Procedure*, Article 273.

in the civil suit. The system does not allow judge to interfere the private interests, but it hails the judicial role in refereeing the fights between the private parties. Such system does not deny the significant role of the advocates in facilitating the proceedings by assisting their clients, but it just does not let them decide truth and justice. Judges in Cambodian legal system are the adjudicators of both factual and legal issues. Thus, the judges decide the truth. In other words, the civil procedure system of Cambodia still adheres the civil law tradition, the concept that of judicial primacy in civil law systems is more than a means or mode of the administration of justice.[819]

On the contrary, judges under American adversary system play different roles as they are passive in terms of involving closely in fact productions and development.[820] Other than setting a time limit for the completion of the process, the judge in a case will normally become involved in the pretrial processes only when one of the parties requests a judicial ruling on the propriety of a particular act, for example a request or response in the discovery or deposition.[821] American judges are not responsible for pretrial discovery of evidence or for an adequate development of the evidence during the trial[822] Thus, the judge is not responsible for obtaining the "truth."[823] Therefore, the judge simply chooses between the contentions of law and the versions of facts laid before the court by the parties.[824]

Therefore, the roles performed by the judges in Cambodian legal system are shifted to the attorneys in the American adversary system. Attorneys in American civil procedure system take chief responsibility for uncovering at least the facts favoring their client and making appropriate case record of those facts.[825] The lawyers play significant role in the development and presentation of evidence and tendering the law, while the role of judge is to decide between those competing presentations the tendered law.[826] This system is party-controlled, which translates to attorney-dominated, because the client usually cedes complete control

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819 Hazard, "Discovery and the Role of the Judge in Civil Law Jurisdictions," 1025.
820 Reitz, "Why We Probably Cannot Adopt the German Advantage in Civil Procedure," 993.
821 Chase, "American 'Exceptionalism' and Comparative Procedure," 293.
822 Hazard, "Discovery and the Role of the Judge in Civil Law Jurisdictions," 1019.
823 Ibid. pg
824 Ibid.pg
825 Reitz, "Why We Probably Cannot Adopt the German Advantage in Civil Procedure," 999.
826 Hazard, "Discovery and the Role of the Judge in Civil Law Jurisdictions," 1019.

of the conduct of the case to his or her attorney,[827] The attorneys in this system ferret out the facts of the case through investigative techniques, discovery, the hiring of experts, and cross-examination at trial.[828] The lawyers of the parties dominate the trial.[829] Such a cultural definition is reinforced by the contingent fee payment system that is common and acceptable in American legal culture.[830] Some American scholars call this adversary system "attorney domination."[831]

The importance of the central role of attorneys may be partly because of the American trial system consists of the jury system. These jurors performs three main functions which include determining what the facts are, evaluating the facts in terms of the legal consequences as formulated by the trial judge in the jury instructions, and presenting the result of deliberations in the form of a verdict.[832] When the evidence is incomplete, the jury must infer the existence or nonexistence of certain facts from other facts on which parties offer evidence.[833] Jurors are not professional judges, so the ultimate decision rests with the non-professionals—this is the point—a case is judged by peers. For this reason, it is appropriate for the adversary system to entrust the hard work to parties and their attorneys establishing the facts concerned to the case and have them admitted without leaving such determination to the jurors.

In contrast, the cultural definition of Cambodian attorneys' roles has long discouraged the out-of-court contact between the parties' attorney and the nonparty witnesses. Cambodian attorneys file motion to court for the examination of evidence to be carried out in the courtroom at the oral argument date. In the event that the court finds that it cannot reach a conclusion on whether to recognize the factual allegations of a party as true based on the evidence offered by the parties, the court examines evidence on its own authority.[834]

Therefore, the adoption of the American form of judicial admission, if Cambodia were to, would

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[827] Franklin D. Strier, "Major Problems Endemic to the Adversary System and Proposed Reform," *Western State University Law Review* 19 (Spring 1992): 466.
[828] Reitz, "Why We Probably Cannot Adopt the German Advantage in Civil Procedure," 995.
[829] Chase, "American 'Exceptionalism' and Comparative Procedure," 298.
[830] Reitz, "Why We Probably Cannot Adopt the German Advantage in Civil Procedure," 995.
[831] Strier, "Major Problems Endemic to the Adversary System and Proposed Reform," 465.
[832] Friedenthal, Kane, and Miller, *Civil Procedure*, 495.
[833] Ibid.
[834] *Cambodian Code of Civil Procedure*, Article 124.

surely lessen the importance of judges' role in the search for truth. To ask the Cambodian judges not to get involved actively in the search for truth by trying to constrain them through the introduction of American system is an impossible order on many judges. Such a constraint will, only lead the most conscientious judges to feel that they merely decide the contest presented by the counsel according to the rules of the game, not search independently for truth and justice."[835] A part from this, the adoption of American practice through the adoption of American ways of judicial admission mean Cambodia would no longer hail judges in assisting parties to determine justice. Moreover, by such adoption, Cambodian must shift her legal culture towards the attorney-dominated legal regime where the power of determining truth would be vested with the individuals, but not the State's organization. Such a shift would be difficult because the roles of judges I a legal system is a matter of legal culture that the positive law does not determine, and the usual tools of legal reform or changes in the positive law are unlikely to be effective agents to change those traditional roles.[836] There is no surprise that from this cultural difference perspective, Cambodia cannot probably adopt American ways of judicial admissions. Professor Carl F. Goodman noted:

> The civil litigation systems … are designed to carry out differing social objectives. The systems have different historic roots and each is a reflection of the society it serves. As a consequence, it should come as no surprise that the structures of the systems differ in their "accommodation," "inducement," or "barrier"….[837]

4. Other Disadvantages in the American Method of Judicial Admission

Beside the above inconveniencies that Cambodia would face if it adopted the American judicial admission system, the adversary system, especially the discovery practices, provides other disadvantages. Those demerits will give negative impacts and pose constraints for our attempt to adopt the American judicial admission system. Such a chief source of frustration in proceeding of a case is not about procedure

