# Models of General Court-Connected Conciliation and Mediation for Commercial Disputes in Sweden, Australia and Japan

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## I. INTRODUCTION

Procedures for the facilitating of settlement in commercial disputes are available for the parties through the general courts in Sweden, Australia and Japan. The national systems show great diversity, however. From the passive trial judge and referrals out of the court in Australia to the very active trial judge and statutory conciliation in Japan, with the Swedish system being positioned somewhere in-between. From a comparison of the three national systems five generic models of general court-connected conciliation and mediation in commercial disputes are identified.

The article is limited to informal dispute resolution procedures that are connected to the general courts, and thus the judicial system. Hence, arbitration and private institutions offering conciliation or mediation are excluded from the analysis. I use the term 'commercial disputes' to refer to conflicts between legal entities, thus excluding individuals such as consumers, in matters of private law which are amenable to out-of-court settlement. General courts are courts with general jurisdiction in these matters, and that are not special courts, summary courts or administrative courts.

In the comparative study I have chosen to make a chronological distinction between three separate periods in the course of judicial proceedings: before trial, during trial, and after trial.[1] The most used argument for encouraging settlements in commercial disputes

1 For the sake of a common definition across the different jurisdictions, 'trial' will be used in this article as meaning one or more public formal hearings in the court of first instance, conducted at least partially orally and traditionally designed to lead to judgment.

is that it reduces the delays and costs of formal litigation. Hence, *when* conciliation or mediation is used in connection with the courts is of importance. For the purpose of identifying the separate procedural models, in addition to the chronological distinction, foremost attention is given to six characteristics: initiative, legal force of the agreement, practice, costs, judicial bias and confidentiality.

## II. COURT-CONNECTED CONCILIATION AND MEDIATION

Two of the most widespread non-adjudicatory forms of ADR are conciliation and mediation. A distinction is made between court-connected and other types of conciliation and mediation. The aspect of being 'connected' to the courts is rather broad, and it is merely a matter of the procedure including some degree of involvement by the courts. Conciliators and mediators outside the court may be used, and the initiative to commence proceedings may lie with the courts or with the parties. However, disputes where the parties take recourse to private conciliation or mediation to begin with because they prefer not to involve the judicial system at all are not included, and neither is threatening to file a suit as a means of settlement negotiation.

The difference between conciliation and mediation is not very clear, and there are differences between different jurisdictions in the use of the terms. As recognised by the European Union, court-connected settlement procedures exist in the member states in general.[2] However, the only term defined by the Commission is ADR: 'out-of-court dispute resolution processes conducted by a neutral third party, excluding arbitration proper.'[3] A shared legal distinction between conciliation and mediation is not recognised.[4]

What is confusing with Swedish terminology is that both conciliation and settlement are usually translated as *förlikning*. Conciliation as a term for a certain kind of procedure seems to have no equivalent in Swedish. On the one hand, the Swedish translation of the modern mediation concept, *medling*, has been used in the Swedish literature as encompassing the two different settlement procedures available in the *Code of Judicial Procedure* ('*CJP*')[5] ch 42 s 17 sub-ss 1 and 2.[6] On the other hand, there is a tendency to limit which practices are to be seen as mediation proper.[7] However, no more precise

2 COMMISSION OF THE EUROPEAN COMMUNITIES, Green Paper on Alternative Dispute Resolution in Civil and Commercial Law, COM (2002) 196 final, 14-15.
3 COMMISSION OF THE EUROPEAN COMMUNITIES, *supra* note 2, 6.
4 COMMISSION OF THE EUROPEAN COMMUNITIES, *supra* note 2, n 3.
5 Rättegångsbalk, Law no 740 of 1942 as amended. Effective as of 1 January 1948.
6 See P.O. EKELÖF / H. EDELSTAM / R. BOMAN, Rättegång V (7th ed, 1998) 64-71.
7 See, eg, B. LINDELL, Förlikning och medling, in: T. Anderson / B. Lindell (eds), Vänbok till Torleif Bylund (2003) 261, 265, and G. KNUTS, Förfarandegarantier vid domstolsanknuten medling (2006) 78.

term than what would be literally translated as 'settlement negotiation' (*förliknings-handling*) is then used for settlement practices excluded.

In Australia, the distinction is addressed by NADRAC.[8] In their glossary of terms, the mediator is described as having 'no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution', whereas the conciliator 'may have an advisory role …, but not a determinative role.' Further, only the conciliator 'may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement.'[9]

The difference between conciliation and mediation in the Japanese legal context is described as a matter of degree of involvement for the neutral third party in resolving the disagreement between the parties. Conciliation is defined as when the conciliator is active by making settlement proposals. Mediation (*assen*) is defined as a more informal kind of dispute resolution, where the mediator will not insist on an agreement but instead only facilitate the discussion with more open-ended suggestions.[10] In discussing Japan, the separation of the terms is of importance since Conciliation (*chôtei*) is a statutory means of dispute resolution of specific legal meaning.

For the sake of constructing generic models of settlement procedures, using the different terms to distinguish between different practices serves an explanatory purpose. Hence, in the comparative study, mediation will be used as meaning a procedure where a neutral third party has a mere facilitating role for settlement discussions between the parties. This may include clarifying the parties' positions. However, it may under no circumstances include determining the dispute, and rarely suggesting settlement terms or expressing an opinion of the likely outcome of a formal litigation with respect to the evidence presented. Conciliation will be used as meaning a procedure where in addition the conciliator will likely hear the parties separately, give concrete suggestions for settlement, and may even under some circumstances determine the dispute if so requested or accepted by the parties.

Conciliation will have the direct purpose of constructing an agreement, while this is only the indirect purpose of mediation. The direct purpose of mediation is instead to enable the parties to communicate effectively. What considerations, legal and extra-legal, that may be taken into account in the practice of conciliation or mediation will not be used as a distinguishing factor between the terms, even if it may serve to set different settlement procedures apart.

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8 National Australian Dispute Resolution Council. A non-statutory body appointed by the Attorney-General with funding provided through the Australian Government Attorney-General's Department and supported by a Secretariat located within the Civil Justice Division of the Department.

9 NADRAC, Legislating for Alternative Dispute Resolution: A Guide for Government Policy-makers and Legal Drafters (2006) Appendix 1: Glossary of Terms.

10 J. DAVIS (contributions by H. Oda / Y. Takaishi), Dispute Resolution in Japan (1996) 152.

## III. GENERAL COMPARATIVE OBSERVATIONS

### *1. Sweden*

The Code of Judicial Procedure (CJP) contains all the rules necessary for both criminal and civil procedure in all instances of courts and includes rules of evidence. There are four general principles, of oral testimony, immediacy, concentration and publicity, and there is free evaluation of evidence. For commercial matters there are three instances of courts, with the Supreme Court (*Högsta domstolen*) as the final court of appeal. The District Courts (*tingsrätt*) are the courts of first instance and have general jurisdiction in all civil matters. The Courts of Appeal (*hovrätt*) also have original jurisdiction in some matters.

The four principles and free evaluation of evidence are consequently connected to a practice of main hearings distinct from pre-trial proceedings, something otherwise uncommon if there is no tradition of a jury system. Commercial cases in the District Courts may be decided by a sole judge if deemed appropriate by the court and accepted by the parties.[11] In all other cases, judgment is made by a panel of judges in all instances of courts.[12] There is no participation of lay persons in the decision making in any instance of courts in commercial cases.

