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Extra-judicial Dispute Resolution in Germany and Japan

Report on the Symposium in Celebration of the 30th Anniversary of the Department of Japanese Law at the FernUniversität in Hagen, Cologne, 30 September and 1 October 2021

The celebratory symposium on the occasion of the 30th anniversary of the Department of Japanese Law in the law faculty of the FernUniversität in Hagen was held on 30 September and 1 October 2021.[1] The venue was the Japanisches Kulturinstitut in Cologne, with the reception subsequently held at the neighbouring Museum for East Asian Art. Among the over 100 participants – a third of whom attended the proceedings online from Japan and various other countries – were researchers, scholars, and practitioners of law, as well as numerous alumni of the Hagen Department of Japanese Law. The event was held in a hybrid fashion, featuring the interaction of participants and speakers both at the venue in Cologne and online. Prof. Dr. Julius WEITZDÖRFER, who became head of the Department of Japanese Law in September of 2020, and Dr. Anna Katharina SUZUKI-KLASEN were the organizers of the symposium.

The symposium – the only Japanese-German bilateral conference held in person in the last two years – sought to explore the role of extra-judicial dispute resolution in Germany and Japan from a comparative perspective. Each of the four main sessions consisted of two presentations, one from the German side and one from the Japanese side. Differences and similarities in the extra-judicial dispute resolution mechanisms were made apparent and achieved further definition in the round of discussion following each session.

The ceremony on 30 September commenced with an address made by Prof. WEITZDÖRFER, who expressed his joy at being able to hold the event in person rather than just online. In his remarks, he introduced the evening's speakers and gave an update on the current situation of his department, which had been without a professor for several years following the departure of Prof. em. Dr. Hans-Peter MARUTSCHKE.

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1 For a German report on the symposium, see Anna Katharina Suzuki-Klasen, "30 Jahre Japanisches Recht an der FernUniversität in Hagen: Festakt und wissenschaftliches Symposium am 30.09. und 1.10.2021 in Köln", Osaka University Law Review 69 (February 2022) 61–66.

Prof. WEITZDÖRFER was followed by the president of the German-Japanese Association of Jurists (Deutsch-Japanische Juristenvereinigung, DJJV), Hironaga KANEKO, who recounted the story of his first encounter with Prof. MARUTSCHKE and the development of legal research on Japanese law in Germany. Mr. Kaneko expressed his joy over the increasing reciprocity of legal research in Germany and Japan. He attributed this to the increase in German interest in Japanese law, a development which has led to the previously one-sided relationship evolving into a full dialogue.

This was followed-up on by the Japanese Consul General in Düsseldorf, Mr. Kiminori IWAMA. He began his address with a tribute to the victims of the disastrous flooding of summer 2021 that had caused extensive damage in the Ahr Valley area (which the Japanese Chamber of Industry and Commerce in Düsseldorf sought to mitigate with a sizeable donation in support of the victims). Mr. IWAMA joined Mr. KANEKO in acknowledging the development of deeper and more reciprocal ties between legal researchers in Germany and Japan. He pointed to the legal problems associated with the Ahr Valley flood as an area in which Japanese disaster law – a topic under investigation at Hagen University – could serve as an important source of inspiration for Germany, due in part to Japan's long history of finding legal solutions for problems resulting from natural disasters.

The next address of the evening was given by the director of the Japanisches Kulturinstitut, Prof. em. Dr. Keiichi AIZAWA, who expressed his pleasure at the choice of venue. Prof. AIZAWA traced the broad range of courses on Japanese law at the FernUniversität in Hagen back to a steadily growing exchange between Germany and Japan and emphasized the close contact with Japan.

The next speaker to address the audience was Prof. em. Dr. jur. Dr. jur. h.c. Ulrich EISENHARDT. He shared the story of how a dinner with the famous Japanese law professor Zentarō KITAGAWA (from the Institute for International Law at Kyoto University) set the events into motion that ultimately led to the foundation of the Department of Japanese Law in Hagen. During that dinner, Prof. KITAGAWA had lamented over the lack of German universities offering classes on Japanese law and the then monodirectional exchange in the field of legal studies between Germany and Japan. In the wake of this conversation, Prof. EISENHARDT recognized the need for German-language courses on Japanese law and thus began the process of establishing the Institute of Japanese Law in Hagen, to his knowledge the first university to award degrees in Japanese law outside of Japan after 1945.

