Comparative Dispute Management: *Court-connected Mediation in Japan and Germany*

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Outline

"Court-connected Mediation in Japan and Germany"

Introduction
[1] During the last decade, there has been a widespread trend in Germany and internationally away from litigation towards Alternative Dispute Resolution (ADR) procedures.(1) In recent years, the German interest has especially focused on mediation as a means of dispute resolution. The year 2000 saw the introduction of a federal mediation

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law that permits all German states *("Länder")* to launch mandatory court-connected mediation with respect to certain kinds of civil disputes. However, mediation is still in its infancy in Germany. Thus, it could be helpful for the purpose of improving the German system to look to other jurisdictions that have mature mediation systems.

[2] Japan has a century-long tradition of non-adversarial dispute resolution methods. Litigation was not known until Occidental countries introduced it in the late 1800s. Until today, Japan has often been referred to as *the non-litigious society*. The current Japanese court-connected mediation system has both advantages and disadvantages from which Germany could learn and obtain ideas on how to improve its own processes of mediation. This is especially true considering the similarities between the litigation systems of the two civil law countries Japan and Germany. Japan's *Code of Civil Procedure* follows its German counterpart almost exactly and its bureaucratic judicial system resembles the one in Germany. (2) Accordingly, a look at the Land of the Rising Sun and its court-connected mediation procedures promises fruitful inspirations for the German mediation movement.
[3] This paper analyses and compares court-connected mediation in Japan and Germany. It is divided into three parts. The first part examines the Japanese concept of court-connected mediation *("chotei")* . Part two will deal with court-connected mediation in Germany, as stipulated by the first state mediation legislation, the Bavarian Mediation Law *("Bayerisches Schlichtungsgesetz" or "BaySchlG")* . In the third part, both mediation models will be compared, according to the following criteria: (1) mediation style and values and theories that underlie the mediation process, (2) voluntary or mandatory nature of mediation, (3) informality of the process, (4) qualifications of mediators, (5) role of mediators, (6) confidentiality, presence of the parties and other persons, (7) private caucuses or joint session.

PART I: Japan

[4] Let us first turn to the Japanese model of court-connected mediation. To understand the Japanese approach, one should keep in mind that dispute resolution methods such as mediation are always an expression of the disputing culture. Thus, it is necessary to analyse the cultural background of mediation in Japan first, in order to understand the significance of *chotei* in contemporary Japanese society.

I. Historical and Cultural Background of Mediation in Japan

[5] Tokugawa Japan (1603-1867) was divided into four social classes. Their hierarchy was (a) the samurai-bureaucrats, (b) the peasants, (c) artisans and (d) merchants.(3) The samurai were the masters of the four classes.(4) Peasants, artisans and merchants owed the samurai a duty of loyalty and were not allowed to behave in a rude manner towards samurai. (5) In this society, people were indoctrinated to consider disputes as morally wrong. (6) It was the duty of senior and authoritative members of the society to keep peace within the boundaries of their social or political influence, and when necessary to make all possible effort to mediate. (7) In contemporary Japan, the class-based hierarchy has been replaced by a vertical structure based on the relative status of any two individuals. (8) The concept of vertical society, *tate shakai*, permeates all interactions among the Japanese. (9) Each individual's position relative to others, based on age, sex, education, and occupation, is determinative. (10) This social hierarchy is rooted in Confucianism and Buddhism, with its emphasis on duty and social harmony. (11) Thus, up until today, disputes are to be resolved in such a way as to preserve "harmonious relationships" and to allow a person to save face. (12) This is ensured by means of conciliation and mediation, rather than by the win/lose outcomes of litigation. (13)

[6] Although the number of civil suits formally adjudicated has increased steadily since 1983, (14) non-adversarial dispute resolution continues to play a predominant role. The main methods of ADR in contemporary Japan are arbitration *("chusai"),* settlement-in-court *("wakai")* and court-connected mediation *("chotei")* . Chotei is the most popular and effective ADR method in Japan. (15) On average, every third newly filed civil case goes to *chotei.* (16) About 55 percent of the court-connected mediations are successfully settled.

II. Court-connected Mediation *("Chotei")*

[7] Court-connected mediation *("chotei")* is based on an agreement between the parties that is facilitated by the intervention of a summary or a district court. (17)
However, the term chotei is used in at least five different technical senses in the Japanese legal material: (1) the institution or whole system of court-connected mediation, (2) the court-connected mediation procedure,(3) the act of mediating itself, (4) the substance of the agreement or compromise embodied in writing, (5) the 'meeting of the minds' in making agreement. (18) This paper uses the term *chotei* to indicate the entire institution, as in number one listed above. Accordingly, *chotei*denotes a prelitigation procedure conducted through the regular summary and district courts. For this, a dispute is settled through negotiation between all parties with the aid of a number of impartial mediators who help the parties to discuss the conflict and devise their own solution.

[8] In Japan there are several types of judicial court-connected mediation - family (*kaji chotei*) and civil (*minji chotei*). These are regulated by the following statutes: (1) the *Civil Conciliation Act* (1951), (2) the *Law for the Determination of Family Affairs* (1947), (3) *the Labour Union Law* (1949), (4) the *Labour Relations Adjustment Law* (1946), (5) the *Pollution Dispute Settlement Law* (1970) and (6) the *Construction Business Law* (1949).

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1. Jurisdiction

[9] Jurisdiction over *chotei* lies either with the family court or the civil courts. The family court has original and exclusive jurisdiction over all family disputes. The process at the family court is flexible and can be adapted to the requirements of the individual case. Mediation is mandatory for all family cases. Unless otherwise provided, general jurisdiction for all non family disputes that go to court-connected mediation, is in one of the summary courts located throughout Japan.(19) The Civil Conciliation Act ("Minji Chotei Ho") (20) provides exclusive jurisdiction for a summary court to conciliate disputes with respect to residential land or buildings (21) , traffic accidents (22) , environmental pollution and infringement of interests, such as access to sunlight and wind.(23)

[10] In contrast to family courts, mediation is not mandatory prior to judicial recourse for cases filed at ordinary civil courts. (24) In these courts, mediation is less important for the resolution of disputes. Consequently, only some judges are in charge of mediation. In the Civil Court of Osaka for example, only three out of twenty judges are dealing with mediation. (25) The mediation procedures in the civil courts and the family courts are very similar. Accordingly, this paper will only generally analyse the concept of *chotei* as provided for by the *Civil Conciliation Act* without further differentiation between the procedures in the civil and family courts.