Before trial, the court may dispose of a case by judgment based on the documents in the case and the preparation,[13] or dispose of a case other than by judgment.[14] The court shall confirm a settlement in judgment (*stadsfäst förlikning*), if requested by both parties.[15] This is an obligation for the court to do, even if the agreement clearly is contrary to the content of law.[16] However, the court is responsible for the content of the agreement to some extent if requested to confirm it, and may even in some cases refuse to do so.[17] As of pre-trial practice, 'preparation' (*förberedelse*) is mandatory.[18] A procedure combining written and oral statements by the parties is most common.[19] Preparatory hearings are usually conducted by the trial judge.[20]

The obligation for the court of substantive procedural guidance during the preparation,[21] taken together with the specific objective for the preparation to elucidate

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11 Code of Judicial Procedure 1942 (Sweden) ch 1 s 3a(3).
12 Code of Judicial Procedure 1942 (Sweden) ch 1 s 3a, ch 2 s 4(1), ch 3 s 6.
13 Code of Judicial Procedure 1942 (Sweden) ch 17 s 2(2), ch 42 s 18(1) 5.
14 Code of Judicial Procedure 1942 (Sweden) ch 42 s 18(1) 1.
15 Code of Judicial Procedure 1942 (Sweden) ch 17 s 6.
16 Regeringens proposition 1986/87:89, Om ett reformerat tingrättsförfarande (1987) 112.
17 See P.O. EKELÖF / H. EDELSTAM / R. BOMAN, *supra* note 6, 72.
18 Code of Judicial Procedure 1942 (Sweden) ch 42 s 6(1).
19 P.H. LINBLOM, Civil and Criminal Procedure, in: M. Bogdan (ed), Swedish Law in the New Millenium (2000) 201, 214.
20 See Code of Judicial Procedure 1942 (Sweden) ch 42 ss 9, 12(1). See also P.O. EKELÖF / H. EDELSTAM / R. BOMAN, *supra* note 6, 24.
21 Code of Judicial Procedure 1942 (Sweden) ch 42 s 6(3).

'whether there are possibilities for an out of court settlement',[22] makes it perceivable as constituting one separate settlement procedure. This preparatory substantive procedural guidance is different from *förlikningsförhandling*, which imposes a duty for the court to 'work for the parties to reach a settlement'.[23] Both procedures are conducted by the trial judge, but the latter involves a much more active role for the judge. The legal grounds are also different. There must always be preparation where the 'possibilities for an out of court settlement' are elucidated, where instead the court must 'work for … a settlement' only when it is appropriate. Both of these procedures are also distinct from the procedure of reference to 'special mediation', which allows the court to 'direct the parties to appear at a mediation session before a mediator appointed by the court'.[24]

Referral to special mediation is used rarely.[25] The time for reference should normally be before the preparation has gone too far, but after the parties' positions have been clarified. The court may refer either a whole case or separate questions to special mediation.[26] Referral should not be done if one or both of the parties oppose to it.[27] There is no certification scheme for approved mediators that may be suggested by the court. A judge other than the trial judge may be used, as well as lay persons with specific professional knowledge of relevance to the dispute.[28] A mediator that is not approved by both parties should normally not be nominated,[29] but the court may choose a mediator it considers appropriate without the parties consent.[30] There is no prohibition against the courts as location for the mediation.[31] The costs for the procedure, the mediator's fee and rent for rooms located out of court, is the parties' responsibility.[32] In comparison, a filing fee is acquired for filing a suit, but the work of the judges and the use of courtrooms are provided for by the state free of charge.[33] If the mediation fails, the case should be referred back to the court.[34]

The extent of the obligation for the court of substantive procedural guidance during trial is more limited than the one during the preparation.[35] Further, different to during the preparation, there is no explicit objective of achieving a 'speedy adjudication'. The primary purpose of the main hearing, where at least one party seeks the justice provided

22 Code of Judicial Procedure 1942 (Sweden) ch 42 s 6(2) 5.
23 Code of Judicial Procedure 1942 (Sweden) ch 42 s 17(1).
24 Code of Judicial Procedure 1942 (Sweden) ch 42 s 17(2).
25 B. LINDELL, Civil Procedure in Sweden (2004) 114.
26 Regeringens proposition 1988/89:95, Om ändringar i rättegångsbalken m m (1989) 209.
27 Regeringens proposition 1988/89:95, Om ändringar i rättegångsbalken m m (1989) 207.
28 P.O. EKELÖF / H. EDELSTAM / R. BOMAN, *supra* note 6, 71.
29 Regeringens proposition 1986/87:89, Om ett reformerat tingrättsförfarande (1989) 207.
30 Regeringens proposition 1986/87:89, Om ett reformerat tingrättsförfarande (1989) 207-208.
31 B. LINDELL, Alternativ rättskipning eller alternativ till rättskipning? (2006) 159.
32 P.O. EKELÖF / H. EDELSTAM / R. BOMAN, *supra* note 6, 70.
33 P.O. EKELÖF / T. BYLUND / R. BOMAN, Rättegång III (6th ed, 1994) 177.
34 P.O. EKELÖF / H. EDELSTAM / R. BOMAN, *supra* note 6, 70.
35 See Code of Judicial Procedure 1942 (Sweden) ch 43 s 4(2).

for in law, must instead be for the court to achieve 'substantive justice' (*materiell rättvisa*).[36] To the greatest extent reasonable, the truth of what has happened should be discovered and the dispute decided in accordance with the content of law.[37] Hence, the substantive procedural guidance during trial will have little do to with working for settlements.

It is firmly expressed that as a guiding principle, the centre of gravity for the administration of justice should be in the District Courts.[38] The main function of the Courts of Appeal is to review and correct any mistakes done in the District Courts,[39] while the Supreme Court mainly is creating precedent.[40] Appeals to the Courts of Appeal are limited to judgments which are allegedly wrongly, precedent questions, and other cases of extraordinary reasons to grant appeal.[41] Appeals to the Supreme Court are limited to precedent questions, and specific cases of extraordinary reasons to grant appeal.[42]

The consequence of the intention to keep the function of the Court of Appeal restricted to correcting mistakes done in the District Courts is that nothing in the appealed case not concerned with these two aspects should be considered. However, leave of appeal is not limited to questions of law.[43] It is also emphasized that the review dispensation system does not limit the right to appeal, since it is investigated whether the District Courts case needs to be tried again.[44] The functional refinement is expressed to reduce disadvantages for parties at dispute. What is especially considered is that an appeal may double the time to final judgment, thus delaying the realization of formal justice and causing costs for the parties. A concern is expressed that delays and costs may force the party with less financial means to make concession it otherwise would not make.[45] Nothing concerning settlement is recommended in regards to the procedure in

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36 JUSTITIEDEPARTEMENTET, Översyn av rättegångsbalken 1: Processen i tingsrätten: Del B. Motiv m m, SOU 1982: 26 (1982) 110-11. See also Regeringens proposition 1986/87:89, Om ett reformerat tingrättsförfarande (1989) 112.

37 JUSTITIEDEPARTEMENTET, Processkommissionens betänkande angående Rättegångsväsendets ombildning: Tredje delen: Rättegången i tvistemål, SOU 1926:33 (1926) 5-6.