The keynote speech, delivered by Prof. Dr. Dr. h.c. mult. Jürgen BASEDOW, *Director Emeritus* at the Max Planck Institute for Comparative and Private International Law, discussed Germany and Japan within the context of international uniform law.

First, Prof. BASEDOW presented the international framework for uniform law step by step and explained the legal and historical development on the basis of the treaties and conventions concluded.[2] When German lawyers consider uniform law, Prof. BASEDOW argued, they primarily think of legal harmonization in the context of European Union law. However, various other sources of uniform law may also come to mind. Already in the 20th century, treaties created the legal framework for universal private law as uniform law. The desire for uniform, cross-jurisdictional law can be traced back in particular to the European settlement of the so-called "New World", to the industrial revolution, and to the expansion of markets and capital, as well as the resulting need for cross-border transactions in goods and finance. However, the prevailing codified law – done in the Roman tradition – was, according to Basedow, initially tied to nation states, which also gained importance in the 18th and 19th centuries. Still, it was in the interest of the political power centres to establish effective and binding rules, especially in contract law and the protection of intellectual property.

Prof. BASEDOW went on to outline the historical development of various conventions, such as the Berne Convention on International Carriage by Rail[3] and the Hague Conventions on Private International Law[4], and in particular the Hague Convention on the Law Applicable to the International Sale of Goods.[5] In this context, Prof. BASEDOW pointed out the weaknesses of the Hague Sales Convention and briefly outlined the development towards the UN Sales Convention.[6] Prof. Basedow described the importance of uniform private law in Asia, which initially had little relevance. However, Japan has co-signed conventions on uniform law (especially the law of the sea, international sales law, oil pollution liability, and air law) and is thus committed to international unification processes.

The symposium on 1 October began with an address by Mr. KANEKO, who emphasized the importance of arbitration in international company relations. He cited the dispute between the German Volkswagen AG and the Japanese Suzuki Motor Corporation as an example of international

2 The lecture is published in this issue; see J. BASEDOW, Japan und Deutschland im Netz des internationalen Einheitsrechts, *supra*, p. 1–18

3 Convention concerning International Carriage by Rail, Bern, 9 May 1980, in force 1 May 1985, 1396 UNTS 2 ("COTIF").

4 A comprehensive list of the Hague Conventions can be found here: *https://www.hcch.net/de/instruments/conventions*.

5 Convention on the law applicable to international sales of goods, The Hague, 15 June 1955, in force 1 September 1964, 510 UNTS 147 ("Hague Convention on International Sale of Goods").

6 United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980, in force 1 January 1988, 1489 UNTS 3 ("CISG").

arbitration panels solving disputes. He pointed further to the recent establishment of the International Dispute Resolution Center in Tōkyō and Ōsaka as proof of the increasing relevance of this legal field.

The first session was dedicated to commercial arbitration. In his opening presentation, Dr. Christian STRASSER, attorney at law and partner at Heuking Kühn Lüer Wojtek, illustrated the emergence of the German legal framework for commercial arbitration, which was driven by economic growth. The procedure is a continuation of trade customs and commercial behaviour. Driven by the question of "Who gets the money?", there is ongoing competition between the ordinary courts and arbitral tribunals, but with special commercial courts involved as well. Yet independent of the fight amongst venues, according to Dr. STRASSER the advantages of arbitration outweigh the disadvantages, especially with regard to costs, confidentiality, and efficiency of the proceedings, but also as regards enforceability. Nevertheless, there are challenges in terms of quality and flexibility that need to be overcome in the future. Dr. STRASSER also highlighted procedural similarities between Japan and Germany, such as the reception of the German Code of Civil Procedure in the late 19th century.

