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Author(s)	Ikeda, Tatsuo; Fujimoto, Toshikazu; Tada, Nozomi et al.
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TRANSNATIONAL LITIGATION AND THE EVOLUTION OF THE LAW OF EVIDENCE IN JAPAN*

*Tatsuo Ikeda***

*Toshikazu Fujimoto****

*Nozomi Tada*****

*Taichi Nishijima******

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** Professor, Osaka University, Japan.

*** Graduate Student, Osaka University, Japan.

**** Graduate Student, Osaka University, Japan.

***** Graduate Student, Osaka University, Japan.

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PREFACE

Recently the amount of litigation in Japanese courts involving international aspects has been rising and rising, corresponding with an increase of contacts with foreign citizens. Theory and practice on international judicial jurisdiction have developed in Japan remarkably (*see infra* §2). On the other hand, however, there are not yet many academic articles and court decisions in Japan dealing with various problems of international judicial assistance to obtain evidence or of the law applicable to evidentiary procedural matters. Looking at the Table on the page 44, we can see the number of official requests from / to foreign countries is relatively small. So, unlike the United States of America or Germany, there are few court cases in Japan, which deal with the taking of evidence in or for use in foreign nations. A decision of the Osaka High Court, July 12, 1973, *Hanrei Jiho* 737, 49, is one of these rare cases, worthy of introduction.

The Osaka District Court of Japan was requested by United States to examine a Japanese witness in aid of a proceeding of U.S. Customs Court, case of Mitsui & Co., Ltd. v. United States. The witness, a director of the Matsushita Electronics Industry Co., Ltd., was granted the privilege not to answer some questions concerning the direct labor costs and selling expenses of electron tube manufactured by the Matsushita in accordance with the Japanese Code of Civil Procedure by the executing judge of the District Court. Then, the U.S. appealed to Osaka High Court against the decision by

the District Court judge recognizing the privilege.

The High Court, ultimately, denied the appeal and supported the District Court judge's decision giving the witness the privilege. A problem should be noted, here, of the appellate jurisdiction to review a decision on procedural matters arising out of the taking of evidence requested by a foreign country as international judicial assistance. To execute requests "letters rogatory" from foreign countries which are not the Party States to Hague Convention on Civil Procedure, there is the Japanese Act on Reciprocal Judicial Aid to be Given at Request of Foreign Courts, as mentioned later (*see infra* §6.3). However the Act has no provisions for the appeal against a decision on procedural matters arising from the taking of evidence. On the other hand, the Act on Special Provisions of Civil Procedure in Accordance with the Enforcement of Hague Conventions on Civil Procedure and Service Abroad (*see infra* §5.3 n.14 and §6.3), which applies to requests from Party States to the Hague Conventions, contains a provision (Article 9) that such an appeal should be made to the High Court. Although the U.S., the requesting state, is not a Party State to Hague Convention on Civil Procedure, the Osaka High Court applied the Act on Special Provisions and acknowledged the procedural lawfulness of the appeal, stating as follows:

"..... it was the United States of America that both requested this examination of the witness and made this appeal. This is nothing other than the expression by the U.S. of willingness to comply with the Act on Special Provisions. Therefore it may safely be said that the Act is applied to this appeal."

One of the major problem of international judicial assistance in Japan concerns the U.S. pretrial discovery, as well as that of many European countries. Though the number is small, half of the official requests are related to the U.S. The taking of depositions in Japan by the U.S. consular agents is frequently conducted, as contrasted with the official request by letters rogatory (*see infra* §6.4 n.22). The direct extraterritorial U.S. discovery is an especially serious problem (*see infra* §6.5).

Our discussion of these matters is based on current Japanese practices. However, the reader should be aware of the possibility of change as the courts continue to inquire into such procedural issues. With this caveat, we will now proceed to answer the questions presented.

The Table: Number of Requests for Evidentiary Assistance from / to Japan

Year	Requesting (to foreign states)	Requested (from foreign states)
1980	—	8
1981	—	7
1982	1	6
1983	2	20
1984	—	5
1985	1	2
1986	—	10
1987	4	16
1988	—	21
1989	5	11
1990	—	9
1991	—	9
1992	—	11

§1.1 THE ROLE OF THE COURT AND THE PARTIES

Q.1: Give a brief summary of your national civil procedure law (including the law of evidence) with special emphasis on the following aspects:

1.1: The role of the judge and the parties in the process

§1.1.1 IN GENERAL

In Japan, a suit is tried by oral argument and examination of evidence in open court. The division of authority and responsibility between the parties and the judge, however, is sometimes problematic. Japanese civil procedure takes a serious view of the principle of the parties' initiative (*Tojisha-shugi*) as well as principle of the court's initiative (*Shokken-shugi*).

