

MYTH AND LEGAL REALITY OF ALTERNATIVE DISPUTE
RESOLUTION IN JAPAN
— A COMPARATIVE ANALYSIS —

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I. Introduction and Methodical Remarks

The topic might look like carrying coals to Manchester given the (allegedly) almost ubiquitous notion of the Japanese being shy to sue each other in a court of law.² This notion

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¹ Nagoya M Y 'Recent Legislative Development of ADR in Japan' <http://www.djiv.org/Zeitschrift%2020/ZJapanR20_HP14_Yoshida.pdf> accessed 26.11.2013, 1. Furuta Y, Tsukamoto H, Mori A 'Japan Enters a New Era' (Asia Law & Practice) <http://www.amt-law.com/pdf/bulletins3_pdf/060111_1-1.pdf> accessed 26.11.2013, 124. Hopt K J, Steffek F, *Mediation: Principles and Regulation in Comparative Perspective* (2012) Oxford: OxfordUniversity Press, p. 1029, 1035, 1036, 1038. Furuta Y, Tsukamoto H, Mori A 'Japan Enters a New Era' (Asia Law & Practice) <http://www.amt-law.com/pdf/bulletins3_pdf/060111_1-1.pdf> accessed 26.11.2013, 124. Irie H, 'An Overview on the Current Status of Japanese Private Dispute Resolution' (JCAA Newsletter 25, 2010) <<http://www.jcaa.or.jp/e/arbitration/docs/news25.pdf>> accessed 26.11.2013, 1.

² Murayama M 'Japanese Disputing Behavior Reconsidered' <<http://www.rchss.sinica.edu.tw/cibs/law/3.%20Survey/>>

is, however, something of the past.³ In nowadays Japan it has become quite common to have an open dispute in court.⁴ Maybe the actual numbers of registered claims in court in per capita not as high as in Germany or the US, but the trend is pointing towards a steady increase in court cases also in Japan^{5,6}.

Moreover, the traditional Japanese trend opting for conciliation in or outside of courts⁷ had maybe not so much to do with a peculiar culture but rather with the excessive costs in time and money to bring cases to court.^{8,9}

Therefore it is worthwhile to investigate into the current state of alternative dispute resolution in Japan in private law disputes.

The point of departure for this comparative analysis is the German legal tradition as the most important and influential civil law country in Europe:

ADR consisting of the three major branches negotiation, mediation and arbitration¹⁰ has had a long, hidden history in German civil procedure law. The main focus used to lie on arbitration being very popular particularly in international dispute resolution¹¹ because, inter alia, of the efficient 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.^{12,13,14}

<papers/20090527/Japanese%20Disputing%20Behavior%20Reconsidered.pdf>>, accessed 26.11.2013, 1-2. Yamada A, 'ADR in Japan: does the new law liberalize ADR from historical shackles or legalize it?' (2009) 2 Contemporary Asia Arbitration Journal, 1, 1.

³ Livdahl D A 'Cultural and Structural Aspects of International Commercial Arbitration in Japan (2003) 20 Journal of International Arbitration 375, 381.

⁴ Yamada A, 'ADR in Japan: does the new law liberalize ADR from historical shackles or legalize it?' (2009) 2 Contemporary Asia Arbitration Journal, 1, 3-4.

⁵ See *Daniel Foote*, Law in Japan — A Turning Point, 2008

⁶ Nottage L. 'Japan's New Arbitration Law: domestication reinforcing internalization?' (2004) 2 International Arbitration Law Review 54, 54. Pardieck A M, 'Virtuous Ways and Beautiful Customs: the role of alternative dispute resolution in Japan' (1997) 11 Temple International and Comparative Law Journal 31, 56. Livdahl D A 'Cultural and Structural Aspects of International Commercial Arbitration in Japan (2003) 20 Journal of International Arbitration 375, 380.

⁷ Yamada A, 'ADR in Japan: does the new law liberalize ADR from historical shackles or legalize it?' (2009) 2 Contemporary Asia Arbitration Journal, 1, 4.

⁸ See *Masasuke Ishibe*, Das Schlichtungswesen aus rechtshistorischer und rechtsvergleichender Sicht, in Marutschke (Ed.), Beiträge zur modernen japanischen Rechtsgeschichte, Berlin 2006, p. 154, 175

⁹ Anderson K, Ryan T, 'Japan: the importance and evolution of legal institutions at the turn of the century' in Black A E, Bell G F, Law and Legal Institutions of Asia: traditions, adaptations and innovations (2011) <<http://ebooks.cambridge.org.ludwig.lub.lu.se/ebook.jsf?bid=CBO9780511921131>> accessed 26.11.2013, 138, 143. Nagoya M Y 'Recent Legislative Development of ADR in Japan' <http://www.djjv.org/Zeitschrift%2020/ZJapanR20_HP14_Yoshida.pdf> accessed 26.11.2013, 193. Nottage L. 'Japan's New Arbitration Law: domestication reinforcing internalization?' (2004) 2 International Arbitration Law Review 54, 55.

¹⁰ Han K, Poon N, 'The Enforceability of Alternative Dispute Resolution Agreements' (2013) 25 Singapore Academy of Law Journal, 455, 457-458.

¹¹ Risse J, 'Arbitration in Germany: Schieds VZ Journal promotes arbitration in Germany' (2003) 4 German Law Journal 199, 199.

¹² For an overview of domestic and international arbitration pursuant to German law see *Diedrich*, Grundlagen der Schiedsgerichtsbarkeit, in: JuS 1998, p. 158 et seq..

¹³ For Japanese law see Iwasaki K, 'Key Features of New Japanese Arbitration Law' (2006) 2 Asian International Arbitration Journal 76, 76 et seq.

¹⁴ Han Han K, Poon N, 'The Enforceability of Alternative Dispute Resolution Agreements' (2013) 25 Singapore Academy of Law Journal 455, 456-457.

In 2002 the German Code of Civil Procedure was modified by using the UNCITRAL Model Law on International Commercial Arbitration^{15,16} as a blueprint with the aim of making Germany a more attractive venue for arbitration, inter alia, by reducing the formalities for a valid arbitration agreement.¹⁷

Mediation remains one of the latest developments for settling disputes in civil and commercial matters in Germany.¹⁸ Nevertheless, there is no statutory provision dealing expressly with mediation. Up until now, mediation in Germany is a private procedure involving an independent third party (the mediator) based upon a separate contract between the parties and the mediator.¹⁹ Therefore this mediation agreement has still to be quite comprehensive containing provision about the procedural rules, costs and the question of limitation of action if mediation should fail. Moreover, the title of a mediator is not protected by German law.²⁰ So anyone can hold him- or herself out as a mediator. So an internet research quickly reveals a vast number of psychologists or even homoeopaths acting as mediators. It is up to the parties to choose a suitable mediator without any state guidance. There is just an indirect control by the bar association if the mediator is also an attorney-at-law (Rechtsanwalt). In the latter case the bar association prescribes a minimum amount of training (currently 100/200 hours) and an accompanying certificate by a university or similar private institute. As the bar association consists of separate branches in the different German Laender, the requirements as to the minimum training for attorneys are not homogenous throughout Germany.²¹

This liberal and autonomous German approach to mediation²² has been changed because of the EU Directive No 2008/52/EC of 21st May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters (the official text can be found at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:EN:PDF>).²³

This Mediation Directive forces the EU Member States to bring into force the laws,

¹⁵ The text of the 1985 (as amended in 2006) UNCITRAL Model Law on International Commercial Arbitration in five equally authentic language versions can be found at www.uncitral.org.

¹⁶ Kroll S 'First Experiences' with the New Austrian Arbitration Law' (2007) 23 *Arbitration International* 553, 554. Risse J, 'Arbitration in Germany: Schieds VZ Journal promotes arbitration in Germany' (2003) 4 *German Law Journal* 199, 199. Schlabrendoff F, 'The Legal Regime of Arbitration in Germany' (2003) 4 *Anuario de Justicia Alternativa* 115, 115.

¹⁷ Weigand F B, 'The UNCITRAL Model Law: new draft arbitration acts in Germany and Sweden' (1995) 11 *Arbitration International* 397, 398-399, 414. Han K, Poon N, 'The Enforceability of Alternative Dispute Resolution Agreements' (2013) 25 *Singapore Academy of Law Journal* 455, 456.

¹⁸ Kilian M, 'At Long Last... Germany has Embraced Mediation: correspondent's report from Europe' (2012) 15 *Legal Ethics* 398, 398.

¹⁹ Hopt K J, Steffek F, *Mediation: principles and regulation in comparative perspective* (Oxford University Press 2013), 539-550.

²⁰ Vries T, 'The Legal Regulation of Mediation in Germany' (2012) 209 *Acta Universitatis Lucian Blaga* 209, 216.

²¹ Morek R, 'New German Mediation Law passed in the Bundestag' <<http://kluwermediationblog.com/2012/01/09/new-german-mediation-law-passed-in-the-bundestag/>> accessed 26.11.2013. Filler E *Commercial Mediation in Europe: an empirical study of the user experience* (2012) Netherlands, Kluwer Law International, 100-128.

²² Hopt K J, Steffek F, *Mediation: principles and regulation in comparative perspective* (Oxford University Press 2013), 528, 572.

²³ Kilian M, 'At Long Last... Germany has Embraced Mediation: correspondent's report from Europe' (2012) 15 *Legal Ethics* 398, 398-399. Knotzl B, Zach E, 'Taking the Best from Mediation Regulations' (2007) 23 *Arbitration International* 663, 663. Vries T, 'The Legal Regulation of Mediation in Germany' (2012) 209 *Acta Universitatis Lucian Blaga* 209, 211.

regulations, and administrative provisions necessary to comply with the Directive's rules before 21st May 2011. However, the Mediation Directive applies pursuant to its Art. 1 only to cross-border disputes in civil and commercial matters.²⁴

Cross-border is defined in Art. 2 1. as a dispute where at least one party is domiciled or habitually resident in a Member State other than that of the other party. So the rules of the Directive apply also as against 3rd countries. Also, mediation can be international but not necessarily cross-border where, for instance, the mediator has a different nationality or the place of mediation —as chosen by the parties- is abroad²⁵.