2. Statutory Basis

[11] Article 1 of the Civil Conciliation Act, characterising the nature of *chotei*, states that:

"This Act aims at effecting a settlement of dispute consistent with reason and befitting actual circumstances by mutual concession of the parties concerned, with respect to disputes relating to civil affairs."

"Mutual concession" is a central feature of judicial court-connected mediation in Japan, be it civil or family. In modern western ADR theory, concession is thought to be less desirable than a creative solution that satisfies the needs and underlying interests of both parties to a dispute. (26) However, in Japan the role of concession in effecting disputes is considered so important that it is specifically provided for by law. This reflects the cultural tradition of consensus in Japan, mutual concessions being one means by which consensus is achieved.

3. Initiation

[12] Application for *chotei* may be made by one or both of the parties (27) in writing or orally to the court. (28) Where civil matters are concerned, application can be made at any time and is voluntary. Court-connected mediation procedures may also be invoked by the judge during a pending lawsuit, without the consent of the parties. (29) However, the court can only do this in the initial stage of the proceedings, after which it needs the parties' consent.(30)

4. Mediators

[13] The court appoints a mediation committee, (31) which is usually composed of a presiding judge and one or two non-judge mediators, or rarely, a judge only. (32) The non-judges are appointed by the Supreme Court as court staff and are trained accordingly. (33) A court-connected mediator must not necessarily be a qualified as a lawyer. The only requirements for a prospective mediator are that he or she must be between 40 and 70 years of age, have expert knowledge and experience useful for settling disputes and/or have rich experience in public life. (34) Concerning the sex of the mediators, there are considerable differences between the family courts and the civil courts. Usually, ordinary civil courts hire only a few female mediators. In the Civil Court of Osaka, for example, only about 10% of all mediators are female.(35) The policy of the family courts is to hire a great number of female mediators in order to have one male and on female mediator in each case, particularly if it is a divorce case. (36)

[14] Court-connected mediators will serve for two years and can be reappointed by the Supreme Court for additional terms.(37) The Supreme Court maintains a list of 12,000 of such commissioners.(38) The Japanese government strongly encourages court-connected mediation and supports the education and training of mediators.(39) Mediation courses at university level, however, are rare.(40) Mediators in Japan come from various professions. Approximately ten percent of them are lawyers. Many female mediators hired by the family courts are housewives and a great number of the male mediators have retired from another profession.(41) Mediators have the status of government employees.(42) They are employed for two years on a part-time basis.(43)

[15] The statutory purpose of lay mediators is to incorporate the citizen's common sense into the resolution of citizen's everyday disputes.(44) Experience has shown that, for this approach to work well, it is necessary that mediators come from a variety of professional fields and from different levels of society. In the early stages many mediators were elderly, distinguished males of their community. These men had a tendency to insist on the traditional community rules and values that were often contrary to statutory rights, rather than to help the disputants to open their negotiations.(45) However, this drawback has been remedied by the appointment of mediators from various social backgrounds.

[16] As stated above, the court-connected mediation process is usually conducted by a "court-connected mediation committee", although a judge can conduct the process alone. (46) However, if it is the parties who propose to conciliate, only a committee can be used.(47) The following comments pertaining to "court-connected mediation committee" refer to a single judge and a group of mediators.(48)

5. Confidentiality

[17] The committee can, in consultation with the parties, ask others to assist them.(49) The procedure is not open to the public, and there are penalties against disclosure by the conciliators.(50) However, in mediations before the civil courts, third parties that have an interest in the outcome of the court-connected mediation may participate in the procedure, with the committee's approval. Also, the committee itself may ask interested persons to participate.(51) In this regard, the Japanese mediation practice differs from the predominant Western practice, where other interested persons can be admitted only when the parties agree.(52) The committee fixes a date for court-connected mediation and serves summons on the parties.(53)

6. Presence of the Parties and Other Persons

[18] The mediation takes place in the court building. All parties are obliged to come to the mediation session, unless they are represented by an attorney. If a party is in default and not excused, it has to pay a penalty of up to 50,000 Yen which is about EURO 429 (USD 371). (54)

7. Procedure

[19] The initial hearing serves to acquaint the parties with the procedure. Subsequent hearings are often held with each party alternatively to identify the nature of the dispute and the relevant issues.(55) Although the *Civil Conciliation Law* contains no provisions regarding whether both parties should be present to negotiate together, Yamada has pointed out that, in practice, the procedure often resembles a chain of private caucuses.(56) He states that, in general, each disputant meets the mediators individually at every conference, so that there is almost no chance that the disputants meet and negotiate with each other. The rationale of this is that the mediators are afraid that, the disputants' negative emotions will burst out at the conference, which would violate the court's dignity and make it more difficult to reach an agreement. The latter assumption is in clear contrast to the dominant Western mediation practice, where the parties are often allowed a so-called *"controlled burn"* , that is a venting of emotions.(57) Western ADR theory works on the assumption that a venting of emotions may sometimes be necessary to enable an enraged party to engage in rational discussion.(58) However, one should also keep in mind that Western concepts are not always likely to work in a different socio-cultural context. A dispute resolution system is the expression of a specific disputing culture. Thus, for a dispute resolution mechanism such as mediation to work well, it has to be in accordance with that culture. One cannot simply impose a Western model upon a different society such as the Japanese with its emphasis on Confucian duties and social harmony. Rather, an ADR system like mediation has to be in accordance with the cultural and societal values of the people it is to serve.

[20] Yet, for the purpose of this examination of the distinctive features of *chotei*, it may be sufficient to note that a procedure that does not provide for an occasion for the parties to bargain directly with each other is clearly inconsistent with the Western concept of mediation as "assisted negotiation". It seems difficult to imagine how the parties can work out an amicable solution that meets their underlying interests and that saves their relationship if they are deprived of the opportunity to hear the other party's side of the story and to bargain with him or her. In compensation for the disputants' own negotiation, the *chotei* mediators often make a concrete proposal and try with enthusiasm to persuade the disputants to accept it.(59)

[21] Moreover, the committee may examine the person or places involved, summon witnesses, or procure expert opinions.(60) At subsequent hearings, the parties are encouraged to make concessions.(61) The committee may forbid parties to pursue certain conduct, if it is thought that the conduct would make it "impossible or extremely difficult" to settle. Further, the mediators can declare a matter unsuitable for court-connected mediation where it would be improper to conciliate, or where a party has requested court-connected mediation unreasonably or with an improper purpose.