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[835] William W Schwarzer, "Managing Civil Litigation: The Trial Judge's Role," *Judicature* 61, no. 9 (April 1978): 402.
[836] Reitz, "Why We Probably Cannot Adopt the German Advantage in Civil Procedure," 992.
[837] Carl F. Goodman, "The Somewhat less Reluctant Litigant: Japan's Changing View Towards Civil Litigation," *Land and Policy in International Business* 32 (Summer 2001): 809.

rules violation or disobedience with a court order but rather the sheer overuse of the system.[838] As Professor Arthur R. Miller described, "[they] can take form of frivolous claims, sham defenses, unnecessary motions, or abuse of the discovery system."[839]

There is much criticism of discovery within American adversarial legal culture.[840] One of the criticisms is the abuses by the attorneys, for example, in terms of pretrial hyperactivity that generates billable hours.[841] The attorney's behavior in litigation tends to over-discover and over-prepare for the purpose of adding hours.[842] Such profit motive provides a great incentive but is not necessarily conducive to the most effective presentation of the case, and certainly not to its just, speedy and inexpensive determination.[843] Such an abuse is often because the Federal Rules relax the restriction on the number of discoveries, for example, interrogatories or request for admissions.[844] Such an abuse is the result of hundreds or even a thousand of requests served by one party to the other calling for admission (see section III. 1.2 in chapter two).

Another aspect of the abuse by American lawyers in the adversary system is that although there is no necessity for them to resort to discovery, but even the best and the brightest lawyers still employ it.[845] Since attorneys are encouraged to win for their clients, they tend to employ this device, which includes request for admissions, to obstruct, frustrate, and wear down opponents and produce a favorable result.[846] Some trial attorneys usually employ tactics to prevail the contravention of the true-merits of a case. The objective in an adversary trial is victory, so attorneys aim at victory and not at aiding the court to discover facts.[847] Winning in the case as priority to searching for the truth is naturally comprehensible because lawyers owe duty to their clients and not to the truth.[848]

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838 Miller, "The Adversary System: Dinosaur or Phoenix," 17.
839 Ibid.
840 Reitz, "Why We Probably Cannot Adopt the German Advantage in Civil Procedure," 1001.
841 Miller, "The Adversary System: Dinosaur or Phoenix," 18.
842 Schwarzer, "The Federal Rules, The Adversary Process, and Discovery Reform," 710.
843 Ibid.
844 Miller, "The Adversary System: Dinosaur or Phoenix," 22.
845 Schwarzer, "The Federal Rules, The Adversary Process, and Discovery Reform," 710.
846 Ibid.
847 Strier, "Major Problems Endemic to the Adversary System and Proposed Reform," 479.
848 Marvin E. Frankel, "The Search for Truth: An Umpireal View," *University of Pennsylvania Law Review* 123, no. 5 (May

The abuses by lawyers are presented earlier may pose more severe harm to the way the truth is unearthed under this attorney-dominated system, especially when the economic situation of parties in the civil suit is different which result in the parties hire lawyers with different qualification. The parties that are well-off can hire the brightest attorneys who have better tactics in the fight, while those with fewer fortunes may resort to only moderate ones. As a result, the opportunity that the best lawyer dominate the proceedings and shape the way for searching truth for justice may be high. Therefore, the fight for truth is unfair because the best lawyers can take advantage of the most from this system while the court remains silent and passive.

These kinds of abuses would likely come along if Cambodia were to import the American ways of judicial admissions. The country would not be able to cure them since this judge-free system was made to restrict the judicial intervention. Such restriction on judges' role by the adversary system is because it is based on the assumption that the truth of controversy will best be arrived at by granting the competing parties, with the help of their advocates, an opportunity to fight as hard as possible. [849] Hence, in civil suits under this system, attorneys may serve as hired mercenaries who fight for victory rather than the knights fighting for justice. Cambodia, then, also needed to train our lawyers to be professional mercenaries if it were to adopt the American judicial admission system.

5. Conclusion

The adoption of the American form of judicial admission, on the one hand, would boost more involvement of private parties, especially lawyers, in the process of civil litigation. Such a policy might lessen the burdens concerning the disputes on the private interests that Cambodian judges have shouldered so far. On the other hand, any attempt for such adoption would be difficult because of the various consequences and disadvantages that Cambodia would face upon its adoption. First, in order to accommodate such a system, Cambodia would have to be ready to undergo the overhaul of our law, which likely affect the whole structure of Cambodian law. In addition to preparing for these unnecessary revisions,

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1975): 1035.

[849] Johnston and Lufranco, "The Adversary System as a Means of Seeking Truth and Justice," 147.

Cambodia might face other practical issues, ranging from the lack of lawyers to operate the system to the undue cost burden on the parties and other advantages as analyzed above. Second, beyond the negative impacts categorized as the technical and practical issues, the significant difference in legal cultures between those of Cambodia and the America is the major constraint for any attempt to integrate the American ways of judicial admission into our civil procedure system. Such difference in legal culture may be chronic regardless of how much Cambodia attempts to change her positive law. Therefore, the attempt to bring the American judicial admission system to Cambodian legal system means the attempt to retool the engine to fit a spare part to work a vehicle, which is not a wise option. In short, the attempt to introduce American ways of judicial admission to Cambodian civil procedure system is not favorable and likely impossible. Hence, Cambodia needs to look for an alternative which is not demanding to her legal system, but which is more practically and theoretically convenient for the law practitioners and the parties in the civil suits.

II. Compatibility of the Japanese Judicial Admission and Cambodian Civil Procedure

If the try for the import of American judicial admission system to Cambodian civil procedure would fail because of the hardships and the disadvantages that Cambodia would face as discussed earlier, Cambodia then would have to consider the Japanese system. The proposal for such consideration lies on predictable feasibility provided by this system as a ground. That feasibility includes workability of that Japanese system, its fitness with Cambodian legal system and culture, and other advantages of the system. Moreover, if even the Japanese system would not meet these expectations, it would be still worth considering if the Japanese system would cause less harms or disadvantages to Cambodian legal system in comparison to its American counterpart that is as disadvantageous to Cambodian civil procedure as analyzed in section I above. The following discussions will explore some of the Japanese advantages in civil procedure from various aspects that include technical and practical advantages as well as legal cultural similarities and comes up with the conclusion that the Japanese judicial admission system is more suitable for Cambodian civil procedure system.