In its Art. 3 a) a statutory definition can be found for “**mediation**” (“... **a structured process**, however named or referred to, whereby **two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement** on the settlement of their dispute **with the assistance of a mediator**.”²⁶ This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.²⁷ It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in questions. (But) It excludes attempts made by the court or the judge seized to settle a dispute in the course of judicial proceedings concerning the dispute in question.”)²⁸

Art. 3 b) defines a “**mediator**” (“... **any third person** who is asked to conduct a mediation in an **effective, impartial and competent way**, regardless of the denomination or profession of that third party in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation.”)²⁹

Moreover, there is a provision in Art. 4 addressed to the Member States to ensure by appropriate means the quality of the mediation by codes of conduct and organisations providing mediation services, as well as effective quality control mechanisms. Additionally, the initial and further training of mediators shall be encouraged to ensure that the mediation is conducted in an effective, impartial and competent manner.³⁰

Art. 7 refers to the necessity of mediation being confidential. This means that without the consent of the parties' mediators or other persons involved in the mediation proceedings must not give evidence in court or arbitration proceedings.³¹ The exceptions are according to Art. 7 1.a) where this evidence is necessary in the best interests of children or to prevent harm to the integrity of persons. Art. 7 1.b) adds on by declaring the evidence as being allowed for the

²⁴ Vries T, 'The Legal Regulation of Mediation in Germany' (2012) 209 Acta Universitatis Lucian Blaga 209, 211. Toulmin J, 'Cross-border Mediation and Civil Proceedings in National Courts' (2009) 10 ERA Forum 551, 557.

²⁵ As to the distinction between cross-border and international mediation see *Diedrich*, in Trossen (ed.), *Mediation (un) geregelt*, 2014, p. 842 et seq.

²⁶ Hilling J B, Huhn M, 'Impact of the EU Mediation Directive on the German Construction Sector (2010) 2 Journal of Legal Affairs and Dispute Resolution in Engineering and Construction 162, 163. Knotzl B, Zach E, 'Taking the Best from Mediation Regulations' (2007) 23 Arbitration International 663, 669. Vries T, 'The Legal Regulation of Mediation in Germany' (2012) 209 Acta Universitatis Lucian Blaga 209, 209.

²⁷ Fealsey A, "Regulating Mediation Qualifications in the 2008 EU Mediation Directive: the need for a supranational standard' (2011) 2 Journal of Dispute Resolution 333, 339.

²⁸ Toulmin J, 'Cross-border Mediation and Civil Proceedings in National Courts' (2009) 10 ERA Forum 551, 557.

²⁹ Knotzl B, Zach E, 'Taking the Best from Mediation Regulations' (2007) 23 Arbitration International 663, 676-677.

³⁰ Knotzl B, Zach E, 'Taking the Best from Mediation Regulations' (2007) 23 Arbitration International 663, 671, 679, 684. Hilling J B, Huhn M, 'Impact of the EU Mediation Directive on the German Construction Sector (2010) 2 Journal of Legal Affairs and Dispute Resolution in Engineering and Construction 162, 163.

³¹ Reichert K, 'Confidentiality in International Mediation' (2004) 59 Dispute Resolution Journal 60, 62, 65.

enforcement of an agreement resulting from the mediation.³²

Additionally, the Member States shall ensure that parties to mediation are not subsequently barred from state court or arbitration proceedings because of the expiry of limitation or prescription periods during the mediation process (Art. 8).³³

The general intention of the Mediation Directive is, however, that the Member States inform the general public of the availability of mediation (Art. 9) and to promote the use of mediation for the extrajudicial cross-border dispute resolution (Preamble no. 5, 7)³⁴

Despite all these attempts to make it a popular means of dispute resolution, mediation has flourished so far rather reluctantly as a hidden flower.

Mediation has become popular, in particular, in German civil courts because the administration of state courts in Germany hopes to reduce the number of law suits,³⁵ thereby having in the long run the chance to reduce costs as not so many judges will be needed.³⁶ This might not be the ideal goal for the third column of power in a democratic state but the positive side effect is remarkable for the parties seeking justice in front of state courts.

This mediation “service” is offered by the courts to the parties in legal proceedings dealing with issues in private law, ranging from contract law over commercial law to family law.³⁷ The judge acting as mediator (“Güterichter”) must not be identical to the judge who hears the case. This shall ensure impartiality. The judges acting as mediators are additionally trained in mediation techniques on a voluntary basis.³⁸

This is in any case good news for the parties as a successful mediation settles usually the dispute also in the long run, i.e. better than any court judgment can do.³⁹

The latest development since the beginning of 2013 has been court assisted mediation even in the finance courts, at least in the Lower Saxony Finance Court at Hannover.⁴⁰ This is insofar unique and dogmatically problematic because of two reasons:

1. Mediation is used as a method for dispute resolution in the area of public law where the state is in a privileged position but at the same time bound by constitutional guarantees,

³² Hilling J B, Huhn M, 'Impact of the EU Mediation Directive on the German Construction Sector (2010) 2 Journal of Legal Affairs and Dispute Resolution in Engineering and Construction 162, 164-165. Toulmin J, 'Cross-border Mediation and Civil Proceedings in National Courts' (2009) 10 ERA Forum 551, 560-561. Knotzl B, Zach E, 'Taking the Best from Mediation Regulations' (2007) 23 Arbitration International 663, 670, 678-679, 682. Vries T, 'The Legal Regulation of Mediation in Germany' (2012) 209 Acta Universitatis Lucian Blaga 209, 214. Fealsey A, "Regulating Mediation Qualifications in the 2008 EU Mediation Directive: the need for a supranational standard' (2011) 2 Journal of Dispute Resolution 333, 339-340.

³³ Hilling J B, Huhn M, 'Impact of the EU Mediation Directive on the German Construction Sector (2010) 2 Journal of Legal Affairs and Dispute Resolution in Engineering and Construction 162, 165.

³⁴ Hilling J B, Huhn M, 'Impact of the EU Mediation Directive on the German Construction Sector (2010) 2 Journal of Legal Affairs and Dispute Resolution in Engineering and Construction 162, 166. Knotzl B, Zach E, 'Taking the Best from Mediation Regulations' (2007) 23 Arbitration International 663, 684.

³⁵ Hopt K J, Steffek F, *Mediation: Principles and Regulation in Comparative Perspective* (Oxford University Press 2013), 526.

³⁶ Vries T, 'The Legal Regulation of Mediation in Germany' (2012) 209 Acta Universitatis Lucian Blaga 209, 210.

³⁷ Knotzl B, Zach E, 'Taking the Best from Mediation Regulations' (2007) 23 Arbitration international 663, 664.

³⁸ Kilian M, 'At Long Last... Germany has Embraced Mediation: correspondent's report from Europe' (2012) 15 Legal Ethics 398, 398-399.

³⁹ Toulmin J, 'Cross-border Mediation and Civil Proceedings in National Courts' (2009) 10 ERA Forum 551, 555.

⁴⁰ Scheuermann, A., Güterichter soll schlichten, Hannoversche Allgemeine Zeitung, 30.01.2013, p. 11.

e.g. equal treatment before the law (Art. 3 (1) GG), right to be heard by the lawful judge (“gesetzlicher Richter, Art. 101 GG). It is doubtful whether the individual citizen, defending his/her rights against the state before a finance court, can voluntarily forego his or her fundamental constitutional rights. Also a judge of the finance court acting as mediator (“Güterichter”) would need to give unilateral legal advice to the private party, as he is bound by the law (Art. 103 GG) to keep it equal to the state or administration on the other side. This would be contrary to the definition of mediation being a structured process whereby the mediator tries to find out the interest of the parties, not the applicable legal rules. Legal advice in mediation should not come from the mediator being independent and not bound by the law but acquired externally.

2. Moreover, the numbers of new cases before the finance court in Lower Saxony (Niedersächsisches Finanzgericht) have been continuously fallen over the years (2012: 4664, 2011: 5186; 2010: 5661).⁴¹ So it rather seems that there is no need for mediation to lower the case load of the court. It rather seems that the court attempts to escape into the more flexible area of private law. However, this flight into private law (“Flucht ins Private”) runs contrary to the genuine task of the finance court, as with all other courts for public and administrative matters, to adjudicate according to the prescribed procedural and substantive rules of public law as the lawful judge individual claims by private parties against the state. Just within a limited legal framework the administration might conclude a settlement (§ 55 in connection with § 54 Act on Administrative Procedure/Verwaltungsverfahrensgesetz).⁴²

Apart from this court guided mediation there are numerous individuals, institutes and associations of various professional backgrounds offering their services. The more serious ones base their mediation on the European Code of Conduct of Mediators^{43,44}, thereby safeguarding an essential quality standard.⁴⁵

To be sure, there are profound reasons for the limited success of mediation and ADR in Germany so far:

1. ADR is a private conflict resolution mechanism held in private behind closed doors.⁴⁶ So the information about ADR spills into the public just occasionally, particularly if ADR fails and the Parties go to a state court.⁴⁷

⁴¹ Scheuermann, A., Güterichter soll schlichten, *Hannoversche Allgemeine Zeitung*, 30.01.2013, p. 11.

⁴² See also Matsuzuka, S./Walther, H., *Mediation zwischen Bürger und Staat in Japan*, ZKM — Zeitschrift für Konfliktmanagement 4/2006, p. 108, 110 who stress that Japanese civil courts are also dealing with administrative matters as there are no separate administrative courts in Japan — an administrative contractual settlement out of court is still prohibited under Japanese law.

⁴³ The European Code of Conduct for Mediators can be found at http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf. Last visited 16 November 2014.

⁴⁴ Fealsey A., “Regulating Mediation Qualifications in the 2008 EU Mediation Directive: the need for a supranational standard’ (2011) 2 *Journal of Dispute Resolution* 333, 337.