[22] Court-connected mediation proceedings often extend over several months with either party or the court-connected mediation committee free to terminate the court-connected mediation at any time.(64) The committee may terminate the court-connected mediation if there is no expectation of agreement or where the agreement settled upon is inappropriate. This is as long as the committee does not decide to pronounce a decision under Art. 17 *Civil Conciliation Act* (discussed below). (65)

8. The chotei Agreement

[23] If the parties decide to settle, the outcome is registered in court, as long as it is not contrary to law or public policy. Subsequently, a formal court-connected mediation agreement (*"chosho"*) is drawn up. Then, the court-

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connected mediation is deemed to have been concluded and the *chosho* has the same effect as an absolute judgment. (66) In cases where the parties cannot come to an agreement, the court may on its own motion make an "order of determination in lieu of court-connected mediation" (*"chotei ni kawaru saiban"* or *"chotei ni kawaru kettei"*).(67) In doing so, it will take the opinions of the committee members into consideration and review the entire matter. The court only makes a decision within the limits of the parties' own proposals. The court has the authority to order payment of money, transfer of goods, and other dispositions of property.(68) Parties may appeal against a decision made in a court-connected mediation procedure, following Supreme Court regulations.(69) They must do so within two weeks of receiving the notice of the decision. If they do, the decision is void.(70) If there is no objection the decision will have the same effect as a compromise during trial, that is, it is binding.(71) Where the parties cannot come to an agreement and the court does not render an order of determination, the court-connected mediation committee may terminate the proceedings as unsuccessful.(72) This is also the case where the parties come to an agreement the content of which is illegal or lacking propriety.(73)

[24] If a party files a suit where the committee decided the procedure would fail, or where the court made a decision to which a party objected thus rendering it ineffective,(74) and the filing is done within two weeks from the date of notice, the filing is back-dated to the date of the proposal for court-connected mediation.(75)

9. Fees and Fines

[25] When a party requests court-connected mediation, it must pay a fee. The amount of this fee is decided by the Supreme Court, within a given range between 1000 and 6000 Yen, which is about EURO 8,5 (USD 7,5) to EURO 51,5 (USD 44,5), depending on the duration of the mediation.(76) Moreover, the *Civil Conciliation Act.* contains several provisions regarding fines, including a fine for not complying with precourt-connected mediation measures under the statute;(77) a fine for a current or former committee member who discloses certain information about a court-connected mediation without justification;(78) and a fine for a current or former committee member who reveals secrets of others learnt in his official capacity.(79)

PART II: Germany

I. Background of Mediation in Germany

[26] Until the late 1990s, general interest in non-adversarial ADR methods has been relatively modest in Germany.(80) Contemporary German disputing culture has almost exclusively focused on litigation and arbitration.(81) Mediation was quite rare, and its use mostly confined to the fields of divorce and environmental disputes.(82) The first German initiative regarding mediation was made in the field of legal sociology,(83) at a conference held in 1977, and later published in the *Jahrbuch für Rechtssoziologie und Rechtstheorie ("Yearbook for Legal Sociology and Legal Theory")*.(84) Although the subject found a broader academic attention, a common interest in mediation was aroused only when the topic was broached by the President of the Federal Constitutional Court *("Bundesverfassungsgericht")* at the Annual Congress of Judges in Essen in 1979. The President pointed out the limited resources of the legal system.(85) The President of the Federal Court of Justice *(Bundesgerichtshof)* also spoke on the matter, concluding that there was a need for more efficiency in the judicial system that perhaps ADR, and especially mediation, could fill.(86) Today, there is a significant body of German literature on mediation (87) and the subject can frequently be found on the agenda of conferences and congresses.(88) In 1999, finally, the Federal parliament introduced legislation permitting all German states *(Länder)* to introduce mandatory court-connected mediation.

II. Court-connected Mediation *("Schlichtung")*

1. Federal Framework

[27] Effective as of 1 January 2000, the Federal Government of Germany has introduced legislation permitting all German states to introduce mandatory court-connected mediation with respect to certain kinds of civil disputes. The new § 15 *Introductory Law of the Code of Civil Procedure (" Einführungsgesetz zur Zivilprozeßordnung"* or *"EGZPO"*) serves two primary goals. Firstly, the Federal Government envisions that the law will promote the practice of mediation as a dispute resolution method among lawyers and disputants and secondly, it aspires to dramatically reduce the case load at magistrate court level.(89)

[28] To qualify for mandatory mediation, the disputes must fall into one of three categories. They must be either:(1) financial disputes before the Magistrates Court up to a litigation value of EURO 750 (2) certain neighbourhood disputes(90) or (3) defamation disputes where the alleged defamation has not occurred through the media. However, § 15 a (2) EGZPO states that the mandatory mediation requirement does not apply to family disputes and disputes that are subject to special procedural rules such as retrials, default actions and other procedures enumerated in § 15 a (2) EGZPO. § 15 a (1) EGZPO empowers state parliaments to legislate to require participation in a mediation in the above-mentioned cases as a prerequisite to formally beginning court proceedings. This means where the states enacted corresponding legislation, all disputes that meet those criteria must be mediated before court proceedings can be instituted.

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[29] Yet, each state has the opportunity to take into account regional factors, such as the local disputing culture, available resources and the existing infrastructure, when enacting corresponding legislation. Hence, this discretion leaves room for the adoption of different mediation models. This potential for diversity and innovation was also envisaged by the Federal Government.(91) However, it is important to keep in mind that the German states are not obliged to legislate on mandatory legislation - § 15 a EGZPO merely puts the legal mechanisms to do so at their disposal. To date, the majority of the German states has drafted bills or enacted state legislation.(92) These bills and laws vary considerably as to the mediation models employed and who is allowed to function as a mediator.(93) Therefore, an appropriate analysis of the situation of court-connected mediation throughout Germany would be beyond the scope of this paper. Thus, I will confine my analysis to the first Mediation Law enacted in Germany, the Bavarian Mediation Law ("Bayerisches Schlichtungsgesetz" or "BaySchlG").