1. Technical Advantages: Existing Devices that Require No Overhaul to our Law

On the contrary to the challenges that Cambodia would face if it were to adopt American ways of

judicial admission, the import of Japanese judicial admission system to its civil procedure system may provide *inter alias* the great technical advantages that will not shaken Cambodian current legal structure. Such advantages hail the suitability of the Japanese judicial admission system for the Cambodian civil procedure The following discussions present those advantages.

One among the advantages provided by the Japanese system of judicial admission to the Cambodian civil procedure system is that the adoption of Japanese does not require any substantial revisions to the current law of Cambodia. As the Japanese practices require that a judicial admission pertaining to an ultimate fact be established only either at preparatory proceedings for oral argument or at oral argument stage, Cambodian law can feasibly accommodate such practices because the current law does have these devices. Cambodian civil procedure, which was adopted based on the Japanese law, has set up these two important devices through which judge learns the nature of the case, the issues for trial, the evidences to be examined and render the judgment.

Preparatory proceedings for oral argument are tools employed by the court and parties to prepare for the oral argument in court.[850] These proceedings aim at improving and facilitating the adjudication in an oral argument, to clarify the points at issue between the parties by arranging and organizing the allegations and arguments of the parties in advance as well as organizing the evidences concerning the points at issue for the court to examine.[851] The Cambodian Code of Civil Procedure requires that the preparatory proceedings for oral argument be carried out on any date within 30 days after the plaintiff file the complaint.[852] These proceedings are led by either a single judge or a panel chaired by a presiding judge. Since the law does not require that such proceedings be open to the public, the court may carry out such proceedings in a undisclosed courtroom, while it may permit the attendance of persons determined to have good cause to be present as observers.[853]

These preparatory proceedings are compulsory before the court can continue to the oral arguments. A

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[850] Japanese Working Group in charge of Drafting Code of Civil Procedure of Cambodia, *Seskti bnylá qaṃbi kram nĭ tividhi rṭṭhppveṇi bhāg 1: nĭ tividhi pṇtỳṅ [Textbook on the Code of Civil Procedure of Cambodia-Part I: Litigation Procedure]*, 73.
[851] Ibid. (*without page numbers ibid is useless*)
[852] *Cambodian Code of Civil Procedure*, Article 80.
[853] Ibid., Article 105.

court can carry out these proceedings according to the actual necessity before the conclusion of these proceedings. Once the preparatory proceedings for oral argument are concluded, parties cannot advance new offensive or defensive measures.[854] However, there are exceptions to this principle. A court may allow the advancement of measure even after the conclusion of the preparatory proceedings when they relate to matters to be examined on the court's own authority or when they would not result in a considerable delay in the proceedings.[855] A court may also permit such belated advancement when the party has established a preliminary showing that he or she was unable to advance such a measures prior to the conclusion of the proceedings, and such inability is not the result of his own gross negligence.[856] The law requires that the court order the clerk to prepare a protocol of these proceedings for each day it is held.[857] These are the proceedings whereby the acts, including admissions, conducted at the preparatory proceedings for oral argument are raised collectively for the oral argument to serve as basic materials for the judgment by treating them as equivalent to the acts conducted at the oral argument in the court.[858]

There are two important tasks for the court to carry out upon the conclusion of these proceedings. The first task is the confirmation with the parties of the facts that the parties have to prove. When the arrangement and organization of the points at issue and evidence are completed and the preparatory proceedings for oral argument are concluded, the court confirms with the parties the facts through the subsequent examination of the evidence in the following oral argument.[859] This practice means that the court and the parties confirm what facts become the subject of the examination and come to a shared recognition regarding this so that oral arguments can be conducted in a concentrated fashion.[860] Second, the court must designate the date for the first oral argument. When the preparatory proceedings for oral argument are concluded, the court must designate a court date for the oral argument and summon the

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[854] Ibid., Article 108.
[855] Ibid.
[856] Ibid.
[857] Ibid., Article 109.
[858] Japanese Working Group in charge of Drafting Code of Civil Procedure of Cambodia, *Seskti bnylá qaṃbi kram nĩ tividhi rṭṭhppveṇi bhāg 1: nĩ tividhi pṇtỳṅ [Textbook on the Code of Civil Procedure of Cambodia-Part I: Litigation Procedure]*, 88.
[859] *Cambodian Code of Civil Procedure*, Article 107.
[860] Ibid., Article 127.

parties to appear on such a date.[861]

Oral argument is a form of adjudication whereby the acts of the court and of the parties submitting to adjudication in litigation are conducted through oral statements and hearing.[862] Such an oral argument is necessary for the rendition of judgment, as a court cannot render judgment on a claim without holding oral argument.[863] The Cambodian Code of Civil Procedure requires that oral arguments be held in the open court and at the date that both parties are available.[864] Thus, this code eliminates the closed-door adjudication as it aims to guarantee the "La Contradiction" principle stipulated in its Article 3, where parties can make assertions and argue against each others at a fair and equal opportunity in court.[865] Moreover, this kind of oral argument provided under this code aims to ensure that the court renders a judgment and actually hears the assertions of the parties directly so as to facilitate the discovery of the truth.[866]

Under current practices in Cambodia, at the beginning of the first oral argument, parties are requested by court to state the result of the conclusion of the preparatory proceedings for oral argument.[867] Such a statement must clarify the facts to be proven by the subsequent examination of evidence in the following oral argument.[868] Therefore, the preparatory proceedings for oral argument are the preparations of the oral argument which means closely to the rehearsal of the oral argument in terms of the contents, but they cannot replace oral argument. The adjudication in the litigation process is conducted by oral argument in principle to the last point,[869] except the case where an action lacks the prerequisites and is legally defective. Such defects cannot be remedied, and the court may render a judgment dismissing the action without