⁴⁵ Hopt K J, Steffek F, *Mediation: principles and regulation in comparative perspective* (Oxford University Press 2013), 528.

⁴⁶ Rau A S, Sherman E F, Peppet S R, *Mediation and Other Non-Binding ADR Processes* (2nd ed. 2002) New York, Foundation Press, 304.

⁴⁷ Han K, Poon N, ‘The Enforceability of Alternative Dispute Resolution Agreements’ (2013) 25 *Singapore Academy of Law Journal* 455, 479.

2. ADR is not very well known amongst the general public. Arbitration has always been known in commercial circles, in particular in the international arena.⁴⁸ Mediation in contrast is hardly known and viewed with suspicion because of the various forms and professions holding themselves out as “experts”.⁴⁹

3. All forms of ADR require at one stage an agreement of the Parties to try to settle their dispute out of court, i.e. an opting out. Without such a contract or contractual clause every citizen in any human rights based country has the constitutional right to sue any other in a court of law on the basis of access to (state backed) justice, e.g. Art. 6 and 13 ECHR.⁵⁰ And lawyers have been so far reluctant to introduce ADR-clauses in ordinary domestic private law contracts, maybe fearing being sued because of professional negligence if the costs of ADR prove to be much higher than litigation in court.

In the following a functional micro-comparison⁵¹ is being applied with just occasional references, where necessary, to the Japanese legal system as a whole.

II. *General Definition of ADR and its Various Forms*

Alternative Dispute Resolution describes various forms of contractual agreements to settle a dispute between the parties in civil and commercial matters outside of state courts in an amicable manner.⁵²

The basis for all forms of ADR is an agreement either as a separate ADR-Agreement (rare) or a clause providing for ADR in the main contract (most common).⁵³

The simplest form of ADR is a re-negotiation between the parties, including maybe their representatives, based upon a contractual clause or an ad hoc-agreement without the involvement of any third party.⁵⁴

The other two main forms of ADR, i.e. mediation and arbitration, involve an independent third party, mediator or arbitrator, whose task is to assist the parties in finding their own most suitable compromise or even rendering an enforceable arbitral award.⁵⁵ Mediation and arbitration require the parties to the dispute to conclude a separate contract with the third party, i.e. the mediator or arbitrator.

⁴⁸ Wells A, ‘Dispute Resolution, Mediation and Arbitration’ (2011) 3 Business Law Review 61, 61. Rau A S, Shermann E F, Peppet S R, *Arbitration* (2 nd ed. 2002) New York Foundation Press, 30-31.

⁴⁹ Kilian M, ‘At Long Last... Germany has Embraced Mediation: correspondent’s report from Europe’ (2012) 15 Legal Ethics 398, 399.

⁵⁰ Hopt K J, Steffek F, *Mediation: Principles and Regulation in Comparative Perspective* (Oxford University Press 2013), 542.

⁵¹ Zweigert/Kötz, *Einführung in die Rechtsvergleichung*, 2. Aufl., § 3 II, p. 34 et seq.

⁵² Reuben C R, ‘Constitutional Gravity: a unitary theory of alternative dispute resolution and public civil justice’ (1999-2000) 47, UCLA Law Review 949, 953. Toulmin J, ‘Cross-border Mediation and Civil Proceedings in National Courts’ (2009) 10 ERA Forum 551, 556.

⁵³ Mihai G, ‘Alternative Methods for the Resolution of Trade Disputes’ (2012) 15 Judicial Current 81, 82, 90.

⁵⁴ Han K, Poon N, ‘The Enforceability of Alternative Dispute Resolution Agreements’ (2013) 25 Singapore Academy of Law Journal 455, 458-467.

⁵⁵ Nolan-Haley J, ‘Mediation: the “New Arbitration”’ (2012) 17 Harvard Negotiation Law Review 61, 63.

Nevertheless, the following main variations of the aforementioned basic forms of ADR can be distinguished⁵⁶:

1. (Re-) Negotiation

Re-negotiation in good faith (!)⁵⁷ can take place at any time provided the parties voluntarily agree on that once the dispute has arisen. Alternatively, a re-negotiation clause can be inserted in the original contract.

The product of a successful re-negotiation is an amended original contract, a new contract or even a termination of the original contract upon mutual consent.⁵⁸

Re-negotiations usually take place in private behind closed doors at a neutral venue. Therefore both parties have to make at least a physical move and might see the dispute differently because of a neutral venue.

If the original or amended contract involves an international element (connecting factor), the rules of private international law of the forum determine the applicable contract law unless the parties use their freedom of choice pursuant to Art. 4 Rome I-Regulation⁵⁹.

2. Mediation

Mediation is a voluntary procedure where the parties appoint an independent third party (the mediator) to assist them in finding a solution for their dispute.⁶⁰ This mediator does not possess any legal qualifications as long as he or she is independent and regarded as competent and suitable by the parties. The parties have to enter into a contract with the mediator defining the content, procedure and fees.⁶¹

The product of a successful mediation is ideally an (enforceable) contract between the parties.⁶² Mediation should also take place behind closed doors, at a relaxed, protected neutral

⁵⁶ Other authors distinguish many more facets in ADR: Informal discussion and problem-solving, Negotiation, Mediation, Conciliation, Facilitation, The Mini-Trial, Arbitration, Commission of Enquiry, Fact-Finding, Hybrid forms of dispute resolution and Relationship-building initiatives, see Mervyn E. King, Foreword, p. vii, in: Paul Pretorius (ed.), *Dispute Resolution*, Cape Town, 1993, and in greater detail Paul Pretorius, Introduction and Overview, p. 3 et seq., in: Pretorius (ed.), *Dispute Resolution*, Cape Town, 1993.

⁵⁷ Quagliato P B, 'The Duty to Negotiate in Good Faith' (2008) 50 *International Journal of Law and Management* 213, 213 — 215. Han K, Poon N, 'The Enforceability of Alternative Dispute Resolution Agreements' (2013) 25 *Singapore Academy of Law Journal* 455, 470-477. Brown H, Marriott A, *ADR: Principles and Practice* (2011) London, Sweet and Maxwell, 71, 72.

⁵⁸ Han K, Poon N, 'The Enforceability of Alternative Dispute Resolution Agreements' (2013) 25 *Singapore Academy of Law Journal* 455, 458, 467.

⁵⁹ „Rome I-Regulation” (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations), OJ L 177/6, 4.07.2008. Available on the Internet at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008R0593:en:NOT>. Last visited 20 March 2011.

⁶⁰ Riskin L L, 'Understanding Mediator's Orientations, Strategies and Techniques: a grid for the perplexed' (1996) 1 *Harvard Negotiation Law Review* 7, 8, 19. Rau A S, Sherman E F, Peppet S R, *Mediation and Other Non-Binding ADR Processes* (2nd ed. 2002) New York, Foundation Press, 50-51.

⁶¹ Hopt K J, Steffek F, *Mediation: Principles and Regulation in Comparative Perspective* (Oxford University Press 2013), 549-554.

⁶² Toulmin J, 'Cross-border Mediation and Civil Proceedings in National Courts' (2009) 10 *ERA Forum* 551, 555, 560. Vries T, 'The Legal Regulation of Mediation in Germany' (2012) 209 *Acta Universitatis Lucian Blaga* 209, 214.

venue. Confidentiality is of paramount importance in mediation.⁶³

Also here, the private international law of the forum determines the applicable contract law provided there is an international or cross border element (connecting factor), unless the parties choose the applicable law according to Art. 4 Rome I-Regulation.

The classification of the agreement between the parties and the mediator is still a bit doubtful but it should be viewed from the typical contractual obligations of the most important party which is the mediator. The mediator renders professional services by enabling fair mediation proceedings. Therefore the state law at the place of business or domicile of the mediator shall apply pursuant to Art. 3 I Rome I Regulation, unless the parties choose a different law according to Art. 4 Rome I Regulation.⁶⁴

The 2008 *EU Mediation Directive on Cross Border Mediation*⁶⁵ lead to new statutes or amended rules in existing statutes regulating mediation in the EU Member States.⁶⁶ Austria, for instance, as the “European pioneer” in mediation has already had since 2003 a comprehensive statute for national mediation including a list of registered mediators who are obliged to have minimum and continuous education plus insurance against professional negligence⁶⁷. However, the 2008 Mediation Directive set out just minimum requirements to be enacted by the Member States in the case of cross border mediation. Cross border mediation being expressly defined in Art. 2 (1) Mediation Directive as relating to a cross-border dispute where at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party (not necessarily a Member State!).⁶⁸

Therefore a long academic discussion took place in Germany whether any new special rules at all were needed to bring the existing German law in line with the Mediation Directive.⁶⁹ However, the German Parliament ended this discussion by promulgating the 2013 Mediation Act (*Mediationsgesetz*) as Preamble No. 8 of the 2008 Mediation Directive indirectly encouraged the Member States to extend the rules and principles laid down for cross border mediation also to purely domestic mediation.

Riskin L L, ‘Understanding Mediator’s Orientations, Strategies and Techniques: a grid for the perplexed’ (1996) 1 *Harvard Negotiation Law Review* 7, 18-22.

⁶³ Reichert K, ‘Confidentiality in International Mediation’ (2004) 59 *Dispute Resolution Journal* 60, 62.

⁶⁴ Diedrich, *International/Cross Border Mediation within the EU — Place of Mediation, Qualifications of the Mediator and the Applicable Law*, in Diedrich (Ed.), *The Status Quo of Mediation in Europe and Overseas*, Hamburg 2014, p. 53, 76.

⁶⁵ Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ L 136, 24.05.2008. Available on the Internet at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008L0052:en:NOT>. Last visited 20 March 2011.

⁶⁶ Fealsey A, ‘“Regulating Mediation Qualifications in the 2008 EU Mediation Directive: the need for a supranational standard’ (2011) 2 *Journal of Dispute Resolution* 333, 333.