38 Regeringens proposition 2004/05:131, En modernare rättegång: Reformering av processen i allmän domstol (2005) 82. Regeringens proposition 1988/89:95, Om ändringar i rättegångsbalken m m (1989) 32.

39 Regeringens proposition 2004/05:131, En modernare rättegång: Reformering av processen i allmän domstol (2005) 82.

40 Regeringens proposition 1988/89:95, Om ändringar i rättegångsbalken m m (1989) 32.

41 Code of Judicial Procedure 1942 (Sweden) ch 49 ss 14-14a.

42 Code of Judicial Procedure 1942 (Sweden) ch 54 ss 10-12.

43 Regeringens proposition 2004/05:131, En modernare rättegång: Reformering av processen i allmän domstol (2005) 177.

44 Regeringens proposition 2004/05:131, En modernare rättegång: Reformering av processen i allmän domstol (2005) 179.

45 Regeringens proposition 2004/05:131, En modernare rättegång: Reformering av processen i allmän domstol (2005) 171.

the Supreme Court, but since it clearly has a strictly precedent creating function there would be no need for settlement procedures according to the refinement argument.

In cases of *förlikningsförhandling* during the preparation in the District Courts, it is sometimes said that the judge should ensure the parties that he or she will resign as trial judge if no agreement can be reached.[46] The reason for this is that a judge that has to conciliate the parties may be seen as no longer impartial during trial. There is primarily one ground constituting judicial bias, concerning 'if some other special circumstance exists that is likely to undermine confidence in his [or her] impartiality in the case.'[47] A judge fulfilling the obligations as stated in the law may not be accused of bias only because of this. However, the lack of precise directions of how the judge should practice *förlikningsförhandling* makes it difficult to know what actions that may be beside the duty and thus can be used to show bias. An example of what may constitute judicial bias is if the judge repeatedly tries to convince the parties to settle.[48] In the *travaux préparatoires* it is only discussed that on the one hand a judge should be willing to resign if accusations of impartiality are voiced by a party, but on the other hand that changing judges would be a waste of resources.[49]

### 2. *Australia*

Australia is a federation, and there are six states: New South Wales ('NSW'), Victoria, Queensland, South Australia, Western Australia and Tasmania. In addition, there are two territories: the Northern Territory and the Australian Capital Territory ('ACT'). The Australian court system is divided into state, territorial and federal jurisdictions, with the High Court of Australia as the final court of appeal.[50] In general there are three instances of courts in the states; lower courts such as the Magistrates' Court or Local Court, intermediate courts like the District Court or County Court, and a Supreme Court.[51]

In commercial cases, the adjudicator is normally a single judge or a panel of judges. In general, there has been a 'virtual abolition of the civil jury'.[52] In some cases a party may still be allowed to request that questions of fact are determined by a jury, but the court may also have the power to order a trial without a jury, even if requested.[53]

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46 K. HYLLENGREN, Förlikning = Förlikning?, in: (1997) 7 Advokaten 11.
47 Code of Judicial Procedure 1942 (Sweden) ch 4 s 13(1) 10.
48 E. TIBY, Domarjäv (1993) 37.
49 Justitiedepartementet, Översyn av rättegångsbalken 1: Processen i tingsrätten: Del B. Motiv m m, SOU 1982:26 (1982) 154-6.
50 See Commonwealth of Australia Constitution Act ch III, especially s 71.
51 S. COLBRAN / G. REINHARDT / P. SPENDER / S. JACKSON / R. DOUGLAS / K. HALL, Civil Procedure: Commentary and Materials (3d ed, 2005) 2.
52 G. DAVIES, Civil Justice Reform in Australia, in: A. Zuckerman (ed), Civil Justice in Crisis (1999) 166, 170.
53 See, eg, Uniform Civil Procedure Rules 1999 (Qld) s 474.

As of common law tradition, there is no Australian code of civil procedure. However, in Queensland the *Uniform Civil Procedure Rules*[54] apply to all instances of courts. In NSW the different procedural rules have been unified into the *Uniform Civil Procedure Rules* and the *Civil Procedure Act*,[55] applying throughout the judicial system. Queensland and NSW are also the jurisdictions that have the most developed systems for settling disputes,[56] as well as being among the most populated. Hence, the following descriptions will mainly deal with civil procedure in these jurisdictions.

In all Australian jurisdictions, except for the ACT, the courts have power to order the parties to participate in ADR, usually both before and during trial. Referral to mediation may occur in both Queensland and NSW. In NSW, the mediation may be divided into two forms. Mediators in NSW may either be selected by the court or by the parties in agreement. In the former case, registrars or officers of the court who are qualified mediators are used and the parties are not charged for neither the mediator nor the courtroom used. In the latter case, there are usually fees for the mediator and for the use of a room, which the parties must pay for.[57] In Queensland, the approved mediators and case appraisers' fees that the parties involved in the dispute are charged for are outlined in an ADR register.[58] The fee may also be determined in the referral order.[59]

In both Queensland and NSW, the court may order mediation at any time while the dispute is before them.[60] The element of force in ordered mediation is complemented in both Queensland and in NSW by a duty for the parties to participate in the proceedings in good faith.[61] In Queensland, the court may before trial direct the registrar to order the parties to attend mediation or case appraisal.[62] If a party objects to the referral, a written objection must be filed within seven days, stating the reasons for the objection.[63] However, the order stands if the court still considers mediation or case appraisal appropriate after hearing the objection.[64] A party may also apply for the dispute to be referred.[65]

In Queensland, there is a statutory scheme for approved mediators and case appraisers, with an ADR register for mediators, case appraisers and a list of approved

54 Part of the Supreme Court of Queensland Act 1991 (Qld).
55 Act no 28 of 2005 as amended.
56 See NATIONAL AUSTRALIAN DISPUTE RESOLUTION ADVISORY COUNCIL, ADR Statistics: Published Statistics on Alternative Dispute Resolution in Australia (2003).
57 SUPREME COURT OF NEW SOUTH WALES, Mediation (2007).
58 SUPREME COURT OF QUEENSLAND, Practice and Procedure: Alternative Dispute Resolution (2007). See Uniform Civil Procedure Rules 1999 (Qld) ss 346-8.
59 See Uniform Civil Procedure Rules 1999 (Qld) s 349.
60 Uniform Civil Procedure Rules 1999 (Qld) s 319(1)(b); Civil Procedure Act 2005 (NSW) s 26(1).
61 Uniform Civil Procedure Rules 1999 (Qld) s 325; Civil Procedure Act 2005 (NSW) s 27.
62 Uniform Civil Procedure Rules 1999 (Qld) s 319(1).
63 Uniform Civil Procedure Rules 1999 (Qld) s 319(2)-(3).
64 Uniform Civil Procedure Rules 1999 (Qld) s 319(4)-(5).
65 Uniform Civil Procedure Rules 1999 (Qld) s 320(1)(a).

venues.[66] In the mediation order, a mediator must be specified by the court or decided to be selected by the parties.[67] The parties may also select in agreement a mediator 'who is not a mediator'.[68] Case appraisers, however, must be either a barrister or solicitor with at least five years of experience,[69] and the parties can not elect someone who does not meet these criteria.[70]