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[861] Ibid., Article 113.
[862] Japanese Working Group in charge of Drafting Code of Civil Procedure of Cambodia, *Seskti bnylá qaṃbi kram nĭ tividhi rṭṭhppveṇi bhāg 1: nĭ tividhi pṇtỳṅ [Textbook on the Code of Civil Procedure of Cambodia-Part I: Litigation Procedure]*, 87.
[863] *Cambodian Code of Civil Procedure*, Article 114.
[864] Ibid., Article 115.
[865] Ibid., Article 3.
[866] Japanese Working Group in charge of Drafting Code of Civil Procedure of Cambodia, *Seskti bnylá qaṃbi kram nĭ tividhi rṭṭhppveṇi bhāg 1: nĭ tividhi pṇtỳṅ [Textbook on the Code of Civil Procedure of Cambodia-Part I: Litigation Procedure]*, 88.
[867] *Cambodian Code of Civil Procedure*, Article 116 (1).
[868] Ibid., Article 116 (2).
[869] Japanese Working Group in charge of Drafting Code of Civil Procedure of Cambodia, *Seskti bnylá qaṃbi kram nĭ tividhi rṭṭhppveṇi bhāg 1: nĭ tividhi pṇtỳṅ [Textbook on the Code of Civil Procedure of Cambodia-Part I: Litigation Procedure]*, 87.

conducting the oral argument.[870]

At this oral argument stage, Code of Civil Procedure of Cambodia still allows the parties to submit new offensive or defensive measures with the permission of court if they are in the scope permissible by Article 108. In other words, the submission of new offensive or defensive measures by the parties is restricted in only some exceptions. First, these measures must relate to the matters that the court will investigate on its own authority.[871] Second, the submission of these measures does not substantially delay the proceedings.[872] Third, these measures may be accepted if the submitting party is able to make a preliminary showing that it is not due to negligence that evidence the parties cannot submit before the conclusion of the preparatory proceedings for oral argument.[873] In addition, if the parties wish to submit new offensive or defensive measures, then they should do so at the appropriate time in the oral argument.[874] However, if any such measures are submitted after the appropriate time and this delays the conclusion of the litigation, then the court will dismiss such measures.[875] However, an oral argument does not have any special stage of division, and there are no determined procedural stages for the submission depending on the kinds of offensive or defensive measures.[876] Even though the oral argument may be extended several times to different dates, these postponements do not follow a pattern of separate procedural stages at each date but are eventually unified as the overall argument.[877] This kind of oral argument is called the "one and only oral argument."[878] Upon the completion of the examination of evidence, the court is in a position to render a judgment concerning the appropriateness of the plaintiff's claim.[879] Thus, if parties make any admission at this stage, then the court will have to base its judgment on the admitted facts.

Therefore, both judicial devices have components that can accommodate the "software" of Japanese judicial admission. In other words, if Cambodia import the Japanese judicial admission system, there is no

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[870] *Cambodian Code of Civil Procedure*, Article 81.
[871] Ibid., Article 108.
[872] Ibid.
[873] Ibid.
[874] Ibid., Article 93.
[875] Ibid., Article 94.
[876] Japanese Working Group in charge of Drafting Code of Civil Procedure of Cambodia, *Seskti bnylá qaṃbi kram nĭ tividhi rṭṭhppveṇi bhāg 1: nĭ tividhi pṇtỳṅ [Textbook on the Code of Civil Procedure of Cambodia-Part I: Litigation Procedure]*, 89.
[877] Ibid.
[878] Ibid.
[879] Ibid., 90.

need for it to revise the current law, but rather the Japanese system is an available product ready to be used by the Cambodian legal system. All the court needs to do is to apply the Japanese common theories related to judicial admission and determines that admission to a fact is established at the preparatory proceedings stage or at the oral argument. In other words, Cambodia just applies the concept of Japanese judicial admission at these stages of the court proceedings while leaving its system as normally. Thus, the Japanese judicial admission system is a major advantage that Cambodia may have to consider.

In addition to the fact that Cambodia has the existing devices to accommodate the Japanese judicial admission system, the import of such a system requires no different mode of final judgment on claim. Unlike the American form of judicial admission where a summary judgment is rendered as a result of the judicial admission, the Japanese civil procedure embraces no such a concept. In order to render the judgment on the merits of the case, the Japanese Code of Civil Procedure requires in principle that parties conduct the oral argument in the court.[880] Hence, even if Japanese parties in civil suits may make admissions pertaining to the facts dispositive of the case in the preparatory proceedings which are the early stages of the court proceeding, the court still need to hold oral argument in order to render the judgment on claim. Such a judgment is ordinary which is different from the American summary judgment. This practice complies with the current civil procedure of Cambodia that dictates that the oral argument is necessary for the court to render the judgment on the merits of the case.[881] Such a similarity is another advantage for Cambodian civil procedure when the country considers the adoption of the Japanese judicial admission system.

In conclusion, the adoption of the Japanese judicial admission system into Cambodian legal system is merely the integration of a legal concept into the existing system. Such integration requires no substantial amendments to the current law. On the contrary, it is a tool ready to be utilized in Cambodian civil procedure system. If we compare the currently existing civil procedure system to a computer, the current Code of Civil Procedure is a complete set of computer component that needs only software to operate. The Japanese judicial admission system is that software. Thus, the Japanese system is worth considering from

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[880] *Japanese Code of Civil Procedure*, 1996, Article 87 (1).
[881] *Cambodian Code of Civil Procedure*, Article 114.

this technical perspective.