⁶⁷ As to the 2003 Austrian Mediation Act (“Civil Law Mediation Act”; *Zivilrechtsmediationsgesetz/ZivMediatG*), in force since 01st May 2004, see [http://www.mediatorenliste.justiz.gv.at/mediatoren/mediatorenliste.nsf/ContentByKey/VSTR-7JRVHG-DE-p/\\$file/2003a029.pdf](http://www.mediatorenliste.justiz.gv.at/mediatoren/mediatorenliste.nsf/ContentByKey/VSTR-7JRVHG-DE-p/$file/2003a029.pdf) (official text in German), an unofficial English translation can be found at http://www.viac.eu/images/documents/en/Austrian_Mediation_Act.pdf (last visited 17 November 2014); Knotzl B, Zach E, ‘Taking the Best from Mediation Regulations’ (2007) 23 *Arbitration International* 663, 663-685.

⁶⁸ As to the difference between the statutory definition of cross border as against the wider notion of “international” mediation and the applicable rules of private international law see Diedrich, in Trossen (Ed.), *Mediation (ung) geregelt, Altenkirchen* 2014, p. 842 et seq.; Diedrich, as above, in Diedrich (Ed.), *The Status Quo of Mediation in Europe and Overseas*, Hamburg 2014, p. 53, 58 et seq..

⁶⁹ Vries T, ‘The Legal Regulation of Mediation in Germany’ (2012) 209 *Acta Universitatis Lucian Blaga* 209, 211.

Additionally, most professional mediators work pursuant to the (voluntary) *European Code of Conduct for Mediators*⁷⁰. This Code lays down fundamental ethical and procedural rules, e.g. in No. 2 the independence and impartiality of the mediator; in No. 3 equal treatment of the parties and fairness of the process.

This European Code of Conduct for Mediators was launched at a European Commission Justice Directorate conference in Brussels on 2nd July 2004. The Code sets out a number of principles to which individual mediators can voluntarily decide to commit. The principles cover all areas of mediation including competence, advertising, impartiality and fees. It is intended to be applicable to all kinds of mediation in civil and commercial matters. The Code was developed by a working group including the British-based Centre for Effective Dispute Resolution/CEDR and other representatives from mediation groups, the legal profession, industry specialists and consumer groups working in co-operation with the European Commission.⁷¹

Therefore this Code should also be agreed upon by the parties to prevent any unforeseen factual or legal complications.

3. Arbitration

Arbitration is the most advanced form of ADR and the closest to state court proceedings.⁷² Its legal basis therefore can be found in the national laws of civil procedure of the EU Member States⁷³ and in the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards^{74,75}, to which all Member States belong.

The parties seek a private resolution of their dispute by referring it to an arbitrator or an arbitration tribunal consisting of three arbitrators. This can only be done by a written agreement. Sufficient is actually a contractual clause containing the arbitration agreement.⁷⁶ The effect of such an arbitration agreement is that a state court does not have jurisdiction (see e.g. § 1032 (1) German Code of Civil Procedure/ZPO).

State courts, however, retain their jurisdiction for interim measures (injunctions) and at a later stage to set aside an arbitral award if fundamental principles of substantive or procedural law were neglected or the enforcement of the award is contrary to the public policy of the court (see § 1059 (2) ZPO and Art. V 1958 New York Convention).⁷⁷

But as a state court in civil proceedings will not act on its own (*ex officio*) the parties to the arbitration agreement have the burden to bring an action in a state court for interim

⁷⁰ The European Code of Conduct for Mediators is available on the Internet at http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf. Last visited 20 March 2011.

⁷¹ Nolan-Haley J, 'Mediation: the "New Arbitration"' (2012) 17 Harvard Negotiation Law Review 61, 71.

⁷² Rau A S, Shermann E F, Peppet S R, *Arbitration* (2 nd ed. 2002) New York Foundation Press, 4-5.

⁷³ Weigand F B, 'The UNCITRAL Model Law: New Draft Arbitration Acts in Germany and Sweden' (1995) 11 Arbitration International 397, 398-399, 398.

⁷⁴ The text of the 1958 Convention is available on the Internet at http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/1958_NYC_CTC-e.pdf. Last visited 20 March 2011.

⁷⁵ Wells A, 'Dispute Resolution, Mediation and Arbitration' (2011) 3 Business Law Review 61, 61. Toulmin J, 'Cross-border Mediation and Civil Proceedings in National Courts' (2009) 10 ERA Forum 551, 557.

⁷⁶ Kroll S "First Experiences" with the New Austrian Arbitration Law' (2007) 23 Arbitration International 553, 556-557.

⁷⁷ Kroll S "First Experiences" with the New Austrian Arbitration Law' (2007) 23 Arbitration International 553, 571.

measures, setting aside an arbitral award or challenging the choice of arbitrators.

Arbitration procedures can generally be distinguished as follows:

- 1) **ad hoc** if the parties themselves appoint an arbitrator or a tribunal including the applicable rules,⁷⁸ or
- 2) **institutional** if the parties choose an institution providing arbitrators and procedural rules,⁷⁹ e.g. ICC, DIS, IEMS.⁸⁰

Arbitration, as other forms of ADR, usually takes place at a convenient, neutral place behind closed doors. Confidentiality is also here a very important feature and advantage over state court proceedings. So just those arbitration proceedings reach the eye of the general public where the parties expressly agreed on going public.

The result of arbitration proceedings is either a compromise/settlement out of court in the form of an enforceable contract or an arbitral award.⁸¹ The arbitral award can directly enforced with the assistance of state courts almost worldwide without any extensive court proceedings⁸² because of the 1958 New York Convention. The enforcement of national and international arbitral awards through state courts is in general an exceptional event. The standard is usually that the party ordered to pay or perform by the arbitration tribunal also does so in due time. The exception, to be sure, can be found if insolvency proceedings have started or the defeated party tries to gain time by trying to hide behind complicated local procedural rules.⁸³

The applicable rules in arbitration proceedings are determined by the parties' choice of law and/or the procedural rules laid down by the chosen institution (if any). Moreover, the arbitration tribunal is in most jurisdictions at least in international proceedings deemed to be generally empowered to act as *amicable compositeur* or rule *ex aequo et bono*. This means that the arbitration tribunal is not bound by the local statutes where the proceedings take place as long as the award remains enforceable. But the parties can exclude this extensive competence as it leads to legal uncertainty because of the unpredictability of the outcome. Moreover, under German law the arbitration tribunal does not possess the competence to rule *ex aequo et bono* but has to apply pursuant to § 1051 (2) ZPO the law with the closest connection to the case, unless explicitly empowered by the parties to decide otherwise.

In addition, it has to be pointed out that there is not second instance or appeal in arbitration proceedings. So an arbitral award is always a final ruling on the case and between the parties.⁸⁴ This renders arbitration proceedings risky and lead very often to pressure on the parties to settle their dispute beforehand, sometimes with the assistance of the arbitration tribunal.

⁷⁸ Lew J D M, Mistelis L A, Kroll S M *Comparative International Commercial Arbitration* (2003) Kluwer Law International, 33-35

⁷⁹ Lew J D M, Mistelis L A, Kroll S M *Comparative International Commercial Arbitration* (2003) Kluwer Law International, 36

⁸⁰ Reichert K, 'Confidentiality in International Mediation' (2004) 59 *Dispute Resolution Journal* 60, 63.

⁸¹ Hopt K J, Steffek F, *Mediation: Principles and Regulation in Comparative Perspective* (Oxford University Press 2013), 535. Knotzl B, Zach E, 'Taking the Best from Mediation Regulations' (2007) 23 *Arbitration international* 663, 663-685, 683.

⁸² Rau A S, Sherman E F, Peppet S R, *Mediation and Other Non-Binding ADR Processes* (2nd ed. 2002) New York, Foundation Press, 304.

⁸³ Nolan-Haley J, 'Mediation: the "New Arbitration"' (2012) 17 *Harvard Negotiation Law Review* 61, 89.

⁸⁴ Kroll S '“First Experiences” with the New Austrian Arbitration Law' (2007) 23 *Arbitration International* 553, 557.

However, national and international arbitration has become quite unpopular in business circles Germany, Japan and elsewhere due to its impressive costs⁸⁵ and inherent risks because of the lack of an appeal. Still arbitration is the most reasonable and professional form of dispute resolution involving big international business deals between different legal systems or cultures. But a stand-alone arbitration agreement is an incomplete form of ADR because it leaves no options. And experience shows that once a dispute has arisen it becomes extremely difficult to enter into a new ADR agreement including re-negotiation and mediation.

4. Hybrid Forms — Going Back and Forward

Hybrid forms of ADR refer to processes that include two or more forms of ADR at the same time. The most widespread forms are Med-Arb⁸⁶ or Arb-Med^{87,88,89}.

But there can also be a state court involved where the parties first go to court and then being advised by the court to find a solution rather through mediation or arbitration. Or the other way round where the parties entered into an arbitration agreement but then rather mutually choose to forego that and start court proceedings instead only to find themselves in mediation proceedings.⁹⁰ So the list of hybrid ADR options is almost limitless.

Hybrid forms of ADR have, however, one thing in common:

There is always an independent third party involved. So hybrid forms can be agreed upon in a contractual clause from the very beginning of the legal relationship between the parties or at a later stage when negotiations fail and a more authoritative but at the same time flexible form of ADR is sought.⁹¹

5. Mixed Forms — Staircase Mechanism

The most advanced and efficient forms in ADR are mixed forms. The basis for mixed ADR is an appropriate contractual clause or separate agreement containing a step-by-step- or staircase-mechanism for solving the dispute.

This staircase mechanism compels the Parties to the contract to try one form of ADR first, then moving to the next. Certainly they can anytime waive their right to this procedure by mutual agreement. But otherwise these staircase ADR-clauses are designed to de-escalate the conflict by keeping it at the lowest possible stage of intervention by a third party. It is

⁸⁵ Rau A S, Sherman E F, Peppet S R, *Mediation and Other Non-Binding ADR Processes* (2nd ed. 2002) New York, Foundation Press, 304. Lew J D M, Mistelis L A, Kroll S M *Comparative International Commercial Arbitration* (2003) Kluwer Law International, 9.