Yoshimi OHARA, attorney at law and partner at Nagashima Ohno & Tsunematsu, first discussed the Japan International Dispute Resolution Centre (hereinafter "JIDRC"), which opened in 2020, and its function as a venue and hearing facility for commercial arbitration in Tōkyō and Ōsaka. In response to the COVID-19 pandemic, a virtual commercial arbitration procedure has been launched, in which the JIDRC offers, among other things, a "voice-to-text" recording service using artificial intelligence. In addition to the already existing means of obtaining information on arbitration in Japan from the JIDRC, a file management service is also under development. Ms. OHARA briefly presented the already implemented and upcoming legal developments. For example, the Law on the Practice of Foreign Lawyers[7] has been amended to ease the requirements under which foreign lawyers may practice in Japan and to allow them to represent clients in commercial arbitration between Japanese parties, provided there is a foreign element in the case. Ms. OHARA also briefly discussed the reform of the Arbitration Act, which is still under discussion. Thus, competence for arbitration proceedings is to be bundled at the district courts in Tōkyō and Ōsaka through their joint jurisdiction, thereby facilitating access to these courts. Judges are also to be given the discretionary power to exempt par-

7 外国弁護士による法律事務の取扱いに関する特別措置法 *Gaikoku bengo-shi ni yoru hōritsu jimu no toriatsukai ni kansuru tokubetsu sochi-hō* [Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers], Law No. 66/1986.

8 仲裁法 *Chūsai-hō* [Arbitration Act], Law No. 138/2003.

ties from the obligation to file translations of foreign documents. Overall, the law should be aligned with the UNCITRAL Model Law on International Commercial Arbitration as amended in 2006.[9] Despite these upcoming innovations, Ms. OHARA raised the question of where commercial arbitration in Japan should go from here.

Chaired by Prof. Dr. Luke NOTTAGE, Professor at the University of Sydney and Special Counsel at Williams Trade Law, the speakers and the audience engaged in a lively discussion, considering, for example, the question of the extent to which lawyers in Germany and Japan take on an arbitrator-mediator role in commercial arbitration.

In the subsequent second section, the presentations revolved around investment arbitration and its mode of operation in Germany and Japan. Junior Prof. Dr. Julian SCHEU, Professor and General Manager at the International Investment Law Centre Cologne and his section counterpart Dr. Lars MARKET, attorney at law and partner at Nishimura & Asahi, gave a dynamic lecture by using a "pass the ball" discussion technique and in doing so vividly presented the legal situation in Germany and Japan under the moderation of Dr. Ruth EFFINOWICZ, Senior Research Fellow at the Max Planck Institute for Comparative and International Private Law. Prof. SCHEU opened with a brief introduction on the investment arbitration and investor-state dispute settlement provisions ("hereinafter "ISDS provisions") that are found in treaties, followed by an outlining of the role of Germany in international investment arbitration. German investors often use this mechanism and are thus frequently involved in investment arbitration proceedings, making Germany the fourth most frequent home state of claimants worldwide. Dr. MARKERT then went on to discuss developments in Japan. Compared to Germany, Japan has tended to keep a low profile and is only 38th on the worldwide list of countries of origin of parties in investment arbitration proceedings. As reported by Dr. MARKERT, it was only recently that the first proceedings against Japan were initiated.

The role of Germany in relation to the EU's investment policy and investment tribunals (which are advocated by the EU and UNCITRAL, for example) was also discussed interactively and with particular attention to the legitimacy of ISDS provisions. Another topic of discussion was the international Energy Charter Treaty[10] and the tension between investment and climate protection in investment arbitration proceedings. Prof. WEITZDÖRFER illustrated this normative conflict by contrasting ISDS pro-

9 The English version of the Model Law is available at *https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf*.

10 The Energy Charter Treat*y*, Lisbon, 17 December 1994, in force 16 April 1998, 2080 UNTS 95, as amended by the Protocol of 17 December 1994.

visions in investment agreements and the emission reduction targets in environmental agreements such as the Paris Climate Agreement.[11]

The third session of the celebratory symposium focused on a comparative discussion of mediation in Japan and Germany. Judith WOLLSTÄDTER, a researcher from Hagen, was the first speaker at this part of the symposium and gave an overview of the state and challenges of mediation in Germany. She argued that mediation had become an established practice for extra-judicial conflict resolution in Germany, albeit one that still had considerable room for future expansion. She further emphasized the need for reforms regarding the training and certification process for German mediators and observed that mediation was not a secure source of income, forcing many mediators to compensate for fluctuations in their revenue by training other aspiring mediators.