2. Practical Advantages

The Japanese practice of judicial admission is more suitable for the Cambodian parties in the civil suits and the law practitioners. First, such a practice requires no lawyer to operate the system of judicial admission because the principal parties can act in litigation on their own, and they can establish admission either at preparatory proceedings or at oral argument that the judge controls. With the intervention of the judge in determining the establishment of a judicial admission, parties can act *pro se* in any case they think appropriate without the concern that they cannot find a qualified lawyer to compete with the other lawyers of their opponent. In other words, the Japanese system is a lawyer-free in that the ordinary people can operate without having to rely on lawyers when these people become parties in civil suits. Thus, it is easily accessible to the parties, and is different from the American system. Professor Carl F. Goodman asserts that it is common that lawyers represent the parties in civil suits, the empirical researches prove that Japanese parties in the less complicated cases represent themselves in the courts, at least in the first-level trial.[882] Due to the reason that Cambodian civil procedure does not adopt the system of compulsory representation by lawyer as the Japanese civil procedure,[883] Cambodian litigants can still enjoy such lawyer-free system after the adoption of the Japanese judicial system. Hence, the Japanese system is more suitable and workable for Cambodian civil procedure system if even Cambodia faces the lawyer shortage.

Second, the Japanese judicial admission system is more economical, as the parties in civil suits under this system do not bear any undue burden on litigation costs. One reason is that the parties can act *pro se*. This self-representation helps cut the expenses on litigation costs. The other reason is that the Japanese system does not set up any formal financial sanction system against the parties who fail to cooperate with their adverse parties in establishing judicial admissions. The Japanese form of judicial admission does not embrace any formal methods for establishing judicial admissions as America does. The only result in

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[882] Carl F. Goodman, "The Evolving Law of Document Production in Japanese Procedure: Context, Culture, and Community," *Brooklyn Journal of International Law* 33 (2007): 137.
[883] Yasuhei Taniguchi, "The 1996 Code of Civil Procedure of Japan-A Procedure for the Coming Century ?," *The American Journal of Comparative Law* 45 (Fall 1997): 788.

failing to precisely answer or object to the allegations raised by the adverse parties in the preparatory proceedings or in the oral argument is "deemed admission."[884] This kind of admission does not bind the parties and the court as the explicit judicial admission as parties can withdraw it easily, and the quasi-admitting parties can dispute the admitted facts in the court second instance with a mere explanation rather than a proof for withdrawal.[885] Therefore, from these practical advantages, the Japanese system is more favorable for Cambodian civil procedure system.

3. Legal Culture Advantages

Beside the advantages on the litigation costs and attorney fees provided under the Japanese civil procedure system, the major advantage that may contribute to the possibility for the adoption of the system into Cambodian law is the similarity in the legal system that defines the roles of judges and attorneys. As the Japanese civil procedure code is the parent law of Cambodian Code of Civil Procedure, both codes share more similarities than disparities. However, the influence by the Japanese civil procedure does not translate that our current legal system has departed from the civil law tradition. The reason is that although the Japanese legal system can be characterized as a hybrid one (civil and common laws),[886] its civil procedure code still retains the fundamental elements of the civil law system which are distinguished from common law.[887]

There are quite few fundamentals of the civil law maintained by the Japanese legal system. Those are the codes, procedure and the trials. In the Japanese legal system, codes are the law, whereas judicial decisions are not, but these decisions are useful for teaching how judges interpret the codes.[888] Since the procedure follows the inquest model traditional under the civil law system, the judge is in charge of fact-finding and is the central figure in every courtroom play, while the law marginalizes the role of the

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[884] Kawano, *Minji Soshō Hō*, 417-418.
[885] Ibid., 419.
[886] Goodman, "The Evolving Law of Document Production in Japanese Procedure: Context, Culture, and Community," 127-130.
[887] Japanese Working Group in charge of Drafting Code of Civil Procedure of Cambodia, *Seskti bnylá qaṃbi kram nĩ tividhi rṭṭhppveṇi bhāg 1: nĩ tividhi pṇtỳṅ [Textbook on the Code of Civil Procedure of Cambodia-Part I: Litigation Procedure]*, 88.
[888] Goodman, "The Evolving Law of Document Production in Japanese Procedure: Context, Culture, and Community," 128.

lawyers.[889] Cambodian civil procedure system shares the similar practice with the Japanese one, while maintaining the *ex officio* examination of evidence if deemed necessary (however, the Japanese civil procedure no longer applies the *ex officio* examination of evidence, but it still leaves the decision to the judge on whether to call a witness to be examined)[890]).[891]

Another fundamental is that the trials in Japan are seamless sequence of the meetings, evidence gathering, witness testimony taking, and so on, constituting a plenary proceeding (oral argument) at the conclusion of which judge, after having clarified the facts and issues, gives his or her conclusion.[892] These practices make no significant differences with those in Cambodia's current procedure system presented in the subsections above.

Another fundamental point that makes Japanese the civil procedure resemble the civil law system is the use of the first appeal trial.[893] Under the Japanese law the first-level appeal is a continuation of a trial because parties and offer new evidence and arguments when doing so will lead to a correct decision.[894] Cambodian legal system shares the same practice, as the appellate trial is the resumed one. At the Appellate Court, parties are required to state the results of oral argument made at the court of first instance.[895] The Appellate Court will require parties to submit to it all the documents collected in the first instance trial in order to carry out the oral argument.[896] The Appellate Court will use these documents to consider adjudicating the facts and laws of the appeal.

Such similarities in legal cultures may make the Japanese judicial admission system ensconced well under our civil procedure system. The rationale this assumption is that the change in a legal system is not only a change of a positive law itself, but also the change of traditional concepts of the law practitioners. However, an attempt towards the American form of admission which is based on adversary model is the

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[889] Hazard, "Discovery and the Role of the Judge in Civil Law Jurisdictions," 1017-1024.
[890] Goodman, "The Evolving Law of Document Production in Japanese Procedure: Context, Culture, and Community," 128-129.
[891] *Cambodian Code of Civil Procedure*, Article 124 (2).
[892] Goodman, "The Evolving Law of Document Production in Japanese Procedure: Context, Culture, and Community," 129.
[893] Ibid.
[894] Ibid.
[895] *Cambodian Code of Civil Procedure*, Article 272 (2).
[896] Japanese Working Group in Charge of Drafting Code of Civil Procedure of Cambodia, *Commentary on Each Article of Code of Civil Procedure of Cambodia*, 250.

attempt to change the whole legal system of Cambodia, which would be impossible. Cambodia would be able to change the positive law successfully through the possible revisions discussed earlier, but the change in traditional way of thinking among the judges and attorneys are doubtful.