2. Bavarian Mediation Law *(BaySchlG)*

a) Scope
[30] Regarding the types of disputes and the maximum litigation value, the *BaySchlG* - unlike for example its North-Rhine Westphalian counterpart.(94) - follows exactly the federal guidelines.(95) As provided by § 15 a (2) No. 6 *EGZPO*, mediation is only a prerequisite to formally beginning court proceedings if both parties reside in the same court district.(96)

b) Mediators
[31] According to Art. 5 (1), (2) *BaySchlG*, lawyers and notaries will be permitted to function as mediators within the mandatory program. However, the Presiding Judge of the High Court of Bavaria may establish and designate further mediators under the mandatory program, provided they fulfil the following requirements: (1) they must be able to ensure that the mediation will be neutral and impartial, (2) they must conduct mediations on a regular basis and not only for a limited span of time, (3) they must follow a mediation procedure that, with respect to its substantial features, corresponds to the *BaySchlG*.(97) Moreover, if both parties agree, the mediation can be conducted by a mediation service of the Chamber of Trade and Commerce or other industry groups.(98)

c) Duties of Mediators
[32] All mediators have a duty of neutrality and impartiality.(99) In addition, lawyer and notary mediators are bound by their general professional standards of conduct(100). A lawyer who has acted as a mediator cannot represent any of the parties in court regarding the same matter.

d) Initiation
[33] Application for mediation may be made by one or both parties in writing to a designated lawyer, notary or mediation service by industry groups (101). However, the mediation can only be conducted by the latter if both parties agree(102).
Upon receipt of the application and payment of a deposit of EURO 120 (approximately USD 105) the mediator determines the date of the mediation(103). The parties will be summoned and be informed about the consequences of their nonappearance (see below).

e) Confidentiality
[34] The mediation is not public(104). Unlike *chotei*, interested parties are not allowed to attend, unless the parties agree. Meditators also have a professional privilege against disclosing information obtained during the mediation.

f) Presence of the Parties and Other Persons
[35] The parties are obliged to come to the mediation session, however, if the mediator approves one party's abstinence, that party can also send a representative that has been expressly authorised to negotiate for the party, provided those representatives "are capable of contributing to the clarification of the facts" (105). Those representatives may also be lawyers(106).

[36] Further, if the party that requested the mediation fails to appear without a valid reason, the request for mediation is deemed withdrawn. If the other party fails to appear without a valid reason, after at least 14 days, the other party will be issued a certificate of failure of the mediation. Yet, Art. 10 (1) *BaySchlG* refers to the possibility of conducting a mediation through the exchange of documents only, if the mediator deems the case appropriate. Unlike the Japanese model, the mediators under the *BaySchlG* can neither examine persons or places involved, summon witness, nor procure expert opinions(107). Witnesses may not take part in the mediation process unless, first, the parties agree to bear the additional costs associated with bringing the witness or expert to the mediation and, second, the participation of witnesses or experts does not unreasonably delay the mediation(108). Furthermore, both parties have the right to be accompanied by their legal representatives to the mediation session(109).

g) Procedure
[37] With the intention of promoting flexibility of the mediation process, minimal guidelines for conducting a mediation appear in the *BaySchlG*. The guidelines include reference to addressing the interests of the parties, joint and private meetings, and the possibility of suggestions for a potential agreement being put forward by the mediator(110). Apart from these matters, the process adapted in any given mediation lies within the discretion of the mediator(111). However, Alexander has pointed out that experience in Australia, the US and the UK indicates that lawyer-mediators, by virtue of their legal training, tend to possess fairly interventionist mediation styles, that is, they are more likely to adopt a legalistic and evaluative approach than a non-lawyer(112).

[38] Furthermore, the wording of Art. 11 (2) *BaySchlG* and its emphasis on "the clarification of the facts" indicate a very legalistic and evaluative understanding of mediation as well. In a facilitative or transformative approach, the mediator would attempt to shift the focus from past blame or from who is right or wrong to future options. The Bavarian approach of clarification of the facts, however, expressly focuses on past incidents and on the right or wrong issue. This is a rather narrow approach, which is quite unfortunate because it precludes some of the greatest potentials of mediation, such as the relationship-saving effect and the finding of an interest-based "win-win solution" by way of a creative option generation.

h) The Mediation Agreement
[39] If the parties decide to settle, the mediator is obliged to draw up a written record of the agreement that must be signed by the parties(113). The mediator confirms the conclusion of the agreement with his own signature(114). That agreement must contain a provision regarding how the cost of the mediation will be split among the parties. The agreement can also be used as the basis for foreclosure(115). If the parties cannot come to an agreement, the mediator will issue a certificate of failure of the mediation. The same applies if the party has not paid the deposit required by Art. 14 *BaySchlG* (116).

i) The Certificate of Failure
[40] The certificate of failure of the mediation is necessary to commence litigation. It will be issued if the mediation has not led to an agreement (117). The mediator is also required to give out a certificate if he is of the opinion that the requirements for the application of the *BaySchlG* are not fulfilled (118). Moreover, he is required to issue a certificate if he regards the particular dispute, for legal or for factual reasons, as not suited for a mediation (119). This discretion of the mediator to determine the suitability of the dispute for mediation is worthy of note, considering the fact that § 15 a *EGZPO* provides for mandatory mediation. However, first comments from practitioners indicate that understanding of the question of whether a dispute is suitable for mediation is more related to the question of the practicability and feasibility of the mediation procedure under the given circumstances of the case, rather than to the issue of whether mediation is a suitable forum for the particular dispute. Hammerl, for instance provides the example of a mediator deciding that a case is not suited for mediation because many witnesses are to be examined or because a complicated legal issue appears to render an amicable settlement impossible.(120)

j) Fees
[41] The fee for the mediation is:
- EUR 50, if the procedure ends without a mediation proceedings (that is, if one of the parties fails to appear).
- EUR 200, if a mediation is conducted (no matter whether an agreement is reached or not).
Generally, the mediator's fee will be borne by the applicant.(121) If the parties fail to reach an agreement, the cost of the mediation will be paid by the party that loses in the subsequent litigation. Furthermore, unless otherwise agreed, all other costs associated with the mediation will be borne by the party incurring those costs.(122) The *BaySchlG* contains a sunset clause with the effect that the law will cease to have effect on 31 December 2005. Consequently, the Bavarian state parliament will be forced to review and assess the effectiveness of the law.