⁸⁶ Limburg A L 'Hybrid Dispute Resolution processes — Getting the Best while Avoiding the worst of Both of of World' <<http://imimmediation.org/?cID=219&cType=document>> accessed 26.11.2013, 4-5, 7-8.

⁸⁷ Limburg A L 'Hybrid Dispute Resolution processes — Getting the Best while Avoiding the worst of Both of of World' <<http://imimmediation.org/?cID=219&cType=document>> accessed 26.11.2013, 5-6, 7.

⁸⁸ See Pretorius, in Pretorius (ed.), as above, p. 5.

⁸⁹ Nolan-Haley J, 'Mediation: the "New Arbitration"' (2012) 17 *Harvard Negotiation Law Review* 61, 85-86.

⁹⁰ Raeschke-Kessler H, 'The Arbitration as Settlement Facilitator' (2005) 21 *Arbitration International* 523, 522.

⁹¹ Limburg A L 'Hybrid Dispute Resolution processes — Getting the Best while Avoiding the worst of Both of of World' <<http://imimmediation.org/?cID=219&cType=document>> accessed 26.11.2013, 6.

Ross W H, Conton D E, 'Hybrid Forms of Third — Party Dispute Resolution: the theoretical implications of combining mediation and arbitration' (2000) 25 *Academy of Management Review* 416, 416-420.

financially and personally not viable to call in a mediator only because this was foreseen in a contractual clause if the Parties still could find mutual agreement on the dispute by negotiations in good faith. The Parties, however, are bound to mediate by contract law and will find it difficult to get the other party to the negotiation table if not provided in a contractual clause. Even if in a mixed ADR clause the first and mildest step is to start negotiations in good faith, it is still binding on the Parties and they are excluded from invoking mediation, arbitration or even state court proceedings. So the Parties have to think about their options and strategies within the framework of a mixed ADR clause. If, on the other hand, an ADR clause does not refer to negotiations first, the Parties often do not feel compelled to try negotiations plus they cannot force the other Party to take part into but need its consent. So it is much more efficient and de-escalating to give the Parties a cornucopia of options via a mixed ADR clause to settle any future (unforeseen) disputes.

Such a mixed ADR clause could look like the following:

- “(1) Exclusive jurisdiction for any lawsuit or legal proceedings for any claims arising out of or because of this Agreement shall have an arbitration tribunal consisting of a sole arbitrator according to the xxx rules. The Parties are free to nominate jointly a suitable arbitrator on their own. The arbitration tribunal is expressly given competence-competence but must not rule *ex aequo et bono*. All arbitrators have to be fluent in English and German.
- (2) The Parties hereby unconditionally agree to the above arbitration clause and submit to and waive any objections to personal jurisdiction of the aforesaid arbitration tribunal. Nevertheless, interim measures may also be taken by an otherwise competent court of justice.
- (3) Before invoking arbitration proceedings, the Parties shall attempt to find an amicable and reasonable solution of the dispute through negotiation first, including mediation. Negotiations in good faith and mediation shall take place in yyy. If the parties fail to choose a suitable mediator being a fully qualified lawyer, the Chamber of Commerce of zzz shall nominate one being fluent both in German and English. Mediation shall be conducted pursuant to the European Code of Conduct of Mediators and the rules of aaa. The Parties shall share the mediation costs equally.”

A mixed ADR clause is certainly lengthy and detailed. This could lead to mistrust and suspicion amongst the parties being in the process of concluding the main contract. So it might not suit all contractual parties and transactions in civil and commercial law. But if the parties can agree on such a mixed ADR clause, they will be rewarded by having all options in their hand to solve a dispute in the most efficient form. They do not have to make a final decision at the time of signing the contract which way of ADR to pursue. On the contrary, the Parties can decide once the dispute has arisen whether they wish to settle amicably and with low expenses through re-negotiation or mediation or rather let it further escalate into (costly) arbitration with the benefit of an easily enforceable award.

As none of the Parties can foresee when which dispute will arise and what kind of financial or other constraints will affect them, it is better to postpone this assessment until the time of the actual dispute. Then a up-to-date assessment of the legal and practical pros and cons of the various forms of ADR can be made — on the basis of an agreed upon mixed ADR-clause that leaves the choice to the parties.⁹²

III. *Background of ADR in Japan*

It has been pointed out that the will and intention of the parties play a central role in ADR as it is based on party agreement.⁹³ The Parties are its principal players and its administration is party-centered. Also in Japan alternative methods are being seen as offering occasions for restoring autonomy of the parties through third party intervention.⁹⁴

The influence of the law depends ultimately on the involvement of legal professionals in ADR.⁹⁵ However, the traditional background of ADR in Japan and within the legal system should be briefly shown:

1. **The Japanese Court System in Civil and Commercial Matters**

The Japanese Court System was newly established by the Court Law in 1947 and is structured as follows:

The highest court is the Supreme Court of Japan⁹⁶ located in Tokyo. The Supreme Court is followed in the hierarchy by the eight High Courts that are located in major cities, e.g. Tokyo, Osaka, Nagoya, Sendai, Hiroshima.

Below the High Courts there are 50 District Courts with one for every prefecture plus specific branches.⁹⁷ Finally, there are the 452 Summary Courts spread over the entire country.

It is worth noting that both District Courts and Summary Courts are courts of first instance. The only distinction is the amount in controversy:

Summary Courts have pursuant to Art. 33 of the SAIBANSHO-HO (Court Law), Statute No. 59 of 1947, jurisdiction in civil and commercial cases with an amount in controversy of up to and including 900.000 Yen (roughly EUR 8.000,00).

Therefore District Courts have jurisdiction in civil and commercial cases with an amount in controversy of more than 900.000 Yen (Art. 24 SAIBANSHO-HO).

If a case goes to a Summary Court as first instance, the first appeal will lie with the District Court. The second appeal has to be brought to the High Court having jurisdiction for that District Court. Only exceptionally, a further appeal in questions of law only (alleged contradiction to the Constitution) may be brought to the Supreme Court.

If a dispute starts at the level of a District Court, the first appeal may be made to the

⁹² Atlas N F, Huber S K, Trachte-Huber T (eds.) *Alternative Dispute Resolution: The Litigator's Handbook* (2003) American Bar Association, 257

⁹³ Kojima, T., *Civil Procedure and ADR in Japan*, Tokyo 2004, Chapter 2 The Role of Law in ADR, p. 22-23.

⁹⁴ Kojima, T., *Civil Procedure and ADR in Japan*, Tokyo 2004, Chapter 2 The Role of Law in ADR, p. 20.

⁹⁵ Kojima, T., *Civil Procedure and ADR in Japan*, Tokyo 2004, Chapter 2 The Role of Law in ADR, p. 28-29

⁹⁶ McKenna S S 'Proposal for Judicial Reform in Japan: an overview' (2001) 2 *Asian-Pacific Law and Policy Journal* 122, 127.

⁹⁷ Anderson K, Ryan T, 'Japan: the importance and evolution of legal institutions at the turn of the century' in Black A E, Bell G F, *Law and Legal Institutions of Asia: traditions, adaptations and innovations* (2011) <<http://ebooks.cambridge.org/ludwig.lub.lu.se/ebook.jsf?bid=CBO9780511921131>> accessed 26.11.2013, 138, 137.

“local” High Court with a second appeal to the Supreme Court in Tokyo.^{98,99}

There is not any specific form of ADR-system embedded in the Japanese Court System. The Japanese Court System follows a traditional hierarchy and appeal’s system that can be found elsewhere in the Civil Law Family, in particular in Germany as it used to be the model for the Japanese law on civil procedure.¹⁰⁰

However, the legal practice before civil and commercial courts might be in fact different from other civil law countries as the judges in Japan take a much more active role having a “duty of clarification”. A breach of this duty might even give rise to an appeal.¹⁰¹

2. ADR in Japan in General

In Japan two major different types of ADR can be distinguished:

Firstly, the “co-ordination type” comprising of conciliation and mediation¹⁰² (“Assen”), and secondly, “the adjudication type” comprising of arbitration.¹⁰³

Traditionally, arbitration is not very popular in Japan¹⁰⁴ when it comes to domestic disputes¹⁰⁵ due to its costs and unpredictability. On the other hand civil conciliation and family conciliation through the guidance and formal supervision of state courts is very widespread.¹⁰⁶ Older figures of 1994 show that of a total number of 380.000 civil cases conciliation was used in more than 120.000 cases and family conciliation in 100.000 cases.¹⁰⁷

The success rate in conciliation under the guidance of state courts is about 50%, i.e. 50% do not have to be solved by rendering a judgement. If one takes then into account the high likelihood of a substantial number of cases being solved by out-of-court-settlements,¹⁰⁸ the role

⁹⁸ See *Kojima, T.*, Civil Procedure and ADR in Japan, Tokyo 2004, Chapter 4 Japanese Civil Procedure in Comparative Law Perspective, p. 93 et seq., 97 et seq.

⁹⁹ Furuta Y, Tsukamoto H, Mori A ‘Japan Enters a New Era’ (Asia Law & Practice) <http://www.amt-law.com/pdf/bulletins3_pdf/060111_1-1.pdf> accessed 26.11.2013, 122.

¹⁰⁰ Anderson K, Ryan T, ‘Japan: the importance and evolution of legal institutions at the turn of the century’ in Black A E, Bell G F, Law and Legal Institutions of Asia: traditions, adaptations and innovations (2011) <<http://ebooks.cambridge.org.ludwig.lub.lu.se/ebook.jsf?bid=CBO9780511921131>>, 124-125. Livdahl D A ‘Cultural and Structural Aspects of International Commercial Arbitration in Japan (2003) 20 Journal of International Arbitration 375, 379.

¹⁰¹ Ramseyer J M/Nakazato M, Japanese Law — An Economic Approach, Chicago/London 200, p. 142-143 with further references.