In Queensland, during mediation the parties may be heard together or separately.[71] The mediator may abandon the mediation if a resolution of the dispute is considered unlikely, but there is no explicit duty to do so.[72] If a resolution can be reached, the agreement is recorded and filed with the court.[73] However, the parties must request that the court make the agreement in an order for it to gain the same legal effect as judgment and be considered binding.[74] If no resolution can be reached on time, the dispute may be referred back to the court by the registrar.[75] The practice is similar in NSW, except that it is not explicitly stated that the parties may be heard separately.[76]

Case appraisal, available in Queensland, is, similar to mediation, performed outside the courts. However, the practice resembles litigation much more strongly than mediation does. The case appraiser has the same power as that of the referring court to decide the issues in dispute.[77] Further, the case appraiser may only give a decision that could have been given in the dispute if it had been decided by the court.[78] Hence, there is a limit to the extra-legal factors that can be considered. A party who is dissatisfied with the case appraiser's decision may choose to take the dispute to trial by filing an election with the registrar within 28 days. If an election is filed, the dispute must be decided in court as if it had never been referred to the case appraiser.[79] However, if an election is not made, the parties are taken to have consented to the case appraiser's decision, and it then becomes binding as an unappealable final resolution of the dispute.[80] However, unlike a court ruling or judgement,[81] the reasons for the case appraisal decision do not have to be stated.[82]

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66 Uniform Civil Procedure Rules 1999 (Qld ss 314, 316, 317.
67 Uniform Civil Procedure Rules 1999 (Qld) s 323(1)(a)(i)-(ii).
68 Uniform Civil Procedure Rules 1999 (Qld) s 323(1)(a)(iii).
69 Uniform Civil Procedure Rules 1999 (Qld) s 315(1)(a).
70 See Uniform Civil Procedure Rules 1999 (Qld) s 334(1)(a).
71 Uniform Civil Procedure Rules 1999 (Qld) s 326(3).
72 Uniform Civil Procedure Rules 1999 (Qld) s 330(1).
73 Uniform Civil Procedure Rules 1999 (Qld) s 327.
74 Uniform Civil Procedure Rules 1999 (Qld) s 658.
75 Uniform Civil Procedure Rules 1999 (Qld) s 323(1)(e).
76 See Uniform Civil Procedure Rules 2005 (NSW) s 20.6.
77 Uniform Civil Procedure Rules 1999 (Qld) s 335(1).
78 Uniform Civil Procedure Rules 1999 (Qld) s 335(2)(a).
79 Uniform Civil Procedure Rules 1999 (Qld) s 343.
80 Uniform Civil Procedure Rules 1999 (Qld) s 341(2).
81 Uniform Civil Procedure Rules 1999 (Qld) s 663.
82 Uniform Civil Procedure Rules 1999 (Qld) s 339(1).

Case appraisal, as in Queensland, does not exist in NSW. However, there is the similar procedure of reference to a referee. In NSW whole matters may be referred by the court to a referee for determination.[83] Referral to a special referee is permitted also in Queensland, but it is limited to a specific question of fact in the case.[84] Both procedures feature the appraisal of an appointed professional outside the court, who hands down a decision that may or may not be accepted by the parties. These are procedures clearly separate from not only mediation due to its determinative character, but also to arbitration due to its non-binding character.

In NSW, the court may appoint any person as referee, even a court officer under certain circumstances.[85] As with mediators,[86] many referees are retired commercial judges, who also engage in commercial arbitration.[87] The court may direct the inquiry of the referee,[88] as well as direct the proceedings.[89] However, subject to these directions, the referee has discretion on how to conduct the proceedings and is not bound by rules of evidence.[90] Contrary to case appraisal in Queensland, the referee must make a written report to the court which includes a reasoned opinion on the matter.[91] However, unlike the case appraiser, the referee is not limited in his or her decision-making to what the court could have decided. To gain the same legal effect as judgment, the referee's report may be accepted, rejected or varied by the court on its own motion or on application by a party.[92] The court may give such judgement or order as it thinks fit.[93] Hence, the court may be seen as retaining the power to ensure adherence to the 'rules of natural justice'.[94]

In Queensland, the special referee is required to conduct the proceedings in the same manner that it would be conducted before a single judge.[95] Consequently, the referee, a court officer, is bound by the rules of evidence and other formalities in his or her inquiry.[96] However, just like in NSW, referral to a special referee may be made without

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83 Uniform Civil Procedure Rules 2005 (NSW) pt 20 s 14(1).
84 Uniform Civil Procedure Rules 1999 (Qld) s 501.
85 Uniform Civil Procedure Rules 2005 (NSW) pt 20 s 15.
86 J.J. SPIEGELMAN, Case Management in New South Wales, Speech (2006). Also, P.A. BERGIN, Presentation of Commercial Cases in the Supreme Court of New South Wales, Speech (2005).
87 J.J. SPIEGELMAN, Case Management in New South Wales, Speech (2006).
88 Uniform Civil Procedure Rules 2005 (NSW) pt 20 s 17.
89 Uniform Civil Procedure Rules 2005 (NSW) pt 20 s 20(1).
90 Uniform Civil Procedure Rules 2005 (NSW) pt 20 s 20(2).
91 Uniform Civil Procedure Rules 2005 (NSW) pt 20 s 23.
92 Uniform Civil Procedure Rules 2005 (NSW) pt 20 ss 22 and 24.
93 Uniform Civil Procedure Rules 2005 (NSW) pt 20 s 24(1).
94 See AUSTRALIAN LAW REFORM COMMISSION, Background Paper 2 (1996), under 'Expert Referral'.
95 Uniform Civil Procedure Rules 1999 (Qld) s 502(3).
96 Supreme Court Act 1995 (Qld) ss 255-257. See P. MCMURDO, The Uniform Management and Disposition of Construction Cases in Australia, Speech (2004).

the consent of the parties.[97] Also, similarly to the rules in NSW, the court may accept, reject or make a decision of its own based on the report.[98]

Leave to appeal is required in most cases before the Court of Appeal divisions of the Supreme Courts in Queensland and NSW. However, in both jurisdictions, the same general procedural rules apply for the superior courts as for the courts of first instance. Settlement procedures are also used in the Supreme Courts of Queensland and NSW.[99] Special leave is required for appeals to the High Court. Applications are considered by a single Justice or by a Full Court, normally after an oral hearing.[100] No ADR is conducted in connection with proceedings in cases on appeal to the High Court.[101]

Due to the procedural construction with referrals out of the court for ADR, grounds for objection of judicial bias are limited. Furthermore, there is no tradition of such accusations in Australia.[102] The only judicial bias expressed in the common law doctrine of 'natural justice' is that no person may be a judge in his own case.[103] Consequently, in both Queensland and NSW, there are explicit rules that a judge must not sit in judgment on the hearing of an appeal from an order made by him or herself.[104] To ensure a fair procedure, however, there is explicit confidentiality.

In Queensland, it is stated that if ordered mediation is unsuccessful and transferred to trial, no inference may be drawn against any party because of a failure to settle the dispute.[105] The confidentiality is similar to when a dissatisfied party to case appraisal may elect to continue to trial, with the statement that the dispute must then be decided in court 'as if it had never been referred to the case appraiser.'[106] In NSW, evidence of anything said or of any admission made during mediation is not admissible in any proceedings before any court.[107] Further, a mediator may disclose information obtained in connection with the mediation only under certain circumstances, such as consent.[108]

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97 See Uniform Civil Procedure Rules 1999 (Qld) s 501 where no condition of consent is imposed.