PART III: Comparison Japan and Germany

[42] Having examined the distinctive features of court-connected mediation in Japan and Germany, as stipulated in the *BaySchlG*, this paper will now compare the two models with respect to the following criteria: (1) mediation style and values and theories that underlie the mediation process; (2) voluntary or mandatory nature of mediation; (3) informality of the process; (4) qualifications of mediators; (5) role of mediators; (6) confidentiality, presence of the parties and other persons; (7) private caucuses or joint session.

I. Mediation Style and Values and Theory that Underlie the Mediation Process
[43] The mediation styles and values that inform the mediation process in Japan and under the *BaySchlG* in Germany differ considerably. The Japanese model is based on the pursuit for social harmony, moral, duties and other extra-legal considerations. A problem with this approach is that the legislatively enforceable rights are not necessarily recognised, as the court-connected mediation committee is not bound by law or the formal weight of evidence.(123)

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Rather, in their interventions the mediators will look more to standards such as reason, common sense, equity and morality.(124) A survey conducted in the early 1990s shows that people are not always satisfied with the present system of court-connected mediation.(125) While a majority of people who have not experienced the court-connected mediation process thought that court-connected mediation was impartial and in line with common sense, only 18 percent of those who have experienced it thought that it was impartial.(126)

[44] The German approach, as embodied in the Bavarian Mediation Law, stands in harsh contrast to the Japanese recognition of extra-legal consideration. The focus on "the clarification of the facts" in Art. 11 (2) *BaySchlG* (127) and the fact that most mediators (if not all) under the mandatory program will be lawyers and notaries, indicate that a very legalistic and evaluative form of mediation is likely to become the face of mediation in the state of Bavaria. Moreover, although the *BaySchlG* contains only minimal guidelines for conducting a mediation, there are several other factors that indicate that mediators under the *BaySchlG* may be very settlement- focused. One factor are the relatively low fees. This means that less experienced lawyer-mediators will be likely to take on the mediation work, which, on account of their lack of mediation experience, may be more likely to adopt a legalistic approach than an interest-based one.(128) Moreover, the *BaySchlG* must be interpreted in light of the federal civil procedure law, § 15 a *EGZPO*. As it is an expressed aim of the legislation to reduce the court caseload, the success of the program is likely to be evaluated according to the number of mediated agreements that are reached.(129) Consequently, a mediator's success will be measured according to his or her strike rate in concluding mediated agreements. This state of affairs is likely to encourage lawyer mediators, especially the inexperienced ones, to recommend solutions to parties fairly early in the process and pressure disputing parties into agreement.

[45] In addition, with respect to the underlying theories of the mediation process, the *BaySchlG* states that it is founded on the following principles: (1) freedom and ‘voluntariliness' of the parties in terms of selection of mediation service; (2) flexibility in the mediation process; (3) professionalism of the mediator; (4) use of existing dispute resolution infrastucture, (5) far-reaching privatisation of mediation.(130) Except the first and last point, these principles seem to be in accordance with the Japanese approach, where a professional judge, together with one to two professional mediators, conducts a flexible mediation process while using the existing dispute resolution infrastructure, that is, the respective family or civil courts.

II. Voluntary or Mandatory Nature of Mediation

[46] In Germany, § 15 a *EGZPO* provides the framework for routine mandatory mediations for almost all small claims and neighbourhood disputes as a prerequisite to the institution of court proceedings. However, the mediator has the discretion to issue a certificate of failure if he regards the particular dispute, for legal or factual reasons, as not suited for mediation. Still, first comments from practitioners indicate that the understanding of the question of whether a dispute is suitable for mediation aims more to the question of practicability of the mediation procedure, rather than to the issue of whether mediation is a suitable forum for the particular dispute.
According to § 15 a (II) *EGZPO*, family disputes are excluded form the mandatory program throughout Germany.(131)

[47] In Japan, on the other hand, mediation is mandatory for family disputes only and voluntary for civil disputes. Yet, judicial compulsion arises if the judge during the trial admonishes the parties to use *chotei* instead. Still, the judge can only invoke *chotei* in the initial stage of the court proceedings, after which he needs the parties' consent. Nevertheless, the judge, on account of his experience, is often in a good position to decide whether the forum "fits to the fuss" (132) , that is, if the dispute better go to *chotei*. Nonetheless, critics have advocated that for *chotei* to work well, recourse to it should be voluntary because the parties may be less likely to reach an agreement if forced.(133)

III. Informality of the Process

[48] The proceeding in Japan is rather formal, given the fact that it takes place under the authority of the judge acting as a mediator. This authority also results in quite encompassing powers of the mediation committee. For instance, it may examine the person or places involved, summon witnesses, or procure expert opinions.(134) In cases where the parties cannot come to an agreement, the mediation committee may even on its own motion make an "order of determination in lieu of court-connected mediation" (*"chotei ni kawaru saiban"* or *"chotei ni kawaru kettei"*). (135) The mediators may also forbid parties to pursue certain conduct, if it is thought that the conduct would make it "impossible or extremely difficult" to settle.(136) This high degree of formality and the authority of the mediating judge deprive the Japanese participants to a large extent of one classic advantage of the mediation process, that is, its informality and good climate for a creative option generation.

[49] The *BaySchlG* provides for a less formal mediation procedure. It also contains minimal guidelines for conducting a mediation, however, it is quite likely that a procedure before a notary commands a certain degree of respect and formality as well – although this would surely not be comparable to a mediation conducted by a judge. The mediation is likely to be even less formal if conducted by a lawyer or an industry-related mediation service. Although the

BaySchlG provides for the possibility of suggestions for a potential agreement being put forward by the mediator, this does not amount to the Japanese situation, where the mediators make a determination on the basis of the parties' proposals that must be appealed, in order to become ineffective. Thus, there is a considerable difference as to the degree of formality between the two mediation models, with the Japanese model resembling more a court proceeding than the Western idea of an informal mediation procedure.