§1.1.2 THE ROLE OF THE COURT AND THE PARTIES IN COURT PROCEEDINGS

It is the court, in Japan, which has authority and responsibility to direct court

proceedings (*Shokken-shinko-shugi*). The court fills the role of leader in proceedings, and has responsibility to facilitate smooth and swift handling of proceedings (Japanese Code of Civil Procedure (JCCP), Articles 126, 132, 133, 135, 139, 152, 158, 219, 221, etc.). The parties may, however, file motions asking the court to proceed in particular ways (Article 31, 31.2, 127(3), 139, 152(3)(4), etc.), and, for protecting parties' interest, may object to the procedural errors by the court or the adverse party (*Sekimonken*).

On the other hand, authority and responsibility for commencing or terminating a suit, establishing subject matter of a suit, and collecting and submitting facts and evidence to the court is given to the parties. The parties are particularly responsible for making clear the contents of a case, and presenting facts and evidence to serve as basis for the court's judgment regarding their claims. This is called "the principle of parties initiative in oral argument" (*Benron-shugi*), one of the most important principles in civil procedure. But the courts cannot be indifferent to clarifying the contents of a case. Although the principle is based on premise that both parties have equal ability in proceeding with the suit, there is no denying that sometimes the parties do not have equal knowledge, experience, and resources, etc. Especially in Japan, as the parties may enter into proceedings not only with the help of a lawyer but also without it, it is quite possible that the points at issue may not be made or that the relevant facts and evidence may not be presented by the parties. Therefore, JCCP gives the court the general authority to clarify matters (*Shakumeiken*) (Article 127).

Thus, in Japan, proceedings are expected to be just, speedy, and inexpensive, through mutual checking and cooperation of the parties and the court. To that end, in a whole amendment of JCCP now in progress, the answer to proper division of authority and responsibility is being considered. The improvement of preliminary proceedings is but one example.

§1.1.3 EXAMINATION OF EVIDENCE

Another important issue is the role of the court and the parties in examination of evidence. JCCP provides for examination of witnesses, expert testimony, examination of parties to the suit, inspection of documents, and inspection of other things, as examination of evidence. In principle, the court with which a suit is filed examines evidence offered by the parties during oral arguments. However, the court need not examine such evidence if it is deemed unnecessary to do so (Article 259). The parties have the right to attend the examination of evidence. The court must give both parties the notice of time and place. The court clerk, as directed by the judge, puts the evidence examined on record (Articles 143, 144 and 149). Considering the entire content of

oral arguments and evidence examined, the court freely determines whether allegations of fact by each party are well-founded (*Jiyu-sinsho-shugi*) (Article 185).

The parties have the responsibility to the court to offer to examine a witness (Article 275). However, the examination of the parties themselves may be done upon the motion of either party or *ex officio* (Article 336). The examination of a witness is done before the judge in the court directly by the party who requested such examination, and then by the opposing party after such examination (Article 294(1), Japanese Rules of Civil Procedure (JRCP), Articles 33, 34) (This cross-examination was introduced by the amendment of JCCP in 1948). The presiding judge may examine the witness after examination by both parties (Article 294(2)), but he may question the witness at any time, if he deems it necessary (Article 294(3)). It is not prohibited by explicit provision for the parties and their attorneys to contact witnesses prior to their giving testimony in court (*cf.* JRCP, Article 4). The provisions for the examination of witnesses are chiefly applied *mutatis mutandis* to the procedure of expert opinion (Article 301). The parties may offer to secure expert opinion, but an expert witness shall be designated by the court (Article 304).

§1.2 MEASURES AVAILABLE TO OBTAIN EVIDENCE AGAINST WILL OF PARTY

Q.1: Give a brief summary of your national civil procedure law (including the law of evidence) with special emphasis on the following aspects:

1.2: Measures available to obtain evidence against the will of a party / the parties

§1.2.1 IN GENERAL

In regard to measures available to obtain evidence against the will of a party or the parties to the suit, strictly speaking, Japanese Code of Civil Procedure (JCCP) has no provisions permitting “direct” compulsion against an unwilling party to the suit, such as an arrest in order to make him appear to testify. However, JCCP does have provisions for “indirect” compulsion—threatening to impose certain procedural disadvantages on a party ordered to produce documents or other things or to testify unless he obeys. To the contrary, various measures of coercion or sanctions including direct compulsion may be used in respect of the examination of a non-party witness (*see infra* §1.2.5).

§1.2.2 INSPECTION OF DOCUMENTS

A party who holds documents to be examined, in conformity with Article 312 of JCCP, must produce them if and insofar as:

(i) he, the holder-party, refers to them in the trial;

(ii) the adverse party who bears burden of proof on a particular issue is entitled to have the holder-party deliver the documents relating to that issue; or

(iii) the documents have been drawn up for the benefit of the adverse party who bears the burden of proof or concerning the legal relationships between the holder-party and the adverse party.