98 Uniform Civil Procedure Rules 1999 (Qld) s 505.

99 NATIONAL AUSTRALIAN DISPUTE RESOLUTION ADVISORY COUNCIL, ADR Statistics: Published Statistics on Alternative Dispute Resolution in Australia (2003) 10-13.

100 Judiciary Act 1903 (Cth) s 21.

101 See NATIONAL AUSTRALIAN DISPUTE RESOLUTION ADVISORY COUNCIL, ADR Statistics: Published Statistics on Alternative Dispute Resolution in Australia (2003).

102 There is no procedure for a party taking legal action accusing a judge of judicial bias in Australia. Instead, what is generally available is merely complaining to a senior judge.

103 *Dr Bonham's Case* (1610) 8 Co Rep 114a.

104 Supreme Court of Queensland Act 1991 (Qld) s 70, Supreme Court Act 1970 (NSW) s 110.

105 Uniform Civil Procedure Rules 1999 (Qld) s 323(1)(e).

106 Uniform Civil Procedure Rules 1999 (Qld) s 343(2)(b).

107 Civil Procedure Act 2005 (NSW) s 30(4)(a).

108 Civil Procedure Act 2005 (NSW) s 31.

*3. Japan*

There are two clearly separate settlement procedures available in Japan: *wakai* and *chôtei*. The structural difference is that the former is conducted by the trial judge, and the latter in a special statutory form. The practice by the trial judge allowed for in *wakai* is very broad, and not regulated in detail. Hence, it is possible to talk of a more and a less restricted form of court activity during *wakai*.

As part of a series of recent reforms throughout the Japanese legal system, a new *Code of Civil Procedure* (*CCP*) was adopted in 1996.[109] There are five types of courts in Japan: the Summary Courts, the Family Courts, the District Courts, the High Courts (including a special Intellectual Property High Court), and the Supreme Court as the final court of appeal. The District Courts have general jurisdiction in civil cases. The District Courts also handles appeals from the Summary Courts, while the High Courts are the appeal instance for District and Family Court cases and have original jurisdiction in a few limited matters.[110]

Litigation in ordinary commercial matters is, in the District Courts, heard by a single judge, or a panel of three judges if the matter is deemed significant or particularly difficult. On appeal to the High Courts and the Supreme Court, cases are heard by a panel of judges.[111] There is presently no jury system in Japan, and no participation of lay judges in civil cases before the courts.[112]

As a general objective, the '[c]ourts shall make efforts to secure that civil actions be conducted with justice and speed, and parties shall conduct civil actions in accordance with the principle of good faith and trust.'[113] Initially, the court may choose between three different pre-trial procedures: preparatory hearing,[114] preliminary procedure,[115] or preliminary procedure by document.[116] Especially the preparatory hearing is constructed for the facilitating of settlement before trial. The additional legal basis for the judge to initiate settlement discussions is *CCP* art 89, stating that the court may attempt to achieve a settlement-in-court (*wakai)* at any stage of the proceedings in the case.

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109 *Minshô-ho,* Law no 109 of 1996 as amended. Effective as of 1 January 1998.

110 Supreme Court of Japan, Judicial Power in the State (2006).

111 Supreme Court of Japan, Judicial Power in the State (2006).

112 A lay participation system is being introduced in criminal procedure, for certain serious offences. Influenced by the Swedish and German model, one judge sits in a panel together with three lay judges (*saiban-in*) and determines both questions of law and fact. Act (2004) Regarding Lay Assessor Participation in Criminal Trial, effective as of 2009.

113 Code of Civil Procedure 1996 (Japan) art 2. English translation from Y. TANIGUCHI, Good Faith and Abuse of Procedural Rights in Japanese Civil Procedure, in: (2000) 8 Tulane Journal of International and Comparative Law 167, n 19.

114 Code of Civil Procedure 1996 (Japan) arts 164-7.

115 Code of Civil Procedure 1996 (Japan) arts 168-74.

116 Code of Civil Procedure 1996 (Japan) arts 175-8.

A judicial institution that has been affected by the legal reforms, but whose core remains intact, is statutory civil conciliation (*chôtei*), regulated by the *Civil Conciliation Act* (*CCA*)[117] and the *Civil Conciliation Rules*.[118] *Chôtei* has for a long time been the most popular general court-connected dispute resolution in Japan, with actions being brought to it more often than to the District Courts.[119] As a result of amendments in 1992, the procedure must be exhausted before the case is filed with the District Court when the case is concerned with the increase and decrease in rent for housing or land. Further, in 1999, the *Specific Conciliation Act* was amended as an exception to *CCA* to provide for debt arrangement through *chôtei*-type conciliation between creditors and small and medium-sized enterprises on the verge of economic collapse.[120] The difference to ordinary *chôtei* is that not all parties, the debtors that is, need to consent to the agreement reached, as is otherwise required in *CCA* art 16.[121]

*Chôtei* is available at the parties' initiation in all civil matters.[122] A fee needs to be paid by the party making a proposal for conciliation.[123] The amount is determined in proportionality to the amount in the matter to be conciliated.[124] Filing a suit also requires paying a filing fee, in general measured by the value of the claim.[125] Hence, if the conciliation is unsuccessful the fee already paid is lost and need to be paid again to initiate formal litigation and the *chôtei* fee is in that case an additional cost.[126]

The trial judge may initiate *chôtei* on his or her own initiative after receiving a suit and in the initial stage of the trial.[127] The legal basis for pre-trial *wakai*, *CCP* art 89, provides that the court may hand over a case to a different judge for a settlement. However, one may identify many pre-trial and trial practices that appear to make *chôtei* redundant. Hence, even though available as a settlement procedure all through the proceedings, conciliation is more connected to what happens before rather than during trial and mainly initiated by the parties rather than by the court. Further, for referral of the dispute to *chôtei* by the trial judge, the parties' consent is needed if the proceeding

117 *Minji chôtei-hô* Law no 222 of 1951 as amended. Effective as of 1 October 1951. An English translation can be found in EHS Law Bulletin Series Vol. II., MA, No. 2360 (2006).
118 *Minji chôtei kisoku,* Ordinance no 2 of 1956 as amended.
119 H. ODA, Japanese Law (2nd ed, 1999) 78-9.
120 *Tokutei saimu tô no chôsei no sokushin no tame no tokutei chôtei ni kan suru hôritsu*. Law no 158 of 1999.
121 S. STEELE, Evaluating the New Japanese Civil Rehabilitation Law, in: (2000) 2(1) Australian Journal of Asian Law 53, n 10.
122 Civil Conciliation Act 1951 (Japan) art 2.
123 Civil Conciliation Act 1951 (Japan) art 10(1).
124 Civil Conciliation Act 1951 (Japan) art 10(1)-(2).
125 Y. SATO, The 1998 Civil Procedure Reform in Japan and Its Complications, in: (2000) 19 Civil Justice Quarterly 224, 238.
126 See D.F. HENDERSON, Conciliation and Japanese Law: Tokugawa and Modern: Vol 2 (1965) 229.
127 Civil Conciliation Act 1951 (Japan) art 20.

has gone so far that issues and evidence have been settled.[128] Hence, the new pre-trial proceedings with their function to manage issues and evidence on an earlier stage also diminish the use of forced *chôtei* during trial.