IV. Qualifications of Mediators

[50] Mediators in Japan come from various professions and only about 10 percent of them are lawyers. Under the *BaySchlG*, it is likely that the vast majority of mediators under the mandatory program will be lawyers or notaries.(137) This is in clear contrast to the interdisciplinary approach to the education of mediators outside the scope of the mandatory program and the diversity in the professional background of practising mediators that has been a defining hallmark of prior German mediation developments. (138) In the Bavarian model, it appears that 'professionalism' of the mediator means that the mediator must be legally qualified.(139) Yet, the challenge in both Germany and Japan is to maintain the field's diversity, while, at the same time, ensuring its quality.

V. Role of Mediators

[51] Unlike the Japanese model, the mediators under the *BaySchlG* can neither examine persons or places involved, summon witnesses, nor procure expert opinions.(140) In contrast to the mediating judge in *chotei*, mediators in Germany may not make a decision within the limits of the parties' own proposals. However, although the *BaySchlG* contains only minimal guidelines for conducting a mediation, for the reasons stated above, (141) it is quite likely that Bavarian mediators may be very settlement-focused in that they recommend solutions to parties fairly early in the process and pressure disputing parties into agreement.

[52] Both the judge-mediators in Japan and the lawyer- or notary-mediators in Germany are bound by their respective professional standards. In Japan, the judge, as an authority under Confucian principles, is also duty-bound to act with compassion and benevolence.(142) An approach based on compassion and benevolence, however, is guided to a large extent by the normative values of the judge, who is most likely a male sitting at the pinnacle of Japanese society.(143) This threatens the mediator's impartiality and the objectivity of the process. Furthermore, with respect to the entire mediation committee, Art. 8 of the Japanese *Civil Conciliation Act* provides that:

"The civil conciliation members shall [(144)], *in addition to participate in the conciliations effected in the Conciliation Committee, state opinions based on their expert knowledge and experience in other conciliation cases in being ordered by the Court, or hear the opinions of concerned persons of the case in relation to settlement of the entrusted disputes, or otherwise take charge of the affairs prescribed by the Supreme Court necessary for the disposing the conciliation cases."*

[53] It is quite striking that the Japanese Civil Conciliation Act expressly states that the mediators should *"take charge of the affairs […] necessary to disposing the conciliation cases."* In light of this provision, it appears that despite their differences as to the importance of moral consideration – as opposed to legal aspects – both mediators in Japan and Germany are likely to adopt a rather interventionist mediation style that presses the parties towards agreement. A facilitative, interest-based model cannot be found in either of the two jurisdictions.

VI. Confidentiality, Presence of the Parties and Other Persons

[54] In both Japan and Germany, the mediation is not public. However, unlike *chotei*, interested parties are not allowed to attend the Bavarian mediation, except the parties agree. Further, in both jurisdictions the parties generally have to attend the procedure, unless they are represented by a lawyer. In Germany, however parties can also be represented by non-lawyers, if the mediator approves it. Furthermore, the *BaySchlG* even provides for the possibility of conducting a mediation through the exchange of documents only. The latter is clearly inconsistent with the concept of mediation as "assisted negotiation" and indicates a very narrow legalistic understanding of mediation that, if put into practice, deprives the disputants of the advantages of a facilitative approach and direct negotiation, such as satisfaction of the parties' underlying interests by way of a creative option generation and the possible saving or even improvement of the relationship between the parties.

[55] While the Japanese mediators have the power to summon witnesses, in Germany, witnesses may only be heard if first, the parties agree to bear the additional costs associated with bringing the witness or expert to the mediation and, second, the participation of witnesses or experts does not unreasonably delay the mediation. This also indicates that the Bavarian model is rather settlement focused. It appears that the *BaySchlG* aims at resolving disputes quickly with little procedural and financial effort. While the economic rationale behind this provision is convincing, it might at the same time backfire with respect to the goal of reducing the case load at magistrates court level. If the mediator is trying to push towards a quick settlement, which is not unlikely considering the relatively low flat rate fee, he might be inclined to find that a hearing of the witnesses would unreasonably delay the procedure. This, in turn, might encourage the party calling upon the witness not to settle and to proceed to litigation instead, hoping that the witness

will be heard in court.

VII. Private Caucuses or Joint Session

[56] As stated above, the *BaySchlG* specifically provides for the possibility of private caucuses and thus appears to assume that the parties shall generally be heard in joint sessions.(145) The basic concept of a joint session enables the parties to negotiate the majority of issues face to face and leaves private caucuses for special circumstances, as deemed necessary by the mediator. For instance, the mediator may suggest a private caucus in order to discover a party's underlying interest that he or she does not want to reveal in front of the other party. Private caucuses may also serve to explore settlement possibilities without the fear of divulging prematurely a party's "bottom line" to other parties. Furthermore, they can help to equalise power imbalances by giving weaker parties more of a chance to talk. Yet in some contexts, such as most domestic violence cases, the power imbalances are systemic, and even private caucuses cannot resolve them. In any event, under the *BaySchlG*, private caucuses appear to be reserved for special issues or circumstances that are not appropriate for the joint session.

[57] In Japan, on the other hand, the *chotei* procedure is generally held between the mediators and one party only, with the other party waiting outside the session room. This carries the inherent danger that the party waiting outside might become worried that the other party might be lying about the dispute and that the mediators might believe him or her. The waiting party might also have concerns regarding the neutrality of the mediators when the private session with the other party is slightly longer than with him- or herself. Under these circumstances, the parties might feel that they have no control and only limited voice in the process. Moreover, due to the lack of communication directly with the other party, a disputant may have only insufficient information to decide whether he or she should agree to the proposal or whether the other party has ulterior motives in making that proposal. For all these reasons, the practical limitation of *chotei* to a chain of private caucuses contravenes the principles of informed consent and procedural fairness.