In these cases, the court orders a holder-party to produce documents in question, if it considers the motion for production of documents well-founded (Article 314(1)). The court may, in cases where he refuses to comply with the production order, deem the allegations of the adverse party relating to such documents to be true (Article 316).

By the way, in a whole amendment of JCCP now in progress, the opinion to generalize the duty to produce documents, as inspection of other things (*see infra* §1.2.3), seems prevailing now.

§1.2.3 INSPECTION OF OTHER THINGS

In respect of inspection of other things, provisions of Article 314 and 316 apply *mutatis mutandis* (Article 335(1)). Unlike inspection of documents, however, cases where a holder-person is obliged to present such things are not specifically mentioned; Article 312 does not apply. Accordingly, if the court considers the motion for presentation well-founded, it shall order a holder-party to present them. The court also may, in case of its refusal, deem the allegations of the adverse party to be true.

§1.2.4 EXAMINATION OF PARTY TO SUIT

According to Article 336 of JCCP, courts may examine parties themselves upon the motion of either party or *ex officio*, if it is unable to reach a conclusion upon an issue of facts through examination of other evidences. It also may require the party to be examined to take an oath. In cases where a party does not respond to a summons, or refuses to take an oath or to make a statement, without justifiable reasons, the court may deem the allegations of the adverse party to be true (Article 338).

§1.2.5 EXAMINATION OF WITNESS

In addition, persons not parties to the suit, provided that they are subject to judicial sovereignty power of the Japanese court, may be generally required to be examined as witnesses (*see* Article 271). Concerning the sanctions for non-appearance without justifiable reasons, JCCP provides a civil penalty not exceeding one-hundred thousand yen (Article 277), punishment, that is, fine not exceeding one-hundred thousand yen or/and imprisonment for less than 30 days (Article 277.2), and arrest in order to make sure of his appearance (Article 278). In case of his refusal to testify without justifiable

reasons, Articles 277 and 277.2 shall apply *mutatis mutandis* (Article 284). Moreover, these provisions apply similarly to cases where a witness refuses to take the oath (Article 293); a person whom the court determines to examine as a witness is in principle required to take an oath (Article 285).

§2 INTERNATIONAL JUDICIAL JURISDICTION

Q.2 : Give a brief summary of the grounds upon which courts in your country exercise jurisdiction in cases involving international aspects

§2.1 IN GENERAL¹⁾

It is generally said that Japan has no statutes expressly prescribing international judicial jurisdiction, except some special provisions in a few treaties.²⁾ The Japanese Code of Civil Procedure (JCCP) is understood to have no provisions *directly* dealing with it, though some scholars disagree. Therefore we must settle this problem in accordance with “*jori*” (justice and general good reasons), an idea of fairness between parties and fair and expeditious administration of justice. Nevertheless it still remains vague.

§2.2 PREVAILING VIEW OF SCHOLARS

The prevailing view of scholars, which is called “*Kankatsu-haibun*” theory (International allocation theory) or “*Syusei-ruisui*” theory (Modification theory), is as follows:

The problem of international judicial jurisdiction is to allocate judicial functions among nations of the world. Thus it is reasonable to modify, taking into consideration the international character of litigation, JCCP’s provisions of domestic territorial competences which embody the allocation of domestic judicial functions to the domestic courts, and apply such newly made jurisdictional rules to decide whether Japanese courts have international judicial jurisdiction over the transnational case. By so doing, it is possible to realize *jori*, an idea of fairness between parties and fair and expeditious administration of justice.

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- 1) This discussion concerns jurisdiction in matters relating to property rights. As to personal status, *e.g.* marriage or parentage, the jurisdiction is generally considered to be different. As the leading case, Supreme Court, judgment, March 25, 1964, *Minshu* volume 18, issue 3, page 486 (divorce case), held, the jurisdiction of Japan could be admitted, in principle, if the defendant had domicile in Japan, or exceptionally, if the plaintiff had domicile in Japan in so far as he was abandoned, or if the defendant was missing, *etc.*
 - 2) *E.g.*, Article 28(1) of the Convention for the Unification of Certain Rules Relating to International Carriage by Air, 1929; Protocol Amending the 1929 Convention for the Unification of Certain Rules Relating to International Carriage by Air, 1955.

For example, Article 4(3) of JCCP, which provides for the place of business of a foreign corporation as the ground for general jurisdiction over it, can be understood when combined with Article 9, which contains a ground for specific jurisdiction over the person who has his place of business as regards a dispute arising from the operation thereof. Thus a new jurisdictional rule has been made that Japanese courts have international judicial jurisdiction over a foreign corporation, if it has place(s) of business in Japan, only as regards a dispute arising from the operation thereof.