The stated purpose of *chôtei* is 'to devise, by mutual concessions of the parties, solutions for disputes concerning civil matters, which are consistent with reason and benefiting actual circumstances.'[129] Hence, extra-legal considerations may be given greater weight than legal rights and duties, contrary to court proceedings and arbitration. The conciliation is almost always carried out by a conciliation committee, which includes two commissioners and one judge.[130] The commissioners are lay persons, which are supposed to be respected people outside of the judicial system that are appointed by the Supreme Court and have received some training.[131] The committee judge is not expected to play an active role, but rather be an observer. It is not explicitly forbidden for the trial judge to sit in the committee, but it almost never happens. The committee judge and the trial judge do not even have any communication in most cases.[132] It is normally the court that selects the committee, but it is also possible for the parties to agree on other conciliators.

The conciliation committee hears both parties, usually separately, suggests one or more settlement agreements, and if necessary, tries to persuade the parties to compromise. As a rule, the proceedings are informal and not public.[133] However, if a trial of facts is conducted, the rules for taking evidence in *CCP* are followed.[134] Further, persons interested in the result may gain permission from the conciliation committee to participate.[135] Successful agreements are recorded and filed with the court, thus becoming public and not private, and they have legal effect as unappealable final judgment.[136]

A case may subsequently be brought to court if the outcome of the conciliation is not accepted by either of the initiating parties. One or both of the parties may also refuse to continue and may instead file suit in court. Filing suit is also available for the parties if the conciliation committee terminates the conciliation when they recognize that it is not possible for the parties to agree. Conciliation should also be considered as not accom-

128 Civil Conciliation Act 1951 (Japan) art 20.
129 Civil Conciliation Act 1951 (Japan) art 1.
130 Civil Conciliation Act 1951 (Japan) arts 5-8.
131 J. DAVIS, *supra* note 10, 310.
132 N. IWAI, Alternative Dispute Resolution in Court: The Japanese Experience, in: (1991) 6 Ohio State Journal on Dispute Resolution 201, 225.
133 N. IWAI, *supra* note 132, 226.
134 D.F. HENDERSON, *supra* note 126, 220.
135 Civil Conciliation Act 1951 (Japan) art 11.
136 Civil Conciliation Act 1951 (Japan) art 16.

plished when the agreement would be 'inappropriate',[137] with the content being contrary to law or public order.[138]

The practice of *wakai* is a private and informal procedure also during the trial stage, and renewed settlement negotiations may be suggested repeatedly by the judge throughout trial.[139] Commencement of *wakai* is a decision made by the judge. The trial may be suspended and settlement meetings scheduled if the parties agree once again to try to come to an agreement, or if the judge finds fit to do so.[140] Discontinued trials are a factor of the Japanese judicial system that supports *wakai*. As a consequence of the lack of a jury system, the trial may be divided into several sessions instead of a concentrated hearing.[141] Hence, more opportunities for the judge to find an appropriate time for a settlement during the trial are available.

It is a matter of the judge's own discretion of how to practice *wakai*. The court is not bound to apply strictly legal principles. Instead, other considerations specific to the parties' situation may be taken into account.[142] There is no explicit duty to provide a reason for any recommendation or decision made in any of the conciliation proceedings. However, for an order made by the court the same obligation of a reasoned decision should apply as in formal litigation.[143]

It is allowed for to proceed with *wakai* even after trial.[144] Hence, before judgement is prepared and issued, the court is allowed to advise the parties of its imminent holding in an effort to obtain a settlement.[145] A settlement after trial is seen as giving the advantage of hindering appeals, thus reducing the costs both for the parties and the judicial system. It further means that the judge does not have to write an opinion, which saves time and thus relieves the court's costs.[146] A final solution to the dispute as soon as possible may also be in the parties' best interest. As a practicality, a settlement is normally easier to enforce than a judgment since the parties have decided themselves how to regulate the disputes and do not have the perception of an unjust treatment.

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137 Civil Conciliation Act 1951 (Japan) art 14.
138 N. IWAI, *supra* note 132, 228.
139 J. DAVIS, *supra* note 10, 304.
140 J. DAVIS, *supra* note 10, 304.
141 M. RAMSEYER / M. NAKAZATO, Japanese Law: An Economic Approach (1999) 140.
142 J. DAVIS, *supra* note 10, 306. Also, N. IWAI, The Judge as Mediator: The Japanese Experience, in: (1991) 10 Civil Justice Quarterly 108, 110.
143 See Civil Conciliation Act 1951 (Japan) art 22. See Specific Conciliation Act 1999 (Japan) arts 19-20.
144 Code of Civil Procedure 1996 (Japan) art 89.
145 C. GOODMAN, Japan's New Civil Procedure Code: Has It Fostered a Rule of Law Dispute Resolution Mechanism?, in: (2004) 29 Brooklyn Journal of International Law 511, 542.
146 C. GOODMAN, supra note 145, n 138.

There is an unlimited right of appeal to the High Courts, while appeals to the Supreme Court are limited as of the new *CCP*.[147] Only lower court decisions that are irreconcilable with Supreme Court precedents or involving some important issues in interpreting law are allowed to be tried. The official reason for introducing such a discretionary appeal system is to save the court's limited resources for important cases.[148] The rules in *CCP* cover the procedure in all instances of the court system. The use of *wakai* in the Supreme Court is not as common as in the District Courts and the High Courts, but is still evident.[149] This was at least true before the new limited right to appeal.

### *4. Conclusion*

In all three national jurisdictions' settlement procedures described above there is a fundamental basis of voluntarism. Even if elements of force may be used initially, a party is always reserved the right to formal litigation and judgment according to the norms of law if they request it. The legal force of settlement agreements is in most cases as an unappealable final judgment, becoming effective simply after duration of time or needing to be accepted and made an order by the court. The court may have an obligation to make the agreement an order as requested by the parties, or it may be allowed to make changes to it as it finds appropriate or refuse to make it enforceable. Some agreements can merely be filed with the court, thus only receiving similar legal force to ordinary contracts and becoming public.

Most of the general court-connected conciliation and mediation observed is conducted as early in the proceedings as deemed appropriate. This is according to the underlying principle in ADR of reducing delays and costs. However, compared to civil procedure in Australia and Japan, general court-connected conciliation and mediation during and after trial is considerably absent in Sweden. All of the settlement procedures in the Swedish system are formally only conducted before trial, and they are presumed to be conducted exclusively in the courts of first instance. This does not mean that there is less emphasize on settlement before trial in Australia and Japan than in Sweden. In Australia, the centre of gravity for settlement activity is also presumed to be before and in the early phase of trial, but it may be applied in all state instances of courts. In Japan, the main form of dispute resolution, *chôtei*, is mostly connected to what happens before trial. However, settlements are facilitated and encouraged all the way up to a final resolution of the dispute, even in the Supreme Court where only questions of law are tried.

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147 Code of Civil Procedure 1996 (Japan) arts 312, 318.