¹⁰² Fuller L L ‘Mediation — its forms and functions’ (1971) 44 Southern California Law Review 305, 308. Rau A S, Sherman E F, Peppet S R, *Mediation and Other Non-Binding ADR Processes* (2nd ed. 2002) New York, Foundation Press, 2-3. Brown H, Marriott A, *ADR: Principles and Practice* (2011) London, Sweet and Maxwell, 156-157.

¹⁰³ Hopt K J, Steffek F, *Mediation: principles and regulation in comparative perspective* (Oxford University Press 2013), 1032.

¹⁰⁴ Anderson K, Ryan T, ‘Japan: the importance and evolution of legal institutions at the turn of the century’ in Black A E, Bell G F, Law and Legal Institutions of Asia: traditions, adaptations and innovations (2011) <<http://ebooks.cambridge.org.ludwig.lub.lu.se/ebook.jsf?bid=CBO9780511921131>>, 138, 139.

¹⁰⁵ Pardieck A M, ‘Virtuous Ways and Beautiful Customs: the role of alternative dispute resolution in Japan’ (1997) 11 Temple International and Comparative Law Journal 31, 45.

Furuta Y, Tsukamoto H, Mori A ‘Japan Enters a New Era’ (Asia Law & Practice) <http://www.amt-law.com/pdf/bulletins3_pdf/060111_1-1.pdf> accessed 26.11.2013, 121.

¹⁰⁶ Pardieck A M, ‘Virtuous Ways and Beautiful Customs: the role of alternative dispute resolution in Japan’ (1997) 11 Temple International and Comparative Law Journal 31, 41.

¹⁰⁷ See *Kojima, T.*, Civil Procedure and ADR in Japan, Tokyo 2004, Chapter 2 “The Role of Law in ADR”, p. 21.

of conciliation in the Japanese dispute resolution system is very substantial.^{109,110}

Conciliation and “Assen” by administrative agencies and private institutions are widely offered in addition to (mandatory) conciliation in court. As these forms of ADR can be universally used for various legal disputes, their social function has become important. A lot of individuals in Japan cannot imagine bringing a law-suit¹¹¹ as this is too far away and removed from everyday life.¹¹² So conciliation with the assistance e.g. of the family and friends¹¹³ is dominating the ADR-scene in Japan amongst individuals. A traditional field of conciliation has always been long term legal relationships, e.g. landlord-tenant and matrimonial¹¹⁴ disputes. However, it is recently also used in temporary disputes, e.g. traffic accident¹¹⁵, pollution¹¹⁶ and product liability¹¹⁷ cases. In particular the introduction of strict liability in product liability law has led to the set-up of numerous dispute resolution or consultation centers for various goods,¹¹⁸ e.g. medical products, consumer goods, cosmetics, toys etc..¹¹⁹

Arbitration:

Despite its German roots¹²⁰, the Japanese law on civil procedure¹²¹ does not contain any

¹⁰⁸ Nottage L. ‘Japan’s New Arbitration Law: domestication reinforcing internalization?’ (2004) 2 International Arbitration Law Review 54, 54.

¹⁰⁹ See *Kojima*, T., *Civil Procedure and ADR in Japan*, Tokyo 2004, Chapter 2 “The Role of Law in ADR”, p. 21.

¹¹⁰ Pardieck A M, ‘Virtuous Ways and Beautiful Customs: the role of alternative dispute resolution in Japan’ (1997) 11 Temple International and Comparative Law Journal 31, 56. Yamada A, ‘ADR in Japan: does the new law liberalize ADR from historical shackles or legalize it?’ (2009) 2 Contemporary Asia Arbitration Journal, 1, 1. Livdahl D A ‘Cultural and Structural Aspects of International Commercial Arbitration in Japan (2003) 20 Journal of International Arbitration 375, 380.

¹¹¹ Niya S, Jarman S, ‘Costs in English and Japanese Legal Procedure’ <<http://sas-space.sas.ac.uk/3539/1/1560-1909-1-SM.pdf>> accessed 26.11.2013, 8. Pardieck A M, ‘Virtuous Ways and Beautiful Customs: the role of alternative dispute resolution in Japan’ (1997) 11 Temple International and Comparative Law Journal 31, 33.

¹¹² Livdahl D A ‘Cultural and Structural Aspects of International Commercial Arbitration in Japan (2003) 20 Journal of International Arbitration 375, 377. McKenna S S ‘Proposal for Judicial Reform in Japan: an overview’ (2001) 2 Asian-Pacific Law and Policy Journal 122, 150.

¹¹³ Fuller L L ‘Mediation — its forms and functions’ (1971) 44 Southern California Law Review 305, 308.

¹¹⁴ Murayama M, ‘Does a Lawyer Make a Difference? Effects of a Lawyer on Mediation Outcome in Japan’ (1999) 13 International Journal of Law, Policy and the Family 52, 53. Murayama M, ‘The Origins and development of Family Conciliation in Japan: a political aspect’ (2010) 32 Journal of Social Welfare and Family Law 143, 147.

¹¹⁵ Iwai N, ‘Alternative Dispute Resolution in Court: the Japanese experience’ (1990-1991) 6 Ohio State Journal on Dispute Resolution, 201, 236.

¹¹⁶ Iwai N, ‘Alternative Dispute Resolution in Court: the Japanese experience’ (1990-1991) 6 Ohio State Journal on Dispute Resolution, 201, 234-235.

¹¹⁷ Barnes Bruce, E. *Culture, Conflict and Mediation in the Asian Pacific* (Lanham, University Press of America 2007), 57. Yamada A, ‘ADR in Japan: does the new law liberalize ADR from historical shackles or legalize it?’ (2009) 2 Contemporary Asia Arbitration Journal, 1, 13.

¹¹⁸ Pardieck A M, ‘Virtuous Ways and Beautiful Customs: the role of alternative dispute resolution in Japan’ (1997) 11 Temple International and Comparative Law Journal 31, 52.

¹¹⁹ *Kojima*, T., *Civil Procedure and ADR in Japan*, Tokyo 2004, Chapter 2 “The Role of Law in ADR”, p. 22; Hopt K J, Steffek F, *Mediation: principles and regulation in comparative perspective* (Oxford University Press 2013), 1022-1023..

¹²⁰ Levin M A, ‘Civil Justice and the Constitution: limits on instrumental judicial administration in Japan’ (2011) 20 Pacific Rim Law and Policy Journal 265, 314. Henderson D F ‘Some Aspects of Tokugawa Law’ (1952) 27 Washington Law Review and State Bar Journal 83, 92. Furuta Y, Tsukamoto H, Mori A ‘Japan Enters a New Era’ (Asia Law & Practice) <http://www.amt-law.com/pdf/bulletins3_pdf/060111_1-1.pdf> accessed 26.11.2013, 121. Oda H, ‘Japanese law’ (Oxford, Oxford University Press 2009), 4, 7, 410; in contrast the German Code of Civil Procedure was revised in

provisions regarding arbitration or other forms of ADR. This is left to special legislation that will be analyzed in the following.

3. The 2004 Act on the Promotion of ADR

On 1st December 2004 the Act on Promotion of Use of Alternative Dispute Resolution (Act. No. 151) was promulgated. It came into force on 1st April 2007 pursuant to Art. 1 of its Supplementary Provisions by Cabinet Order No 186 of 2006.

The Act was supplemented by the Ministry of Justice Ordinance for Enforcement of the Act on Promotion of Use of Alternative Dispute Resolution (No. 52 of 28th April 2006, entering into force on 1st April 2007). The latter Ordinance contains mainly definitions of persons in Art. 1 and 2 as so-called “substantial controllers” according to Art. 6 (4) of the 2004 Act because of their business interests, kinship etc. who must not exercise any pressure on the ADR proceedings. Moreover, this Ordinance sets out the formalities to be observed in obtaining a certificate as person carrying out private dispute resolution services on a regular basis from the Minister of Justice (Artt. 4 et seq.).

Additionally, the Cabinet Order No. 186 of 28th April 2006 (in force since 1st April 2007) has excluded a few, very specific forms of ADR from the sphere of application of the 2004 Act (Art. 1) and set the fees for applying for a certificate for private dispute resolution service providers (Art. 3, roughly € 1400,00 or € 1300,00 if filed electronically.).

The 2004 Act contains in its Art. 1 a kind of preamble laying out the reasons for promulgating the Act:

It refers to the changes in the social and economic climate at home and abroad that have made alternative dispute resolution an important means of achieving prompt dispute resolution based on the specialized expertise of a third party. Alternative Dispute Resolution (ADR) is being defined as “procedures for resolution of a civil dispute between parties who seek, with the involvement of a fair third party, a resolution without using litigation”.)

The purpose of the Act is said to provide for the setting out the basic concepts, stating the responsibilities of the government and other entities, to establish a certification system and a set of special rules on nullification of prescription and other matters so as to make ADR procedures easier to utilize, thereby enabling parties to a dispute to choose the most suitable method for resolving a dispute.¹²²

Art. 3 (1) of the 2004 Act mentions procedural standards to be observed:

ADR procedures shall like legal procedures for settling disputes, be executed in a fair and

2002 and contains in its 10th book (§ § 1025 et seq. ZPO) on the basis of the 1985 UNCITRAL Model Law on International Commercial Arbitration (http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html; last visited 17.11.2014) an updated set of rules stating the point of intervention by the state courts, thereby setting indirectly the minimum standards for valid arbitration proceedings, see Schlosser, in: Stein/Jonas (ed. Bork/Roth, Kommentar zur Zivilprozessordnung, Vol. 10, 23rd ed., Tübingen 2014, vor § 1025 Rn 1+2 with further references.

¹²¹ Levin M A ‘Circumstances That Would Prejudice Impartiality: the meaning of fairness in Japanese jurisprudence’ (2013) 36 Hastings International & Comparative Law Review 475, 480.

¹²² See also Matsuzuka, S./Walther, H., Mediation zwischen Bürger und Staat in Japan, ZKM — Zeitschrift für Konfliktmanagement 4/2006, p. 108, 109.

appropriate manner while respecting the voluntary efforts of the for dispute resolution. ADR shall be aimed at achieving prompt dispute resolution based on specialized expertise and I accordance with the facts of the dispute.