§2.3 PREVAILING VIEW OF COURTS

On the other hand, however, in most decisions and practices of lower courts, a little different approach is used after the Supreme Court's judgment of October 16, 1981, *Minshu* 35, 7, 1224, the *Malaysia Airlines* case. In *Malaysia Airlines*, the Supreme Court held that it is in conformity with *jori* to subject a foreign defendant to jurisdiction of Japanese courts if, in a transnational case, any bases for territorial competence provided by JCCP are found within Japan. In other words, courts of Japan recognize their jurisdiction over the transnational case, when they consider that, if it were a domestic case, one (or some) of them would have the territorial competence(s) under JCCP.

Most of *post-Malaysia Airlines* cases of lower courts, referring to this Supreme Court decision, say:

Japanese courts have jurisdiction, in principle, if Japan has a (or some) ground(s) for territorial competences under JCCP. However, if there are "exceptional circumstances" causing violation of an idea of fairness between the parties, fair and expeditious administration of justice, jurisdiction of Japanese courts should be denied.

We will first show, bearing in mind the above-mentioned recent approach of the lower courts, the bases for territorial competence under JCCP, which offer grounds upon which Japanese courts may in principle exercise jurisdiction in cases involving international aspects. Secondly, exceptional circumstances will be explained.

§2.4 GROUNDS FOR JURISDICTION; COMPETENCE UNDER JCCP

After enumerating the grounds briefly, we will attempt to provide some interpretation.

(i) general jurisdiction³⁾

(a) domicile of defendant; for foreign corporations, its place of business (Articles 1 to 4),

(ii) specific jurisdiction⁴⁾

3) General jurisdiction permits a court to adjudicate any claims against a defendant.

4) Specific jurisdiction permits a court to adjudicate only claims related to or arising from the thing, act, fact, etc.

- (b) place of performance, in matters relating to property rights (Article 5),
- (c) place of payment, as regards a dispute concerned with payment of bills or checks (Article 6),
- (d) place of registry of ships, in matters relating to property rights of the crew (Article 7) or as regards a dispute concerning the ships or voyage with the shipowner or the charterer (Article 10),
- (e) situs of property of defendants without domicile in Japan, in matters relating to property rights (Article 8),
- (f) place of business, as regards a dispute arising out of the operations thereof (Article 9),
- (g) situs of a ship, in matters relating to the obligation arising from or secured by it (Article 11),
- (h) corporation's principal place of business, as regards a dispute arising out of the internal affairs of the corporation (Articles 12 to 14),
- (i) place of tort, in matters relating to it (Article 15),
- (j) place of salvage, as regards a dispute arising from it (Article 16),
- (k) situs of immovables, as regards a dispute concerned with them (Article 17),
- (l) place of registration, as regards a dispute concerned with it (Article 18),
- (m) domicile of deceased, as regards a dispute concerned with the inheritance (Articles 19 and 20),
- (n) forum of related actions (Article 21),
- (iii) others
 - (o) agreement of forum selection by the parties (Article 25), and
 - (p) general appearance as defendant (Article 26).

In these grounds, especially, the following have been often referred to: (a) domicile of defendant; foreign corporations' place of business,⁵⁾ (b) place of performance,⁶⁾ (e) situs of property,⁷⁾ (i) place of tort,⁸⁾ (n) forum of related actions,⁹⁾ (o) agreement of forum selection.¹⁰⁾

To apply these points of contact to particular cases, courts sometimes interpret them or make additional modifications in view of the need to give due respect to the international character of litigation. For example, the ground (e), situs of property, which is sometimes criticized for exorbitant jurisdiction, was permit as a base of the

5) See *Malaysia Airlines*, *supra* § 2.3.

6) Tokyo District Court, judgment, February 15, 1984, *Hanrei Jiho* 1135, 70.

7) Tokyo District Court, judgment, October 23, 1987, *Hanrei Jiho* 1261, 48.

8) Tokyo District Court, judgment, March 27, 1984, *Hanrei Jiho*, 1113, 26.

9) Tokyo District Court, judgment, May 8, 1987, *Hanrei Jiho* 1132, 40; Tokyo District Court, judgment, June 1, 1987, *Hanrei Jiho*, 1261, 105.

10) Supreme Court, judgment, November 28, 1975, *Minshu* 29, 10, 1154.

jurisdiction after the court considered a particularly close connection with Japan: Hachioji Branch Court of Tokyo District Court, judgment, May 22, 1991, *Hanrei Times* 755, 213. Concerning (n), forum of related actions, in case of consolidation of claims of different parties, jurisdiction is not as a rule permitted, unlike domestic cases. Tokyo District Court, judgment, July 28, 1987, *Hanrei Jiho* 1275, 77.