CONCLUSION

[58] This comparison has shown that even in countries with similar legal frameworks, that is, almost parallel Codes of Civil Procedure and a similar court structure, the concepts of court-annexed mediation can look quite different in practice. One reason for this are the different cultures of Japan and Germany, the first being a Confucian society based on social hierarchy, reciprocal duties and the pursuit for harmony, the latter being a Christian-Occidental country whose legal culture has been influenced by the Glossators´ and Commentators´ academic approach to law during the Reception of Roman Law and the intellectual heritage of Enlightenment.(146) These cultures are reflected in Japan's rather formal and at the same time morality-focused *chotei*, and Germany's more legalistic approach to mediation. Mediators in Japan have considerably more powers than their German counterparts. At the same time, they come from various social and professional backgrounds. This, in contrast to the German favouritism for legally trained mediators, helps to maintain the diversity of the mediation field. However, where the Bavarian model has an advantage over the Japanese model is that the *BaySchlG* appears to provide for joint sessions as a general rule. This procedure is preferable to the Japanese chain of private caucuses because it respects the principles of procedural fairness and informed consent.

[59] With respect to different disputing cultures, one of the express goals of the German § 15 a *EGZPO* is to bring about a change to Germany's rights-based disputing resolution system. Whether current state mediation laws such as the *BaySchlG* can achieve this goal remains to be seen. In any event, although one cannot simply blindly transpose elements of collectivism and societal duties into the German concept of mediation, Germany can learn much of value for its own developing mediation system by closely examining Japan's mature mediation procedures, their format, advantages and disadvantages.

[60] However, this comparison has also shown that both the Japanese and the Bavarian model cannot be classified as facilitative or interest-based models of mediation. In light of the above-mentioned benefits of interest-based mediation, the author hopes that the analysis of further foreign mediation systems such as the American or Australian one, as well as experience from less evaluative state mediation models in other German states, may encourage state parliaments to adopt a facilitative model, rather than a narrow and legalistic one.

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(17) Ibid at 41.
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(19) Art. 3 *Civil Conciliation Act.*
(20) Law No. 222 of Japan, June 9, 1951, translated in (1975) 2 EHS Law Buletin Series. Although this act deals with court-connected mediation, it will be referred to as *Civil Conciliation Act*, according to the terminology used in (1975) 2 EHS Law Bulletin Series (most recent translation: 1991).
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(24) Pardieck AM, supra note 9 at 42.
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(40) Krapp T, supra note 25 at 170.
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(47) Art. 5, s 2 *Civil Conciliation Act.*
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(50) Arts. 37, 38 *Civil Conciliation Act.*
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(52) This is the case in, for example, Australia, Germany, the United Kingdom and the United States.
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(54) Art. 27 *Law for the Determination of Family Affairs*; Art. 34 *Civil Conciliation Act.*
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(58) Id. 3 at 156.
(59) Yamada A, supra note 44 at 3.
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(69) Art. 21 *Civil Conciliation Act.*
(70) Art. 18 *Civil Conciliation Act.*
(71) Art. 18 *Civil Conciliation Act.*
(72) Art. 14 *Civil Conciliation Act.*

(73) Ibid.
(74) Arts. 14 and 15, cl. 2, Art 18 *Civil Conciliation Act.*
(75) Art. 19 *Civil Conciliation Act.*
(76) Cf. Krapp T, supra note 25 at 170.
(77) Art 35 *Civil Conciliation Act.*
(78) Art. 37 *Civil Conciliation Act.*
(79) Art. 38 *Civil Conciliation Act.*
(80) With respect to mediation, Alexander has analysed six theories that attempt to explain why mediation has not earned more recognition in Germany, which she names the (1) authoritätshypothese, (2) Justizratshypothese, (3) Mißverständnishypothese, (4) Ausbildungshypothese, (5) Qualitätshypothese and (6) Effizienshypothese, see Alexander N, *Wirtschaftsmediation in Theorie und Praxis*, Peter Lang: Frankfurt et al., 1999 at 8-11.
(81) See Hoffmann-Riem W, 'Konfliktbewältigung in einer angebotsorientierten Rechtsschutzordnung', (1997) *Zeitschrift für Rechtspolitik* 190; Proksch R, 'Mediation in Deutschland – Stand und Perspektiven außergerichtlicher Konfliktregelung durch Mediation', (1998) 1 *Zeitschrift für Mediation* 7; Risse J, 'Die Rolle des Rechts in der Wirtschaftsmediation', (1999) *Betriebs Berater*, Beilage 9 at 1; Strempel D, 'Mediation in Rechtspflege und Gesellschaft: Eine Einführung', in: Strempel D (ed.), *Mediation für die Praxis: Recht, Verfahren. Trends*, Haufe: Berlin, 1998 at 7.
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(87) Important works are, for example, Breidenbach S, Henssler M (eds), *Mediation für Juristen,* Otto Schmidt, Köln 1997; Bühring-Uhle C, *Arbitration and Mediation in International Business: Designing Procedures for Effective Conflict Management*, New York, Kluwer Law International, 1996; Gottwald W, Strempel D (eds), *Streitschlichtung: Rechtsvergleichende Beiträge zur außergerichtlichen Streitschlichtung*, Bundesanzeiger, Köln 1995; Ponschab R, Schweizer A, *Kooperation statt Konfrontation: Neue Wege anwaltlichen Verhandelns*, Otto Schmidt, Köln 1997.
(88) For example, the Centrale für Mediation and the Center for Negotiation and Mediation at the University of Münster congress "Institutionalisierung von Mediation", held in Münster from 17.11.-18.11.2000.
(89) Deutscher Bundestag, Begründung zu § 15 a EGZPO, BGBl. 1999 I at 2400.
(90) These types of disputes are enumerated in §§ 606, 910, 911, 923 *Civil Code* ("Bürgerliches Gesetzbuch" or "BGB"). In addition, a reference in § 15 a (I) 2. *EGZPO* to Art. 124 Introductory Law to the Civil Code *("Einführungsgesetz zum Bürgerlichen Gesetzbuch" or "EGBGB")* paves the way to mediation for neighbourhood disputes that are subject to the respective state legislation.
(91) See Deutscher Bundestag, supra note 89.
(92) Including Bavaria, Baden-Württemberg, Hamburg, Hesse, Lower Saxony, North-Rhine Westphalia and Schleswig-Holstein.
(93) For instance, North-Rhine Westphalia designates its so-called *"Schiedspersonen"* (Conciliators) as mediators under the mandatory program, see NRW Mediation Law (*"Gesetz über die Anerkennung von Gütestellen im Sinne des § 794 Abs. 1 Nr. 1 der Zivilprozeßordnung und die obligatorische Streitschlichtung in Nordrhein Westfalen"* or *"GüSchlG NRW"*). The *"Schiedspersonen"* in North-Rhine Westphalia have a tradition of more than 170 years. They are elected by the town councils of their respective community and have the statues of honorary public servants. See "Vorblatt zum Gesetzentwurf der Landesregierung Nordrhein Westfalen" at http://www.jm.nrw.de/stat_jm/themen/streitschl/Vorblatt.htm. In Baden-Württemberg, on the other hand, only lawyers are permitted to function within the mandatory program, see § 3 Baden-Würrtembergian Mediation Law *("Gesetz zur obligatorischen außergerichtlichen Streitschlichtung")*, Landtag von Baden-Württemberg, Drucksache 12/5033, 04. 04. 2000.
(94) Under which only disputes with a litigation value of maximum 1200 must go to mandatory mediation.
(95) As provided in § 15 a (1) EGZPO in conjunction with Art. 124 *EGBGB* is Art. 43 –Art. 52 *AGBGB.*
(96) Art. 2 *BaySchlG.*
(97) See Art. 5(3) BaySchlG in conjunction with Art. 22 Executory Law of the Constitution of Courts Act and of Federal Procedural Laws *("Gesetz zur Ausführung des Gerichtsverfassungsgesetzes und von Verfahrensgesetzen des Bundes"* or *"AGGVG")*
(98) Art. 3 (1) cl. 1 *BaySchlG.*
(99) Arg. ex. Art. 22 Nr. 1 AGGVG, Art. 8 (1) cl. 3 *BaySchlG.*
(100) Art. 8 (1) cl. 1, 2 *BaySchlG.*