148 T. KOJIMA, Japanese Civil Procedure in Comparative Law Perspective, in: (1998) 46 Kansas Law Review 687, 716.

149 J. DAVIS *supra* note 10, 303. Also, N. IWAI, *supra* note 142, 108, 111.

Settlements are allowed for during the proceedings and in all instances of courts in Sweden, but there are no specific means for the court to facilitate settlement after the preparation is concluded. No particular reason to explain the comparative lack of settlement procedures during trial can be found. What forms the basis for the argument to why there should be no settlement procedures in cases on appeal in Sweden is that leave to appeal is required for cases before the Courts of Appeal and the Supreme Court. The ambition in Sweden to refine the functions of the three instances of courts causes settlement procedures applied to the specific issues that should be tried in the superior courts to appear inappropriate. There is clearly no such ambition in the other jurisdictions of the comparative law study.

As in Sweden, restricting the final court of appeal to mainly precedent creation and not settlement facilitation is the case in the High Court of Australia. In Japan, there is a use of settlement procedures in the Supreme Court. However, recently the rules on appeal have changed to make it a precedent creating instance, thus the facilitating of settlement may come to decrease together with the caseload. However, on an intermediate level, there are settlement procedures available for all cases in Australia and Japan. Admittedly, appeals to the High Courts in Japan are consequently unlimited. However, leave to appeal is required in the Supreme Courts in Australia. In Australia, applying settlement procedures on the lower level is seen as admittedly diminishing the importance for such practice in the superior courts, but it is still available for cases where it may be successfully applied.

A neutral and impartial court is valued in all jurisdictions, even if it is sought in different ways in relation to the function of the trial judge, judicial bias and confidentiality. In Australia general court-connected conciliation and mediation is exclusively done through referrals away from the trial judge, while in Japan the trial judge is very active. There is no procedure of reference to conciliation or mediation conducted outside the judicial system in Japan, while the trial judge performs no ADR in Australia. The situation in Japan may be due to the tradition of entrusting the judicial system with a broad dispute resolution power and the courts' superior hierarchal position, as well as a lack of such private competence. Regarding the latter, there has recently been a statutory scheme introduced for listing private ADR services which have been officially approved.[150] This is interesting, aiming to introduce the modern concept of ADR as derived from USA, which can be seen as a development away from the settlement procedures described above. However, since the focus of this article is court-connected settlement procedures this development will not be further commented.[151]

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150 *Saiban-gai funsô kaiketsu tetsuzuki no riyô no sokushin ni kansuru hôritsu,* Law for Promotion of Use of Alternative Dispute Resolution 2004 (Japan), effective as of 2007.

151 Instead, see M. YOSHIDA, Recent Legislative Development of ADR in Japan, in: (2005) 20 ZJapanR / J.Japan.L. 193.

The Swedish system is positioned much closer to the practice in Japan than to the Australian system, but it is still much more restrictive than the former in regards to the activity of the trial judge. This difference between Sweden and Japan may be due to different rules on judicial bias.[152] The reason for the difference to Australia is not in relation to the judges there being even more restricted by the threat of accusations of bias, but instead rather a remnant of the traditional role of the judge in adversarial proceedings in Australia.

Connected to judicial bias is confidentiality. In Sweden, there is no specific obligation for confidentiality of what has occurred during settlement negotiations. This may be a consequence of the principle of immediacy, that only what has been presented during the main hearing should be considered by the court, and that the rules on judicial bias oppose the judges from receiving information. Confidentiality receives even less focus in Japan, and there seems to be no such explicit legal limitations. However, the trial judge is encouraged not to participate in settlement negotiations conducted by others and to separate between his or her own settlement practice and the collection of evidence. In Australia, explicit rules on confidentiality are set in place to ensure that there will be no accusations of judicial bias.

## IV. GENERIC MODELS

From comparing the national procedures, five models of general court-connected conciliation and mediation may be identified. The settlement facilitating practices are first differentiated as being either conciliation or mediation, and then a further distinction is made based on the connection to the general courts. The five models can be divided into three categories: ADR by trial judge, reference to private ADR, and institutionalized ADR.

(1) Belonging to the first category are the models *mediation by trial judge* and *conciliation by trial judge.* The national procedures that could be described as mediation by trial judge are the preparatory substantive procedural guidance in Sweden and the Japanese *wakai* in its more restricted form of court activity. The model is conducted exclusively in the preparation in Sweden. Discussing extra-legal issues during trial is seen as irrelevant for judgment and thus the court may be inclined to interrupt the parties before they can reach an agreement. The model is almost always practiced only before trial in Japan as well. When the issues of the dispute have been clarified and the evidence to be presented has been referred to, the more active intervention of conciliation by trial judge is allowed for and usually practiced instead of mediation proper.

152 There are no grounds for dismissal covering such judicial bias in Japan. See Code of Civil Procedure (Japan) art 23.

In both jurisdictions, the place for the procedure would be a room provided by the court, but not necessary a courtroom.

The difference to private mediation is that the judiciary runs the procedure and is available to play a role as legal and moral supervisor, and also provide a fair setting. However, it must be allowed for some flexibility both in the setting and in factors that may be considered by the parties for the procedure to even be seen as mediation proper. Further, the parties are not charged for court's expenses, thus providing a cheaper and more easily accessible dispute resolution for disputants than equivalent private services.

The procedural model of conciliation by trial judge is represented in the Swedish *förlikningsförhandling* and the Japanese *wakai* in its less restricted form of court activity. The procedure is more regulated in Japan than in Sweden, with sections explicitly allowing for concrete settlement proposals and explaining how they may be accepted by the parties. In Japan, the procedure is also applied throughout the proceedings in all instances and repeatedly. This is supported by discontinued trials. In Sweden, however, the procedure is only applied in the preparation in the first instance and only once. The difference in practice between Japan and Sweden is related to that in Sweden trials are concentrated. The control of the settlement negotiations and the agreement is even tighter in the hands of the court in this procedure than during mediation by trial judge. In both Japan and Sweden, the model can be seen as following after failed attempt by the trial judge to mediate between the parties. As no reasons are given for concrete settlement proposals in either Sweden or Japan, it is important that they are not presented by the court as decisions.

(2) Belonging to the second category are the models *reference to mediation* and *reference to conciliation.* Reference to mediation is practiced in Sweden and in Australia. The Swedish 'special mediation', however, falls within this category only as long as the appointed 'special mediator' acts in a way that is consistent with mediation proper. A definitional consequence of ordering a case to be referred out of the ordinary court proceedings is that the mediation in question is private, which is different from in-court mediation by trial judge and mediation in an institutionalized form (statutory mediation). In NSW, when in reference to mediation a court officer is elected mediator by the court, the procedure is fully financed by the judicial system. However, the same rules as when otherwise referring a case to a private mediator in Australia applies to the conduct. The lack of a specific organization makes that practice belonging to this model and not constituting statutory mediation, despite being conducted in the courts and free of an extra charge.