§2.5 EXCEPTIONAL CIRCUMSTANCES

In deciding whether there are any "exceptional circumstances", all relative factors in each case are taken into consideration. For instance,

(i) whether a party is a corporation or an individual (especially from the point of view of consumer protection), (ii) connection between the case and Japan, (iii) possibility for defendant to anticipate lawsuit in Japan, (iv) relation or the scope of business of defendant (corporation), (v) whether it is convenient for the court to take evidence,¹¹⁾ (vi) effectiveness of the resolution of a dispute, especially satisfaction of plaintiff's claims, *etc.* (vii) existence of same litigation pending in foreign courts (*lis pendence*).¹²⁾

§3 LAW APPLICABLE TO MATTERS OF PROCEDURE

Q.3: Which legal system governs questions of procedure in transnational litigation? Distinguish between substantive and procedural law, which special emphasis on the procedural law (applicability of the *lex fori* or *lex causae*).

§3.1 PRINCIPLE OF "LEX FORI"

In international civil litigation in Japan, matters of procedure are in principle governed by *lex fori* (forum law), that is, the internal law of Japan. This principle, which has been traditionally recognized by many countries in the world, prevails in Japan in both case-law and doctrine; but Japan has no statutory rules that specifically address it.

Recently, however, more and more scholars have argued for an approach to selecting the law applicable to procedures in conformity with the nature of matters, rather than using the mechanical *substantive-procedural* dichotomy.

11) Judgment of Tokyo District Court, June 20, 1986, *Hanrei Jiho* 1196, 87, denied the jurisdiction of Japan because of existence of exceptional circumstances; the Japanese court could not obtain official judicial assistance from Taiwan, where the gravity of evidence seemed to be located.

12) *E.g.*, Tokyo District Court, judgment, January 29, 1991, *Hanrei Jiho* 1390, 98. In this case, Court dismissed the suit because of exceptional circumstances; (i) earlier existence of litigation there, (ii) gravity of evidence in the U.S., (iii) American defendant's unexpectedness of the suits in Japan, *etc.*

§3.2 SUBSTANTIVE OR PROCEDURAL

No general principle seems to exist that defines “matters of procedure,” namely, that determines classification of issues as “substantive” or “procedural”. As a result, court decisions may vary. For example:

(i) prescription: *substantive*, Tokushima District Court, judgment, December 16, 1969, *Hanrei Times* 254, 209 (prescription of claim for attorney’s fee was governed by New York State law, *lex causae*).

(ii) period of limitation for claims: *substantive*, Supreme Court, judgment, June 27, 1975, *Kasai Geppo* 28, 4, 83 (claim for acknowledgement); Tokyo District Court, judgment, July 7, 1956, *Horitsu Shinbun* 12&13, 27 (claim for acknowledgement).

(iii) ability to be a party: *procedural*, Tokyo High Court, judgment, June 28, 1968, *Kosaiminshu* 21, 4, 353 (appellate review of the judgment of Tokyo District Court on August 9, 1960, *infra*). *But substantive*, Tokyo District Court, judgment, August 9, 1960, *Kaminshu* 11, 8, 1647 (To the question of whether a Kenyan partnership may be a party, the law of Kenya where it was incorporated, was applied. The court, however, added in *obiter dicta* that application of JCCP, *lex fori*, was not prevented if JCCP permitted its ability to be a party).

(iv) *action oblique*: *procedural*, Tokyo District Court, judgment, July 20, 1962, *Kaminshu* 13, 7, 1482 (in direct action against an insurance company of U.S., Japanese law, *lex fori*, was applied to whether wife and children of the injured person might sue the company with which the person who caused the injury was insured). *But* the prevailing view of scholars classifies it as *substantive*.

§3.3 RULES OF EVIDENCE

In regard to the rules of evidence, *lex fori* would have been applied in most cases without special consideration to this problem. We can see some old cases, rendered before World War II, that considered such matters.

(i) Concerning admission in the divorce action by an American couple, the case of Great Court of Judicature, judgment, June 8, 1922, *Horitsu Shinbun* 2016, 18, applied *lex fori*, and did not permit the admission by the defendant.

(ii) In the case of Great Court of Judicature, judgment, November 3, 1921, *Horitsu Shinbun* 1933, 22, admissibility of documentary evidence drawn up by a notary public of New York State of the United States was determined according to *lex fori* in a broad sense.

(iii) However, the case of Yokohama District Court, judgment, October 2, 1908, *Horitsu Shinbun* 573, 12, applied English law, *lex causae*, as regards presumption on defects of cargo.