Additionally, Art. 3 (2) of the 2004 Act states the principle of cooperation and collaboration that persons involved in ADR shall observe.

Apart from these definition and procedural standards, the 2004 Act sets out in Art. 4 the responsibilities of the government as follows:

The government shall —having the objective of promoting the use of ADR in mind — research and analyse the trends, use, and other matters of ADR at home and abroad, provide relevant information and take other necessary measures. This shall familiarize the public with ADR (Art. 4 (1)).

Furthermore, Art. 4 (2) addresses local public entities that shall endeavour to provide information on ADR and take other necessary measures while sharing appropriate roles with the government. The reason for this task is that the widespread use of ADR will contribute to an improvement in the general social well-being!

The entire Chapter II is devoted to the certification procedure of Private Dispute Resolution Services by the government (Art. 5 et seq.). Art. 6 provides for the minimum standard for the applicant having necessary knowledge and skills as well as a financial base for carrying out the services. In addition, the Dispute Resolution Service Provider has to show its procedural rules for ensuring equal treatment of the parties, notifying them in an appropriate manner, for preserving confidentiality and for establishing a set of fees or expenses that are not extremely unreasonable. Art. 7 lists reasons for disqualifying an ADR provider, e.g. declared bankruptcy or sentenced to imprisonment etc.

The prescription period shall be suspended because of the ADR proceedings, provided a law suit is being filed within one month after ADR has failed (Art. 25 (1)). This is, however, not the case in private, not court-assisted, mediation.¹²³ So the parties to mediation unrelated to court proceedings are well advised to agree expressly on a suspension of the period of limitations.

And where a lawsuit is already pending between the parties, the lawsuit shall be suspended for a period of no more than four month upon the joint request of the parties (Art. 26 (1)).

The 2004 Act is peculiar insofar as it contains in its Chapter V (Art. 32 et seq.) numerous penal provisions for persons failing to observe the standards set out for carrying out alternative dispute resolution services as an entity or individual and to give correct statements on facts and financial affairs during ADR proceedings.

IV. *Social and Legal Reality of ADR in Japan*

1. **ADR in the Tradition of Conciliation in Japan**

Conciliation and settlements of disputes out of court have a long tradition in Japan:

¹²³ Matsuzuka, S./Walther, H., Mediation zwischen Bürger und Staat in Japan, ZKM — Zeitschrift für Konfliktmanagement 4/2006, p. 108, 109.

Already during the Edo-Time private disputes were not brought before a state court but conciliated between the parties with the assistance of the mayor or a village elder to reach a peaceful settlement (Naisai). The state courts had too few means to deal with private disputes that did not infringe upon the powers of the state (emperor). Besides, this form of private conciliation was seen as belonging to the autonomy and competence of the municipality.¹²⁴

In the beginning of the Meiji-Regime the judiciary underwent major changes as it was reformed pursuant to European standards. As the judges had to deal with gaps in the statutes and also simply lack of knowledge of how the new legal rules should be applied, they were trained to settle all civil and commercial cases in court. Such a settlement conciliated by the judge was called Kankai. It even went further in 1881 when judges were instructed by rules of court to demand from the parties to settle their private dispute. So it became common practice for the parties to attempt to settle their dispute before the hearing even without being asked by the judge to do so.¹²⁵ The official judicial statistics from 1878 till 1885 indicate that 80-90% of all civil and commercial cases pending before first instance courts were referred to conciliation (Kankai) and 50-70% of them were ended by a settlement between the parties.¹²⁶

The high number of settlements cannot be viewed necessarily as a sign for the general tendency of the Japanese to settle private disputes out of court because the Kankai-“judges” acted authoritatively, thereby almost forcing the parties into a settlement. Kankai was abolished in 1890 when the new Code of Civil Procedure came into force.¹²⁷

Specific forms of genuine Japanese alternative dispute resolution mechanisms have therefore already a long and solid tradition in the Japanese legal system.¹²⁸

Additionally, it was mentioned often and by various authors that the Japanese culture has been favouring non-confrontation because of traditional social rules, e.g. the rules of *giri*.¹²⁹ Going to court is for ordinary Japanese citizens the last resort as it shows that all interpersonal attempts finding a compromise failed. So the plaintiff is in breach of fundamental principles of society as he indirectly admitted that he rejects compromises.¹³⁰

Now the question is how this tradition is being used in nowadays practice. For a complete analysis it is necessary to find out what the practice of ADR consists of in everyday legal life in Japan, i.e. the law in action. The following empirical research was conducted:

¹²⁴ Ishibe, Masasuke, *Das Schlichtungswesen aus rechtshistorischer und rechtsvergleichender Sicht*, in: Marutschke (ed.), *Beitraege zur modernen japanischen Rechtsgeschichte*, Berlin 2006, p. 150, 158.

¹²⁵ Ishibe, M., *Das Schlichtungswesen aus rechtshistorischer und rechtsvergleichender Sicht*, as above, p. 150, 159.

¹²⁶ Ishibe, M., *Das Schlichtungswesen aus rechtshistorischer und rechtsvergleichender Sicht*, as above, p. 150, 160 with further references.

¹²⁷ Ishibe, M., *Das Schlichtungswesen aus rechtshistorischer und rechtsvergleichender Sicht*, as above, p. 150, 160.

¹²⁸ Hopt K J, Steffek F, *Mediation: principles and regulation in comparative perspective* (Oxford University Press 2013), 1013. Barnes Bruce, E. *Culture, Conflict and Mediation in the Asian Pacific* (Lanham, University Press of America 2007), 56. Callister R R, James A., Wall, Jr. 'Japanese Community and Organizational Mediation' (1997) 41 *The Journal of Conflict Resolution* 311, 314.

¹²⁹ Noda, Y., *Introduction to Japanese Law* (ed. By Angelo, A.), Tokyo 1976, p. 174 et seq. with further references.

¹³⁰ Matsuzuka, S./Walther, H., *Mediation zwischen Bürger und Staat in Japan*, ZKM — Zeitschrift für Konfliktmanagement 4/2006, p. 108.

Firstly, a questionnaire was drafted and sent to exemplarily chosen addressees and secondly, personal interview were conducted with various experts and practitioners on the basis of the questionnaire.

The outcome of this research conducted from October through to December 2010 and in 2013 is the following:

2. Questionnaire on the Use of ADR

The questionnaire consisted of seven questions being of a more general nature to leave enough room for unforeseen responses that should not get curtailed by questions being too narrow. The questions were as follows:

1. Which statutes or statutory provisions do exist in Japan for different kinds of alternative dispute resolution (negotiation, mediation, arbitration etc.)?
2. What kind of contractual provisions do exist in Japan for alternative dispute resolution, e.g. in labour agreements?
3. Is it common or normal in Japan to insert ADR-clauses in certain civil or commercial contracts? If so, in which and if not, why not?
4. Is it in Japan rather common or normal to insert ADR-clauses in international contracts? If so, what kind of, and if no, why not?
5. Has there been a change in Japan during the last years how to deal with legal disputes (in or out of court), and if so, why?
6. What kind of influence do have legal protection insurance or legal expenses as such (court and attorney's fees) on the culture of dispute resolution in Japan?
7. Do you see any advantages in ADR in comparison to ordinary court proceedings in civil and commercial matters (efficiency, costs, time, business relationships), and if so, what kind of?

This questionnaire was sent by ordinary mail with return postage to selected

1. Leading Japanese law firms in Tokyo.
2. Major Japanese Motorcycle Producers (Honda, Kawasaki, Suzuki, Yamaha)
3. Civil Courts of First Instance in Tokyo

The addressees were selected as being exemplary for:

- a) large law firms working, inter alia, in ADR with sufficient experience,
- b) civil courts of first instance having to deal with either failed ADR or referring the parties to ADR, and
- c) large companies being faced with the need of ADR in intra-company dispute resolution but also in domestic and international commercial activities.

The law firms and the courts were selected from the large Tokyo area only because of the capital's overall importance in commerce and political significance for Japan as a whole.

In respect to the companies just the major players in the world's first class Japanese motorcycle industry were chosen. The car manufacturers are already quite well known, so it was time to look also into another Japanese industry being at the cutting edge of technology

thus not having any time to waste on costly law suits.

3. Personal Interviews on the Use of ADR

The author conducted various interviews with Japanese practitioners, mostly attorneys, in Tokyo from November through to December 2010 to investigate into the “daily life” of ADR in civil and commercial matters in practice. These interviews were repeated for obtaining an update from February to March 2013. However, little had changed except for more attorneys had been recently admitted to the Bar thereby creating stiffer competition amongst attorneys. This rather little change might set a gradual trend in Japan stressing the growing importance of trained lawyers for advice and dispute settlement.

4. Results from the Questionnaire and the Personal Interviews

The general result regarding civil and commercial contracts in Japan was that ADR-clauses are not being used. Instead, disputes that cannot be settled by re-negotiation are being referred to state courts. The overall approach of the law departments and practising attorneys was very positive towards the competence of state courts and the duration of court proceedings in Tokyo.

The number of court proceedings in civil and commercial matters has lately clearly increased. The reason for this rise in numbers can be seen in the accountability of the board of directors towards the shareholders to pursue the interest of the company in a neutral and professionally adequate manner. The interests of the company forbid an early compromise whereby money is being lost at least prematurely.

Courts in contrast are viewed by everyone, including shareholders, as just and neutral. Therefore it is easier to render transactions that were not performed in an optimal manner transparent to the shareholders through court proceedings.

a) The Practical Use of Re-Negotiation

The vast majority of answers referred to re-negotiation as an almost natural way in Japan attempting to settle the dispute. The important detail is that negotiation usually takes place without the involvement of lawyers.

However, a tendency is lately being seen favouring court proceedings as they are viewed to be cheaper and (still) more efficiently.

b) The Practical Use of Mediation

So far mediation is hardly being used in practice and also not being favoured by companies due to the accountability towards their shareholders.

Additionally, ADR is seen as being unpredictable and uncertain. Therefore, it is uncommon to include ADR clauses, not even for mediation, in contracts.