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(101) Arts. 3, 9 *BaySchlG.*
(102) Art. 3 *BaySchlG.*
(103) Art. 10 (1), 14 (1), 13 (2) No. 2, (3) *BaySchlG.*
Art. 10 (2) *BaySchlG.*
Art. 11 (2) *BaySchlG.*
Art. 11 (3) *BaySchlG.*
Art. 10 (3) cl. 1 *BaySchlG.*
Art. 10 (3) *BaySchlG.*
Art. 11 (3) *BaySchlG.*
(110) Art. 10 (1) *BaySchlG.*
(111) Art. 10 (4) *BaySchlG.*
(112) Alexander N, 'German Law Paves the Way for Mandatory Mediation', (2000) 2(9) *ADR Bulletin* 87 at 88.
(113) Art. 12 cl. 1 *BaySchlG.*
(114) Art. 12 cl. 2 *BaySchlG.*
(115) Art. 18, 19 *BaySchlG* in conjunction with § 794 (I) Code of Civil Procedure *("Zivilprozeßordnung" or "ZPO")* .
(116) Art. 11 (4) *BaySchlG.*
(117) Art. 4 (1) *BaySchlG.*
(118) Art. 4 (2) *BaySchlG*.
(119) Ibid.
(120) See Hammerl M, 'Der Ablauf des Schlichtungsverfahrens nach dem Bayerischen Schlichtungsgesetz (BaySchlG) at http://www.rechts-links.com/mitteilungen/gang_des_verfahrens.htm.
(121) Art. 14 *BaySchlG.*
(122) Art. 17 *BaySchlG.*
(123) Iwai N, 'Alternative Dispute Resolution in Court: The Japanese Experience', supra note 55 at 468.
(124) Haley JO, 'The Politics of Informal Justice: The Japanese Experience, 1922-1942', in Abel R (ed), *The Politics of Informal Justice*, Volume 2, Academic Press, New York, 1982 at 231; Iwai N, 'Alternative Dispute Resolution in Court: The Japanese Experience', supra note 55 at 468.
(125) See Oda H, supra note 16 at 84.
(126) Japan Federation of Bar Associations ed., *Shimin to Horitsu-mondai (Citizens and Legal Problems)* , Tokyo, 1986 at 175-77, as referenced in Oda H, supra note 16, at 84 (Fn 6).
(127) See above.
(128) See also Alexander N, 'German Law Paves the Way for Mandatory Mediation', supra note 112 at 88.
(129) Ibid.
(130) *Cf.* Bayerischer Landtag, Drucksache 14/2265 at 9.
(131) § 15 a (2) *EGZPO.*
(132) Cf. Sander FEA, Goldberg SB, 'Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure', (1994) 10 *Negotiation Journal* 49.
(133) Henderson DF, *Conciliation in Japanese Law: Tokugawa and Modern,* University of Tokyo Press, Tokyo, 1965 at 235.
(134) Ibid, at 468.
(135) Art. 17 *Civil Conciliation Act.*
(136) Art. 12 *Civil Conciliation Act.*
(137) Even though the President of the Bavarian High Court may exercise its discretion under Art 5(3) *BaySchlG*, Art. 22 AGGVG to establish further mediators under the mandatory program, the exercise of this discretion is not very likely to outweigh the number of lawyer and notary mediators that can simply apply to be designated as mediators or, in the case of notaries, are even 'automatically' required to act as mediators under the program.
(138) See Alexander N, 'German Law Paves the Way for Mandatory Mediation', supra note 112 at 88.
(139) Ibid at 87.
(140) Art. 10 (3) cl. 1 *BaySchlG.*
(141) Part III Point I 'Mediation Styles and Values and Theories that Underlie the Mediation Process' at 22-23 of this paper.
(142) Obuchi T, 'Role of the Court in the Process of Informal Dispute Resolution in Japan: Traditional and Modern Aspects With Special Emphasis on In-Court Compromise', (1987) 20 *Law in Japan* 74 at 89, 94.
(143) Pardieck AM, supra note 9 at 39.
(144) Remember that the Act translates *chotei* as conciliation, although court-connected mediation is the more precise description.
(145) Art. 10 (1) BaySchlG.
(146) Ebke WF et al, Introduction to German Law, Kluwer Law International, The Hague, London, Boston, 1996; Foster NG, German Legal System and Laws, Blackstone Press, London, 1996.