Following on from Ms. WOLLSTÄDTER'S presentation, Prof. Aya YAMADA from Kyōto University analysed the state of mediation in Japan, with special emphasis on a form of court-annexed mediation process known in Japan as 調停 (*chōtei*). She argued that the decrease in civil court cases being filed with Japanese district courts over the past twenty years did not result from an increase in *chōtei* mediations. As a possible explanation, Prof. YAMADA proposed the view that other forms of ADR had surpassed *chōtei* mediations in importance, with the Japanese Ministry of Justice and local administrations both actively supporting ADR.

In the subsequent discussion, which was moderated by professional mediator and attorney at law Dr. Eva SCHWITTEK, the presenters reiterated that the use of extra-judicial mediation is more widespread in Japan than it is in Germany. They identified cultural differences pertaining to conflict resolution as potential explanatory factors, with Japanese culture more strongly favouring conciliatory approaches to disputes.

The fourth and final session of the symposium was held on system design for the settlement of consumer and mass disputes. In the session's first presentation, Dr. Christof BERLIN, attorney at law and head of the Conciliation Body for Public Transport, gave an overview of the alternative dispute resolution methods available to consumers in Germany. He described them as a cost-efficient alternative to court proceedings having a low threshold for consumers. The potential for ADR had been further increased by a 2013 European Parliament directive that facilitated the use of ADR in transboundary disputes. He cited cases for which there were no legal precedents as remaining particularly challenging.

Assoc. Prof. Dr. Hideaki IRIE from the Kyūshū University Graduate School of Law held the final presentation of the symposium, offering a

11 Paris Agreement, Paris, 12 December 2015, in force 4 November 2016.

perspective on the resolution of mass disputes in Japan by drawing upon the legal battle over the question of compensation in the wake of the Fukushima Dai'ichi nuclear disaster. He concluded that extra-judicial dispute resolution had proven its merit in the wake of the Fukushima nuclear disaster and emphasized in particular the successful performance of the Dispute Resolution Center for Nuclear Damage Compensation. By employing lawyers as mediators, the Dispute Resolution Center had been able to resolve over 26,000 cases. Nevertheless, he cautioned that an overreliance on ADR, due to its less public nature, may have the potential to obfuscate the scale of some problems that require a political approach to formulate solutions for the benefit of society as a whole.

The subsequent discussion, moderated by Prof. Dr. Moritz BÄLZ, sought to draw upon the German and Japanese examples in an attempt to identify the ideal approach for dealing with mass disputes. The presenters, while praising the advantages of ADR over litigation, agreed that the amount of possible variation in such cases makes it difficult to develop a judicial remedy fit for all mass dispute scenarios. Dr. BERLIN also addressed the criticism of ADR as being too opaque and as clouding issues rather than revealing them, arguing that most of the ADR cases that the Conciliation Body for Public Transport has tackled were unlikely to go to court in the first place.

The closing remarks of the symposium were delivered by Prof. MARUTSCHKE, the first head of the department of Japanese Law at the FernUniversität in Hagen. He summarized the similarities and differences between extrajudicial conflict resolution approaches in Germany and Japan and reflected on his own experience of studying Japanese law. Prof. MARUTSCHKE cited the presentations and discussions over the course of the symposium as proof for his belief that exchanges between Japan and Germany in the field of legal science may contribute to solving a variety of legal problems. When discussing the history of Japanese law at the FernUniversität in Hagen, MARUTSCHKE emphasized the role that Prof. EISENHARDT had played in turning the idea of offering courses on Japanese law into a reality. Prof. MARUTSCHKE called the celebratory symposium an example of the respectable academic work being done in Hagen in the field of Japanese law and expressed his hope that Japanese law may continue to have a home in Hagen for a further thirty years.

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