In Sweden, reference to special mediation is an obligation for the court only during the preparation and only in first instance. In Australia, reference to mediation is presumed to happen mainly before or in the early phase of trial, but the rules apply to all instances of courts in the states. The parties may also be forced to participate in the private mediation and they have to do it in good faith. It is not prohibited to refer a case

to special mediation without consent in Sweden, but it never happens due to the construction of the obligation of referral. There is no specific requirement on the parties' behavior during special mediation either. In Australia, there are statutory schemes for listing approved mediators and venues to which the court may refer a case or an issue. However, there are no limitations as to by whom and where the mediation may be conducted, if the parties consent. In Sweden, there is no similar structure in the judicial system that supports the referral. There are also set time limits for the procedure in Australia, which is not the case in Sweden. Having trial judges act as mediators demands them to be in possession of two diverse competences in dispute resolution. Whereas conciliation resembles adjudication to an extent, mediation is based on a completely different approach. Using mediation outside of the court also has the advantage, in a flexible way, of being able to include issues and parties otherwise not part of the proceedings.

Similar to reference to mediation, reference to conciliation is a matter of using private conciliation as it is conducted outside the judicial system. An example of this model is when in the Swedish procedure of 'special mediation' the appointed 'mediator' takes on the role of conciliator, which is argued to be what is presumed by the legislator.[153] The model is also applicable to the Australian procedures of reference to case appraisal and to a referee. Unlike with mediation, the conciliator gives concrete settlement proposals, or even makes decisions on an intermediate level as in the Australian versions. Only approved conciliators may be used in Australia, while there are no limitations in Sweden. No problems of judicial bias occur in either of the jurisdictions, unless judges normally in the courts of appeal are used as conciliators that decide the dispute.

Different to mediation, using private conciliation instead of conciliation by trial judge is not a matter of wanting to avoid the demand on judges for double competences in general, but instead specific private conciliators may have competences that are suitable for specific disputes. Contrary to the Swedish system, in Australia the connection to the court and the ordinary proceedings are much closer than when referring a case to mediation. This may be due to the practice resembling adjudication more than mediation does, and thus the public demand for fair procedure is greater. The risks for the parties feeling they have not been treated fairly by the conciliator may be seen as a responsibility of the court. An advantage of reference to conciliation compared to conciliation by trial judge is that the different modes of proceedings are made clearer to the parties. The private conciliator used also has greater freedom in proposing concrete settlement agreements than a judge.

153 B. LINDELL, Civilprocessen (2nd ed, 2003) 679.

(3) Belonging to the third category is only one model; *statutory conciliation.* This does not mean that there can be no statutory mediation, but merely that it is not used in any of the three jurisdictions compared. Statutory conciliation is a model of institutionalized conciliation provided for within the judicial system. It is most clearly represented by the Japaese *chôtei*. However, reference to a special referee, as in Queensland, also falls within this model. The latter is also the only national procedure in the study where a whole case may not be referred. Instead, only specific questions of fact may be considered. Hence, the procedure is a matter of expert determination in that form of the model. In comparison, the Japanese *chôtei* may thus be seen as 'peculiar to Japan', but it is not as unique if seen as one form of a generic procedural model.

The practice of statutory conciliation is in-between conciliation by trial judge and reference to conciliation, being positioned somewhat besides the ordinary court structure instead of within or outside of it. As in the other conciliation models, it may resemble summary proceedings. However, it may be much more informal than when conducted by the trial judge, allowing for other issues and parties to play a part. At the same time, the closer connection to the court than in reference to conciliation makes collaborations with and transfers from the court easier. The connection also makes guaranteeing confidentiality in the conciliation sessions more difficult. However, by adhering to the ordinary procedures when collecting evidence, there would be no need for confidentiality on the facts proved and it could instead be directly transferred to the proceedings in formal litigation if the parties chose to proceed with that.

Statutory conciliation, in regards to the practicality of being part of the judicial system, may easily be required to be exhausted before taking a case into formal litigation. This is also the case for certain disputes in Japan. Statutory conciliation may also be available for parties involved in a dispute before even filing suit in court, thus not involving the court at all before requesting an agreement to be recorded. This is not possible in any of the other models. The conciliators may make sure that the content of the agreement adheres to certain standards, even though extra-legal factors are considered in the process. Even if private conciliators may be given a specified mission by the court, they would still not be employed by the state and be under the same responsibility for ensuring public confidence in the judicial system.

ZUSAMMENFASSUNG

*Der Beitrag erläutert Begrifflichkeit und Praxis von gerichtsnaher Schlichtung und Mediation in Handelstreitigkeiten in Schweden, Japan und Australien (schwerpunktmäßig in den Bundesstaaten Queensland und New South Wales). In Bezug auf die vieldiskutierte niedrige Zahl von Verfahren in Japan vertritt er eine von der tradierten Interpretation abweichende Position: die geringe Verfahrensdichte sei nach neueren Analysen nicht mehr international als eine Ausnahme anzusehen, sondern lasse sich vielmehr mit einem allgemeingültigen institutionellen Erklärungsansatz entschlüsseln. Damit werden die für Japan gewonnenen verfahrensrechtlichen Beobachtungen leichter verständlich, und entsprechend stellt der Beitrag diese in einen konzeptionell breit angelegten Rechtsvergleich.*

*Der erste Teil des Beitrages differenziert zwischen den beiden Verfahrensarten anhand der Rolle, die der neutralen dritten Partei zukommt. Während der Mediator sich im Rahmen der Mediation typischerweise passiv verhalte, nehme der Schlichter bei der gerichtsnahen Schlichtung durch eigene Vorschläge Einfluß, was den Ausgang des Verfahrens entscheidend beeinflussen könne. Der Begriff „gerichtsnah" wird dabei weit interpretiert.*

*Als Ergebnis der Analyse im zweiten Teil des Beitrages wird die Freiwilligkeit als charakteristisches Merkmal herausgestellt, das die unterschiedlichen Verfahren in den drei Rechtssystemen kennzeichne. Auch soweit teilweise die Einleitung eines Verfahrens nicht freiwillig geschehe, behalte jedoch jede Partei das Recht, die Streitfrage durch ein formales Gerichtsverfahren klären zu lassen. In allen Ländern würden sowohl die Schlichtung als auch die Mediation so früh wie möglich eingeleitet, um die vorrangigen Ziele – Verfahrensbeschleunigung und Kostenminimierung – zu erreichen.*

*Die Unterschiede in den Rechtssystemen werden wie folgt herausgearbeitet: Im Vergleich zu Australien und Japan, würden Schlichtung und Mediation in Schweden äußerst selten während eines laufenden Gerichtsverfahrens oder im Anschluß an ein Gerichtsverfahren eingeleitet. In Australien würden ferner die Verfahren grundsätzlich unter Ausschluß der Richter durchgeführt, während die Richter in Japan regelmäßig eine aktive Rolle spielten. Insgesamt sei die schwedische Praxis der japanischen sehr viel ähnlicher als der australischen; allerdings sei die Rolle der schwedischen Richter stärker zurückgenommen als die der japanischen.*

*Abschließend entwickelt der Beitrag auf der Grundlage eines Vergleiches der verschiedenen Verfahren in den drei Rechtsordnungen generische Modelle der Streitbeilegung in Handelssachen, wobei das unterschiedliche Verhältnis von gerichtsnaher Schlichtung und Mediation zur ordentlichen Gerichtsbarkeit als Differenzierungskriterium dient. Es werden fünf unterschiedliche Modelle identifiziert und in drei Kategorien unterteilt: außergerichtliche Streitbeilegung durch einen Richter, Rückgriff auf einen privaten Schlichter und das Modell einer institutionalisierten außergerichtlichen Streitbeilegung. (deutsche Übersetzung durch die Red.)*