Other issues such as methods of evidence, sufficiency of evidence, in general, seem to be governed by *lex fori*.

On the other hand, scholars generally assert that the laws applicable to substantive matters (*lex causae*) determine the question of which party bears the burden of proof, including the issue of presumption. And it is suggested by some scholars that some other issues (for example, form of oath, privilege) could be governed by the personal law of witness if appropriate.

§4 ASCERTAINMENT OF CONTENT OF FOREIGN LAW

Q.4: Ascertainment of the content of the foreign *lex causae*: *Iura novit curia* vs foreign law as a point in issue that must be proved by evidence.

§4.1 IN GENERAL

The application of the foreign law by Japanese courts can occur in at least two ways: when the court itself investigates its existence and content, or when the parties assert its existence and prove its content. A related question is what the court should do when the content of foreign law is unknown.

§4.2 PROOF OF FOREIGN LAW

This problem was previously prescribed in the Japanese Code of Civil Procedure (JCCP). Its former Article 219 stated that the parties should prove foreign law, but the court could exercise its authority to carry out necessary investigations in the absence of such proof. The provision was deleted, however, in 1925 because it was thought to be unnecessary. In the absence of positive law, the practice of courts has been varied.

Generally, the court has been held to have the responsibility to know the existence and content of law, as well as the authority to interpret and apply it with or without proof by parties. However, in practice, to know the content of foreign law may be difficult, so the party who wants its application may present information on its existence and content to the court. Accordingly, the court must ascertain the foreign law *ex officio*, but the parties can give assistance to the court. Thus it seems to be difficult, at least in regard to foreign law, to apply the principle of "*Iura novit curia*" rigidly.

At least one court has held that the parties should assert the application of foreign law and prove it (Osaka District Court, judgment, April 12, 1960, *Kaminshu* 11, 4, 817). However, the general tendency of courts on this issue is not yet clear.

§4.3 IN CASES WHERE FOREIGN LAW IS UNKNOWN

From time to time, courts are faced with cases involving foreign law which is unknown. So, we will take a general view of doctrines and cases concerning procedural management of this matter.

This problem has mainly been discussed in the field of private international law. One position is that the parties' claims or defenses should be excluded when they fail to prove foreign law. However, this position is often criticized as an unjust refusal of judgment. Today in Japan, the general view is that the "substitutional" law should be applied. But as to what law is to be regarded as a substitution, opinions vary.

One opinion is that *lex fori* should be applied. This position, however, seems to violate the equality of foreign law and *lex fori*.

Another approach is that, when the foreign law to be applied is unknown, the law of the country which has the most similar legal order to that foreign country should be applied. For example, if the law of the Democratic People's Republic of Korea (North Korea) is unknown, the law of the Republic of Korea (South Korea) or that of a socialist state, such as the People's Republics of China, would be a more appropriate choice. However, similarity is difficult to define.

Another approach is to decide by *jori* (justice and general good reasons) (*Dajoukan-fukoku* of 1875, No.103, Article 3). This is the formerly prevailing opinion in Japan. To be concrete, if the foreign law to be applied is unknown, the judges attempt to guess the rules to be enforced in that country from its whole legal order. However, the actual difficulty of doing so may lead judges to depend on judicial arbitrariness.

Moreover, recently, some authors say that another choice of law should be made, and the law of the state which is the next most closely connected should be applied, considering all the related factors (*cf. Horei*, the Japanese Private International Law, Article 14). And if a court is unable to choose such a law, it has no other alternative than to refer to principle of *lex fori*.

Court decisions also vary. The *jori* approach was adopted in Sapporo District Court, judgment, June 26, 1984, *Kasai Geppo* 37, 7, 65; Tokyo High Court, judgement, July 13, 1981, *Hanrei Jiho* 1013, 34, *etc.* The most similar law approach was used in Chiba District Court, judgment, August 11, 1965, *Kasai Geppo* 18, 9, 53; Nagoya Family Court, decision, November 30, 1983, *Kasai Geppo* 36, 11, 138, *etc.*

§5 OBTAINING EVIDENCE ABROAD FOR USE IN CIVIL LITIGATION IN JAPAN

§.5: Describe the measures that can be taken within your national legal system to obtain evidence from foreign sources.

§5.1 IN GENERAL

When examination of evidence located in a foreign country is necessary to litigation pending in a court of Japan, under the Japanese Code of Civil Procedure, Article 264(1), the court will request;

(i) the foreign competent authority, by issuing a letter rogatory, to examine the evidence, or

(ii) the Japanese diplomatic officer or consular agent stationed in that country to examine the evidence.¹³⁾

In these cases, determination of whether a request should be issued is made by the presiding judge (Article 130). And the request must be sent to that country, in principle, through the Supreme Court of Japan (Rule 27 of Rules on Judicial Management for Lower Courts).