On the contrary, the adoption of the Japanese system, which shares the same legal culture with Cambodian one will not suggest any changes to the current legal system of Cambodia. Such an adoption enables Cambodian judges and attorneys to still enjoy their respective privileges and roles provided by the civil law tradition that they have long enjoyed in their status in civil litigation while operating the new system. In short, the attempt to adopt the American system that would suggest an institutional change would be impossible, while it would be favorable for Cambodia to adopt the Japanese one that is not demanding, but may work well from the point of legal culture perspective.

4. The Search for Truth and the Indispensability of Judicial Intervention

Beyond the rationales provided in the above discussion, what makes the adoption of the Japanese judicial admission preferable its appreciation of judicial intervention in the process of establishing admissions, which is a process for the search for truth. The adoption of the Japanese judicial admission system will not only help Cambodia to maintain the current role of Cambodian judges as civil law system judges, but will also means that the country appreciates the indispensability of judicial intervention in the search for truth. There are quite a few arguments for Cambodia to claim that judicial intervention in the search for truth indispensable.

First, judicial intervention can help prevent or reduce the abuse by the parties, especially the lawyers. If the plaintiff and defendant are strictly confined to their private interests in the disputes, they will simply fight at any costs to weaken their counterparts to win. Hence, letting the parties, especially the lawyers, decide the truth through means of obtaining judicial admission on their own outside of courtroom means letting them decide their own fates in the fight. As a result, the one with a better sword and skill will win the fight. In other words, the parties who can hire lawyers with tactics and skills can win in the suit. There are standard rules of games for the competitors, and there are general procedural rules for the parties in a civil suit. However, because each case is unique in its facts, personalities and needs, general rules do not

obviate the need for individualized judicial management.[897] Lawyers will not make any mistake if they place more emphasis on the advancement of the interests of their clients than on the commitment towards the sake of truth and justice.

Therefore, the intervention of judges in the process of establishing a civil admission is crucial, as their involvement will not only moderate the search for truth, but to also lessen the abuse by the more tactical lawyers. In his call for the change in American practice and the appeal for the end of judicial passivity, William W Schwarzer proclaimed:

> The time has come to discard the stereotype of "the ignorant and unprepared judge [as] the properly bland figurehead in the adversary scheme of things,"…. It is time to clear the way for active judicial participation in the management of civil litigation.[898]

Moreover, the active involvement of a judge in the case will possibly marginalize the disparity in the quality of the representation that may be caused by the mismatch of lawyers. In other words, the judges can play a significant role in ensuring that the parties present the truth for the sake of non-faulty justice. Professor Fleming James, the foremost American scholar, explained the importance of judicial intervention:

> Anything that the law of procedure or the judge's role can do to equalize opportunity and to put a faulty presentation on the right track to that disputes are more likely to be settled on the merits, will…increase the moral force of the decision.[899]

Second, judicial intervention in the process of admission can maximize the level of obtaining the substantial truth. If the purpose of a trial is the determination of truth which is the basis of justice,[900] the judge has the professional responsibility to ensure the administration of justice.[901] Although there is no scale to measure the honesty, fairness or the reliability of judges in a country, their professional responsibility should hold them accountable for their active acts in the search for truth. However, it is hard

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[897] Schwarzer, "Managing Civil Litigation: The Trial Judge's Role," 404.
[898] Ibid., 406.
[899] Fleming James, *Civil Procedure* (Little, Brown, 1965), 7.
[900] Frankel, "The Search for Truth," 1033.
[901] Strier, "Major Problems Endemic to the Adversary System and Proposed Reform," 483.

for a legal system to realize such conception if the right and duty to search and present admissions as truth exercised by parties through their lawyers by using extra-judicial methods. The adversary system bases on the assumption that the truth of a controversy will be best arrived at by granting the competing parties and their lawyers an opportunity to fight as hard as possible.[902]Meanwhile the American ways of judicial admission ground on the adversary system, this method of search for truth is doubtful.

If one holds that the truth is construed on the admissions made by the parties, such conception may be partly true if the parties voluntarily make such admissions within their knowledge. However, judicial admissions that have conclusive effects under the American system are not limited to the express admissions made in writing by the responding parties, but also extend to those as a result the default of the responding parties. Thus, the presumption of truth in such a case is based on the admission due to the default of the parties. In such a case, the so-called truth is not determined by will of the parties, but by their default, and judges have no direct involvement in the process of the search for truth but rather on the result presented by the other parties through their lawyers in compliance with the procedure rules. However, the art of advocacy and the must-win concept can simply lead the counsel have a lack of devotion to justice.[903] The adoption of such a practice translates the idea that a judicial admission system puts more trust in the particular individuals rather than in the government in determining the truth. In criticizing this practice, Judge Marvin E. Frankel commented:

> The fact is that our system does not allow much room for effective or just intervention by the trial judge in the adversary fight about the facts. The judge views the case from a peak of Olympian ignorance. His intrusions will in too many cases result from partial or skewed insights. He may expose the secrets one side chooses to keep while never becoming aware of the other's.[904]

The truth should not be rated by a legal system so low that the system neglects the value that the judicial institution of justice means to serve. Nonetheless, law should put more weight on the professional umpires who have been trained for years not to just compromise with the truth presented by the lawyers of

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[902] Johnston and Lufranco, "The Adversary System as a Means of Seeking Truth and Justice," 147.
[903] Frankel, "The Search for Truth," 1047.
[904] Ibid., 1042.

the parties, but who have been entrusted to provide justice based on truth that arrives at their best knowledge. Judges have assigned task to promote through trial an objective search for the truth.[905] If the judges cannot have adequate knowledge of the truth, it is hard for parties to expect the right result of judge's decision in a civil suit. In order to avoid such unjust situation, Cambodia should adopt a system that enables or imposes judges to get closely involved in the process of the establishment of judicial admissions.