Nevertheless, the advantages of ADR are obvious for practitioners in Japan, e.g. confidential proceedings, experts may decide (not any state court judge), quicker dispute resolution because of just one instance, choice of the procedural language, choice of a truly neutral organ/person as not all institutions (mediators/arbitrators) are independent towards foreigners.

c) The Practical Use of Arbitration

In respect to arbitration some attorneys mentioned a specific technique in drafting arbitration clauses in commercial contracts between companies with their respective place of business in the Peoples Republic of China and Japan. Such arbitration clauses usually contain a variation regarding the place of arbitration: If the arbitration proceedings are being commenced by the Chinese party, arbitration takes place in Japan and vice versa. In both aforementioned cases the local rules of arbitration would apply or more specifically, the rules of the chosen local arbitration institution unless ad hoc arbitration is agreed upon.

This rather common model is designed to keep trust and mistrust regarding the different legal systems and the independence of arbitrators in balance. At the same time this is an uncomfortable arbitration clause convinces parties often rather to settle their dispute amongst themselves instead of having to travel abroad and spent a fortune on arbitration.

However, in respect to international commercial contract in general institutional arbitration is being favoured by often inserting an arbitration clause for ICC or JCAA proceedings.¹³¹ Here the advantages of a truly independent institution, competent arbitrators, just one instance and choice of language are being favoured.

Legal reality in Japan seems to show the (traditional) overarching importance of alternative dispute resolution out of court but not yet within the framework of the 2004 Act on the Promotion of ADR. Also, there seems to be a growing tendency towards court proceedings in civil and commercial matters in contrast to the former assumption that court proceedings are the last resort and contrary to fundamental principles of society. Commercial reality requires also Japanese companies to please their shareholders in monetary terms — even if they are contrary to century-old traditions.

However, the results of this empirical research have to be viewed with caution as they only show a limited cross-section of legal reality in Japan. Legal reality and legal culture is subject to change. So it would be certainly worthwhile to review the outcome of this empirical research on ADR in civil and commercial matters in Japan in a few years time.

V. *Summary and Outlook*

From a comparative, German and European point of view the collected data and material on ADR in Japan can be summarized as follows but with one caveat: It is most likely that ultimately only Japanese lawyers can completely understand the nuances of legal reality and culture in Japan.¹³²

¹³¹ Kawasaki's answer of 08th December 2010. Most companies, law firms and individuals, however, wanted to remain anonymous.

¹³² The famous caveat of *Ernst Rabel* holds still true that "... comparatists when exploring on foreign territory may come upon "natives lying in wait with spears..." ("mit Pfeilen lauernde Eingeborene"), see Zweigert/Kötz, *An Introduction to Comparative Law* (translated by Tony Weir), 3rd Ed., Oxford 1998, p. 36.

1. Theoretical Background in Japanese Law — Law in the Books

Japanese substantive and procedural law in civil and commercial matters is deeply rooted in the civil law traditions with German law at its base with US-American influence after World War II. As Japan adopted the initial version of the German civil code¹³³ and the German code of civil procedure¹³⁴, the black letter law is very similar to that in Germany. The *praesumptio similitudinis* in comparative law works insofar. However, the 2004 Act on Alternative Dispute Resolution has marked an autonomous and remarkable step forward in fostering ADR in Japan, particularly mediation but mainly in the form of court assisted mediation.

2. Legal Reality — Law in Action

The legal reality in Japan paints another, more complex, picture as to the use of ADR in daily practice:

The working hypothesis was that the Japanese society and business world have changed over the past 20 years becoming more litigation orientated. The analysis, however, showed a much more complex situation that requires distinguishing:

- a) Private disputes
- b) Commercial disputes
- c) International commercial disputes (e.g. China-Japan Arbitration)

Purely private disputes are hardly brought before a court of law as informal compromises, sometimes with the help of a third party (not a lawyer!), are generally preferred.

In commercial disputes state courts are viewed as competent, fast, cheaper and efficient. The decisions of courts in Japan are more predictable than in ADR. Moreover, the accountability of the board of directors or the CEO towards the shareholders of the company prohibits the premature use of mediation or settling for an early, not optimal compromise. Court proceedings in contrast are public and transparent giving reasons that can be used as explanations for the shareholders.

In international commercial transactions institutional arbitration is being favoured as it produces relatively quick and (almost) world-wide enforceable awards.

3. Outlook

In the end it remains open whether the Japanese reluctance to use mediation and arbitration in civil and commercial matters truly stems from its unique blend of legal culture or just from pure ignorance of the available options in ADR.

The 2004 Act on Promoting ADR was an even braver and more comprehensive attempt by the Japanese lawmaker to foster mediation and other forms of ADR than the EU's 2008

¹³³ Livdahl D A 'Cultural and Structural Aspects of International Commercial Arbitration in Japan (2003) 20 Journal of International Arbitration 375, 379.

¹³⁴ Levin M A, 'Civil Justice and the Constitution: limits on instrumental judicial administration in Japan' (2011) 20 Pacific Rim Law and Policy Journal 265, 314. Furuta Y, Tsukamoto H, Mori A 'Japan Enters a New Era' (Asia Law & Practice) <http://www.amt-law.com/pdf/bulletins3_pdf/060111_1-1.pdf> accessed 26.11.2013, 121.

Mediation Directive. The EU with its focus on promoting intra-EU trade (free movement of goods and services) and consumers needed to buy all these goods, came therefore lately up with two more directly binding legal acts on ADR:

The 2013 EU Directive on ADR for Consumers Disputes (2013/11/EU) and the 2013 EU Regulation Online Dispute Resolution for Consumer Disputes (No. 524/2013 EU).

All these laudable attempts to provide individuals and entities in civil and commercial transactions with more efficient tools to solve their disputes have one dogmatic foundation:

Contract law and more precisely a voluntary agreement NOT to sue in a state court but to embark on an alternative, maybe more appropriate, journey.

To be sure, a minimum amount in controversy is essential. Parties who wish to spend their time with fighting over (legal) principles beyond commercial reason, may, as always, file their claims in state courts. The fundamental human right of access to justice (e.g. Art. 6 ECHR) permits them to do so.

All in all, the legal reality in the EU, particularly Germany, as compared to Japan is not as different as it used to be 50 years ago. The global economy does not allow for too exotic or cumbersome dispute resolution mechanisms or legal culture — at least in the area of commercial activities.

The cornerstone for fostering ADR and in particular mediation is education and information:

Educating truly professional mediators and informing the business community and the general public by suitable means on the alternative options in dealing with disputes.

And as long as neither parties nor their attorneys or lawyers do not know anything about it, they will simply block any form of ADR.

Lawyers so far prefer arbitration as they can (relatively) quickly obtain a final award that is easily enforceable worldwide by virtue of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Plus, arbitration is in principle just like litigation with a few peculiarities due to the private nature of the proceedings (e.g. establishing an unbiased panel of arbitrators). Billing hours, statements, strategy etc. remain the same and there is an independent 3rd party, the arbitrator or arbitration tribunal, who ultimately decide and can thus, if needed, be made the scapegoat for an unfavourable award.

Mediation and re-negotiation require in contrast the active involvement of the parties who are also responsible for the outcome.¹³⁵

So mediation and re-negotiation are unsuitable for parties who wish to delegate the dispute — regardless of higher efficiency and lower costs.

To cut a long story short, the myth of a totally different legal culture in Japan regarding the solution of disputes in civil and commercial cases is by now dead. Language and culture as such are in Japan certainly unique but its legal system is adapting to the need in civil and commercial cases to find more efficient dispute resolution mechanisms than state courts. The Japanese lawmakers saw in fact the sign of the times much earlier than the EU or Germany trying to steer the general public and professionals gently towards ADR by promulgating the 2004 ADR Act.

And it is very likely that the Japanese traditional culture to avoid openly visible conflicts

¹³⁵ See Kojima, T., *Civil Procedure and ADR in Japan*, Tokyo 2004, Chapter 2 The Role of Law in ADR, p. 20.

will prove over time the 2004 Act on the Promotion of ADR in practice highly successful whereas mediation in Europe will remain a niche for the foreseeable future despite the EU's well-meant legislative efforts.

Legal professionals, however, are rightfully forced because of the existing legislation — both in Japan and the EU — to inform their clients of the options available in ADR and not just stick to court proceedings or costly arbitration. Otherwise attorneys might be faced by claims of their clients for professional negligence. This is the ultimate benefit of the Japanese 2004 ADR Act and the 2008 EU Mediation Directive (in conjunction with the 2013 EU Directive on ADR for Consumers Disputes (2013/11/EU) and the 2013 EU Regulation Online Dispute Resolution for Consumer Disputes (524/2013 EU)):

The clients can make an informed decision whether or not to prefer ADR by inserting such a clause in a contract or entering into an ADR agreement after the dispute has arisen. To be sure, there will be a natural reluctance of parties and lawyers to venture into the still largely uncharted territory of mediation and ADR (except arbitration) where legal certainty in practice is missing because of a lack of court decisions. Nevertheless, these court decisions confirming the legal status and essential requirements of mediation and other forms of ADR will come in due time — both in Japan and the EU.

Certainly this will take time as it did with the 1980 Vienna Sales Convention (CISG) that used to be excluded as a standard in choice of law clauses — by now with a large enough non-binding case law (Case Law on UNCITRAL Texts/"CLOUT") the CISG has lost its (alleged) unpredictability and gained trustworthy standing in international sales law. A similar development can be expected for ADR, particularly mediation, in Japan not only because of the 2004 Act on the Promotion of ADR but also because of its sensible legal/cultural tradition avoiding a "win - loose" situation.

However, the tradition of open strife and confrontation in Europe, particularly Germany, and individual rights (entitlements) is still hindering the use of ADR and mediation much more than in Japan. To be sure, the tools of ADR are in the same toolbox as court proceedings. So the advantages and disadvantages of the various options on dealing with disputes professionally have to be carefully analyzed in the individual case — regardless of the cultural background.