§5.2 REQUIRED EXISTENCE OF CONVENTIONS

Despite the above-mentioned methods provided by JCCP, Japanese domestic law, when actually entrusting the taking of evidence in a foreign country requires the existence of an international convention or agreement on judicial assistance between Japan and that foreign country. This comes from the view that because the act of taking evidence is a public matter, it may violate the "judicial sovereignty" of the country where the evidence is located unless its authorities participate or give their consent.

§5.3 HAGUE CONVENTION ON CIVIL PROCEDURE

As a result, Japan has concluded many conventions or agreements with many countries on evidentiary assistance. Among them, the Hague Convention on Civil Procedure of March 1, 1954¹⁴⁾ (HCCP) is the only multilateral convention to which Japan is a Party State.¹⁵⁾ According to Chapter II of HCCP, Japanese courts may adopt the following ways;

13) According to Article 264(2), the examination of evidence abroad is valid insofar as it is consistent with provisions of JCCP, even if contrary to the laws of the State of execution.

14) 286 U.N.T.S.265. The Convention came into force for Japan on July 26, 1970. Following its ratification, Japan enacted the Act on Special Provisions of Civil Procedure in Accordance with the Enforcement of Hague Conventions on Civil Procedure and Service Abroad (hereinafter Act on Special Provisions for HCCP), Law No.115 (June 5, 1970), and the Rules on Special Provisions of Civil Procedure in Accordance with the Enforcement of Hague Conventions on Civil Procedure and Service Abroad, Supreme Court Rule No.6 (July 7, 1970).

15) Japan has not yet ratified the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of March 18, 1970, 847 U.N.T.S. 231.

(i) to request by letters rogatory a competent authority of another Party State (Article 8 of HCCP); letters rogatory are sent, in principle, to the designated authority of that State, unless the agreement to allow direct transmission of letters rogatory to its court exists between Japan and that State (Article 9(1) and (4) of HCCP), or

(ii) to have letters rogatory executed directly by Japanese diplomatic or consular agents in another Party State; if and insofar as conventions between Japan and that State so allow or that State does not object (Article 15 of HCCP).

§5.4 BILATERAL CONVENTIONS

Japan has concluded bilateral conventions on evidentiary assistance with the following countries; most of these conventions were not concluded until it really became necessary for Japan to obtain evidence in these countries or for these countries to do so in Japan,

Brazil, Denmark, Federal Republic of Germany, India, Iran, Iraq, Italy, Kuwait, Pakistan, Syria, Sri Lanka, Spain, Sweden, Switzerland, Thailand, the United Kingdom, and the United States.¹⁶⁾

To these countries, Japanese courts may request, by letters rogatory, permission to examine evidence located there.

§5.5 CONSULAR CONVENTIONS

Additionally, Japan has concluded with the United States the "Consular Convention between Japan and the United States of America"¹⁷⁾ (hereinafter Japan-U.S. Consular Convention). Article 17 provides:

"(1) A consular officer may within his consular district:

.....

(e)

(ii) take depositions, on behalf of the courts or other judicial tribunals or authorities of the sending state, voluntarily given, or

(iii) administer oaths to any person in the receiving state in accordance with the laws of the sending state and in a manner not inconsistent with the laws of the receiving state;"

Further, Japan has concluded with the United Kingdom the "Consular Convention between the United Kingdom of Great Britain and Northern Ireland and Japan"¹⁸⁾

16) As of July, 1992. Denmark, Federal Republic of Germany, Italy, Spain, Sweden and Switzerland are also Party States to the HCCP.

17) 518 U.N.T.S. 179.

18) 561 U.N.T.S. 25.

(hereinafter Japan-U.K. Consular Convention). According to Article 25:

“A consular officer shall be entitled, on behalf of the courts of the sending State, to take evidence voluntarily given, orally or in writing, provided that this is in accordance with the laws of the sending State and not inconsistent with the laws of the receiving State.”

Thus, with regard to the United States and the United Kingdom, Japanese consular officers may take depositions voluntarily given from any person there. In the U.S. they also may administer oaths to any person. In all cases, the taking of evidence must be conducted in accordance with the laws of the U.S. or U.K. and not inconsistently with the laws of Japan. As the use of measures of compulsion is not allowed in either consular convention, the requesting court of Japan, if necessary, should issue the letters rogatory under the above-mentioned conventions on judicial assistance (*see supra* §5.4).