5. Conclusion

Through the analyses above, it is more convenient for Cambodia to adopt the Japanese judicial admission system. First, from the technical perspective, if the country adopts the Japanese system, it will not require any overhaul to our legal system, as the current civil procedure of Cambodia already comprises of devices necessary for the establishment of judicial admission in Japanese way. Second, another advantage of the Japanese judicial admission system is its practicality and the easy access by the parties in the civil suits. In other words, such a system neither requires any expansion of number of lawyers to operate it nor will it be a costly. Such practical advantages provide the country a prospect that the system will work in its legal system.

Third, from the legal culture perspective, the Japanese judicial admission does provide Cambodia a huge advantage. The similar definition of the roles of judges and lawyers in Cambodian and Japanese legal systems translates the conception that the Japanese judicial admission system can be soundly ensconced in Cambodian legal system. Cambodian Judges and lawyers do not have to face any difficulties in operating the system to be imported from Japanese civil procedure system. Moreover, these law practitioners do not have to change their behavior toward civil litigations. These practitioners will still enjoy the privileges and duties that the civil law tradition has bestowed on them. Thus, not only the positive law that will not be revised, but also the traditional practices of the judges and lawyers of Cambodian legal system will remain the same.

Fourth, the adoption of Japanese form of judicial admission will boost the understanding that although

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[905] Ibid., 1035.

Cambodia still hails the parties' activeness in the civil suits and that Cambodian legal system does not rate the value of truth very low. In other words, Cambodian legal system does not permit the out-of-court fight, while judge will wait in the court to see who, plaintiffs or defendants, have been defeated and decide their fact based on law by taking the result of the facts provided by each party. On the contrary, the adoption of the Japanese judicial admission system will affirm that Cambodian civil procedure system places judges in the central role in the search for truth and that the court still maintains its significance as the State's dispute resolution organization who actively searches for the substantial truth based on the judges. Moreover, such an active involvement of judicial in the process and determination of judicial admission will likely diminish the prospective abuses made by Cambodian lawyers the same ways that the American lawyers do concerning the fact production that leads to judicial admission.

Therefore, the Japanese judicial admission system is applicable to Cambodian civil procedure system. Cambodia can apply this system without any, or less, prospect of detriment to its legal system while the country is still able to maintain the current legal cultures. In other words, this system is a spare part that fits the current engine and Cambodia does not have to reorganize the engine to fit the spare part in order to operate the vehicle.

CONCLUSION: CAMBODIA TOWARDS *BENRON SHUGI*

Cambodian judges should apply the provisions concerning the judicial admission related to facts prescribed in the current Code of Civil Procedure. However, in order to activate this application, judges must consider what elements will constitute an admission and by which method. The judicial admission system will not only expedite the case, but it will also serve as an effective means to speedily reveal the truth. Through the two systems of judicial admission that this dissertation has provided detailed analyses, Cambodia must opt for the one practiced under the *benron shugi*, that is, the Japanese system. Such a recommendation does not depend on the reason that Japanese civil procedure is Cambodia's parent law, but it cautiously bases on a number of analyses provided in chapter four above.

In order to adopt any new system, Cambodia must consider its familiarity to Cambodian legal culture because once it is too alien to the country, it will jeopardize the country's legal system, as it may not be practical. The transition from one legal culture to another is a time consuming process with needs lots of preparation. The adoption of the American judicial admission system will probably put us in the jeopardy as explained in chapter four of this dissertation. Although the introduction of American ways of judicial admission is not the recommendation of the whole Anglo-American legal system to Cambodian civil procedure, the presence of this one little practice will have tremendous impact the whole civil procedure system of the country. This dissertation is not commenting that the American ways of judicial admission detriment the civil justice system of Cambodia, yet this dissertation is convinced to believe that adopting them to civil procedure system of Cambodia is a big challenge and Cambodia is not yet qualified to move in this giant steps. The big challenge here refers to the overhaul on Cambodia's civil procedure system to accommodate American judicial admission system and a number of other disadvantages that Cambodia will face. Meanwhile, the qualification that this dissertation means is the question of Cambodia's readiness to operate the system as the country can logically foresee the shortage of lawyers. The recommendation for the adoption of the Japanese judicial admission system to Cambodian civil procedure system does have a concrete foundation.

First, the technical, practical and legal culture advantages provided in the analyses above can make us,

as Cambodian parties and law practitioners, anticipate that the Japanese judicial admission system works properly in our civil procedure system. In fact, legal development has no limit and other scholars may provide a better solution or theory, but for the time being, we need a system to cure the defect in our legal practices, and the Japanese one is best suitable for our civil procedure system. If this recommendation works only in the short run, it will best serve as a foundation for the theoretical developments for our civil procedure. So long as a foundation is needed for the construction of a structure, the legal theories must need a theoretical basis as a plan for the construction and development as well.

Second, the other minor premise for the recommendation of the Japanese civil procedure is that it is Cambodia's parent law. It is preferable or even inevitable that we have to refer to it in legal interpretation when we face theoretical issues or when our legal practitioners encounter any practical problems before we reach out to other legal system as a supplement in interpreting our own law.

As provided in the detailed analyses above, the Japanese system is more favorable to Cambodia's civil procedure than the American one from many corners of advantage. It is not a wise decision to opt for a thing with the prospect of high risk and rule out the one with fewer disadvantages. If we have a better alternative, there should not be reason that Cambodia turns down it and risk adopting a system that will cause overhaul to its legal system and which is likely impractical in its legal tradition.

