

## **Alternative Dispute Resolution in International Commercial Transaction and Conflict of Laws (summary)**

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As the recent enactment of the Arbitration Law (2003) and the Law on Promoting the Use of Out-of-Court Dispute Resolution Procedures (the ADR Basic Law: 2004) shows, the Japanese Government takes a positive attitude toward the fostering of alternative dispute resolution (ADR), i.e., arbitration, judicial and non-judicial conciliation. The emergence of the UNCITRAL Model Law on International Commercial Conciliation (2002) may trigger the use of conciliation for the resolution of international commercial disputes. This paper will give a brief overview of conflict-of-laws issues, which may arise in the resolution of international commercial disputes through ADR mechanisms.

The UNCITRAL Model Law on International Commercial Arbitration (1985) and the Model Conciliation Law apply only to “international” cases, whereas the Japanese Arbitration Law does not distinguish between domestic and international cases. The latter attitude should also be favored in the regulation of conciliation. While the Model Arbitration Law and most national legislation including Japanese Arbitration Law are to be applied “if the place of arbitration is in the territory of this State”, the autonomy of the parties should be recognized for the determination of applicable procedural rules on commercial conciliation. The arbitration/conciliation agreement and the substance of disputes is to be governed by the law chosen by the parties. Article 29 of the Arbitration Law and Article 25 of the ADR Basic Law, both stipulate that an interruption of limitation on the basis of the commencement of arbitral/ADR proceedings, may only be applied, if the substance of the disputes is to be governed by the Japanese Law.

The recognition and enforcement of foreign arbitral awards is globally assured by the New York Convention of 1958. Following the Model Law, Article 45 of the Japanese Arbitration Law adopted the provisions which essentially incorporated the requirements for recognition and enforcement of foreign arbitral awards stipulated in the New York Convention. In effect, this would result in the withdrawal of reciprocity reservation made by the Japanese government in accor-

dance with Article I(3) of the Convention.

If the parties settle the dispute during the arbitral proceedings, the arbitral tribunal may make a ruling on agreed terms, which has the same effect as an arbitral award (Article 38 Japanese Arbitration Law). The global enforceability of this "consent award" or "award by consent" under the New York Convention has been scarcely doubted. However, in a recent German court decision, execution of the domestic consent award was rejected on the ground that the parties' agreement had been based on the fraudulent materials.

The attitudes of national legislation towards the enforceability of the parties' agreement reached as a result of the conciliation proceedings are quite diverse. While Article 14 of the Model Conciliation Law prescribes the binding effect and enforceability of the settlement agreement, the ADR Basic Law of Japan does not contain any provision in this regard. The validity and effect of the settlement is to be determined by *lex causae* of the settlement.

In Japan, a compromise between parties, which has been reached through court or judicial conciliation proceedings and entered in the court records, is enforceable (Article 267 Civil Procedure Law, Article 16 Civil Conciliation Law, Article 22 Civil Execution Law). Nevertheless, *res judicata* effect is generally denied by both theory and practice. According to the prevailing view, foreign court settlements as well as authentic instruments which are enforceable in the country of origin can not be recognized and enforced in Japan. However, *de lege ferenda*, in view of the strong tendency of international agreements like the Brussels Regulations, global enforceability should be given to these instruments.