§6 OBTAINING EVIDENCE IN JAPAN IN AID OF CIVIL LITIGATION IN FOREIGN COUNTRIES

Q.6: How can evidence be obtained from your own country for purposes of civil litigation in foreign countries (*e.g.* obtaining evidence from witnesses for the use of foreign courts; discovery of documents and other evidentiary material for purposes of litigation abroad, *etc*)?

§6.1 IN GENERAL

In order to obtain evidence located in Japan, it is required, as a rule, that conventions or agreements on evidentiary assistance have been signed. However, in practice, letters rogatory from countries (*e.g.* Australia, China) not having concluded such conventions or agreements are sometimes executed.

§6.2 HAGUE CONVENTION ON CIVIL PROCEDURE

A Party State to HCCP may request the court of Japan, by means of a letter rogatory, to take statements of witnesses or inspect documents or other things, *etc.* (Article 8 of HCCP). The designated authority of Japan, to which letters rogatory should be sent in conformity with Article 9(1), is the Ministry of Foreign Affairs (Article 2 of Act on Special Provisions for HCCP). If agreement to allow direct transmission of letters rogatory to a competent Japanese court exists, that State may send a letter rogatory directly to the court, not to the Ministry of Foreign Affairs (Article 9(4) of HCCP).

Concerning the taking of evidence by the Party State's diplomatic or consular

agents in Japan (Article 15 of HCCP), the following official notice¹⁹⁾ was given by the Department of Justice of Japan in 1953, before Japan's ratification of HCCP: consular agents of a foreign country may, subject to the condition of reciprocity, take statements voluntarily made from their own nationals in Japan though they should not be allowed to take such statements from Japanese or nationals of a third country.

§6.3 BILATERAL CONVENTIONS

A Party State to the bilateral agreement on evidentiary assistance with Japan (*see supra* §5.4) may request Japanese courts directly, by a letter rogatory, to obtain evidence. States that have not joined the HCCP can use only this method. In order to execute letters rogatory, the Act on Reciprocal Judicial Aid to be Given at Request of Foreign Courts²⁰⁾ applies. Its Articles 1.2 and 3 provide that judicial aid shall be rendered under the following conditions;

- (i) the request shall be made through the diplomatic channel,
- (ii) the request shall be made in writing stating the names of the parties to the litigation, the manner in which the evidence is to be taken, the name, nationality, and domicile or residence of the person to be examined, and the matters to be investigated,
- (iii) in case the letter rogatory and documents annexed thereto are not written in Japanese, translation thereof into Japanese shall be appended to the original,
- (iv) the state to which the requesting court belongs shall guarantee the payment of the expenses incurred in the execution of the letter of request,
- (v) that state shall assure that it could render judicial aid in the same or similar matters if so requested by the Japanese courts, and
- (vi) the letter rogatory shall be executed in accordance with the laws of Japan.²¹⁾

§6.4 CONSULAR CONVENTIONS

For the United States, on the basis of article 17(1)(e)(ii) and (iii) of Japan-U.S. Consular Convention, consular officers may take depositions voluntarily given from any person in Japan and administer oaths to any person in Japan.²²⁾ Similarly a

19) Official Notice, Department of Justice, No.1722 of Civil Matters-*Koh* (September 22, 1953), from the Permanent Vice-Minister of the Department of Justice to the Head General Official of the Supreme Court.

20) Law No.63 (March 13, 1905), as amended by Law No.7 (March 29, 1912), and by Law No.17 (March 22, 1938).

21) The validity and admissibility of evidence obtained will be determined by according to the law of the state to which requesting court belongs.

22) Deposition is usually taken in the "deposition room" of the U.S. embassy or consulate in Japan. We hear that the persons who want to use deposition room for taking depositions have to wait their turn for several months.

officer of United Kingdom may, on the basis of article 25 of Japan-U.K. Consular Convention, take evidence voluntarily given. In each case, the evidence must be taken in accordance with the laws of the U.S. or U.K. and not inconsistently with the laws of Japan.

Further, as mentioned above (*see supra* §6.2), consular agents stationed in Japan of the states other than the U.S. or U.K., may take statements voluntarily made from their own nationals in Japan on the condition of reciprocity, but not from Japanese or nationals of a third state.

§6.5 DIRECT EXTRATERRITORIAL U.S. DISCOVERY

In regard to the U.S. pretrial discovery, it is generally said that engaging in discovery in Japan, not regarded as a purely private act, is unlawful unless it is conducted through official judicial assistance procedures, namely, the request by means of letters rogatory to Japanese courts based on the bilateral agreement or the taking of depositions voluntarily given under the Japan-U.S Consular Convention. However, direct extraterritorial U.S. discovery in Japan, not through regular judicial assistance procedures, seems not to be uncommon. That is because Japanese defendants fear that serious disadvantages or sanctions in U.S. litigation would be imposed in case of their non-compliance.