ANNEX

Comparison Chart on the Commonalities/Similarities and Differences between American, Japanese Judicial Admissions and the Acknowledgment under Cambodian Civil Procedure Practices

<table>
<tr><th colspan="3">CHART I: COMMONALITIES/SIMILARITIES</th></tr>
<tr><th>America</th><th>Japan</th><th>Cambodia</th></tr>
<tr><td colspan="3">1. Disadvantageous Nature of Statement or Assertion: The statement or assertion is disadvantageous to the admitting party who makes it.</td></tr>
<tr><td colspan="2">2. Effects of Judicial Admissions:
a. Effect on court:
- The court is bound by the admissions and must its judgment on the admitted facts/matters.
- Although the court may find through the examination of evidence that the admitted facts/matters contradict the truth, court must not overrule the admission and judge differently.
- This effect is called “trial elimination effect.”
b. Effect on parties:
- The parties do not need to prove the admitted facts/matters.
- The admitting party cannot assert against the admitted facts/matters.
- The admitting party cannot withdraw admission freely.
- The party for whom admission is established can enjoy the binding effects of admission, but is not necessarily bound by it.
- The admitting party can withdraw the admission that will become the basis of judgment if doing so is more preferable for its case.</td><td>Uncertain</td></tr>
<tr><td colspan="2">3. Scope of Effects:
-The effects are valid only in the pending case in which the admissions are established.
-The admissions in one case do not have any effects on the same parties in other cases.</td><td>Uncertain</td></tr>
<tr><td colspan="3">4. Purpose and Advantages of Judicial Admission System:
-To expedite the civil dispute resolution;
-To promote the speedy trial and time and cost savings by without eliminating the costly examination of evidence.</td></tr>
</table>

CHART II: DIFFERENCES			
	America	**Japan**	**Cambodia**
Subject Matters	-Facts: there are no conflicts among scholars about what kind of facts are subject to judicial admission, while judicial precedents make no distinctions between admissions of ultimate facts or indirect facts. -The application of law to fact: such requests for admissions involving the application of law to fact are permissible by the Federal Rules of Civil Procedure. -Opinion on a matter of fact or the application of law to fact: scholars and court practices have held that the request is permissible if it is not about the pure legal conclusion. -The genuineness of a document: that law does not regard as privileged one.	-Ultimate Facts: there are no conflicts between the theories and judicial precedents concerning the admission of ultimate fact. Judicial Admissions on ultimate facts become common theories and practices. -Indirect Facts: there are two conflicting school of opinions related to the admission of such kind of facts. One school of thoughts supports such admission, while the other negates it. Historically, judicial precedents shifted from acknowledging indirect facts admission to refusing it. -Secondary Facts (authenticity of documentary evidences): the former *daishin'in* court originally negated the establishment and the effects of admission of the authenticity of the execution of the documentary evidence, but later acknowledged them. However, the since 1977 the Supreme Court has made it clear that such admission does not bind the courts. Scholarly opinions split with different explanations. However, the medium approach explains that such admission should bind the parties, but not the court. -Right: scholarly opinions split on whether right can be subject to judicial admission. The judicial precedents are also vague and cannot be confirmed if the majority of courts' decision validate the admission of right.	-Facts: the judgments of the Supreme Court seem to refer only to facts without any distinction of their types. None scholar has ever provided any discussions on the theory of facts; neither has any courts' decision. -In the analysis of case 4 in chapter three, the courts presumed that the defendant concluded the contract with the plaintiff because of the acknowledgement of the defendant of the authenticity of the execution of the loan contract requiring the defendant to prove. So it may be suitable that Cambodian courts affirm the admission of secondary fact (authenticity of documentary evidence).

Methods of Establishment	-Extra-judicially operated without court intervention; -Through pleadings (written answer to acknowledge the allegations in the pleadings) without judicial intervention; -Through request for admissions provided by Rule 36 (written answer to admit the requested points) without judicial intervention; -Through stipulation of parties (written agreements between parties) without judicial intervention;	-Through the statement or assertion made at oral argument proceeding administered by professional judge(s), or -Through the statement or assertion made at the preparatory proceedings for oral argument administered by professional judge (s); and -Consistency of those statements or assertions; and -The disadvantageousness of the statements or assertions on the admitting party (common theory).	Oral argument: according to the case analyses, most of the judgments revealed that courts validated the statement so of the parties (especially the defendants' acknowledgment of plaintiffs' assertions) in the oral arguments.
Scope of Application	-No particular rules which confirm that judicial admission applies only to the property-related proceedings. -No theories that explain if judicial admission system applies only to property-related proceedings.	-It applies only to the general procedure that concern only the properties of the parties. -It does not apply to other special proceedings that concern the public interests, such as personal status proceedings. The restriction is provided in those special procedural laws where they explicitly stipulate exemption of the application of provisions related to the admission provided in general civil procedure.	**N/A**

Withdrawal and Conditions	No specific rules that govern the conditions for the withdrawal of admissions; -Each device has its own rule that can apply to the withdrawal of admission established under that device (for example, if the admission established through pleading, rules concerning the amendment of the answer to the pleadings). -Admissions established under Rule 36 (Request for admissions) will lose effect when the court allows the party to serve the late response after admissions are deemed established. Common grounds for court to grant such permission are: (1) the existence of mistake, (2) inadvertence, (3) excusable neglect, (4) the absence of prejudice to the opposing party, or (5) if there is a "good cause."	The admitting party can withdraw an admission only if: if: -The adverse party gives consent to the withdrawal; or -The admission was made as a result of the criminal acts of the others (it is not limited to the act carried out by the third person; however, it also includes the acts committed by adverse party in litigation.); or -The admission is due to falsity and mistake (however, the Supreme Court's decisions make it clear that only proof on falsity is required while mistake can be presumed).	-No judicial precedents are available for determining what the conditions for the withdrawal of admission are. -Scholarly opinions do not exist. -Article 213 mentions that a party can withdraw an admission if (1) the adverse party does not object, or (2) the admission is false and made based on mistake, or (3) the admission was made due to a criminal act of another. -The Supreme Court's judgment (in case review 5) indicated that the party who stated that the acknowledgment was false must prove that the later statement was true. Thus, the truthfulness of the later statement will prove that the acknowledgment is false which will lead to the permission for withdrawal (although the Supreme Court was silent about the proof on "mistake.")
Remark	-The entries in this chart on Cambodian judicial admission system part are based on the personal presumption through the case analyses, but not what vided precisely by Cambodian scholars or court's judgments. -N/A stands for "Not Available"		

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